OPINION OF ADVOCATE GENERAL POIARES MADURO delivered on 18 July 2007 [1]

1. The Court is asked to rule on an appeal brought by the Kingdom of Sweden against 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* ('the judgment under appeal'), [2] dismissing the action brought by IFAW Internationaler Tierschutz-Fonds gGmbH ('IFAW') for annulment of the Commission's decision of 26 March 2002 refusing it access to certain documents relating to the declassification of a protected site.

2. According to the appellant, the Court of First Instance was incorrect in holding that Article 4(5) 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 [3] ('the Regulation'), on which the contested decision is based, obliges an institution to refuse any request for access to a document in its possession originating from a Member State, if the Member State opposes disclosure.

3. As the analysis of the case will show, the legal issues at stake in this case and the debate to which it has given rise both highlight the cultural differences in matters of transparency and pit them against each other: a difference between Community culture, which has been brought around more or less reluctantly and only recently to the requirement of transparency and the culture of the Nordic countries, which have an old and particularly robust tradition of transparency; [4] a difference also between the cultures of the Member States, as evidenced by the present case, in which six Member States have become involved, four intervening before the Court of First Instance and/or the Court of Justice to oppose the interpretation endorsed by the Court of First Instance, two to defend it. The case and the legal issue it raises also bear witness to the reciprocal interactions between the different legal orders in matters of transparency:

1 — Original language: Portuguese.

2 — Case T-168/02 *IFAW Internationaler Tierschutz-Fonds* v *Commission* [2004] ECR II-4135.

3 — OJ 2004 L 145, p. 43.

4 — On the highlighting of this contrast, see Ragnemalm, H., 'Démocratie et transparence: sur le droit général d'accès des citoyens de l'Union européenne aux documents détenus par les institutions communautaires', *Mél. G. F. Mancini*, Vol. II, ed. Dott. A. Giuffrè, Milan, 1998, p. 809. Suffice it to state that the public's right of access to official documents has been enshrined in the Swedish constitution since 1766.

'drawing inspiration from national forms of transparency, European transparency in turn generates its own variations, which have repercussions in the Member States'. [5] Lastly, the case involves a provision of the Regulation which is particularly susceptible to being challenged through litigation: in two years of application of the Regulation, 6 of 11 actions brought before the Court of First Instance against negative decisions of the Commission have concerned the application of Article 4(5). [6]

I — Framework of the appeal

4. In order to achieve a full understanding of the case, what is at stake and how it may be resolved, a summary of the principal applicable provisions, the facts and the solution adopted by the Court of First Instance is needed.

A — *Applicable provisions*

5. 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.'

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

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

5 — Rideau, J., 'Jeux d'ombres et de lumières en Europe', in *La transparence dans l'Union européenne: mythe ou principe juridique?*, LGDJ, Paris, 1998, p. 1.

6 — See Report from the Commission on the implementation of the principles in EC Regulation No 1049/2001 regarding public access to European Parliament, Council and Commission documents, of 30 January 2004, COM(2004) 45 final, point 3.5.2.

7. On the basis of Article 255(2) EC, the Council adopted the Regulation. Recitals 4, 6, 9, 10 and 15 in the preamble to that regulation are worded as follows:

'(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.

...

(6) Wider access should be granted to documents in cases where the institutions are acting in their legislative capacity, including under delegated powers, while at the same time preserving the effectiveness of the institutions' decision-making process. Such documents should be made directly accessible to the greatest possible extent.

...

(9) On account of their highly sensitive content, certain documents should be given special treatment. Arrangements for informing the European Parliament of the content of such documents should be made through inter-institutional agreement.

(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 attached to the Final Act of the Treaty of Amsterdam 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.'

8. Article 1(a) of Regulation No 1049/2001 provides:

'Purpose

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'.

9. Article 2 of that regulation provides:

'Beneficiaries and scope

1. Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, has a right of access to documents of the institutions, subject to the principles, conditions and limits defined in this Regulation.

...

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

...

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

...'

10. According to Article 3(b) of the Regulation, for the purposes 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'.

11. Article 4 of the Regulation provides:

'Exceptions

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.'

12. Article 5 of that regulation provides:

'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.'

13. According to Article 9 of the Regulation:

'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.

4. An institution which decides to refuse access to a sensitive document shall give the reasons for its decision in a manner which does not harm the interests protected in Article 4.

5. Member States shall take appropriate measures to ensure that when handling applications for sensitive documents the principles in this Article and Article 4 are respected.

6. The rules of the institutions concerning sensitive documents shall be made public.

7. The Commission and the Council shall inform the European Parliament regarding sensitive documents in accordance with arrangements agreed between the institutions.'

B — *The facts*

14. On 19 April 2000, the Commission of the European Communities issued an opinion authorising the Federal Republic of

Germany to declassify the Mühlenberger Loch site, which was until then an area protected under Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, [7] for the purpose of a project which consisted of the enlargement of the Daimler Chrysler Aerospace Airbus factory and the reclamation of part of the estuary for a runway extension.

15. By letter of 20 December 2001, addressed to the Commission, IFAW, a non-governmental organisation active in the field of protection of animal welfare and nature conservation, requested access inter alia to correspondence exchanged between the Federal Republic of Germany and the City of Hamburg concerning that site and the related project, and also to correspondence from the German Chancellor.

16. Since the Federal Republic of Germany, which had been consulted by the Commission concerning that request, had opposed disclosure of the documents, the Commission took the view that Article 4(5) of the Regulation prohibited it, in those circumstances, from granting access to them and, consequently, on 26 March 2002 adopted the contested decision refusing IFAW's request.

7 — OJ 1992 L 206, p. 7.

17. By application lodged at the Registry of the Court of First Instance on 4 June 2002, IFAW brought an action for annulment against the Commission's decision of 26 March 2002.

C — *The judgment under appeal*

18. In support of its action for annulment, the applicant put forward inter alia a plea alleging infringement of Article 4 of the Regulation. It submitted that the Commission's interpretation of Article 4(5) of that regulation, to the effect that it must refuse access to a document received from a Member State when that Member State opposes its disclosure, is incorrect. In its view, the possibility given under Article 4(5) of the Regulation to a Member State from which a document originates to request an institution which has that document in its possession not to disclose it cannot be regarded as being a right of veto, as the final decision must rest with the institution.

19. On the basis of a line of argument developed in paragraphs 50 to 65 of its judgment, the Court of First Instance dismissed that plea and accordingly held that the action for annulment was unfounded.

20. According to the judgment under appeal, the power given to Member States

under Article 4(5) of the Regulation to request an institution not to disclose a document originating from it without its prior agreement constitutes an instruction to the institution not to disclose the document in question where the Member State is opposed to disclosure. The Member State is under no obligation to state the reasons for its request and the institution is bound to abide by the instruction without being able to examine whether non-disclosure of the document in question is justified in, for example, the public interest.

21. The Court of First Instance took the view that Article 4(5) of the Regulation thus lays down a *lex specialis* for the Member States in relation to Article 4(4), which allows other third parties only the right to be consulted by the institutions, in order to determine whether the document they communicated to them comes within the scope of one of the exceptions provided for in Article 4(1) or (2) of the Regulation, and then subject to the condition that it is not clear whether or not the document should be disclosed.

22. The Court of First Instance bases its interpretation of Article 4(5) of the Regulation on the consideration that the obligation to obtain the Member State's agreement would risk becoming a dead letter if the Member State were not granted a right of veto. It also bases itself on 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 of the European Union not to communicate to third parties a document originating from that State without its prior agreement. The Court of First Instance further held that the power conferred 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, as evidenced by recital 15 in the preamble to the Regulation. Consequently, when a Member State has made a request concerning a document pursuant to Article 4(5) of the Regulation, access to that document is governed not by the Regulation but by the relevant national provisions of the Member State concerned, which were not amended by adoption of the Regulation.

23. The Court of First Instance added that, '[i]n 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'. [8]

8 — Judgment under appeal, paragraph 60.

24. Finding that the documents whose disclosure had been requested by the applicant were documents originating from a Member State within the meaning of Article 4(5) of the Regulation that the Federal Republic of Germany had asked the Commission not to disclose, the Court of First Instance held that the Commission's decision was not vitiated by any infringement of Article 4 of that regulation.

II — Analysis of the appeal

25. It is against that judgment of the Court of First Instance delivered on 30 November 2004 that the Kingdom of Sweden, which had already intervened in support of the form of order sought by the applicant in the proceedings before the Court of First Instance, has appealed to this Court. In support of its appeal, the appellant puts forward a single plea in law alleging infringement of Community law arising from a disregard of the scope of Article 4(5) of the Regulation: far from laying down a right of veto for the Member States, as held by the Court of First Instance, Article 4(5) gives them merely a right to be consulted before any disclosure of a document by the institution to which they communicated the document; the institution retains, however, the responsibility for deciding whether or not to make the document public, and a decision not to grant access may be justified only in one of the exceptional cases justifying confidentiality provided for in Article 4(1) to (3) of the Regulation.

26. It is evident that two diametrically opposed views on the scope of Article 4(5) of the Regulation are in conflict here. In order for the interpretation of that provision to be clarified, it is necessary to assess the appropriateness of the interpretation. To that end, I will show that neither a literal interpretation of Article 4(5) nor respect for the will of the Member States expressed in Declaration No 35 required the solution adopted by the Court of First Instance, contrary to what it held. On the contrary, a systematic and teleological interpretation calls for a different solution.

A — *The lack of a cogent answer on the basis of a literal interpretation and the search for the parties' intention*

1. The wording of Article 4(5) of the Regulation

27. It should be recalled as a preliminary point that in the state of the law as it stood

prior to that resulting from the Regulation, the right of access to documents concerned only documents drawn up by the institutions. [9] By contrast, for documents held by an institution but drawn up by a third party, that is, a natural or legal person, a Member State, another institution or Community body or any other national or international body, the 'authorship rule' prevailed. Under that rule, an institution was not empowered to disclose documents originating from third parties; the party requesting access was required to address its request directly to the author of the document. [10] Although this was understood from the outset in the case-law to be a limitation on the general principle of the right of access and thus to be interpreted and applied restrictively, [11] the authorship rule had nevertheless been stated to be an 'absolute and unqualified exception for documents authored by a third party'. [12]

28. One of the principal contributions of the Regulation has thus been to expand the scope of application of Community law governing the right of access to the institutions' documents by abolishing the authorship rule. Henceforth, under Article 2(3) of that regulation, the right of access applies to 'all documents held by an institution, that is to say, documents drawn up or received by it and in its possession'. Consequently, the institutions may have to disclose documents originating from third parties, including Member States in particular, in accordance with the definition of the concept of third party in Article 3(b) of the Regulation. The abolishment of the authorship rule was offset, however, by special treatment under Article 4(5) of the Regulation, in particular for documents originating from Member States. Determining what exactly that special treatment consists in is what the present dispute is all about.

29. If the terms of the provision in question were clear, it would be possible legitimately to assume that the rule must simply be applied as laid down: *in claris non fit interpretatio*. In the present case, however, it is impossible to draw the answer from the wording, as it is far from clear. It states that '[a] Member State may request the institution not to disclose a document originating from that Member State without its prior agreement'. As the Commission itself acknowledged, '[t]he wording of Article 4(5) does not make it clear to what extent the institutions are required to respect the negative opinion of a Member State as regards the disclosure of one of its documents'. [13] The emphasis placed on the fact that any disclosure by an institution of a document transmitted to it by a Member State might, at the Member State's request,

9 — See, to that effect, Case T-123/99 *JT's Corporation* v *Commission* [2000] ECR II-3269, paragraph 53, and Case T-191/99 *Petrie and Others* v *Commission* [2001] ECR II-3677, paragraph 47.

10 — For a discussion of the rule, see Joined Cases T-110/03, T-150/03 and T-405/03 *Sison* v *Council* [2005] ECR II-1429, paragraph 92.

11 — See Case T-188/97 *Rothmans* v *Commission* [1999] ECR II-2463, paragraph 55, and Case T-92/98 *Interporc* v *Commission* [1999] ECR II-3521, paragraph 69.

12 — See Case T-47/01 *Co-Frutta* v *Commission* [2003] ECR II-4441, paragraph 59.

13 — Report from the Commission on the implementation of the principles in EC Regulation No 1049/2001 regarding public access to European Parliament, Council and Commission documents, of 30 January 2004, COM(2004) 45 final, point 3.5.2.

be subject to its 'prior agreement' would argue in favour of recognition of a right of veto for the Member State. Conversely, the use of the word 'request' tends to lead to the conclusion that the decision on disclosure ultimately lies with the institution in possession of the document since, as the applicant in the proceedings before the Court of First Instance rightly pointed out, the term 'request' may be defined as the action or fact of soliciting something, which means that the party which has made a request expects a response to that request and also the exercise of discretion by the party responding. This ambiguity in the wording of Article 4(5) of the Regulation is highlighted by the contrast which may be gleaned from a reading of the terms of Article 9(3), which clearly affirms a right of veto in stating that '[s]ensitive documents shall be recorded in the register or released only with the consent of the originator'. Therefore, I cannot follow the Court of First Instance which, in the judgment under appeal, held that the obligation imposed on an institution in possession of a document originating from a Member State to obtain the latter's prior agreement before any disclosure of that document, is 'clearly laid down' by Article 4(5) of the Regulation. [14]

30. The amendments to their Rules of Procedure effected by the three institutions, in performance of the obligation to adapt to the provisions of the Regulation as required by Article 18, also confirm, if indeed confirmation were necessary, the equivocal wording of Article 4(5). A reading of those rules shows that the Commission apparently did not renounce the possibility of disclosing a document originating from a Member State against the explicit opinion of its the author, even when the Member State had requested the Commission not to do so without its prior agreement. [15] The Council, for its part, merely reproduced the wording of Article 4(5) of the Regulation. [16] The European Parliament's Rules of Procedure do not make any specific provision for documents originating from the Member States and merely provide, in the case of documents originating from third parties, that they be consulted 'with a view to assessing whether one of the exceptions laid down in Articles 4 or 9 of Regulation (EC) No 1049/2001 is applicable'. [17]

31. Legal literature is itself divided on the meaning to be attached to the terms of Article 4(5) and on the scope to be given it. Some writers believe the wording of the provision to be explicit confirmation of the

14 — Paragraph 58 of the judgment under appeal.

15 — See Article 5(4)(b) and (6) of Commission Decision 2001/937/EC, ECSC, Euratom of 5 December 2001 amending its rules of procedure (OJ 2001 L 345, p. 94).

16 — See Article 2(1)(b) of Annex II to Council Decision 2004/840/EC of 29 November 2001 amending the Council's Rules of Procedure (OJ 2001 L 313, p. 40).

17 — See Article 9(3) of Bureau Decision on public access to European Parliament documents of 28 November 2001 (OJ 2001 C 374, p. 1).

right of veto for Member States. [18] Others, by contrast, have advocated a different interpretation, leaving the last word on a request for access ultimately up to the institution in possession of the document. [19]

32. In reality, as pertinently pointed out by the Danish Government, the ambiguity of the terms of Article 4(5) of the Regulation reflects a 'constructive ambiguity' which was the only way for it to be adopted by the Community legislature. [20] It was the result of tensions which accompanied the origins of the Regulation, an opposition between those who favoured maintaining relative secrecy and those who favoured greater transparency, one which divided the different protagonists of the legislative procedure. [21] The Commission wished to retain control for the Member States over the disclosure of documents they provide to the institutions. Its initial proposal thus provided in Article 4(d) that '[t]he institutions shall refuse access to documents where disclosure could significantly undermine the protection of ... confidentiality as requested by the third party having supplied the document or the information, or as required by the legislation of the Member State'. [22] The Parliament took the view that the decision on disclosure of a document originating from a Member State had to lie with the institution in possession of it and, consequently, had suggested an amendment to that effect to the Commission's regulation proposal. [23] In the Council, Member States themselves were divided, as illustrated by the fact that a proposal from the French Presidency, tabled in December 2000, which clearly recognised a right of veto for the Member States, was ultimately not accepted.

2. The scope of Declaration No 35

33. The compromise solution was thus to reproduce almost literally in Article 4(5) the text of Declaration No 35, as the Court of First Instance itself noted [24] and as evidenced by recital 10 in the preamble to the Regulation, the essence of which is to the

18 — See, inter alia, to that effect, Cabral, P., 'Access to Member State documents in EC law', *ELR* vol. 31 (2006), No 3, p. 378, 385; see also De Leeuw, M.E., 'The regulation on public access to European Parliament, Council and Commission documents in the European Union: are citizens better off?' *ELR* vol. 28 (2003), No 3, p. 324, 337-338.

19 — See inter alia, Harden, I., 'Citizenship and Information', *European Public Law* vol. 7 (2001), No 2, p. 165, 192; Peers, S., 'The new regulation on access to documents: a critical analysis', *YEL* 21 (2001-2002), p. 385, 407-408.

20 — See also, to the same effect, Heliskoski, J., and Leino, P., 'Darkness at the break of noon: the case law on Regulation No 1049/2001 on access to documents', *CMLR* vol. 43 (2006), No 3, p. 735, 771-772.

21 — For a discussion of the divisions between the different players in the legislative process, see Bjurulf, B., and Elgström, O., 'Negotiating transparency: the role of institutions', *JCMS* vol. 42 (2004), No 2, p. 249.

22 — Proposal for a Regulation of the European Parliament and of the Council regarding public access to European Parliament, Council and Commission documents (OJ 2000 C 177 E, p. 70).

23 — See Amendment No 36, in Report A5 — 0318/2000 of 27 October 2000.

24 — Paragraph 57 of the judgment under appeal; see also Case T-76/02 *Messina* v *Commission* [2003] ECR II-3203, paragraph 41, and Case T-187/03 *Scippacercola* v *Commission* [2005] ECR II-1029, paragraph 56.

effect that the extension of the right of access to documents received by the institutions must be construed in the light of Declaration No 35.

34. How, then, is the scope of that reference to Declaration No 35 to be gauged? The status of declarations annexed to treaties remains relatively unclear. Although Article 311 EC provides that protocols annexed to the founding treaties by common consent of the Member States 'form an integral part thereof' and therefore have the same legal value, [25] the Treaty is silent on declarations. The preponderance of opinion [26] refuses to recognise any binding legislative effect for declarations included in final acts of Community treaties, seeing in them merely an expression of a political commitment. The case-law has long refused to take a stand on the matter. Only recently did it extend interpretative scope to declarations, [27] thus falling into line with the accepted view in international law. Article 31 of the Vienna Convention on the Law of Treaties of 23 May 1969 states that a treaty is to be interpreted in the light of its context, which encompasses 'in addition to the text, including its preamble and annexes ... any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty'. Declarations drawn up by the parties are thus included as bases of interpretation. [28] Does this mean that the interpretation of a treaty thus given by common accord of the States Parties in a declaration can go as far as to amend the stipulations in it? International law may have already provided a number of illustrations, in so far as the signatory States are a treaty's authentic interpreters, [29] but that cannot be the case in Community law, given the rigid nature of the founding treaties which have constitute the constitutional charter of the Communities. [30]

35. Since Declaration No 35 may thus legitimately serve as a basis of interpretation of Article 4(5) of the Regulation, it remains to be determined whether it offers any clarification as to the meaning of the provision. According to the United Kingdom, that declaration shows that in adopting Article 255 EC, the scope of which extends to documents created by third parties and held by Community institutions, the Member States required there to be guarantees that documents originating from them

25 — As the Court of Justice recognised long ago in Joined Cases 7/54 and 9/54 *Groupement des industries sidérurgiques luxembourgeoises* v *High Authority* [1956] ECR 175, 194: '[u]nder Article 84 of the Treaty, the words "this Treaty" mean the provisions of the Treaty and its Annexes, of the Protocols annexed thereto and of the Convention on the Transitional Provisions. For that reason, the provisions contained in all those instruments are equally binding ...'.

26 — See Thot, A., 'The legal status of the declarations annexed to the Single European Act', *CMLR* 1986, p. 803; Constantinesco, V., 'La structure du Traité instituant l'Union européenne', *CDE* 1993, No 3-4, p. 251, 261; Petit, Y., 'Commentaire de Article R', in Constantinesco, V., Kovar, R., and Simon, D., *Traité sur l'Union européenne:commentaire article par article*, éd. Economica, Paris, 1995, p. 913, 922 to 924; Simon, D., *Le système juridique communautaire*, 3rd ed., PUF, 2001, sp. 306.

27 — See Case T-187/99 *Agrana Zucker und Stärke* v *Commission* [2001] ECR II-1587, and order of the Court in Case C-321/01 P *Agrana Zucker und Stärke* v *Commission* [2002] ECR I-10027.

28 — See Combacau, J., and Sur, S., *Droit international public*, 7th ed., Paris: Montchrestien, 2006, pp. 174-175.

29 — Ibid.

30 — Case 294/83 *Les Verts* v *Parliament* [1986] ECR 1339, paragraph 23.

would not be disclosed by the institutions without their consent. The Court of First Instance gave the provision the same scope since, after reviewing the wording of the provision, it inferred therefrom that there was a right of veto for the Member States in respect of any request for access to a document provided by them to an institution. [31] Declaration No 35, however, is drafted in the same terms as Article 4(5) of the Regulation and carries the same ambiguity. It cannot therefore be of assistance in clarifying its meaning. It does not, any more than the wording of Article 4(5), offer a clear, unambiguous confirmation of a right of veto for Member States.

36. The wording of Article 4(5) is — it must be acknowledged — flawed by an irreducible ambiguity. Admittedly, it does not exclude the interpretation given to it by the Court of First Instance; the terms of the provision do not explicitly reduce the guarantees granted to the Member States in the event of a request, addressed to an institution, for disclosure of a document originating from them to a mere consultation. In that regard, Article 4(5) cannot be viewed, from a purely literal point of view, as the counterpart of Article 5, which provides that '[w]here a Member State receives a request for a document in its possession, originating from an institution, ... 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 wording of Article 4(5) does not, however, impose the interpretation endorsed by the Court of First Instance. Moreover, the power granted by the provision to the Member States to request non-disclosure of their documents to third parties without their prior agreement has been expressly referred to by the Court of First Instance as being an 'exception' to the right of access to documents of the institutions. [32] According to settled case-law, any exception to the right of access to documents of the institutions must be interpreted and applied strictly. [33] Therefore, an interpretation recognising an unconditional right of veto for the Member States over access to documents provided by them to an institution could have been accepted only if it had sufficient support to be found in the actual wording of Article 4(5).

B — *A systematic and teleological interpretation*

37. In the absence of an indisputable answer which might be gleaned from a literal interpretation of Article 4(5) of the Regulation, it is appropriate to attempt to elucidate the meaning of the provision in question by placing it in the overall legislative context in which it is situated and by referring to the objectives of the set of norms of which it forms a part. The provision in question is part of a legal context marked by a slow but inexorable rise in the strengthening in

31 — See judgment under appeal, paragraphs 57 and 58.

32 — *Messina* v *Commission*, paragraph 55.

33 — See, inter alia, Joined Cases C-174/98 P and C-189/98 P *Netherlands and van der Wal* v *Commission* [2000] ECR I-1, paragraph 27; Case C-353/99 P *Council* v *Hautala* [2001] ECR I-9565, paragraph 25; Case C-41/00 P *Interporc* v *Commission* [2003] ECR I-2125, paragraph 48; Case C-266/05 P *Sison* v *Council* [2007] ECR I-1233, paragraph 63; and Case T-105/95 *WWF UK* v *Commission* [1997] ECR II-313, paragraph 56.

Community law of the requirement of transparency in general, and of the right of access to documents of the institutions in particular.

38. A right of public access to documents of the institutions was, for a long time, a concept foreign to Community law. Its evolution was one of 'progressive affirmation' [34] of the right of public access to documents held by public authorities, the principal milestones of which I will discuss only briefly. The attachment to transparency in the decision-making process was first expressed formally in Declaration No 17 relating to the right of access to information annexed to the Final Act of the Treaty on European Union, signed in Maastricht on 7 February 1992, which recommends the adoption of measures designed to improve public access to information held by the institutions. In the absence of general Community rules laying down the scope of that right of access, it has been for the institutions to break with the traditional principle of administrative secrecy by deciding themselves whether or not they wished to grant access to a requested document held by them. Following the adoption by common agreement, on 6 December 1993, of a Code of conduct concerning public access to documents held by them, [35] the Council and the Commission, on the basis of their power of internal organisation, [36] each took a decision implementing those principles [37] and a decision formally adopting that code. [38] Despite that progressive affirmation of the right of public access to documents of the institutions, despite the invitations from its Advocates General [39] or some of its Members, [40] despite being spurred by some of the stands taken by the Court of First Instance, [41] and even though it itself recognised that the right of public access to documents held by public authorities is enshrined as a constitutional or legislative principle by the majority of the Member States, [42] the Court of Justice has not formally established it as a general principle of Community law. [43]

39. The development did not stop there, however. The next stage was the confirma-

34 — To use the words of the Court itself in Case C-58/94 *Netherlands* v *Council* [1996] ECR I-2169, paragraph 36; Case C-41/00 *Interporc* v *Commission*, paragraph 38.

35 — Code of conduct 93/730/EC concerning public access to Council and Commission documents (OJ 1993 L 340, p. 41).

36 — The legality of that basis has been recognised: see *Netherlands* v *Council*.

37 — Council Decision 93/731/EC of 20 December 1993 on public access to Council documents (OJ 1993 L 340, p. 43).

38 — Commission Decision 94/90/ECSC, EC, Euratom of 8 February 1994 on public access to Commission documents (OJ 1994 L 46, p. 58).

39 — See Opinion of Advocate General Tesauro in *Netherlands* v *Council*, point 19, and Opinion of Advocate General Léger in *Council* v *Hautala*.

40 — See, inter alia, Ragnemalm, H., 'Démocratie et transparence: sur le droit général d'accès des citoyens de l'Union européenne aux documents détenus par les institutions communautaires', cited above, pp. 826-827.

41 — The Court of First Instance has referred to the 'principle of the right to information' in Case T-14/98 *Hautala* v *Council* [1999] ECR II-2489, paragraph 87, and to the 'principle of transparency' in Case T-211/00 *Kuijer* v *Council* [2002] ECR II-485, paragraph 52.

42 — See *Netherlands* v *Council*, paragraph 34.

43 — See, inter alia, *Council* v *Hautala*, paragraph 31, where the Court did not find it necessary to rule on 'the existence of a principle of the right to information', and the finding by Advocate General Léger in his Opinion in Case C-41/00 *Interporc* v *Commission*, points 75 to 80.

tion by the Treaty of Amsterdam, first, of a 'principle of openness' in the second paragraph of Article 1 TEU and, second, of a right of access to documents of the Parliament, the Council and the Commission in Article 255 EC. Admittedly, those provisions do not have direct effect and so cannot form the basis of a request for disclosure of a document of an institution; for a right of access to be exercised, legislation governing its exercise must be adopted. [44] On this point, Article 255(2) EC, resulting from the Treaty of Amsterdam, provides a legal basis for that purpose, by giving the Council, in co-decision with the Parliament, the task of establishing the general principles and the limits of the right of access to documents of the institutions. It is on this legal basis that Regulation No 1049/2001, the general Community legislation relating to the right of access to documents held by the institutions, was adopted. The fact remains that henceforth the existence of the right of access to documents of the institutions is no longer based on internal measures adopted by the institutions, with which they are bound to comply by virtue of the maxim *patere legem quam ipse fecisti*, or even on the Regulation, but on a provision of constitutional import.

40. This protection of the right of access under ever higher norms has been accompanied by a development in its substance. We have gone from a situation of a mere favour being granted to the individual by the institutions in the exercise of their discretionary power to one of a true subjective, fundamental right granted to the individual. As long as public access to documents of the institutions was left to their discretion, the measures they had taken on how such requests were to be dealt with were aimed solely at ensuring internal operation in the interests of sound administration. They did not confer any subjective right on individuals enabling them to obtain the information sought, even if they could claim for compliance with the measures taken. [45] With the introduction of Article 255 EC by the Treaty of Amsterdam, access to documents of the institutions has become a subjective right granted to 'any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State'. That right of access, moreover, is of the nature of a fundamental right, as confirmed by the fact that it was reproduced in Article 42 of the Charter of Fundamental Rights. [46]

41. This reinforcement of the status of the right of access is closely linked to the change in the objectives pursued by 'the requirement of transparency'. [47] The few obligations with which the institutions were charged, linked

44 — See, to that effect, *Petrie and Others* v *Commission*, paragraphs 34 to 38.

45 — See Opinion of Advocate General Tesauro in *Netherlands* v *Council*, points 18 to 20.

46 — On the value of the Charter as a criterion of interpretation of instruments for the protection of the rights referred to in Article 6(2) TEU, see my Opinion in Case C-305/05 *Ordre des barreaux francophones et germanophone and Others* [2007] I-5305, point 48.

47 — Case T-264/04 *WWF European Policy Programme* v *Council* [2007] II-911, paragraph 61.

in varying degrees to that requirement, tended above all to ensure effectiveness of Community action and review of its lawfulness. Examples include respect for the rights of the defence, the obligation to state obligations, and openness of Community acts. With the advent of the right of access to documents held by public authorities, transparency has become aimed more at reinforcing the democratic legitimacy of Community action. [48] If one wished to be provocative, one could doubtless question the alleged relationship between transparency and democracy. Is it not the symptom of a general feeling of suspicion on the part of citizens towards those in power and of the representative democratic system? There is, moreover, a risk that transparency will not be used in the same manner by all citizens and that it will serve to promote privileged access to the political system for certain interest groups. Be that as it may, that link with the principle of democracy, on which the Union is founded, [49] has been emphasised from the beginning. Already Declaration No 17 relating to the right of access to information, annexed to the final act of the Treaty on European Union, stated that 'transparency of the decision-making process strengthens the democratic nature of the institutions'. The case-law has referred to the terms of that declaration on a number of occasions, [50] and explained that transparency aimed at giving the public the widest possible access to documents guarantees 'greater legitimacy and is more effective and more accountable to the citizen in a democratic system', [51] because it allows citizens 'to carry out genuine and efficient monitoring of the exercise of the powers vested in the Community institutions. [52] 'Only where there is appropriate publicity of the activities of the legislature, the executive and the public administration in general, is it possible for there to be effective, efficient supervision, inter alia at the level of public opinion, of the operations of the governing organisation and also for genuinely participatory organisational models to evolve as regards relations between the administration and the administered'. [53] Lastly, the links between transparency and democracy thus highlighted were reiterated in recital 2 in the preamble to the Regulation.

42. It should be borne in mind that, even when the principle of the widest possible access to documents held by the institutions was still only laid down in measures of internal organisation, the case-law had already inferred that the exceptions and limitations imposed by those measures were to be interpreted and applied restrictively, so

48 — For a discussion of the links between transparency and democracy, see Lequesne, Ch., 'La transparence, vice ou vertu des démocraties?', in *La transparence dans l'Union européenne, mythe ou principe juridique?*, cited above, p. 11; Meisse, E., 'La démocratie administrative dans le traité établissant une Constitution pour l'Europe', in Constantinesco, V., Gautier, Y., and Michel, V., (ed.), *Le traité établissant une Constitution pour l'Europe, Analyses et commentaires*, PUS, 2005, p. 397.

49 — As stated in Article 6(1) TEU.

50 — See T-174/95 *Svenska Journalistförbundet* v *Council* [1998] ECR II-2289, paragraph 66; Case T-309/97 *Bavarian Lager* v *Commission* [1999] ECR II-3217, paragraph 36; and *Petrie and Others* v *Commission*, paragraph 64.

51 — *Kuijer*, paragraph 52, and Case C-41/00 *Interporc* v *Commission*, paragraph 39.

52 — Case T-92/98 *Interporc* v *Commission*, paragraph 39.

53 — Opinion of Advocate General Tesauro in *Netherlands* v *Council*, point 14.

as not to undermine the application of the principle.[54] Since the right of access to documents of the institutions has become a fundamental right of constitutional import linked to the principles of democracy and openness, any piece of secondary legislation regulating the exercise of that right must be interpreted by reference to it, and limits placed on it by that legislation must be interpreted even more restrictively.[55] It follows, inter alia, that whereas for as long as the right of access to documents of the institutions was recognised only through measures of internal organisation, those measures could exclude certain categories of documents from their scope, in particular those not originating from the institutions, the existence of a fundamental right of access to documents of the institutions guaranteed by a higher-ranking provision henceforth prohibits the Community legislature from restricting its scope.[56] Such a restriction would result from an interpretation which regards Article 4(5) of the Regulation as recognising a right of veto for the Member States over disclosure of documents originating from them. In that case, said the Court of First Instance, a document in respect of which a Member State has made a request for non-disclosure is not governed by Community law but by the relevant national provisions of that Member State.[57] Moreover and in any event, the recognition of an unconditional right of veto for the Member States over disclosure by the institutions of documents communicated by them to the institutions would undermine too seriously the fundamental right of access to documents and the transparency of the Community decision-making process which that right is intended to uphold. First, many of the documents which are used in the Community decision-making process originate from the Member States. Second, since most of the national legal rules of the Member States governing transparency provide for exceptions to the right of access if the documents requested relate to the State's foreign policy, that is, the relations that State maintains with other States or international organisations, there is a real risk that they would rely on Article 4(5) almost automatically to prevent disclosure of documents they have provided to Union institutions.

43. It follows, moreover, from the link established in the European Union between the principle of transparency and the democratic system that access to a document must be determined not so much by the identity of the author as by the importance of the

54 — See, inter alia, *WWF UK* v *Commission*, paragraph 56; Case T-124/96 *Interporc* v *Commission* [1998] ECR II-231, paragraph 49; *Svenska Journalistförbundet* v *Council*, paragraph 110; *Bavarian Lager* v *Commission*, paragraph 39; *Kuijer* v *Council*, paragraph 55; *WWF European Policy Programme* v *Council*, paragraph 39; *Netherlands and van der Wal* v *Commission*, paragraph 27; *Council* v *Hautala*, paragraph 25; and Case C-41/00 *Interporc* v *Commission*, paragraph 48.

55 — For a discussion of the obligation to interpret Community legislation in a manner compatible with the fundamental rights guaranteed in the Community legal order, see Joined Cases 46/87 and 227/88 *Hoechst* v *Commission* [1989] ECR 2859, paragraph 12, and the Opinion of Advocate General Léger in *Council* v *Hautala*.

56 — This follows from a converse reading of the case-law: see Case C-41/00 *Interporc* v *Commission*, paragraphs 41 to 43; Case T-92/98 *Interporc* v *Commission*, paragraph 66; *JT's Corporation* v *Commission*, paragraph 53; *Petrie and Others* v *Commission*, paragraph 47.

57 — Judgment under appeal, paragraph 61.

document for knowledge and accountability of the Community decision-making process.

44. Furthermore, the purpose of the Regulation is precisely to give shape to the right of access to documents of the institutions enshrined by Article 255 EC by laying down its general principles, conditions and limits. As is clear from by Article 1, read, inter alia, in the light of recital 4 in the preamble, and as the Court of Justice has itself stated, 'the purpose of the regulation is to give the fullest possible effect to the right of public access to documents held by the institutions'. [58] In that light, as I have already observed and as the Court of First Instance itself noted in the judgment under appeal, [59] one of the most significant developments achieved by the Regulation compared to the law as it stood previously was the abandonment of the authorship rule. Thus, recognising an unconditional right of veto for Member States over the disclosure by the institutions of documents originating from the Member States, as the Court of First Instance did, would amount to reintroducing through the back door, at least partially, that same authorship rule. Such an interpretation is, in my view, incompatible with both the objective and purpose of the Regulation.

45. According to the Commission and the United Kingdom, however, not allowing a right of veto for a Member State from which the requested document originates and leaving it to the institution in possession of the document to decide on disclosure would lead to harmonisation through the back door of the national rules relating to the right of access, contrary to the stated objective of the Regulation and in breach of the principle of subsidiarity. The Court of First Instance also shared this view, as it based itself on recital 15 in the preamble to the Regulation, which states that 'it is neither the object nor the effect of this Regulation to amend national legislation on access to documents'. [60] Moreover, in order to preserve the application of national laws governing transparency, it held that any request from a Member State to refuse access pursuant to Article 4(5), because it 'constitute[s] an instruction to the institution not to disclose the document in question', [61] has the effect of removing the document it provided to the institution from the domain of Community law on access and making it subject to the national law of the Member State concerned. [62]

46. This analysis is, however, at odds with the explicit terms of Article 2(3) of the Regulation, according to which that 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'. Nor can it be easily reconciled with Article 2(2), according to which '[t]he institutions may ... grant access to documents to any

58 — *Sison* v *Council*, paragraph 61.

59 — Paragraphs 53 and 54 of the judgment under appeal.

60 — See paragraph 57 of the judgment under appeal.

61 — Paragraph 58 of the judgment under appeal.

62 — Paragraph 61 of the judgment under appeal.

natural or legal person not residing or not having its registered office in a Member State'. A combined reading of those two provisions indicates that a document provided by a national authority to an institution is, as of that moment, exclusively subject to Community law and under the responsibility of that institution. A parallel reading of Article 5 thus shows clearly the logic behind the Regulation: the law applicable to a request for access and the competent authority for deciding on whether it is to be disclosed depend not on the origin of the document or the status of its author but on the identity of the party in possession of it or, more accurately, the status of the body to which the request for access is addressed.

47. Nor does the fear that national legislation on transparency will be called into question if the institution in whose possession is a document originating from a Member State acquires power to decide on disclosure of the document appear to be well founded. Community rules and national rules remain autonomous because they cover different areas. Admittedly, some overlapping may arise: the same document may come under both national law and Community law. Even in that case, however, a decision taken by an institution on the basis of the Regulation does not bind the Member State from where the requested document originates if a request for disclosure of the document is also addressed to it directly; the request will be considered having regard to national law. Subject to Article 5 of the Regulation, which requires that the objectives of that regulation be not frustrated in so doing, a Member State may thus disclose a document to which the Community institution has refused access because its national rules on transparency are more generous. Conversely, an institution may, subject to conditions or limits to be specified further, grant access to a document to which the Member State which provided it has refused access because the Community rules which the Member States have agreed to impose on the institutions grant wider access to documents than the national law of the Member State concerned. Such differences of assessment, of which *Svenska Journalistförbundet* v *Council*, offers an emblematic illustration, [63] need not cause offence. They are precisely the manifestation and result of the fact that Community law relating to the right of access has neither the object nor the effect of harmonising national legislation in this area.

48. Although, as I have just discussed, a teleological and systematic interpretation means that Article 4(5) cannot be regarded as recognising a right of veto for Member

63 — In that case, the Swedish authorities had granted access to 18 of the 20 requested Council documents relating to the establishment of Europol, whereas the Council had disclosed only four.

States, some practical effectiveness must still be given to that provision. I agree with the Court of First Instance [64] that Article 4(5) lays down a *lex specialis* by placing the Member States in a situation different from other third parties, whose situation is governed by Article 4(4). But it suffices, for the purposes of giving practical effect to Article 4(5), to see it as a right for a Member State, if it so requests, to be consulted as of right by the institution to which the request for disclosure of the document provided to it by the Member State was directed. A Member State intending to rely on Article 4(5) is thus in a privileged position as compared to third parties, because it is guaranteed the opportunity to present to the institution in possession of its document the reasons which in its view weigh against disclosure of the document, even if it were clear to the institution that the document should or should not be disclosed. In other words, either the Member State from which the requested document originates does not make a request under Article 4(5), in which case, like other third parties, it will be consulted by the institution in possession of the document under Article 4(4) only if it is not clear that the document should or should not be disclosed; or the Member State makes such a request, in which case it must be consulted by the institution in any event.

49. It is true that the United Kingdom objects that to reduce Article 4(5) to a mere procedural obligation of systematic consultation of the Member State from which the requested document originates when it makes a request to that effect does not give genuine scope to that provision as compared with Article 4(4), because consultation under Article 4(5), in cases in which it is clear that the document in question should or should not be disclosed, is of no interest. That objection cannot be upheld, because the reasons a Member State may put forward to justify non-disclosure by the institution in possession of the document provided by the Member State are not limited to the exceptions to the right of access laid down in Article 4(1) to (3), which are the only reasons in respect of which it may be clear for that institution that the document in question shall or shall not be disclosed.

50. A Member State may not of course put forward any reason it wishes to oppose disclosure of the requested document by the institution to which the request for disclosure is directed. It follows from Article 255(2) EC that the reasons must necessarily relate to public or private interests. However, the reasons of 'public or private interest' the Member State may put forward are not limited to the exceptions to the right of

64 — Paragraph 58 of the judgment under appeal.

access laid down by the Regulation; they may also be drawn from the national law of the Member State concerned.

51. Ultimately, however, it will be for the institution in possession of the document to rule on the request for access, without being bound by the views of the Member State from which the document originates. On that point too, it is not possible to follow the Court of First Instance's interpretation to the effect that the Member State need not give reasons for its request for non-disclosure made pursuant to Article 4(5).[65] If the Member State does not give the reasons which, in its view, justify a refusal to allow access, how can the institution be aware of the existence of a specific need for confidentiality, much less be convinced of it?

52. However, although in the course of an assessment of the reasons provided by the Member State, the institution may reconsider the Member State's assessment of a specific need for confidentiality under one of the exceptions to the right of access laid down by the Regulation, it clearly cannot do so if the request for non-disclosure made by the Member State has been made on grounds of protection of a public or private interest provided for under national law.

53. The institution might yet, in my view, not follow the request for non-disclosure based on the specific need for confidentiality drawn from national law if it believes that transparency of the Community decision-making process so requires. To put it another way, if a good understanding of the reasons which led to the Community decision concerned so requires, the institution must be able to — and indeed must — grant access to the document originating from the Member State to the party which requested it, even though the Member State has objected on grounds of secrecy protected under its national law. What is at stake is the objective of transparency, of which the fundamental right of access to documents forms a part.[66] What is at stake is also the effectiveness of the principle of democracy with which, as seen above, transparency is today closely linked. What is at stake, finally, is the requirement of structural congruence, as the transfer of competence to the Community must not lead to diminished democratic control of power by the citizens of the Member States. But that could occur if, for example, a Member State were to rely on an exception to the right of access based on national law relating to that State's foreign policy in respect of all documents communicated by it to the institutions for the purpose of Community decision-making. If

65 — Paragraph 59 of the judgment under appeal.

66 — For confirmation, reference is made to the recent, enlightening Article I-50 of the Treaty establishing a Constitution for Europe.

a Member State could simply rely on such an exception in order systematically to circumvent any request for access to a document relating to its participation in Community decision-making, the role that the principle of transparency is supposed to play in democratic control of the political process would be undermined. It would unacceptable for certain powers, which were subject to democratic control mechanisms at national level, systematically to escape equivalent democratic control mechanisms simply by being transferred to the Community, on the ground that they now form part of 'the States' foreign policy'.

54. In assessing the need for transparency in the Community decision-making process in order to decide on a request it has received for access to a document originating from a Member State, the institution must nevertheless have regard to the national law as a whole, observance of which the Member State has relied on to request non-disclosure under Article 4(5). Again, the institution will be more sensitive here if the Member State, by providing it with the reasons for its request for non-disclosure, has put it in a position to understand why confidentiality is necessary for the observance of national law and its objectives. This balancing is called for by the principle of loyal cooperation governing relations between the institutions and the Member States, as reiterated in recital 15 in the preamble to the Regulation, just as it also requires Member States to communicate to the institutions the documents necessary for Community decision-making and, above all, just as it, conversely, obliges the Member States not to undermine the achievement of the objectives of the Regulation when, as provided for by Article 5 of the Regulation, they decide on the basis of their national law on a request for access to a document in their possession originating from an institution.

55. I cannot emphasise enough that the recognition of a right to have the last word thus enshrined for an institution in possession of a document originating from a Member State on a request for access addressed to it, to my mind, is the only interpretation that agrees with the fact that the right of access to the documents of the institutions is a fundamental right. Any restrictions on a fundamental right can be justified only if they are for the protection of a legitimate interest and if, in keeping with the principle of proportionality, they do not go beyond what is appropriate and necessary to attain the objective pursued. [67]

56. Lastly, I note that, while necessary in law, the interpretation of Article 4(5) of Regulation No 1049/2001 I suggest will be, if not in law, at least in practice, of limited

67 — See, for example, Case 222/84 *Johnston* [1986] ECR 1651, paragraph 38.

impact on the extent of the consultation with the Member State. In most cases, it is foreseeable that the opinion of the Member State from where the requested document originates will be followed by the institution. [68]

57. It follows from all the foregoing considerations that the judgment under appeal is vitiated by an error of law in that it interpreted Article 4(5) of the Regulation as conferring on Member States a right of veto over disclosure of documents originating from them by the institution in possession of the documents, to which a request for access has been addressed.

58. If the Court should not follow my opinion, finding instead that it must uphold the judgment under appeal, a correction should in any event be made to the Court of First Instance's reasoning, by substituting new grounds. It seems to me that the Court of First Instance's reading [69] of Article 4(5), to the effect that that provision places a systematic obligation on an institution in possession of a requested document to consult the Member State from which that document originates before making any decision on its disclosure, even where the Member State has not previously made any request for confidentiality, in order, so it seems, precisely to enquire whether it wishes to make such a request pursuant to Article 4(5), is at odds with the clear wording of that provision, which explicitly makes the obligation to consult the Member State contingent on that State having first made a request for non-disclosure. Admittedly, in the present case, the national documents requested had been provided to the Commission by the German authorities before the entry into force of the Regulation. In such a case, the implementing provisions for that regulation introduced by the Commission into its Rules of Procedure [70] provide for consultation of the authority of origin, irrespective of whether a request has been made previously pursuant to Article 4(5). It is therefore of minor significance for the lawfulness of the judgment under appeal that the Commission's consultation of the German authorities in the present case took place without any prior request from them. The generality of the terms employed by the Court of First Instance, however, gives the impression that the invitation it extends to the institutions to consult the Member State from whence the requested document originates in order to enquire whether that State wishes to avail itself of Article 4(5) applies both to documents provided to it before the implementation of the Regulation and to documents

68 — Already, as evidenced by an initial report drawn up by the Commission (see Report from the Commission on the implementation of the principles in EC Regulation No 1049/2001 regarding public access to European Parliament, Council and Commission documents, of 30 January 2004, point 3.5.1), rarely have the institutions disregarded an opinion given by a third party pursuant to Article 4(4).

69 — Paragraph 60 of the judgment under appeal.

70 — See Article 5(4)(a) of Decision 2001/937. For a discussion of that requirement, see *Messina* v *Commission*, paragraph 42.

communicated after that date. To that extent, the reasoning of the judgment is in conflict with the explicit wording of Article 4(5) and accordingly cannot be upheld. I would therefore suggest that the Court of Justice rectify it so as to limit the consultation of the Member State concerned by the institution which has received a request for access to a document originating from that Member State, in order to determine whether it wishes to rely on Article 4(5), to cases where it provided that document before the entry into force of the Regulation.

III — Conclusion

59. For those reasons, I suggest that the Court should allow the ground of appeal alleging infringement of Community law and therefore 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*.