JUDGMENT OF THE COURT (Grand Chamber)

18 December 2007 *

In Case C-64/05 P,

APPEAL under Article 56 of the Statute of the Court of Justice, brought on 10 February 2005,

Kingdom of Sweden, represented by K. Wistrand, acting as Agent,

appellant,

supported by:

Republic of Finland, represented by E. Bygglin and A. Guimaraes-Purokoski, acting as Agents, with an address for service in Luxembourg,

intervener on appeal,

* Language of the case: English.

the other parties to the proceedings being:

IFAW Internationaler Tierschutz-Fonds gGmbH, formerly Internationaler Tierschutz-Fonds (IFAW) GmbH, established in Hamburg (Germany), represented by S. Crosby, Solicitor, and R. Lang, avocat,

applicant at first instance,

Kingdom of Denmark, represented by B. Weis Fogh, acting as Agent,

Kingdom of the Netherlands, represented by H.G. Sevenster, C. Wissels and M. de Grave, acting as Agents,

United Kingdom of Great Britain and Northern Ireland, represented by S. Nwaokolo and V. Jackson, acting as Agents, and J. Stratford, Barrister,

interveners at first instance,

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

defendant at first instance,

supported by:

Kingdom of Spain, represented by I. del Cuvillo Contreras and A. Sampol Pucurull, acting as Agents, with an address for service in Luxembourg,

intervener on appeal,

THE COURT (Grand Chamber),

composed of V. Skouris, President, P. Jann, C.W.A. Timmermans, A. Rosas, K. Lenaerts, G. Arestis and U. Lõhmus, Presidents of Chambers, K. Schiemann (Rapporteur), P. Kūris, E. Juhász, J. Malenovský, J. Klučka and E. Levits, Judges,

Advocate General: M. Poiares Maduro,
Registrar: C. Strömholm, Administrator,

having regard to the written procedure and further to the hearing on 16 January 2007,

after hearing the Opinion of the Advocate General at the sitting on 18 July 2007,

gives the following

Judgment

1 By its appeal the Kingdom of Sweden asks the Court to set aside the judgment of the Court of First Instance of the European Communities of 30 November 2004 in Case T-168/02 *IFAW Internationaler Tierschutz-Fonds* v *Commission* [2004] ECR II-4135 ('the judgment under appeal') dismissing the action brought by IFAW Internationaler Tierschutz-Fonds gGmbH ('IFAW') for the annulment of the decision of the Commission of the European Communities of 26 March 2002 ('the contested decision') refusing IFAW access to certain documents received by the Commission in the course of a procedure which ended with the Commission giving an opinion favourable to the carrying out of an industrial project on 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 Habitats Directive').

Legal context

2 Article 255(1) and (2) EC provides:

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

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

3 Declaration No 35 on Article [255(1) of the EC Treaty] attached to the Final Act of the Treaty of Amsterdam ('Declaration No 35') states:

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

4 Recitals 2 to 4, 10 and 15 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) read as follows:

'(2) Openness enables citizens to participate more closely in the decision-making process and guarantees that the administration enjoys greater legitimacy and is more effective and more accountable to the citizen in a democratic system. Openness contributes to strengthening the principles of democracy and respect for fundamental rights as laid down in Article 6 of the EU Treaty and in the Charter of Fundamental Rights of the European Union.

(3) The conclusions of the European Council meetings held at Birmingham, Edinburgh and Copenhagen stressed the need to introduce greater transparency into the work of the Union institutions. This Regulation consolidates the initiatives that the institutions have already taken with a view to improving the transparency of the decision-making process.

(4) The purpose of this Regulation is to give the fullest possible effect to the right of public access to documents and to lay down the general principles and limits on such access in accordance with Article 255(2) of the EC Treaty.

...

(10) In order to bring about greater openness in the work of the institutions, access to documents should be granted by the European Parliament, the Council and the Commission not only to documents drawn up by the institutions, but also to documents received by them. In this context, it is recalled that Declaration No 35 ... provides that a Member State may request the Commission or the Council not to communicate to third parties a document originating from that State without its prior agreement.

...

(15) Even though it is neither the object nor the effect of this Regulation to amend national legislation on access to documents, it is nevertheless clear that, by virtue of the principle of loyal cooperation which governs relations between the institutions and the Member States, Member States should take care not to hamper the proper application of this Regulation and should respect the security rules of the institutions.'

5 Under the heading 'Purpose', Article 1 of Regulation No 1049/2001 provides:

'The purpose of this Regulation is:

(a) to define the principles, conditions and limits on grounds of public or private interest governing the right of access to European Parliament, Council and Commission (hereinafter referred to as "the institutions") documents provided for in Article 255 of the EC Treaty in such a way as to ensure the widest possible access to documents,

...'

6 Article 2(3) and (5) of Regulation No 1049/2001 provides, under the heading 'Beneficiaries and scope':

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

...

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

7 Under Article 3(b) of the regulation, for the purpose of the regulation, 'third party' is to 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'.

8 Article 4 of Regulation No 1049/2001, 'Exceptions', provides:

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

(a) the public interest as regards:

— public security,

— defence and military matters,

— international relations,

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

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

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

— commercial interests of a natural or legal person, including intellectual property,

— court proceedings and legal advice,

— the purpose of inspections, investigations and audits,

unless there is an overriding public interest in disclosure.

3. Access to a document, drawn up by an institution for internal use or received by an institution, which relates to a matter where the decision has not been taken by the institution, shall be refused if disclosure of the document would seriously undermine the institution's decision-making process, unless there is an overriding public interest in disclosure.

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

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

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

...

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.'

9 Article 5 of Regulation No 1049/2001 states, under the heading 'Documents in the Member States':

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

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

10 Article 9 of the regulation, on 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.

...'

Facts of the dispute

11 In response to an application by the Federal Republic of Germany under the second subparagraph of Article 6(4) of the Habitats Directive, the Commission on 19 April 2000 gave an opinion favourable to the carrying out of an industrial project on the Mühlenberger Loch site, an area protected under that directive. The project consisted of an enlargement of the factory of Daimler Chrysler Aerospace Airbus GmbH and the reclamation of part of the Elbe estuary in order to extend a runway.

12 By letter to the Commission of 20 December 2001, IFAW, a non-governmental organisation active in the field of the protection of animal welfare and nature conservation, requested access to various documents the Commission had received in connection with the examination of that industrial project, namely correspondence from the Federal Republic of Germany, the City of Hamburg and the German Chancellor.

13 After informing IFAW by letter of 24 January 2002 that, having regard to Article 4(5) of Regulation No 1049/2001, it took the view that it was obliged to obtain the agreement of the Member State concerned before disclosing the documents in question, the Commission on 12 February 2002 received a request from the Federal Republic of Germany not to disclose them.

14 Since it considered that in those circumstances Article 4(5) of the regulation prohibited it from disclosing the documents, the Commission on 26 March 2002 adopted the contested decision refusing IFAW's request.

The judgment under appeal

15 By application lodged at the Registry of the Court of First Instance on 4 June 2002, IFAW brought an action for the annulment of the contested decision. In support of its application it relied on two pleas in law, namely infringement of Article 4 of Regulation No 1049/2001 and breach of the duty to state reasons. By the judgment under appeal, the Court of First Instance dismissed the action as unfounded.

16 On the first plea in law, the Court of First Instance held that the Commission was right, in the contested decision, to consider that, where a Member State relies on Article 4(5) of Regulation No 1049/2001 and asks an institution not to disclose a document originating from that State, such a request constitutes an instruction not to disclose, which the institution must comply with, without it being necessary for the Member State concerned to give reasons for its request or for the institution to examine whether non-disclosure is justified.

17 In this respect, the Court of First Instance held, more precisely, in paragraphs 57 to 62 of the judgment under appeal:

> '57 ... it follows from Article 4(5) of [Regulation No 1049/2001] that the Member States are subject to special treatment. That provision confers on a Member State the power to request the institution not to disclose documents originating from it without its prior agreement. It is appropriate to point out that Article 4(5) of the Regulation reflects Declaration No 35, by which the Conference agreed that the principles and conditions set out in Article 255 EC would allow a Member State to request the Commission or the Council not to communicate to third parties a document originating from that State without its prior agreement. The power conferred on the Member States by Article 4(5) of the

Regulation is explained by the fact that it is neither the object nor the effect of that regulation to amend national legislation on access to documents (see the 15th recital in the preamble to the Regulation and Case T-76/02 *Messina* v *Commission* [2003] ECR II-3203, paragraphs 40 and 41).

58 Article 4(5) of the Regulation places the Member States in a different position from that of other parties and lays down a *lex specialis* to govern their position. Under that provision, the Member State has the power to request an institution not to disclose a document originating from it without its "prior agreement". The obligation imposed on the institution to obtain the Member State's prior agreement, which is clearly laid down in Article 4(5) of the Regulation, would risk becoming a dead letter if the Commission were able to decide to disclose that document despite an explicit request not to do so from the Member State concerned. Thus, contrary to what [IFAW] argues, a request made by a Member State under Article 4(5) does constitute an instruction to the institution not to disclose the document in question.

59 The Member State is under no obligation to state the reasons for any request made by it under Article 4(5) of the Regulation and, once it has made such a request, it is no longer a matter for the institution to examine whether non-disclosure of the document in question is justified in, for example, the public interest.

60 In order to ensure that Article 4(5) of the Regulation is interpreted in a manner consistent with Declaration No 35 and to facilitate access to the document in question by enabling the Member State, where appropriate, to give its consent to disclosure of that document, the institution must consult that Member State where an application for access is made in relation to a document originating from that State. If, after having been consulted, the Member State does not

make a request under Article 4(5) of the Regulation, the institution remains obliged, under Article 4(4), to assess whether or not the document should be disclosed.

61 The Court holds that, as the Commission rightly argues, where access to a document in respect of which a Member State has made a request under Article 4(5) is not governed by the Regulation, it is governed by the relevant national provisions of the Member State concerned, which were unaffected by the adoption of the Regulation. Accordingly, it is for the national administrative and judicial authorities, in applying national law, to assess whether access to documents originating from a Member State should be granted and whether the right of interested parties to a legal remedy will then be assured by the application of national rules.

62 As regards the argument of [IFAW] ... which is based on the wording of Article 9(3) of the Regulation, it should be observed that Article 9 lays down specific rules to govern the treatment of "sensitive" documents originating from, in particular, the institutions, the Member States, third countries or international organisations in the areas covered by Article 4(1)(a) of the Regulation, notably public security, defence and military matters. Article 9 refers, inter alia, to the persons authorised to handle such documents and provides that sensitive documents are to be recorded in the register or released only with the consent of the originator. Given the specific character of the situation governed by that article, it is clear that it is not linked to Article 4(5) of the Regulation and that the wording of Article 9(3) cannot properly be relied on for the purpose of interpreting Article 4(5).'

18 On the second plea in law, the Court of First Instance held that, in so far as the contested decision referred to the non-disclosure request made by the Federal Republic of Germany and stated that such a request is binding on the institution to

which it is addressed, it was clear enough to enable IFAW to understand why it had been refused access and to enable the Court of First Instance to exercise its power of review.

The appeal

19 By its appeal, in support of which it puts forward a single plea in law alleging infringement of Article 4 of Regulation No 1049/2001, the Kingdom of Sweden asks the Court to set aside the judgment under appeal and to give judgment itself and annul the contested decision.

20 By order of the President of the Court of 5 October 2005, the Kingdom of Spain and the Republic of Finland were given leave to intervene in support of the forms of order sought by the Commission and the Kingdom of Sweden respectively.

21 The Kingdom of Denmark, the Kingdom of the Netherlands, the Republic of Finland and IFAW claim that the Court should allow the appeal.

22 The Kingdom of Spain, the United Kingdom of Great Britain and Northern Ireland and the Commission contend that the appeal should be dismissed.

Arguments of the parties

23 According to the Kingdom of Sweden, the Court of First Instance erred in considering that Article 4(5) of Regulation No 1049/2001 allows a Member State to impose an absolute veto, without stating any reasons, on the disclosure of documents originating from it that are held by an institution.

24 Such an interpretation reintroduces the 'authorship rule', although this was abandoned by the Community legislature when the regulation was adopted, and disregards the principle stated in Article 2(3) of the regulation, according to which it is solely for the institution in possession of documents to decide whether access to them should be allowed.

25 Unlike Articles 2(5) and 9 of Regulation No 1049/2001, relating to sensitive documents, Article 4(5) of the regulation does not have the clarity that is required of any exception to the basic principles of the legislation of which it forms part.

26 Article 4(5) introduces a procedural rule giving the Member States the right to be consulted and to make a request for non-disclosure, giving reasons on the basis of the substantive exceptions set out in Article 4(1) to (3).

27 According to the Kingdom of Sweden, the Court of First Instance was also wrong to find, in paragraph 57 of the judgment under appeal, that the right of veto thus allegedly conferred on the Member States is justified by the fact that it is neither the object nor the effect of Regulation No 1049/2001 to amend national legislation on access to documents. The applicability of particular legislation depends not on the

origin of the document but on the body to which the request for access is made. No provision of the regulation indicates that national law is intended to govern a request for access made to a Community institution, and a decision taken by that institution under that regulation has no legal effect on the law applicable to a request for access to the same document made to an authority of a Member State.

28 IFAW, in addition to adopting the arguments of the Kingdom of Sweden, adds, first, that the Court of First Instance erred in law in paragraph 58 of the judgment under appeal by classifying Article 4(5) of Regulation No 1049/2001 not as an exception but as a *lex specialis*, and thereby choosing a maximalist rather than a restrictive interpretation of that provision.

29 Second, in view of the reference to the principle of loyal cooperation in recital 15 in the preamble to Regulation No 1049/2001 and of the fact that the first paragraph of Article 5 of the regulation provides that Member States in possession of documents originating from an institution are competent to decide, possibly after consulting the institution in question, whether disclosure should be made, Article 4(5) of the regulation should be given an interpretation that ensures a balance between the Member States and the institutions. The institutions must therefore, for their part, have power to decide on requests for disclosure of documents originating from Member States.

30 Third, by finding in paragraph 61 of the judgment under appeal that a request made by a Member State pursuant to Article 4(5) of Regulation No 1049/2001 has the effect of disapplying the regulation in favour of national law, the Court of First Instance misinterpreted the scope of the regulation, which in fact covers all documents in the possession of an institution.

31 Fourth, Declaration No 35 has no normative effect. Since its content is no different from the language of Article 4(5) of Regulation No 1049/2001, the declaration also cannot be used as an aid to the interpretation of that provision.

32 According to the Netherlands Government, as the purpose of Regulation No 1049/2001 is to give the public the widest possible right of access to documents, the wording of Article 4(5) of the regulation, which mentions a 'request' by the Member State, and the fact that that paragraph follows Article 4(4), which lays down a procedural rule, confirm that paragraph 5 does not create an additional ground of exception to those set out in paragraphs 1 to 3 of Article 4.

33 The Kingdom of Denmark states that the inclusion of Article 4(5) in Regulation No 1049/2001, a provision whose wording — like that of Declaration No 35 — is deliberately ambiguous, was the result of a political compromise between the various players involved in the Community legislative procedure. While the Commission wanted documents originating from the Member States to be subject to national law, and the Parliament considered that disclosure of such documents should be a matter of Community law, the Member States for their part were divided on the issue.

34 The Community judicature, in whose hands the legislature deliberately agreed to leave the matter, should therefore go beyond the ambiguities of the wording of Article 4(5) and adopt the interpretation best capable of fitting the legislative context of that provision and agreeing with the objectives of Regulation No 1049/2001 and with general principles, in particular the principle of proportionality, the duty to state reasons, and the right to an effective remedy.

35 According to the Kingdom of Denmark, such objectives and principles militate against an unconditional right of veto for the Member States, and the institution concerned and the Community judicature should remain competent to assess, in the light of the reasons put forward by a Member State, whether the refusal to disclose a document is in fact justified on grounds of public or private interest. Such grounds should be fairly assessed by the institution and relayed if necessary to the person who made the request for access.

36 The Republic of Finland likewise considers that a Member State which opposes disclosure of a document should give reasons for its position, so as to enable the institution concerned to make sure that the reasons put forward are capable of justifying a refusal to grant access and to comply with its obligation to state reasons if it takes a decision to that effect.

37 However, the Republic of Finland submits, first, that the grounds a Member State may rely on to oppose communication of a document are not limited to those listed in Article 4(1) to (3) of Regulation No 1049/2001 but may also be derived from national law, other more specific Community provisions on access to documents, or international agreements. Second, where such grounds have been put forward by the Member State, the institution concerned cannot substitute its own assessment of those grounds for that of the Member State and, consequently, cannot disclose the document requested.

38 The Commission takes the view that the Court of First Instance was right to consider that the purpose of Article 4(5) of Regulation No 1049/2001, as is clear especially from recital 15 and the reference to Declaration No 35 in recital 10 in the preamble to the regulation, is to preserve the application of the legislation and policies of the Member States concerning access to 'national' documents, having regard in particular to the lack of Community harmonisation in the field and the principle of subsidiarity.

39 Article 4(5) thus does not introduce an additional exception concerning access to documents but merely confirms that the question of whether or not a document originating from a Member State is to be disclosed must be assessed by reference to national law. Any objection to disclosure on the part of a Member State must therefore be assessed in relation to the applicable national law and be capable of being reviewed by the courts of that Member State.

40 According to the United Kingdom, short of depriving of all effect the inclusion of the words 'without its prior agreement' in Article 4(5) of Regulation No 1049/2001, that provision must be read as making it clear that what is laid down here is an obligation to obtain that agreement, which must be obtained prior to any disclosure of the document, not merely an obligation to consult the Member State concerned. As to the expression 'may request', it does not imply the existence of a discretion on the part of the institution, but merely indicates that it is for the Member States alone to assess whether or not such a request should be made in the particular case.

41 Recital 10 in the preamble to Regulation No 1049/2001 and its reference to Declaration No 35 confirm that Article 4(5) of the regulation is intended to take into account that, when adopting Article 255 EC, the Member States required guarantees as regards the disclosure of documents originating from them. The interpretation proposed by the Kingdom of Sweden would moreover amount to harmonisation by the back door of the national rules, contrary to recital 15 in the preamble to the regulation and to the principle of subsidiarity.

42 The arguments of the Kingdom of Spain essentially agree with those of the United Kingdom. In particular, it is submitted that the very wording of Article 4(5) of Regulation No 1049/2001 shows that the agreement of the Member State which has made a request on the basis of that provision is made into a legal condition which must be satisfied prior to disclosure of the document in question.

Findings of the Court

The requirement of prior agreement of the Member State

43 As the Court of First Instance rightly observed in paragraph 58 of the judgment under appeal, Article 4(5) of Regulation No 1049/2001 places the Member States in a position that is different from that of other third parties, by providing that, unlike them, any Member State has the possibility of requesting the institution not to disclose a document originating from that State without its prior agreement.

44 The Court of First Instance was also right to find, also in paragraph 58, that the requirement in that provision of 'prior agreement' of the Member State 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. It is clear that 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.

45 Since an 'agreement' is legally different from a mere 'opinion', the very wording of Article 4(5) of Regulation No 1049/2001 precludes an interpretation to the effect that the provision merely confers on a Member State making use of the possibility given by that provision the right to be consulted by the institution before the institution decides, possibly despite the opposition of the Member State in question, to allow access to the document concerned.

46 Moreover, such a right to be consulted is already possessed by the Member States to a great extent by virtue of Article 4(4) of the regulation, which lays down an obligation to 'consult the third party' unless it is clear that the document shall or shall not be disclosed.

47 The fact that Article 4(5) of Regulation No 1049/2001 uses different terms from those of Article 9(3) of the regulation, a provision which also refers to the need to obtain the consent of the originator, has no bearing on the interpretation set out in paragraphs 44 and 45 above. In contrast to Article 9(3), Article 4(5) does not make the prior agreement of the Member State an absolute condition of the disclosure of a document, but makes the possible need for such agreement subject to a prior expression of will by the Member State concerned. In those circumstances the use of the expression 'may request' simply emphasises that that provision 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.

48 Nor is it possible to accept the argument that Article 4(5) of Regulation No 1049/2001 should be interpreted by reference to Article 5 of the regulation, in order to ensure a balance between the treatment given to documents originating from the institutions in the possession of the Member States and that given to documents originating from the Member States in the possession of the institutions.

49 That is shown by the simple fact that the Community legislature expressed itself in very different terms with respect to those two classes of documents, by laying down in the first paragraph of Article 5 of Regulation No 1049/2001 merely an obligation on the Member States to 'consult' the institutions when access is sought to a document originating from them.

50 It follows from the above that, where a Member State has made use of the option given to it by Article 4(5) of Regulation No 1049/2001 to request that a specific document originating from that State should not be disclosed without its prior agreement, disclosure of that document by the institution requires, as the Court of First Instance correctly held in paragraph 58 of the contested decision, the prior agreement of that Member State to be obtained.

51 On the other hand, the judgment under appeal is vitiated by errors of law as regards the scope of such prior agreement.

The scope of the prior agreement which must be sought under Article 4(5) of Regulation No 1049/2001

52 As the Kingdom of Denmark in particular has pointed out, it is apparent from Article 255(2) EC that the limits governing the exercise of the right of access to documents guaranteed by Article 255(1) EC, which are to be determined by the Council acting in accordance with the procedure referred to in Article 251 EC, must be necessary 'on grounds of public or private interest'.

53 Reflecting that provision of the Treaty, which it implements, Regulation No 1049/2001, as may be seen from recital 4 in the preamble and Article 1(a), has the purpose of defining the principles, conditions and limits on grounds of public or private interest concerning the right of public access to documents, so as to give the fullest possible effect to that right.

54 Moreover, recitals 2 and 3 in the preamble to that regulation show that its aim is to improve the transparency of the Community decision-making process, since such openness inter alia guarantees that the administration enjoys greater legitimacy and is more effective and more accountable to the citizen in a democratic system.

55 As recital 10 in the preamble to Regulation No 1049/2001 emphasises, it is precisely the concern to improve the transparency of the Community decision-making process that explains that, as provided by Article 2(3) of the regulation, the right of access to documents held by the Parliament, the Council and the Commission extends not only to documents drawn up by those institutions but also to documents received from third parties, including the Member States, as expressly stated by Article 3(b) of the regulation.

56 By so providing, the Community legislature, as the Court of First Instance observed in paragraphs 53 and 54 of the judgment under appeal, abolished the authorship rule that had applied previously. As may be seen from Council Decision 93/731/EC of 20 December 1993 on public access to Council documents (OJ 1993 L 340, p. 43), Commission Decision 94/90/ECSC, EC, Euratom of 8 February 1994 on public access to Commission documents (OJ 1994 L 46, p. 58) and European Parliament Decision 97/632/EC, ECSC, Euratom of 10 July 1997 on public access to European Parliament documents (OJ 1997 L 263, p. 27), such a rule meant that, where the author of a document held by an institution was a natural or legal person, a Member State, another Community institution or body, or any other national or international organisation, the request for access to the document had to be made directly to the author of the document.

57 The provisions of Article 4(1) to (3) of Regulation No 1049/2001, which provide for various substantive exceptions, and of Articles 2(5) and 9, which lay down special rules for sensitive documents, thus take care to define the objective limits of public or private interest that are capable of justifying a refusal to disclose documents held

by the institutions, whether they were drawn up by them or received by them, and in the latter case whether they originate from Member States or other third parties.

58 In such a context, it is clear that to interpret Article 4(5) of Regulation No 1049/2001 as conferring on the Member State a general and unconditional right of veto, so that it can oppose, in an entirely discretionary manner and without having to give reasons for its decision, the disclosure of any document held by a Community institution simply because it originates from that Member State, is not compatible with the objectives mentioned in paragraphs 53 to 56 above.

59 On this point, it must be stated, in the first place, that the interpretation thus adopted by the Court of First Instance would, as submitted by the Kingdom of Sweden in particular and as observed by the Advocate General in point 44 of his Opinion, bring with it the risk of reintroducing in the case of the Member States, at least in part, the authorship rule which the Community legislature has however abolished.

60 Beside that reintroduction of the authorship rule, that interpretation would bring with it, in the second place, the risk of approving, in disregard of the objectives pursued by Regulation No 1049/2001, a potentially considerable reduction in the degree of openness of the Community decision-making process.

61 Far from referring only to documents of which the Member States are the 'authors' or which have been 'drawn up' by them, Article 4(5) of Regulation No 1049/2001 potentially concerns every document 'originating' from a Member State, in other words, as the Commission rightly submits and as was agreed at the hearing by IFAW

and all the Member States which are parties to this appeal, the entirety of the documents, whoever their author may be, that a Member State transmits to an institution. In this case the only relevant criterion is the origin of the document and the handing over by the Member State concerned of a document previously in its possession.

62 It must be stressed in this respect that, as the Kingdom of Sweden submitted at the hearing and the Advocate General observed in point 42 of his Opinion, the creation of a discretionary right of veto for the Member States would in those circumstances have the potential effect of excluding from the provisions of Regulation No 1049/2001 an especially important class of documents that could form the basis of the Community decision-making process and cast light on it.

63 As IFAW in particular points out, both in their capacity as members of the Council and as participants in many committees set up by the Council or the Commission, the Member States constitute an important source of information and documentation intended to contribute to the Community decision-making process.

64 It follows that the right of public access would potentially be frustrated, to that extent, without any objective reason. The effectiveness of that right would thereby be substantially reduced (see, by analogy, Case C-353/99 P *Council* v *Hautala* [2001] ECR I-9565, paragraph 26).

65 In the third place, there is nothing in Regulation No 1049/2001 to support the Court of First Instance's conclusion that the Community legislature intended by Article 4(5) of that regulation to enact a sort of conflict-of-laws rule for the purpose of preserving the application of national rules, or even, as suggested by the

Commission, the policies of the Member States, concerning access to documents originating from the Member States, at the expense of the specific rules laid down in that field by the regulation.

66 On this point, it should be recalled, first, that in view of the objectives pursued by Regulation No 1049/2001, in particular the fact noted in recital 2 in the preamble that the public right of access to the documents of the institutions is connected with the democratic nature of those institutions and the fact that, as stated in recital 4 in the preamble and in Article 1, the purpose of the regulation is to give the public the widest possible right of access, the exceptions to that right set out in Article 4 of the regulation must be interpreted and applied strictly (see, to that effect, in relation to the legislation prior to Regulation No 1049/2001, Joined Cases C-174/98 P and C-189/98 P *Netherlands and van der Wal* v *Commission* [2000] ECR I-1, paragraph 27; *Council* v *Hautala*, paragraphs 24 and 25; and, with reference to Regulation No 1049/2001, Case C-266/05 P *Sison* v *Council* [2007] ECR I-1233, paragraph 63).

67 Second, as has already been stated in paragraphs 55 and 56 above, it is clear from recital 10 in the preamble to and Article 2(3) of Regulation No 1049/2001 that all documents held by the institutions are within the scope of the regulation, including those originating from the Member States, so that access to such documents is in principle governed by the provisions of the regulation, including those which lay down substantive exceptions to the right of access.

68 Thus, for instance, according to Article 4(4) of Regulation No 1049/2001, if the institution concerned considers that it is clear that access to a document originating from a Member State should be refused on the basis of the exceptions in Article 4(1) or (2), it will refuse the request for access without even having to consult the

Member State from which the document originates, whether or not that Member State has previously made a request under Article 4(5) of the regulation. In such a case it is thus obvious that the decision on the request for access is taken by the institution, having regard solely to the exceptions that derive directly from the rules of Community law.

69 Third, it is evident that Article 4(5) of Regulation No 1049/2001, like Article 4(1) to (4), does not contain any reference to the national law of the Member State.

70 Fourth, as regards the fact that recital 15 in the preamble to Regulation No 1049/2001 states that it is not the object or the effect of the regulation to amend national legislation on access to documents, that — contrary to the view taken by the Court of First Instance in paragraph 57 of the judgment under appeal — is not capable of affecting the scope to be given to Article 4(5) of the regulation. Read as a whole and in conjunction with Article 5 of the regulation, to which it relates, that recital is intended solely to recall that requests for access to documents held by the national authorities, including documents that originate from Community institutions, remain governed by the national rules applicable to those authorities, without the provisions of Regulation No 1049/2001 taking the place of those rules, subject to the requirements laid down by Article 5 imposed by the obligation of loyal cooperation under Article 10 EC.

71 Moreover, documents which a Member State transmits to a third party do not remain subject exclusively to the legal order of that State. As the Kingdom of Sweden rightly submits, a Community institution, as an external authority distinct from the Member States, is part of a legal order with rules of its own as regards access to the documents in its possession. It follows in particular that the rules

governing such access cannot have the effect of amending national law, which, as the Advocate General observes in point 47 of his Opinion, governs the conditions of access to a document held by a national authority.

72 Fifth, as IFAW notes, the interpretation adopted by the Court of First Instance has the consequence that access to documents of the same kind and of the same importance for shedding light on the Community decision-making process could be granted or refused depending solely on the origin of the document.

73 With reference to the particular circumstances of the present case, it would follow that documents of the same kind, likely to have played a decisive part in the Commission's decision to release an opinion favourable to the carrying out of an industrial project in an area protected under the Habitats Directive, would sometime be accessible to the public and sometimes inaccessible, depending on the rules or the policy on access to documents of the Member State in which such a project was to be carried out.

74 Sixth, as regards the principle of subsidiarity, it suffices to state that, although they relied on that principle in support of their common arguments, neither the Kingdom of Spain nor the United Kingdom and the Commission have demonstrated, or even attempted to explain, why that principle should prevent the disclosure of documents originating from the Member States and held by the Community institutions in connection with the exercise of their own decision-making powers from being covered by the Community provisions relating to access to documents, or why it should require such disclosure to be outside those provisions and covered by the national rules alone.

75 It follows from the foregoing that Article 4(5) of Regulation No 1049/2001 cannot be interpreted as conferring on the Member State a general and unconditional right of

veto, so that it could in a discretionary manner oppose the disclosure of documents originating from it and held by an institution, with the effect that access to such documents would cease to be governed by the provisions of that regulation and would depend only on the provisions of national law.

76 On the contrary, several factors militate in favour of an interpretation of Article 4(5) to the effect that the exercise of the power conferred by that provision 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 Community decision. Seen in that way, the prior agreement of the Member State referred to in Article 4(5) 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.

77 Beside the fact that such an interpretation is compatible both with the objectives pursued by Regulation No 1049/2001, as set out in paragraphs 53 to 56 above, and with the need, noted in paragraph 66 above, to interpret Article 4 of the regulation strictly, it can also be justified by the more immediate legislative context of Article 4(5) of the regulation.

78 It should be observed that, while Article 4(1) to (3) of Regulation No 1049/2001 clearly lists substantive exceptions that may justify, or as the case may be require, a refusal to communicate the document that has been asked for, Article 4(5) confines itself to requiring the prior agreement of the Member State concerned where that State has made a specific request to that effect.

79 Moreover, Article 4(5) follows a provision, namely Article 4(4), which lays down a procedural rule, imposing an obligation to consult third parties in the circumstances it describes.

80 Finally, Article 4(7), which lays down rules concerning the period during which the various exceptions to the right of public access to documents are to apply, refers expressly only to the exceptions laid down in Article 4(1) to (3) and makes no reference to the provisions of Article 4(5).

81 Both the position of paragraph 5 within the article of which it forms part and the content of that article therefore allow the conclusion, in the light of the objectives pursued by Regulation No 1049/2001, that Article 4(5) of that regulation is a provision dealing with the process of adoption of the Community decision.

82 As to the discussion between the parties on the legal effects of Declaration No 35, it suffices to state that the interpretation adopted in paragraph 76 above does not in any event contradict that declaration. Although the declaration shows that the Member States, while adopting Article 255(1) EC, intended to reserve the possibility of retaining a certain control over decisions to disclose documents originating from them, it does not on the other hand give any details as to the substantive grounds on which such control might be exercised.

83 It remains to point out that, while the decision-making process thus established by Article 4(5) of Regulation No 1049/2001 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, it is none the less possible for the legitimate interests of the Member States to be protected on the basis of those exceptions and by virtue of the special rules for sensitive documents laid down in Article 9 of the regulation.

84 In particular, there is nothing to exclude the possibility that compliance with certain rules of national law protecting a public or private interest, opposing disclosure of a document and relied on by the Member State for that purpose, could be regarded as an interest deserving of protection on the basis of the exceptions laid down by that regulation (see, with respect to the legislation prior to Regulation No 1049/2001, *Netherlands and van der Wal* v *Commission*, paragraph 26).

The procedural implications of the decision-making process established by Article 4(5) of Regulation No 1049/2001

85 As to the procedural implications of Article 4(5) of Regulation No 1049/2001 so interpreted, it should be noted, in the first place, that where the implementation of rules of Community law is thus entrusted jointly to the institution and the Member State which has made use of the possibility granted by that provision, and such implementation consequently depends on the dialogue to be carried on between them, they are obliged in accordance with the duty of loyal cooperation set out in Article 10 EC to act and cooperate in such a way that those rules are effectively applied.

86 It follows, first, that an institution which receives a request for access to a document originating from a Member State and that Member State must, once that request has been notified by the institution to the Member State, commence without delay a genuine dialogue concerning the possible application of the exceptions laid down in Article 4(1) to (3) of Regulation No 1049/2001, while paying attention in particular to the need to enable the institution to adopt a position within the time-limits within which Articles 7 and 8 of the regulation require it to decide on the request for access.

87 Next, if the Member State concerned, following such dialogue, objects to disclosure of the document in question, it is obliged, contrary to what the Court of First Instance held in paragraph 59 of the judgment under appeal, to state reasons for that objection with reference to those exceptions.

88 The institution 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. Where, despite an express request by the institution to the Member State to that effect, the State still fails to provide the institution with such reasons, the institution must, if for its part it considers that none of those exceptions applies, give access to the document that has been asked for.

89 Finally, as is apparent in particular from Articles 7 and 8 of the regulation, the institution is itself obliged to give reasons for a decision to refuse a request for access to a document. Such an obligation means that the institution must, in its decision, not merely record the fact that the Member State concerned has objected to disclosure of the document asked for, but also 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 the regulation applies. That information will 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.

90 In the second place, it must be pointed out, regarding the last point, that if the Member State gives a reasoned refusal to allow access to the document in question and the institution is consequently obliged to refuse the request for access, the person who has made that request enjoys judicial protection, contrary to the fears expressed by IFAW in particular.

91 It is true that, according to settled case-law, in an action brought under Article 230 EC the Court has no jurisdiction to rule on the lawfulness of a measure adopted by a national authority (see, inter alia, Case C-97/91 *Oleificio Borelli* v *Commission* [1992] ECR I-6313, paragraph 9).

92 It is also settled case-law that that position cannot be altered by the fact that the measure in question forms part of a Community decision-making procedure, where it is clear from the division of powers in the field in question between the national authorities and the Community institutions that the measure adopted by the national authority is binding on the Community decision-taking authority and therefore determines the terms of the Community decision to be adopted (*Oleificio Borelli* v *Commission*, paragraph 10).

93 In the present case, however, it must be noted that Article 4(5) of Regulation No 1049/2001 — unlike other Community legislation on which the Court has ruled (see, inter alia, Case C-269/99 *Carl Kühne and Others* [2001] ECR I-9517, paragraphs 50 to 54) — did not aim to establish a division between two powers, one national and the other of the Community, with different purposes. As pointed out in paragraph 76 above, that provision creates a decision-making procedure the sole object of which is to determine whether access to a document should be refused under one of the substantive exceptions listed in Article 4(1) to (3) of the regulation, a decision-making procedure in which both the Community institution and the Member State concerned play a part, in the terms stated in paragraph 76.

94 In such a case it is within the jurisdiction of the Community judicature to review, on application by a person to whom the institution has refused to grant access, whether that refusal was validly based on those exceptions, regardless of whether the refusal results from an assessment of those exceptions by the institution itself or by the relevant Member State. From the point of view of the person concerned, the

Member State's intervention does not affect the Community 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.

Setting aside of the judgment under appeal

95 It follows from all the foregoing that the Court of First Instance committed errors of law that justify quashing the judgment under appeal, first, by holding in paragraphs 58 and 59 of that judgment that the refusal of a Member State to give its prior agreement to disclosure of a document on the basis of Article 4(5) of Regulation No 1049/2001 does not have to be accompanied by reasons and, notwithstanding the lack of such reasons, is equivalent to an instruction to the institution concerned not to disclose the document, that institution not being able to examine whether the non-disclosure of the document is justified, and, second, by holding in paragraph 61 of the judgment that the consequence of such an objection by the Member State is that access to the document in such a case is governed not by the regulation but by the relevant provisions of national law.

96 In accordance with the first paragraph of Article 61 of the Statute of the Court of Justice, if the Court of Justice quashes the decision of the Court of First Instance, it may itself give final judgment in the matter, where the state of the proceedings so permits. That is the case here.

The application at first instance

97 In the light of all the foregoing, it must be concluded that IFAW was right to submit, in the first plea in law in support of its application to the Court of First Instance, that the contested decision infringed Article 4 of Regulation No 1049/2001.

98 That decision was adopted by the Commission on the basis of an incorrect interpretation of Article 4(5) of Regulation No 1049/2001, namely that a Member State is entitled under that provision unconditionally and in a discretionary manner to object to the disclosure of a document originating from it, without being required to base its objection on the grounds of exception set out in Article 4(1) to (3) of Regulation No 1049/2001 and to state reasons for its objection.

99 As follows from paragraphs 52 to 89 above, Article 4(5) entitles a Member State to object to the disclosure of documents originating from it only on the basis of those exceptions and if it gives proper reasons for its position. That provision also requires that the institution to which such an objection is made must, once the possibilities of dialogue in good faith with the Member State mentioned in paragraph 86 above have been exhausted, make sure that those reasons exist and refer to them in the decision it makes to refuse access.

100 Accordingly, the contested decision must be annulled. In those circumstances there is no need for the Court to rule on the second plea in law relied on in support of the application to the Court of First Instance, alleging breach of the obligation to state reasons.

Costs

101 The first paragraph of Article 122 of the Rules of Procedure provides that, where the appeal is well founded and the Court of Justice itself gives final judgment in the case, the Court is to make a decision as to costs. Under Article 69(2) of the Rules of Procedure, which applies to appeal proceedings by virtue of Article 118, the

unsuccessful party is to be ordered to pay the costs, if they have been applied for in the successful party's pleadings. The first subparagraph of Article 69(4) provides that the Member States which intervene in the proceedings are to bear their own costs.

102 Since the appeal has been successful, the Commission must be ordered to pay the costs relating to the appeal incurred by the Kingdom of Sweden and by IFAW, as applied for in their pleadings.

103 The Commission and the other parties to the appeal are to bear their own costs relating to the proceedings on appeal.

104 Since the Court has moreover allowed the application made by IFAW at first instance, the Commission must also be ordered to pay the costs incurred by IFAW before the Court of First Instance, as applied for in IFAW's pleadings at first instance.

105 The Commission and the Member States which intervened before the Court of First Instance are to bear their own costs relating to the proceedings at first instance.

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

1. **Sets aside the judgment of the Court of First Instance of the European Communities of 30 November 2004 in Case T-168/02 *IFAW Internationaler Tierschutz-Fonds* v *Commission*;**

2. **Annuls the decision of the Commission of the European Communities of 26 March 2002 refusing IFAW Internationaler Tierschutz-Fonds gGmbH access to certain documents received by the Commission in the course of a procedure which ended with the Commission giving an opinion favourable to the carrying out of an industrial project on 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;**

3. **Orders the Commission of the European Communities to pay the costs incurred by the Kingdom of Sweden in connection with the appeal proceedings and the costs incurred by IFAW Internationaler Tierschutz-Fonds gGmbH both in the appeal proceedings and in those at first instance in which the Court of First Instance of the European Communities gave judgment on 30 November 2004, *IFAW Internationaler Tierschutz-Fonds* v *Commission*;**

4. **Orders the Kingdom of Denmark, the Kingdom of Spain, the Kingdom of the Netherlands, the Republic of Finland, the United Kingdom of Great Britain and Northern Ireland, and the Commission of the European Communities to bear their own costs relating to the appeal;**

5. **Orders the Kingdom of Denmark, the Kingdom of the Netherlands, the Kingdom of Sweden, the United Kingdom of Great Britain and Northern Ireland, and the Commission of the European Communities to bear their own costs relating to the proceedings at first instance.**

[Signatures]