JUDGMENT OF THE GENERAL COURT (Third Chamber)

26 October 2011 *

In Case T-436/09,

Julien Dufour, residing in Jolivet (France), represented by I. Schoenacker Rossi and H. Djeyaramane, lawyers,

applicant,

supported by

Kingdom of Denmark, represented by B. Weis Fogh and S. Juul Jørgensen, acting as Agents,

by

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

* Language of the case: French.

and by

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

interveners,

v

European Central Bank (ECB), represented initially by K. Laurinavicius and S. Lambrinoc, and subsequently by S. Lambrinoc and P. Embley, acting as Agents,

defendant,

supported by

European Commission, represented by J.-P. Keppenne and C. ten Dam, acting as Agents,

intervener,

ACTION for, first, annulment of the decision of the Executive Board of the ECB, notified to the applicant by letter of the President of the ECB of 2 September 2009 refusing to grant the applicant access to the databases used as a basis for preparing

ECB reports on staff recruitment and mobility, secondly, an order requiring the ECB to deliver up to the applicant the databases in question and, lastly, a claim for damages in respect of the loss allegedly sustained by the applicant as a result of the refusal of his application for access,

THE GENERAL COURT (Third Chamber),

composed of O. Czúcz, President, I. Labucka and D. Gratsias (Rapporteur), Judges,

Registrar: V. Nagy, Administrator,

having regard to the written procedure and further to the hearing on 7 June 2011,

gives the following

Judgment

Legal context

1 Public access to European Central Bank (ECB) documents is governed by Decision 2004/258/EC of the ECB of 4 March 2004 (OJ 2004 L 80, p. 42). Articles 2, 3, 4, 6, 7, 8

and 9 of that decision provide as follows:

'*Article 2*

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 ECB documents, subject to the conditions and limits defined in this Decision.

…

Article 3

Definitions

For the purpose of this Decision:

(a) "document" and "ECB document" shall mean any content whatever its medium (written on paper or stored in electronic form or as a sound, visual or audiovisual recording) drawn up or held by the ECB and relating to its policies, activities or decisions, …

Article 4

Exceptions

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

(a) the public interest as regards:

— the confidentiality of the proceedings of the ECB's decision-making bodies,

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

— the internal finances of the ECB or of the [national central banks],

— protecting the integrity of euro banknotes,

— public security,

— international financial, monetary or economic relations;

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

(c) the confidentiality of information that is protected as such under Community law.

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

— the 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 containing opinions for internal use as part of deliberations and preliminary consultations within the ECB or with [national central banks] shall be refused even after the decision has been taken, unless there is an overriding public interest in disclosure.

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

5. If only parts of the requested document are covered by any of the exceptions, the remaining parts of the document shall be released.

6. The exceptions as laid down in this Article 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 unless specifically provided otherwise by the ECB's Governing Council. In the case of documents covered by the exceptions relating to privacy or commercial interests, the exceptions may continue to apply after this period.

…

Article 6

Applications

1. An application for access to a document shall be made to the ECB in any written form, including electronic form, in one of the official languages of the Union and in a sufficiently precise manner to enable the ECB to identify the document. The applicant is not obliged to state the reasons for the application.

2. If an application is not sufficiently precise, the ECB shall ask the applicant to clarify the application and shall assist the applicant in doing so.

3. In the event of an application relating to a very long document or to a very large number of documents, the ECB may confer with the applicant informally, with a view to finding a fair solution.

Article 7

Processing of initial applications

1. An application for access to a document shall be handled promptly. An acknowledgement of receipt shall be sent to the applicant. Within 20 working days from the receipt of the application, or on receipt of the clarifications requested in accordance with Article 6(2), the Director-General [of the] Secretariat and Language Services of the ECB shall either grant access to the document requested and provide access in accordance with Article 9 or, in a written reply, state the reasons for total or partial refusal and inform the applicant of their right to make a confirmatory application in accordance with paragraph 2.

2. In the event of total or partial refusal, the applicant may, within 20 working days of receiving the ECB's reply, make a confirmatory application asking the ECB's Executive Board to reconsider its position. Furthermore, failure by the ECB to reply within the prescribed 20 working days' time-limit for handling the initial application shall entitle the applicant to make a confirmatory application.

3. In exceptional cases, for example in the event of an application relating to a very long document or to a very large number of documents, or if the consultation of a third party is required, the ECB may extend the time-limit provided for in paragraph 1 by 20 working days, provided that the applicant is notified in advance and that detailed reasons are given.

4. Paragraph 1 shall not apply in case of excessive or unreasonable applications, in particular when they are of a repetitive nature.

Article 8

Processing of confirmatory applications

1. A confirmatory application shall be handled promptly. Within 20 working days from the receipt of such application, the Executive Board shall either grant access to the document requested and provide access in accordance with Article 9 or, in a written reply, state the reasons for the total or partial refusal. In the event of a total or partial refusal, the ECB shall inform the applicant of the remedies open to them in accordance with Articles 230 and 195 of the Treaty.

2. In exceptional cases, for example in the event of an application relating to a very long document or to a very large number of documents, the ECB may extend the time-limit provided for in paragraph 1 by 20 working days, provided that the applicant is notified in advance and that detailed reasons are given.

3. Failure by the ECB to reply within the prescribed time-limit shall be considered to be a negative reply and shall entitle the applicant to institute court proceedings and/or submit a complaint to the European Ombudsman, under Articles 230 and 195 of the Treaty, respectively.

Article 9

Access following an application

1. Applicants may consult documents to which the ECB has granted access either at its premises or by receiving a copy, including, where available, an electronic copy. The costs of producing and sending copies may be charged to the applicant. This charge shall not exceed the real cost of producing and sending the copies. Consultation on the spot, copies of less than 20 A4 pages and direct access in electronic form shall be free of charge.

2. If a document has already been released by the ECB and is easily accessible, the ECB may fulfil its obligation of granting access to it by informing the applicant how to obtain the requested document.

3. Documents shall be supplied in an existing version and format (including electronically or in an alternative format) as requested by the applicant.'

2 Article 3(a) and Article 11 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) are worded as follows:

'*Article 3*

Definitions

For the purpose of this Regulation:

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

…

Article 11

Registers

1. To make citizens' rights under this Regulation effective, each institution shall provide public access to a register of documents. Access to the register should be provided in electronic form. References to documents shall be recorded in the register without delay.

2. For each document the register shall contain a reference number (including, where applicable, the interinstitutional reference), the subject-matter and/or a short description of the content of the document and the date on which it was received or drawn up and recorded in the register. References shall be made in a manner which does not undermine protection of the interests in Article 4.

3. The institutions shall immediately take the measures necessary to establish a register which shall be operational by 3 June 2002.'

Background to the dispute

3 The applicant, Mr Julien Dufour, is a doctoral student of sociology preparing a thesis entitled 'Sociogenèse de l'autorité d'une institution financière: le cas de la [BCE]' (The sociogenesis of a financial institution's authority: the case of the ECB).

4 By email of 28 May 2009, the applicant asked the ECB for access, first, to its reports on staff recruitment and mobility ('the reports') and, secondly, to the 'databases used to compile the statistical analyses for the reports'.

5 By letter of 23 July 2009, the ECB informed the applicant that it had decided to grant him partial access to the reports. Regarding the databases used as a basis for preparing the reports, however, the ECB refused the applicant's request for access on the grounds that the databases did not 'as such' come within the definition of the term 'document' in Article 3(a) of Decision 2004/258 and that no separate document existed such as might be provided to the applicant in response to his request.

6 By letter of 9 August 2009, the applicant made a confirmatory application, in accordance with Article 7(2) of Decision 2004/258, in relation to access to the databases to which he had referred in his initial application. In his confirmatory application, he argued, in substance, that, contrary to the position expressed by the ECB in its letter of 23 July 2009, a database is a document within the meaning of Decision 2004/258. There could be, he maintained, 'no doubt that the information requested [was] indeed content stored in electronic form (the "databases") and drawn up by the ECB'. He went on to clarify that he was not asking for disclosure of any names and that his application related to the databases which had been used as a basis for preparing the reports 'without the columns setting out the surnames and first names' of the staff members concerned.

7 By decision of the ECB's Executive Board, notified to the applicant by letter of the President of the ECB of 2 September 2009 ('the contested decision'), the applicant's confirmatory application was refused. The following points were made in justification of that refusal:

'the electronic databases used in drawing up the reports … cannot be regarded as a document within the meaning of Decision [2004/258] on public access to ECB documents in that no printed versions of the database (such as would fall within the definition of "document") exist as separate documents. Consequently, it is impossible to satisfy your request simply by extracting the data in printed form or as an electronic copy. In order to accede to your request, it would be necessary for the data to be further organised and analysed, following which fresh information would have to be set out in another document. That procedure would represent a significant burden of work. However, such additional organisation and analysis is beyond the scope of the regime for public access to ECB documents as set out in Decision [2004/258], since the document sought does not exist and would have to be created'.

Procedure and forms of order sought

8 By application lodged at the Registry of the General Court on 29 October 2009, the applicant brought the present action.

9 By three separate documents lodged at the Registry on the same day, the applicant applied for the case to be decided under the expedited procedure, pursuant to Article 76a of the Rules of Procedure of the General Court, and made two applications for legal aid pursuant to Article 94 of the Rules of Procedure. Those applications were rejected, respectively, by decision of 10 December 2009 and by orders of the President of the Fifth Chamber of the General Court of 15 March 2010 in Cases T-436/09 AJ and T-436/09 AJ II *Dufour* v *ECB*, not published in the ECR.

10 By separate documents lodged at the Registry of the General Court on 9 February, 18 February and 8 March 2010, respectively, the Kingdom of Denmark, the Kingdom of Sweden and the Republic of Finland applied for leave to intervene in support of the form of order sought by the applicant. By orders of 24 March and 21 April 2010, the President of the Fifth Chamber of the General Court granted those applications for leave to intervene. The Kingdom of Sweden, the Republic of Finland and the Kingdom of Denmark lodged their statements in intervention on 12 May, 3 June and 9 June 2010 respectively.

11 By document lodged at the Registry of the General Court on 25 February 2010, the European Commission applied for leave to intervene in support of the form of order sought by the ECB. By order of 24 March 2010, the President of the Fifth Chamber of the General Court granted the Commission leave to intervene. The Commission lodged its statement in intervention on 9 June 2010.

12 Owing to a change in the composition of the Chambers of the Court, the Judge-Rapporteur initially designated was appointed to the Third Chamber, to which the present case was accordingly assigned. By reason of the partial renewal of the Court, the present case was assigned to a new Judge-Rapporteur sitting in the same Chamber.

13 After hearing the report of the Judge-Rapporteur, the General Court (Third Chamber) decided to open the oral procedure and, by way of the measures of organisation of procedure provided for in Article 64 of the Rules of Procedure, asked the ECB and the Commission to reply in writing to a question and the ECB and the Kingdom of Sweden to produce certain documents. The parties complied with those requests.

14 The parties presented oral argument and replied to the questions put to them by the Court at the hearing on 7 June 2011.

15 The applicant claims that the Court should:

— annul the contested decision;

— order the ECB to deliver up to him all the databases which made the compilation of the reports possible;

— order the ECB to pay the sum of EUR 5 000 in compensation for the harm which he has suffered;

— order the ECB to pay the costs.

16 The Kingdom of Denmark, the Republic of Finland and the Kingdom of Sweden support the applicant's request for annulment of the contested decision.

17 The ECB contends that the Court should:

— dismiss the action as inadmissible or, in the alternative, as unfounded;

— order the applicant to pay the costs.

18 The Commission supports the ECB's plea that the action for annulment should be dismissed as unfounded.

The application for annulment

1. *Admissibility*

Arguments of the parties

19 The ECB argues, in the first place, that the applicant's plea for annulment of the contested decision is inadmissible because it serves no purpose.

20 First, the ECB observes that, in connection with its staff recruitment procedures, it uses a computer system that is managed by an external service provider. That computer system enables candidates to make applications online and to submit the requisite

information concerning their personal data, studies and experience. It also enables more general information relating to recruitment procedures to be gathered, such as the number of candidates. The technical configuration of the computer system in question does not, however, enable data to be extracted on all profiles. Furthermore, in the event that a candidate does not submit an application for any new vacant posts, his data will be automatically deleted by the system after a period of 24 months and will be retrievable only by an external service provider in return for payment. The computer system has been in use since December 2004, before which time recruitment procedures were organised on the basis of applications lodged in paper form. Some information relating to those earlier applications has been manually summarised with the aid of spreadsheet software.

21 Secondly, the ECB submits that data on the mobility of its internal staff members could be obtained only from another ECB computer system, namely the system for the management of staff and salaries. That computer system contains data on all its members of staff, past and present, from 1998 onwards, and also on trainees, probationary officials and external personnel from 2007 onwards. Data on staff mobility in particular are available from 2004 onwards. Data on staff mobility prior to 2004 are contained in a separate database, which may be accessed but not updated. In addition, there is another database containing data on external personnel and trainees and probationary officials for the period from 1999 to 2007.

22 Thirdly, the ECB states that the reports were drawn up following organisation and analysis of the raw data available at the time when they were prepared. It asserts that it has explained to the applicant that it would have been impossible to accede to his request for access simply by extracting data from the databases concerned. It would

have been necessary to assemble the required information manually, using specific search criteria, and to prepare new reports, either in electronic format or on paper.

23 Moreover, the ECB submits that, owing to the automatic deletion of certain data after a period of 24 months and the addition of data relating to new staff recruitment procedures organised by the ECB, the data which had served as a basis for preparing the reports were no longer available in their entirety or in the condition that they had been in when the reports were being prepared. Only certain extracts from the databases, used when the data were being organised for the purpose of preparing the reports, have been retained, and then only in arbitrary fashion.

24 The ECB concludes that the action for annulment serves no purpose, in that the applicant is seeking access to the databases themselves or to extracts from the databases which do not exist and which would have to be created in order to accede to his request.

25 In the second place, the ECB argues that the applicant's second claim is inadmissible since, according to settled case-law, the Courts of the European Union cannot, on annulling a decision relating to access to the documents of an institution, body, office or agency of the European Union, order the author of the annulled decision to take the necessary measures to comply with the judgment annulling the decision.

26 The applicant disputes the ECB's arguments and maintains that his action is admissible.

Findings of the Court

27 In the first place, the ECB's assertion that the action for annulment serves no purpose may be understood only in the sense that the applicant has no interest in the annulment of the contested decision since, even if the decision were to be annulled, it would still be impossible to grant him access to the databases referred to in his application for access because they do not exist.

28 It is settled case-law that an action for annulment brought by a natural or legal person is admissible only in so far as that person has an interest in the annulment of the contested measure. In order for such an interest to be present, the annulment of the contested measure must of itself be capable of having legal consequences and the action must be likely, if successful, to procure an advantage for the party who has brought it (see Case T-195/08 *Antwerpse Bouwwerken* v *Commission* [2009] ECR II-4439, paragraph 33 and the case-law cited).

29 Nevertheless, without calling into question the settled case-law referred to in the preceding paragraph, in the present case, which concerns access to documents, account must also be taken of the fact that, in adopting Decision 2004/258, the legislature was conscious of the difficulty in identifying documents which arises, first and foremost, for citizens seeking information. In most cases, they do not know which documents contain the information and must therefore rely on the administrative authorities which hold the documents and thus the information also (see, by analogy, judgment of 10 September 2008 in Case T-42/05 *Williams* v *Commission*, not published in the ECR, paragraph 71).

30 Thus, the wording of Article 6(2) of Decision 2004/258, with its use of the verbs 'ask' and 'assist', appears to indicate that whenever the institution to which the application is addressed encounters a lack of clarity in an application for access, for whatever reason, it must contact the applicant in order to define the documents sought as well as

possible. The provision is thus one which, in the field of public access to documents, formally translates the principle of sound administration, which is one of the guarantees afforded by the legal order of the European Union in administrative procedures. The duty to assist is therefore fundamental to ensuring the effectiveness of the right of access defined by Decision 2004/258 (see, by analogy, *Williams* v *Commission*, cited in paragraph 29 above, paragraph 74).

31 It follows from the foregoing considerations that the ECB may not at the outset reject an application for access on the ground that the document to which it refers does not exist. On the contrary, it must in such a case ask the applicant to clarify his request, pursuant to Article 6(2) of Decision 2004/258, and assist him to that end, in particular by indicating to him the documents which it does hold that are similar to those referred to in the application for access or which are likely to contain some or all of the information which he seeks. It is only when, despite such clarification, the applicant persists in requesting access to a non-existent document that the ECB is entitled to reject the application for access on the ground that the subject-matter of that application does not exist.

32 In the present case, it must be borne in mind that the applicant's initial application concerned, in particular, access to the 'databases used to compile the statistical analyses for the reports' (see paragraph 4 above).

33 Both in its letter of 23 July 2009 (see paragraph 5 above) and in the contested decision, the ECB rejected that application essentially on the ground that the databases to which the applicant sought access were not documents within the meaning of Decision 2004/258. By contrast, it in no way cast doubt upon the existence of those databases.

34 Admittedly, with the arguments summarised in paragraphs 20 to 23 above, the ECB has qualified that position considerably, explaining, in substance, that there were no specific databases designed to support the drafting of the reports, but that relevant data were contained in a computer system for the management of applications for posts as well as in the other databases which it uses for the management of its staff. Those data had been retrieved from those databases to be used as a basis for drafting the reports.

35 However, the additional explanations offered by the ECB do not in any way support the conclusion that the applicant had no interest in seeking the annulment of the contested decision.

36 The contested decision is founded on the view, which the applicant disputes, that Decision 2004/258 does not apply in the case of access to databases or to the data which they contain.

37 If the applicant's arguments to the contrary were to be accepted and the contested decision annulled for that reason, the ECB would, it is true, not be obliged to allow the applicant access to non-existent databases. It would, however, in such a case be required to ask the applicant to clarify his application for access, pursuant to Article 6(2) of Decision 2004/258, and to assist him to that end, informing him, as it effectively did with the arguments summarised in paragraphs 20 to 23 above, of the databases which it does maintain and which are likely to contain information of interest to him.

38 It follows that the applicant does have an interest in bringing the action and that his application for annulment is admissible.

39 In the second place, in so far as concerns the applicant's second claim, which is for an order requiring the ECB to 'deliver up to [him] all the databases which made the compilation of the reports possible', it is settled case-law that the Court is not entitled,

when exercising judicial review of legality, to issue directions to the institutions or to assume the role assigned to them. That limitation of the scope of judicial review applies to all types of contentious matters that might be brought before it, including those concerning access to documents (Case T-204/99 *Mattila* v *Council and Commission* [2001] ECR II-2265, paragraph 26).

40 Consequently, the applicant's second claim must be dismissed as inadmissible.

2. *Substance*

41 In support of his application for annulment, the applicant puts forward three pleas in law alleging, first, an error of law in that the contested decision rests upon an exception to the right of access to documents for which there is no provision in Decision 2004/258, secondly, an error of law in that, in the contested decision, the ECB wrongly took the view that the databases were not documents within the meaning of Article 3(a) of that decision and, thirdly, an error of law in that, in the contested decision, the ECB wrongly invoked the burden of work and practical difficulties which granting access would involve in order to refuse access to the databases in question.

42 In addition, in their statements in intervention, the Kingdom of Denmark, the Republic of Finland and the Kingdom of Sweden allege that the obligation to give reasons was infringed in the contested decision. Given that the infringement of that obligation is a matter of public interest which must, if necessary, be raised by the EU Court, even of its own motion (Case C-166/95 P *Commission* v *Daffix* [1997] ECR I-983, paragraph 24, and Case T-404/06 P *ETF* v *Landgren* [2009] ECR II-2841,

paragraph 137), it is appropriate to consider this question first, before going on to analyse the three pleas in law put forward by the applicant.

The statement of reasons for the contested decision

Arguments of the parties

43 The Kingdom of Denmark, the Republic of Finland and the Kingdom of Sweden argue, in substance, that the contested decision fails to state to the requisite legal standard the factors which led to the conclusion that the applicant's request for access did not relate to a document within the meaning of Decision 2004/258.

44 The ECB and the Commission presented their written observations on that argument in response to a written question from the Court. They submit, in substance, that the reasons for the contested decision were stated to the requisite legal standard, with the result that the interveners' abovementioned argument must be rejected.

Findings of the Court

45 Article 7(1) and Article 8(1) of Decision 2004/258 provide that, in response to an application for access to an ECB document, the ECB must either grant access to the document requested and allow the applicant access in accordance with Article 9 or state the reasons for its total or partial refusal in a written reply to the applicant.

46 It follows that a statement of reasons must be given both for a decision of the ECB rejecting an initial application for access to documents and for a decision rejecting a confirmatory application.

47 According to settled case-law, which is equally applicable in the field of access to documents, the statement of reasons must be appropriate to the measure at issue and must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted the measure, in such a way as to enable the persons concerned to ascertain the reasons for it and to enable the Courts of the European Union to exercise their power of review. The extent of the statement of reasons required depends on the circumstances of each case, in particular the content of the measure in question, the nature of the reasons given and the interest which the addressees of the measure, or other parties to whom it is of direct and individual concern, may have in obtaining explanations. It is not necessary for the statement of reasons to go into all the relevant facts and points of law, since the question whether it meets the requirements must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question (see *Williams* v *Commission*, cited in paragraph 29 above, paragraph 94 and the case-law cited).

48 In the present case, it must be held that the ECB complied with its obligation to inform the applicant of the reasons for its refusal to grant him total or partial access to the databases referred to in his application.

49 Both the letter of 23 July 2009 rejecting the applicant's initial application for access and the contested decision state, in substance, that the applicant's request for access was refused on the ground that it did not relate to a document within the meaning of Article 3(a) of Decision 2004/258.

50 More specifically, they both state that, in the ECB's view, the databases referred to in the applicant's request for access are not documents within the meaning of Article 3(a) of Decision 2004/258. The ECB has asserted in this connection that printed versions of the contents of the databases in question would have been documents and that a request for access to them might have been made. However, it has also stated that no such versions existed. In order to create them, it would be necessary to carry out additional organisation and analysis of the data and to create a new document and that procedure, which would entail a significant burden of work, was not contemplated by Decision 2004/258 (see paragraphs 5 to 7 above).

51 That statement of reasons enabled the applicant to understand the justification for the ECB's refusal of his request for access and to challenge that refusal before the Courts of the European Union, as he has indeed done, and it now falls to this Court, in the context of examining the pleas in law raised by the applicant in support of his action, to consider whether the reasons on which the ECB relied in refusing the applicant's request for access were right or wrong.

52 Furthermore, it has consistently been held that the obligation to state reasons is an essential procedural requirement, as distinct from the question whether the reasons given are correct, which goes to the substantive legality of the contested measure (see Joined Cases T-239/04 and T-323/04 *Italy* v *Commission* [2007] ECR II-3265, paragraph 117 and the case-law cited). Indeed, the fact that a statement of reasons is incorrect does not mean that it does not exist (see Case T-368/09 P *Sevenier* v *Commission* [2010], not yet published in the ECR, paragraph 25 and the case-law cited).

53 It must therefore be concluded that the reasons for the contested decision were stated to the requisite legal standard, irrespective of the question whether those reasons are well founded, which now falls to be considered. In this connection, it is appropriate to begin by examining the second plea in law, alleging an error of law in that, in the

contested decision, the ECB wrongly took the view that the databases were not documents within the meaning of Article 3(a) of Decision 2004/258.

The second plea in law, alleging an error of law in that, in the contested decision, the ECB wrongly took the view that the databases were not documents within the meaning of Article 3(a) of Decision 2004/258

Arguments of the parties

54 The applicant, along with the Kingdom of Denmark, the Republic of Finland and the Kingdom of Sweden, argues at the outset that, in interpreting the concept of a document for the purposes of Decision 2004/258, account must be taken of the principles which inspired the adoption of Regulation No 1049/2001 and of the case-law on its application, particularly since that regulation is mentioned in recital 2 in the preamble to that decision.

55 The parties intervening in support of the form of order sought by the applicant also take the view that the word 'document', which is defined in the same terms in both Decision 2004/258 and Regulation No 1049/2001, must be interpreted uniformly in both cases and must be given a broad interpretation that takes account of technological developments. The Republic of Finland adds that too narrow an interpretation of that term would lead, indirectly, to a broadening of the scope of the various exceptions to the public's right of access to documents, which would be at variance with the case-law, which advocates strict interpretation and application of those exceptions.

56 The applicant argues that the contested decision is vitiated by an error of law in that the ECB took the view that a database is not a document in relation to which an application for access can be made on the basis of Decision 2004/258. He submits that, in the contested decision, the ECB erroneously maintained that a database could constitute a document within the meaning of that decision only if a printed version of it existed, whereas, in view of the terms used in Article 3(a) of the decision, a database is itself a document. In this connection, the applicant refers to paragraph 30 of the judgment of the Court of Justice in Case C-444/02 *Fixtures Marketing* [2004] ECR I-10549, which, he argues, supports his argument. He states that his application for access related to the 'raw' data, that is to say, data that have not been manipulated, within the relevant ECB databases.

57 The applicant adds that granting his request would in no way entail the creation of a new document. It would merely be necessary to select certain variables and then copy them, an exercise similar to the selective photocopying of a document. Moreover, in response to the argument that a document within the meaning of Decision 2004/258 must have a degree of stability, the applicant emphasises that that is an additional criterion not contemplated by the definition given in Article 3(a) of the decision.

58 Whilst supporting the applicant's claim for annulment of the contested decision, each of the three interveners in support of his claim adopts a slightly different position as regards the question whether a database and the data which it contains constitute documents within the meaning of Decision 2004/258.

59 The Kingdom of Denmark argues that a database, as such, is not a document for the purposes of the provisions relating to access to documents, which apply only to individual, well-defined documents that actually exist. However, anything that can be extracted from a database by means of a normal or routine search which does not involve an unreasonable burden of work should be regarded as a document in relation to which an application for access might be made. The Kingdom of Denmark thus

concludes that the ECB ought to have considered whether the information sought by the applicant could be extracted from its databases by means of a normal search and, if it could, should have granted his request for access.

60 The Kingdom of Sweden takes issue with the assertion in the contested decision that the applicant's request for access did not relate to documents. Under Decision 2004/258, the ECB was, it maintains, required to permit access to the data stored in electronic form in a database unless one of the exceptions provided for in Article 4 of that decision precluded such access being granted. The fact that the data stored in electronic form were not arranged in any particular order other than a purely logical order cannot lead to any different conclusion. The place in which the data in question are stored is equally irrelevant.

61 Nevertheless, according to the Kingdom of Sweden, data deleted from a database cannot be the subject of an application for access. Similarly, an institution cannot be required to obtain data which it does not hold in order to reply to a request for access.

62 Moreover, the Kingdom of Denmark and the Kingdom of Sweden argue that, in its observations on complaint 1693/2005/PB to the European Ombudsman, the Commission itself interpreted the term 'document' appearing in Regulation No 1049/2001 as also referring to the results of normal database searches.

63 The Republic of Finland takes the view that the contested decision is founded on an unduly narrow interpretation of the term 'document' appearing in Decision 2004/258.

It maintains that the term also includes any combination of data in a database that can be produced using the tools for that database. The fact that such a search, although possible, is not carried out by the institution in question as part of its day-to-day activities is, in that regard, irrelevant. The Republic of Finland adds, as a secondary point, that whilst the data contained in a database do not constitute documents within the terms of that decision, the ECB ought to have provided the applicant with any separate printable document capable of meeting his request for access.

64 The applicant, along with the Republic of Finland and the Kingdom of Sweden, also refers to Articles 6 and 9 of Decision 2004/258. Given those provisions, neither possible difficulties in identifying the document referred to in an application for access nor any practical difficulties, including any excessive burden of work that a positive response to such an application might entail for the ECB, constitute valid reasons for refusing such an application. That is all the more true given that the ECB can ask the person requesting access for any further clarification that might be required in order to reach an amicable solution. It could also, if necessary, grant access to voluminous documents at its premises.

65 Lastly, the applicant also disputes the ECB's argument that it would be impossible to list a database in a register such as that provided for in Article 11 of Regulation No 1049/2001. He refers, in this connection, to the practice of Eurostat (the European Union's statistical office), which offers online access to various sets of statistics.

66 The ECB points out, in the first place, that neither Article 255 EC nor Regulation No 1049/2001 applies to it. Admittedly, Decision 2004/258 refers to Article 1 EU and to the joint declaration relating to the regulation. Nevertheless, Decision 2004/258 is a measure adopted on the basis of the statutes of the European System of Central Banks and of the ECB and Article 23 of the ECB's internal rules of procedure. Thus, even though some of the terms used in Regulation No 1049/2001 and Decision

2004/258 are similar, the objective of the decision is not to extend application of the regulation to the ECB's documents. According to the ECB, the terms of that decision ought, therefore, to have been given a meaning consistent with the objectives of the particular regime for public access to its documents.

67 In addition, the ECB and the Commission point out that the judgment in *Fixtures Marketing*, cited in paragraph 56 above, on which the applicant relies, concerns the interpretation of Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases (OJ 1996 L 77, p. 20). That judgment therefore has no relevance to the present case, which concerns the interpretation of Decision 2004/258. Furthermore, the ECB points out that the applicant has not raised a plea that that decision, which, in any event, benefits from a presumption of lawfulness, is unlawful.

68 Unlike the ECB, the Commission takes the view that, given the reference to Regulation No 1049/2001 in Decision 2004/258 and the fact that a similar definition of the term 'document' is given in both texts, the definition set out in Article 3 of that decision must be reconcilable with the wording and general scheme of that regulation.

69 In the second place, the ECB makes a number of observations relating to the characteristics of a document within the meaning of Article 3(a) of Decision 2004/258. Since the definition given in that provision covers 'any content', its purpose is to include the greatest possible amount of real material. Moreover, the form in which the content is stored, electronic or otherwise, is of no importance. Lastly, 'material' must be regarded as being a document within the meaning of that definition, whether it has been prepared or created by the ECB or is merely held by it.

70 According to the ECB and the Commission, the definition of the term 'document' appearing in Decision 2004/258 must be considered in the context of the other provisions of that decision, in particular Articles 6 and 9 thereof, and must be given a 'systematic interpretation'. It is clear from the two provisions just mentioned that the documents covered by the decision must be capable of being transmitted to the applicant as they are, without anything being done to their content or form, must exist as actual, separate documents without needing to be created and must be in a sufficiently stable form to have a 'content'. That would be so, for example, in the case of text on a piece of paper or in an electronic document.

71 Furthermore, the ECB maintains that the interpretation of the term 'document' appearing in Decision 2004/258 must be consistent with the objectives of that decision, namely that of enabling the ECB to analyse the possible harm arising from communication of a document to a member of the public and thus of establishing whether one or other of the exceptions set out in Article 4 of the decision precludes such communication. That objective also confirms the view that the term 'document' presupposes that the material in question has a certain degree of stability and is real, and thus excludes material the content of which may be constantly modified or modified on an ad hoc basis.

72 Lastly, the ECB argues that neither Decision 2004/258 nor European Union law more generally provides for a right of public access to information. Consequently, the term 'document' appearing in that decision cannot be interpreted in such a way as to lead to the de facto recognition of such a right.

73 In the third place, the ECB and the Commission argue that the databases referred to in the applicant's request for access are not documents within the meaning of Decision 2004/258. First, the applicant's assertion that, in the contested decision, the ECB expressed the opinion that only printed versions of a database constituted documents is attributable to an oversimplistic reading of the decision. The databases referred to in the applicant's request for access are neither a register nor a compilation of documents. Unlike a documentary database such as the EUR-Lex database, they are not

documentary in nature. The data contained in these databases can be used only to produce 'internal' documents with a specific purpose, with the aid of the retrieval and organisational tools which operate for the databases themselves. The ECB consequently submits that the information contained in its databases cannot, as such, be provided to the applicant and that it would be necessary to create a fresh document in order to accede to his request. That, however, goes beyond the parameters of Decision 2004/258. Furthermore, the applicant has failed to explain the reasons for which he alleges that the databases referred to in his request constitute documents.

74 In this same context, the Commission argues that, by his application, the applicant sought to obtain access to the databases themselves. In addition to information, however, the databases contain, amongst other things, the software needed to make them function, search tools and logical and system-based interconnections. The applicant's request for access was therefore broader in scope than a request for access to a document. In reality, he is hoping to obtain access to a tool which will enable him to create his own documents in accordance with his own search criteria.

75 Secondly, the ECB and the Commission argue that the databases referred to in the applicant's request for access do not have the stability of content necessary for them to be treated as documents. Their content is in fact constantly evolving, with the addition or deletion of information. The Commission also observes in this context that the expressions 'drawn up or held by' and 'originating from', used in Article 3(a) and Article 5 of Decision 2004/258 respectively, support this view. The same applies to the references to 'a very long document' and 'to a very large number of documents'

in Article 6(3), Article 7(3) and Article 8(2) of the decision. Quantitative indications such as these presuppose stable content capable of being individually identified.

76 Thirdly, the ECB and the Commission argue that acknowledgement that the databases at issue in this case are documents in relation to which an application for access may be made would give rise to a number of practical difficulties. First of all, the specific, individual examination of the content of each document covered by an application for access called for by the case-law requires a stable, identifiable document and would thus be impossible in the case of a database the content of which is constantly evolving.

77 Next, it would be impossible to assess whether one or other of the exceptions provided for in Article 4 of Decision 2004/258 would preclude the access sought, especially in the case of a database that contained a large amount of personal data.

78 Lastly, the measures provided for in Regulation No 1049/2001 in order to facilitate the exercise of the right of access, such as the registers of documents and publication in the *Official Journal of the European Union*, confirm that the legislature was referring specifically to individual documents, to the exclusion of databases such as those in the present case. The fact that Decision 2004/258 makes no provision for the creation of a register of documents similar to that provided for in Article 11 of Regulation No 1049/2001 cannot lead to any different conclusion.

79 In the fourth place, the ECB and the Commission refer to the Ombudsman's report of 10 December 2008 on public access to European Union databases, the Commission's Green Paper entitled 'Public Access to Documents held by Institutions of the European Community: A review' (COM(2007) 185 final), the proposal for a regulation of the European Parliament and of the Council regarding public access to European Parliament, Council and Commission documents (COM(2008) 229 final — COD 2008/0090) and the Commission's report on the implementation of the principles of

Regulation No 1049/2001 (COM(2004) 45 final), all of which corroborate the theory that databases are not documents for the purposes of the provisions relating to access to documents.

80 The Commission maintains that the origin of Regulation No 1049/2001 also confirms the view that a database cannot be regarded as a document within the meaning of that regulation and Decision 2004/258. In support of that assertion, it refers to a series of documents predating the adoption of that regulation.

81 In addition, the ECB argues that it was precisely because the data contained in its databases do not constitute documents that it drew up the reports, in order to satisfy its obligation, recognised by case-law (Case T-264/04 *WWF European Policy Programme* v *Council* [2007] ECR II-911, paragraph 61), to draw up and retain documentation relating to its activities.

Findings of the Court

— The term 'database'

82 It must be observed that all the parties refer in their arguments to the concept of a database without, however, defining that concept. It is therefore necessary to begin examining the present plea by analysing this concept.

83 It is appropriate to point out in that regard that, even though the definition of the term 'database' given in Article 1(2) of Directive 96/9 is, as the ECB rightly points out (see paragraph 67 above), relevant only for the purposes of the application of that directive, it can serve as a guide. That is all the more true given that, at the hearing, whilst maintaining its view that Directive 96/9 is not applicable in the present case, the ECB confirmed, in response to a written question from the Court, that, 'from a computing point of view', the databases at issue in this case do indeed come within the scope of the definition mentioned, above, as is noted in the transcript of the hearing.

84 Article 1(2) of Directive 96/9 defines a database as 'a collection of independent works, data or other materials arranged in a systematic or methodical way and individually accessible by electronic or other means'.

85 As the Court of Justice held in paragraphs 29 and 30 of its judgment in *Fixtures Marketing*, cited in paragraph 56 above, classification as a database is dependent, first of all, on the existence of a collection of 'independent materials', that is to say, materials which are separable one from another without their informative, literary, artistic, musical or other value being affected. It also requires that the independent materials making up that collection be systematically or methodically arranged and be individually accessible in one way or another. While it is not necessary for the systematic or methodical arrangement to be physically apparent, that condition implies that the collection should be contained in a fixed base, of some sort, and include technical means such as electronic, electromagnetic or electro-optical processes, or other means, such as an index, a table of contents, or a particular plan or method of classification, designed to allow the retrieval of any independent material contained within it.

86 That second condition makes it possible to distinguish a database within the meaning of Directive 96/9, characterised by a means of retrieving each of its constituent materials, from a collection of materials providing information without any means of processing the individual materials which make it up (*Fixtures Marketing*, cited in paragraph 56 above, paragraph 31).

87 On the basis of that analysis, the Court of Justice concluded that the term 'database', as defined in Article 1(2) of Directive 96/9, refers to any collection of works, data or other materials, separable one from another without the value of their contents being affected, that includes a method or system of some sort for the retrieval of each of its constituent materials (*Fixtures Marketing*, cited in paragraph 56 above, paragraph 32).

— Analysis of the definition of the term 'document', appearing in Article 3(a) of Decision 2004/258

88 It now falls to the Court to analyse the various components of the definition of the term 'document', appearing in Article 3(a) of Decision 2004/258. First, it must be observed that the expressions 'medium', 'stored', 'recording', 'drawn up' and 'held' used in that definition indicate, implicitly but clearly, that what was contemplated was content that is saved and that may be copied or consulted after it has been generated. Material that is not saved does not, therefore, constitute a document, even if the ECB has knowledge of it.

89 Thus, where the views expressed at an ECB staff meeting are neither recorded by sound or audiovisual recording equipment nor formally set down in minutes, there can be no question of there being any document to which an application for access may be made, even if those who attended the meeting have a precise recollection

of the tenor of their discussions (see, to that effect and by analogy, *WWF European Policy Programme* v *Council*, cited in paragraph 81 above, paragraphs 76 to 78).

90 Secondly, it is clear from the definition set out in Article 3(a) of Decision 2004/258 that the nature of the storage medium on which content is saved is irrelevant to the question whether that content does or does not constitute a document. It can therefore be either a traditional type of medium, such as paper, or a more sophisticated type of medium, such as the various electronic storage devices (hard disk, electronic memory-chip, and so on) or the various media used for sound, visual or audiovisual recordings (CDs, DVDs, video cassettes, and so on). Any new storage or recording medium that may be developed in the future will, in principle, already be covered by the definition in question.

91 Thirdly, the wording of Article 3(a) of Decision 2004/258 refers to 'any content'. In other words, the type and nature of the content stored are equally irrelevant. Indeed, admitting any kind of medium necessarily implies the admission of any content that can be stored on the various types of medium allowed. Thus, a document within the meaning of the definition given in that decision may contain words, figures or any other kind of symbol, but also images and sound recordings, such as the words of a speaker, or visual recordings, such as films.

92 The only restriction on the content that falls within the definition set out in Article 3(a) of Decision 2004/258 is the condition that it must relate to the ECB's policies, activities or decisions.

93 Fourthly, and for the same reasons, it may be inferred from the definition of the term 'document' appearing in Article 3(a) of Decision 2004/258 that the size, length, volume or presentation of the content have no bearing on the question whether or not it falls within the abovementioned definition.

94 Thus, it may be concluded that a document within the meaning of Decision 2004/258 may be a book of several hundred pages or a 'piece of paper' (to borrow the term used by the ECB in an argument summarised in paragraph 70 above) containing a single word or figure, such as a name or telephone number. Similarly, a document may consist not only of text, as in the case of a letter or memorandum, but also a picture, catalogue or list, such as a telephone directory, a price list or a list of spare parts.

— The subject-matter of the applicant's request for access

95 As is clear from the considerations set out in paragraphs 82 to 87 above, the term 'database' refers not only to the entirety of the data contained in it but also to the technical means with which it is equipped and which enable the systematic or methodical arrangement of the data as well as their targeted, individual retrieval.

96 However, it must be observed that, neither in his initial and confirmatory applications nor in his written submissions to the Court did the applicant draw any clear distinction between the data contained in a database and the database itself, which, as has just been pointed out, is a concept of broader scope.

97 Whereas, in his initial application (see paragraph 4 above), the applicant referred to the 'databases used to compile the statistical analyses for the reports', in his confirmatory application (see paragraph 6 above), he stated that 'the information requested [was] indeed content stored in electronic form (the "databases") and drawn up by the ECB'. He has thus given the impression that his application for access related only to the data contained in an ECB database. He also appears to use the term 'database' as a collective noun to designate the data contained in a database, wholly leaving aside the structural elements of the database.

98 Furthermore, whilst, in the heading given to the present plea in the application, the applicant refers to the 'documental nature of databases', in his reply he asserts, on the one hand, that a database is 'both 'content' and 'container'' and, on the other hand, that his request for access related solely to 'raw data'.

99 The explanations which the applicant provided in response to a question put by the Court at the hearing also failed to dispel the confusion arising from this vagueness in terminology. When asked whether his application for access related solely to the data contained in an ECB database or was to be understood as also extending to other elements of the database, which it fell to him to specify, the applicant stated that he had indeed asked for a 'database', hoping to obtain, 'for example, a table which might contain information about staff recruitment and mobility'. He pointed out that if such a database existed, he wished to receive a 'photocopy' of it, adding that he expected to receive 'that database, that compilation'. He went on to say that, if the ECB did not have 'such a table, such a compilation', there would certainly be staff records which he could have used. When asked whether, in light of his explanations, it was right to conclude that a photocopy would have satisfied him and that he was thus not also requesting database tools, he answered that, 'initially', a photocopy would indeed have

been sufficient but that later he might require the tools available for the database. All these statements were formally noted in the transcript of the hearing.

100 In so far as the other parties to the procedure are concerned, they refer in their arguments both to the data contained in a database and to a database 'as such'.

101 If account is also taken of the explanations offered by the applicant at the hearing, it must be held that the applicant's request for access related, at the very least, to access to all the data contained in one or more ECB databases, without necessarily ruling out that it also related to other elements of those databases. That being so, it falls to the Court to examine, first of all, whether such a collection of data constitutes a document within the meaning of Article 3(a) of Decision 2004/258. Whether or not other elements of such a database can also be the subject of an application for access to documents is a question that, if necessary, need be addressed only thereafter.

— Classification of the entirety of the data contained in a database as a document within the meaning of Article 3(a) of Decision 2004/258

102 It must be observed that, as is clear from the considerations set out in paragraphs 82 to 87 above, the characteristics of a database include, first, the existence of content of some kind or other (informative, literary, artistic, musical or other) and, secondly, the existence of a fixed medium of some kind or other in which that content may be stored.

103 Clearly, therefore, the collection of data contained in a database within the meaning of Article 1(2) of Directive 96/9 exhibits the two essential characteristics of a document within the meaning of Article 3(a) of Decision 2004/258, since it constitutes content stored in a medium. That conclusion is equally valid with respect to the data contained in the ECB databases at issue in the present case, which, as has already been pointed out, in so far as they relate to the ECB's activities, come within the scope of the abovementioned definition.

104 Nevertheless, by the arguments summarised in paragraph 73 above, the ECB and the Commission contend, in substance, that a database is not a document within the meaning of Article 3(a) of Decision 2004/258 and that, consequently, the data which it contains cannot, merely by virtue of their inclusion in the database in question, be regarded as a document.

105 Neither the ECB nor the Commission has explained what, in their view, is a document for the purposes of Article 3(a) of Decision 2004/258 or the reasons for which the data contained in a database may not be the subject of an application for access. The distinction which the Commission seeks to draw between databases that are documentary in nature, such as the EUR-Lex database, and databases of a different nature gives rise to the same questions.

106 Whilst the ECB and the Commission do not say as much, their reasoning, as set out in paragraph 105 above, appears implicitly to be based on the premiss that an item of data, taken individually, is not 'content' of sufficient substance or nature to constitute a document within the meaning of Decision 2004/258 or Regulation No 1049/2001.

107 If that premiss were to be accepted, then, having regard to the characteristics of databases mentioned in paragraph 87 above, it would be possible to maintain that a

database could, at most, contain documents that were more than mere data items. Indeed, the elements which comprise such a database, that is to say, the data items, are independent one from another. They are not, as a general rule, presented in any fixed, immutable order, but may be presented in a multitude of different combinations, using the technical and other means available. If it were to be accepted that each of these elements is not necessarily a document and, in addition, that there is no fixed combination for several of them, such as might constitute a document, it would be logical to conclude that the mass of data contained in a database is not, taken as a whole, a 'document'.

108 The fact remains, however, that the premiss referred to in paragraph 106 above is in no way supported by the wording of the definition set out in Article 3(a) of Decision 2004/258, according to which 'any content' may constitute a document. As has already been noted (see paragraphs 93 and 94 above), the terms used in that definition necessarily imply that even content of minuscule proportions, such as a single word or figure, is, if it is stored (for example, if it is written on a piece of paper), sufficient to constitute a document.

109 Account must also be taken of the fact that acceptance of that premiss would give rise to the question of what size of content is required in order to constitute a document within the meaning of Decision 2004/258. In other words, if it were to be admitted, for example, that a figure or a single word were not sufficient for that purpose, it would then be necessary to establish whether a sentence, a whole paragraph or some other larger piece of text might be necessary for that purpose. Given that the author of that decision decided not to set any minimum threshold for the size of content required in the definition set out in Article 3(1) of the decision, the Courts of the European Union cannot themselves assume that task.

110 Moreover, accepting the premiss referred to in paragraph 106 above would imply the exclusion, from the definition of the term 'document' given in Article 3(a) of Decision

2004/258, of any collection of materials of modest size where those materials are independent, that is to say, separable one from another without their value being affected. Thus, a price list or a list of spare parts or even a telephone directory could also not be regarded as a 'document' either, since these are texts which are not likely to be read as a whole, but rather to be consulted periodically, in order to locate a precise, small piece of information, such as the price of a given product or a person's telephone number. However, neither the ECB nor the Commission seems to maintain that lists and directories are not documents within the meaning of Decision 2004/258.

111 Finally, the premiss referred to in paragraph 106 above takes no account of the fact that the significance of a data item contained in a database does not reside merely in its size, which may be very small, but also in the multiple relationships, direct and indirect, which it has with other data items contained in the same database. Indeed, it is precisely those relationships that enable the content of a database to be 'systematically or methodically arranged', to borrow the expression used in paragraph 30 of the judgment in *Fixtures Marketing*, cited in paragraph 56 above. Thus, even a small number of data items extracted from a database can convey useful information, whether one information item or several, whereas, as a general rule, a morsel of text taken out of context will lose its meaning.

112 That consideration also enables the Court to reject the argument which the ECB and the Commission put forward at the hearing, alleging that an extract of all the data contained in a database would be incomprehensible.

113 When asked whether that argument was to be understood as meaning that, in order to constitute a document within the meaning of Decision 2004/258, content stored in a medium must be comprehensible, the ECB replied that that was not an 'isolated criterion', but rather 'something that had to be understood in the context of the document'. It added that, even if content did not have to be comprehensible in and of itself,

it did have to be contained within a document that was comprehensible to the person requesting access to it, since the legislature could not have intended to establish a regime that allowed access to incomprehensible documents.

114 In response to the same question, the Commission pointed out that the question whether or not a document to which access is sought is comprehensible 'underlies' its interpretation of Article 3(a) of Decision 2004/258 to some extent, but that, legally speaking, it is not the decisive factor. The decisive factor, it maintains, is that the content of a non-documentary database is not the same thing as a search result, since each of these will comprise different elements. 'Content' and 'raw data' are concepts that have no meaning in the case of a non-documentary database. A process of extraction is necessary in order to make the data fit a certain classification, and this will result in one content being exchanged for another. Consequently, in the Commission's view, if raw content is incomprehensible, the alteration of content required, and thus the creation of a new document, means that an application for access such as that at issue in the present case is something more than an application for access to a pre-existing, identifiable document. These statements made by the ECB and the Commission were noted in the transcript of the hearing.

115 These arguments of the ECB and the Commission cannot, however, be accepted. It must be observed at the outset that, as those two parties implicitly acknowledge, the wording of Article 3(a) of Decision 2004/258 contains no provision for a criterion based on the comprehensibility of the content stored. Moreover, if such a criterion were to be established, it would be necessary to specify the point of view from which such comprehensibility were to be assessed. Indeed, content might have meaning for certain persons and yet be incomprehensible to others.

116 In any event, in light of the considerations set out in paragraph 111 above, the ECB and the Commission are mistaken in their implicit yet clear assertion that the data contained within a database, taken as a whole, are no more than a meaningless mass. Those data are stored, not haphazardly or without order, but in accordance with a

precise classification system, which, by its complexity, makes the creation of multiple relationships between the data items possible.

117 Thus, contrary to the Commission's contention, the arrangement of the data according to a certain classification does not occur at the time of their extraction from the database. That arrangement exists from the moment at which the database is created and each data item entered into it. Extracting all the data contained in a database and presenting them in a comprehensible manner is perfectly feasible. If it is sufficiently sophisticated, the database's classification system may even enable the entirety of the data contained in the database to be presented in a variety of different ways, according to the classification criterion employed (alphabetical order, ascending order, descending order, and so on). Admittedly, presenting the entirety of the data held in a database that contains a very large amount of data could, by reason of the volume of data presented, make it difficult to locate a specific item of information, hidden among a large number of similar items. However, that in no way implies that such a presentation would be 'incomprehensible'.

118 All the foregoing considerations therefore support the conclusion that the entirety of the data contained in an ECB database constitutes a document within the meaning of Article 3(a) of Decision 2004/258 and may consequently form the object of an application for access made pursuant to that decision.

— The alleged practical difficulties ensuing from a right of access to an institution's databases

119 It is appropriate to consider whether the potential difficulties of a practical nature ensuing from a right of access to an institution's databases, which the ECB and the

Commission plead, might justify a different interpretation of Article 3(a) of Decision 2004/258, one that excludes from the meaning of the term 'document' the data contained in an ECB database. In this connection, the Court will examine in turn the arguments relating to the alleged excessive burden of work which would result from the recognition of such a right, the alleged lack of stability of the content of a database, the potentially sensitive or confidential nature of the data contained in such a database and the alleged difficulties of setting out a database in a register of documents such as that provided for by Article 11 of Regulation No 1049/2001.

120 It is appropriate in that regard to point out, first, that there is nothing to indicate that the application of Article 9(1) of Decision 2004/258 to the data contained in a database might pose particularly significant problems. In principle, it ought to be perfectly feasible for the person concerned to consult an ECB database at the premises of the ECB, if necessary with the assistance or under the supervision of a member of its staff. Moreover, it cannot automatically be ruled out that the entire content of a database can be transmitted to the person concerned in the form of an electronic copy, particularly if the database is relatively small.

121 Nevertheless, it must be pointed out that the General Court has already had occasion to state, in connection with Regulation No 1049/2001, that it should be borne in mind that it is possible for an applicant to make a request for access under that regulation which would entail imposing a burden of work that could very substantially paralyse the proper working of the institution to which the request is addressed. The Court has held that, in such a case, the institution's right to seek a 'fair solution' with the applicant, in accordance with Article 6(3) of Regulation No 1049/2001, reflects the possibility of taking into account, even if only to a very limited extent, the need to reconcile the interests of the applicant with those of sound administration. The Court concluded that an institution must therefore retain the right to balance the interest in public access to the documents against the burden of work so caused,

in order to safeguard, in those particular cases, the interests of good administration (Case T-2/03 *Verein für Konsumenteninformation* v *Commission* [2005] ECR II-1121, paragraphs 101 and 102, and *Williams* v *Commission*, cited in paragraph 29 above, paragraph 85).

122 The Court did, however, make it clear that that possibility remained applicable only in exceptional cases, particularly in view of the fact that it is not, in principle, appropriate that account should be taken of the amount of work entailed by the exercise of the applicant's right of access and its interest in order to vary the scope of that right. In addition, in so far as the right of access to documents held by the institutions constitutes an approach to be adopted in principle, it is with the institution relying on an exception related to the unreasonableness of the task entailed by the request that the burden of proof as to the scale of that task rests (*Verein für Konsumenteninformation* v *Commission*, cited in paragraph 121 above, paragraphs 103, 108 and 113, and *Williams* v *Commission*, cited in paragraph 29 above, paragraph 86).

123 Those considerations may be applied by analogy to the application of Decision 2004/258. First, Article 6(3) of that decision is identical to Article 6(3) of Regulation No 1049/2001. Secondly, Article 7(4) of that decision provides that paragraph 1 of that article, which deals with the processing of initial applications, does not apply in cases of 'excessive or unreasonable' applications.

124 It must therefore be concluded that the possibility that a database may contain a very large amount of data overall is not a cogent reason for denying that those data constitute a document within the meaning of Article 3(a) of Decision 2004/258, given that the case-law has already contemplated the possibility of an application for access to documents imposing, by reason of the extent of the object thereof, a significant burden of work on the addressee of that application and has envisaged the solution to be adopted in such exceptional cases.

125 Secondly, the alleged lack of stability of the content of a database, to which the ECB and the Commission refer in their arguments, is equally incapable of supporting the conclusion that the content of a database cannot constitute a document within the meaning of Article 3(a) of Decision 2004/258.

126 It must be observed in this connection that, admittedly, in order for it to be stored in a medium, content must exhibit a certain degree of stability. Content that is present on a technical device only momentarily does not fulfil that condition. Thus, the words spoken by the two parties to a telephone conversation or the images captured on a security camera and projected onto a screen do not constitute a document within the meaning of Article 3(a) of Decision 2004/258. Their presence on the technical device in question (the telephone line or the projection screen respectively) lasts but an instant and consequently there can be no question of there being any content stored in a medium.

127 Nevertheless, once content has been stored by the ECB in an appropriate medium, it constitutes a document within the meaning of Article 3(a) of Decision 2004/258 and one which may be the subject of an application for access. The fact that such content may subsequently be altered is in that regard irrelevant. To return to the example of a security camera transmitting images, if that camera were to be connected to a device which automatically records the images transmitted during the last 30 days, that recording would indisputably constitute a document that may form the subject of an application for access. The fact that images that are over 30 days old are deleted on a daily basis from the system in order to be replaced by more recent images is not sufficient to lead to the contrary conclusion.

128 Clearly, an application for access cannot refer to future content or to content that has not yet been recorded, since this would constitute a document that did not exist at the time of making the application; nor may it relate to content which, although once recorded, has been deleted by the time the application is made.

129 With regard, more particularly, to content that has been deleted, it must be concluded that it is not held by the ECB, within the meaning of Article 3(a) of Decision 2004/258, if the ECB can no longer access it through the normal use of the recording device on which it was stored. The fact that a specialist might, by resorting to technical means beyond the scope of normal use, be able to restore to a storage medium in the ECB's possession content that has been erased from that medium is not sufficient to support the conclusion that the ECB holds that content.

130 In other words, when faced with an application for access made pursuant to Decision 2004/258, the ECB may be required to search the current contents of the various storage media in its possession in order to find the subject-matter of the application, but it cannot, however, be required to restore content that has already been deleted for the purpose of conducting such a search.

131 By contrast, as the Kingdom of Sweden rightly points out, it must be held that content which is stored by an external service provider on behalf of the ECB in such a way as to be available to the ECB at any time is held by the ECB for the purposes of Article 3(a) of Decision 2004/258.

132 The foregoing considerations may be applied without any particular difficulty to data contained in a database. In this connection, it should be observed at the outset that it is perfectly possible to envisage a database the content of which is stable and may not be altered in any way. For example, a database recording precipitated calcium carbonate and ground calcium carbonate shipments made by the European Economic Area's main suppliers between 2002 and 2004, such as was at issue in the judgment in Case T-145/06 *Omya* v *Commission* [2009] ECR II-145, paragraph 2, once complete, cannot, in principle, undergo any alteration.

133 That consideration, by itself, deprives of much of its persuasive force the argument of the ECB and the Commission founded on the alleged lack of stability of the contents of the databases at issue in the present case. Indeed, if the data contained in a perfectly stable database may constitute a document within the meaning of Article 3(a) of Decision 2004/258, then it is difficult to reach any different conclusion with regard to databases the contents of which are liable to change over time.

134 Furthermore, the considerations set out in paragraphs 128 to 130 above can offer an appropriate solution to any problem arising from the potentially unstable nature of the content of a database which is the subject of an application for access made pursuant to Decision 2004/258.

135 Indeed, it goes without saying that such an application may relate to the content of the database only at the time the application is made and, consequently, may not relate to data that have already been deleted or have not yet been added.

136 Admittedly, where an application is made for access to a database the content of which is liable to vary, the ECB might be obliged to take the steps necessary to ensure that none of the data contained in that database at the time when the application is made is deleted before a reply is made to the request.

137 However, such an obligation is intrinsic to the exercise of the right of access to ECB documents enshrined in Decision 2004/258, and the consultation between the ECB and the applicant for access, which is provided for in Article 6(3) of that decision, will make it possible to resolve any difficulties appropriately and fairly.

138 Thirdly, as regards the argument of the ECB and the Commission relating, in substance, to the potentially sensitive or confidential nature of certain data contained in an ECB database, it must be observed that that eventuality cannot in any case provide sufficient reason for refusing to acknowledge that the content of such a database constitutes a document within the meaning of Article 3(a) of Decision 2004/258.

139 Indeed, the various exceptions to the right of access laid down in Article 4(1) of Decision 2004/258 enable the ECB, in principle, to refuse to disclose sensitive or confidential data, without calling into question the classification of the entirety of the data contained in a database as a document within the meaning of Article 3(a) of that decision.

140 Nor can the Commission succeed in its argument that it would be impossible to conduct a specific, individual examination of all the data contained in a database in order to establish whether one or other of the exceptions to the right of access laid down in the relevant rules, namely in Article 4 of Decision 2004/258, applies.

141 Even leaving aside the fact that, as the Court of Justice pointed out in paragraph 54 of its judgment in Case C-139/07 P *Commission* v *Technische Glaswerke Ilmenau* [2010] ECR I-5883, it is in some cases open to the institution concerned to base its decisions in that regard on general presumptions, a specific review of a database to determine whether it contains any data likely to fall within the scope of application of one or other of the exceptions in question is in no way inconceivable.

142 Given that, by its very nature, a database enables every item of data which it contains to be accessed individually (see paragraphs 85 to 87 above), it is clearly sufficient to identify, in the course of such a review, a single item of data that falls within one or other of the exceptions to the right of access in order to form the conclusion that access to the entirety of the data within the database cannot be granted.

143 It would then fall to the ECB, in such case, to consider whether partial access might be granted, in accordance with Article 4(5) of Decision 2004/258.

144 It must be observed in this connection that it is clear from the wording itself of that provision that the ECB is required to consider whether it is appropriate to grant partial access to the documents requested and to confine any refusal exclusively to information covered by the relevant exceptions. The ECB must grant partial access if the aim pursued by that institution in refusing access to a document may be achieved where all that is required of the institution is to blank out the passages or data which might harm the public interest to be protected (see, by analogy, *WWF European Policy Programme* v *Council*, cited in paragraph 81 above, paragraph 50).

145 It is precisely in such a case that the various search tools with which an electronic database is equipped and, most importantly, its operating software, take on particular importance. Such tools can ensure that the ECB is able to identify, if necessary after conferring with the applicant informally, pursuant to Article 6(3) of Decision 2004/258, and to communicate to him the information in which he is interested and to exclude any information that comes within one or other of the exceptions laid down in Article 4 of the decision.

146 An application designed to have the ECB search its databases and to communicate the results thereof should be seen within the same context since it is, in essence, an application for partial access to a document (namely the entirety of the data contained within a database).

147 Admittedly, Article 4(5) of Decision 2004/258 contemplates partial access as a solution to be adopted where it is impossible wholly to satisfy a request for access. Nevertheless, given that the persons referred to in Article 2(1) of that decision have a right of access, in principle, to ECB documents in their entirety, they may, a fortiori, request only partial access to such documents.

148 Such an application for partial access must comply with the rules set out in Article 6(1) of Decision 2004/258, adapted as necessary to take account of the fact that the application relates to only parts of a document. It must therefore identify in a sufficiently precise manner not only the document, within the meaning of Article 3(a) of the decision, which is the subject of the application, but also the part of the document to which access is sought. However, the application of Article 6(2) and (3) of that decision will make it possible for any difficulties encountered by the applicant to be alleviated.

149 Moreover, it must be pointed out that, whilst a database, by its very nature, offers significant scope for partial access focusing exclusively on the data likely to be of interest to the applicant, account must also be taken of the consideration, expressed in paragraph 128 above, that a request for access may relate only to a document that already exists and may not, therefore, necessitate the creation of a new document (see also, to that effect and by analogy, *WWF European Policy Programme* v *Council*, cited in paragraph 81 above, paragraph 76). An application for access that would require the ECB to create a new document, even if that document were based on information already appearing in existing documents held by the institution, is not an application for partial access and does not come within the parameters of Decision 2004/258.

150 That consideration, when applied to a case involving databases, means that, in the event of an application for access designed to have the ECB carry out a search of one or other of its databases using search criteria specified by the applicant, the ECB is obliged, subject to the possible application of Article 4 of Decision 2004/258, to accede to that request, if the search called for can be carried out using the search tools available for the database in question.

151 Indeed, as has already been observed (see paragraph 117 above), because of the complex relationships within a database which link each data item to a number of other data items, it is possible for the entirety of the data contained in the database to be presented in a variety of different ways. It is equally possible to select only some of the data included in such a presentation and to blank out the rest.

152 It is not permissible, however, to compel the ECB, by means of an application for access to documents formulated on the basis of Decision 2004/258, to communicate to the applicant part or all of the data contained in one or other of its databases organised according to a classification scheme that is not supported by that database. Such an application would in fact require the creation of a new 'document' and would for that reason not come within the parameters of the decision. Indeed, what an application of that kind seeks to obtain is not partial access to a classification of data that can be achieved using the database tools at the ECB's disposal (and, thus, a pre-existing classification), but the creation of a new classification of the data, and thus of a new document, within the meaning of Article 3(a) of the decision.

153 In light of those considerations, it is therefore clear that, in the context of an application for partial access to a document, the Kingdom of Denmark and the Republic of Finland are correct in their contention (see paragraphs 59 and 63 above) that anything that can be extracted from a database by means of a normal or routine search may be the subject of an application for access made pursuant to Decision 2004/258.

154 Fourthly, the ECB and the Commission also cannot succeed in their argument that it would be impossible to list a database in a register of documents such as that provided for by Article 11 of Regulation No 1049/2001.

155 It must be observed at the outset that, unlike Regulation No 1049/2001, Decision 2004/258 makes no provision for the ECB to create such a register. It should also be borne in mind that the obligation to create a register laid down in Article 11 of Regulation No 1049/2001 is intended to make citizens' rights under that regulation effective (see, to that effect, *Williams* v *Commission*, cited in paragraph 29 above, paragraph 72). It is therefore questionable whether the difficulty, or even the impossibility, of setting out material in such a register can constitute sufficient reason for concluding that that material is not a document within the meaning of Article 3(a) of the decision.

156 In any event, listing a database in such a register, along with the references provided for in Article 11(2) of Regulation No 1049/2001, would not appear to pose any particular difficulties. Article 11 in no way requires such a listing to be adapted every time data are added to or deleted from a database. At most, such adaptation would be necessary only if the content of the database were significantly altered. Moreover, a listing of the database in the register could be updated at reasonable intervals, in order to reflect, as extensively as possible, the current content of the database.

157 It follows from all the foregoing considerations that the classification of the entirety of the data contained in a database as a document within the meaning of Article 3(a) of Decision 2004/258 would not give rise to any insurmountable difficulty of a practical nature. For that reason, the arguments to the contrary raised by the ECB and the Commission must be rejected.

— The arguments derived from the preparatory work for Regulation No 1049/2001 and from the other documents relied on by the parties

158 It now falls to the Court to examine the arguments derived from the preparatory work for Regulation No 1049/2001 and from the other documents relied on by the parties.

159 First, no useful guidance can be obtained from the points which the Commission has put forward relating to the origins of Regulation No 1049/2001. Indeed, not only do the documents referred to contain no specific references to databases, but they also address definitions of the term 'document' that are different from the definition ultimately chosen and set out in Article 3(a) of Regulation No 1049/2001.

160 Secondly, the Commission's proposal, set out in its document COM(2008) 229 final — COD 2008/0090, to add the following clarification to that definition, 'data contained in electronic storage, processing and retrieval systems are documents if they can be extracted in the form of a printout or electronic-format copy using the available tools for the exploitation of the system', had it been adopted, would have led, in substance, to the same result as the findings set out in paragraphs 146 to 153 above. Consequently, the Commission cannot call those findings into question, since it could reasonably be assumed that it was merely attempting to clarify what is already expressed, implicitly but necessarily, by the current wording of the definition of the term 'document' given in Regulation No 1049/2001 and Decision 2004/258. The same applies to the Commission's Green Paper referred to by the ECB (see paragraph 79 above), which mentions the need to clarify the status of information held in databases and suggests a solution along the same lines as the Commission's abovementioned proposal.

161 Thirdly, the Commission's report on the implementation of the principles of Regulation No 1049/2001, to which the ECB refers, merely reiterates, in connection with the question whether a database is a 'document' within the meaning of that regulation, the argument that a database is not a 'document' since it does not contains any 'documents'. That argument has already been examined and rejected (see paragraphs 105 to 118 above).

162 Fourthly, as regards the Ombudsman's report to which the ECB refers (see paragraph 79 above), it must be observed that the ECB is mistaken in its assertion that the Ombudsman expressly acknowledged that the definition of the term 'document' given in Regulation No 1049/2001 did not include data contained in databases. In his report, the Ombudsman merely observed that data held in a database '[did] not clearly fall within the scope' of the legislation on the public's right of access to documents. Moreover, the Ombudsman pointed out that he did not have to adopt a conclusive finding on the matter in his decision on complaint 1693/2005/PB, to which the Kingdom of Denmark and the Kingdom of Sweden refer (see paragraph 62 above).

163 Consequently, it must be held that no argument against the classification of the entirety of the data contained in a database as a document within the meaning of Article 3(a) of Decision 2004/258 can be derived from the matters addressed in paragraphs 159 to 162 above.

— Conclusion

164 It is clear from all the foregoing considerations that a literal interpretation of the definition of the term 'document' appearing in Article 3(a) of Decision 2004/258 leads to the conclusion that the entirety of the data contained in a database constitutes a

document within the meaning of that provision and that no considerations of a practical nature, and none of the various documents to which the parties refer, can call that conclusion into question.

165 Moreover, the conclusion that the entirety of the data contained in a database constitutes a document within the meaning of Article 3(a) of Decision 2004/258 is also consistent with the objective of granting wider access to ECB documents, mentioned in recital 3 in the preamble to that decision, which states that '[w]ider access should be granted to ECB documents'.

166 Contrary to the ECB's submissions (see paragraph 66 above), neither the fact that Article 255 EC and Regulation No 1049/2001 do not apply to it nor 'the objectives of the particular regime for public access to [ECB] documents' stand in the way of that interpretation of Article 3(a) of Decision 2004/258. Admittedly, recital 3 in the preamble to the decision, referred to in paragraph 165 above, also mentions the need for 'protecting the independence of the ECB and of the national central banks... and the confidentiality of certain matters specific to the performance of the ECB's tasks'. Nevertheless, whilst that requirement may justify the adoption of specific exceptions to the right of access to ECB documents, including, in particular, those set out in the first to fourth indents of Article 4(1)(a) of the decision, it cannot in any way authorise an interpretation of Article 3(a) of the decision that would run counter to its literal wording. As regards the ECB's argument that Article 255 EC and Regulation No 1049/2001 do not apply, it must be observed, first, that the conclusion drawn in paragraph 164 above is based on the wording of Article 3(a) of Decision 2004/258, without making any reference to Article 255 EC or Regulation No 1049/2001, and, secondly, that, in any event, the ECB itself referred, in recital 2 in the preamble to the decision, to the joint declaration relating to Regulation No 1049/2001, which calls upon 'the other institutions and bodies of the Union to adopt internal rules on public access to documents which take account of the principles and limits set out in

the Regulation', concluding that '[t]he regime on public access to ECB documents... should be revised accordingly'.

167 The conclusion that the entirety of the data contained in a database constitutes a document within the meaning of Article 3(a) of Decision 2004/258 in and of itself supports the finding that the contested decision is vitiated by an error of law and must be annulled.

168 Indeed, the reasons given for the contested decision all rest upon the premiss that the entirety of the data contained in a database does not constitute a document within the meaning of Article 3(a) of Decision 2004/258.

169 Only if that premiss could be accepted would it be possible to refuse the applicant's request for access on the ground that no 'printed versions' of the ECB's databases existed 'as separate documents'. As the ECB and the Commission rightly point out (see paragraph 73 above), that view, expressed in the contested decision, should not be understood as meaning that, in the ECB's opinion, only printed documents come within the definition of the term 'document' given in Article 3(a) of Decision 2004/258, which would be clearly at variance with the wording of the provision. Rather, it should be understood as meaning that data do not constitute a 'document' so long as they are contained in a database and that they may be classified as such only once they have been extracted from the database in order to be formally set down in another printed or printable document.

170 That same premiss also provided the basis for the ECB's assertion in the contested decision that the applicant's request for access could not be satisfied 'simply by extracting the data' but that it would be necessary for the data to be 'further organised

and analysed', tasks going beyond the scope of the regime for public access to ECB documents instituted by Decision 2004/258. The fact that that part of the statement of reasons for the contested decision begins with the word 'consequently' confirms this conclusion.

171 Any different interpretation of that part of the contested decision cannot be accepted. Admittedly, it is clear from the matters set out in paragraphs 145 to 153 above that the ECB is entitled to reject an application for access to data contained in one or other of its databases in the case where it is impossible to extract and convey to the applicant the data referred to in his application because the search tools available for the database in question are insufficient or inadequate.

172 Nevertheless, it is also clear from those same considerations that, before rejecting an application for access on such grounds, the ECB must, in accordance with Article 6(2) and (3) of Decision 2004/258, confer with the applicant. In that context, it must briefly explain to the applicant the various possibilities for searching the database in question and, if appropriate, permit him to clarify or amend his application so as to target the information likely to be of interest to him that may be extracted from the database in question with the aid of the search tools available for that database.

173 Moreover, even if, after conferring with the applicant, it is still impossible to locate the data referred to in the application for access using the available search tools, the ECB must give a brief explanation, in its decision rejecting the application, of the reasons connected with the technical configuration of the database in question for which it is unable to accede to the request. It must be concluded that such an explanation is wholly lacking in the contested decision.

174 Consequently, the assertion in the contested decision that the applicant's request for access could not be satisfied 'simply by extracting the data' cannot be understood as meaning that the data referred to in that request could not be extracted from the databases concerned by means of a normal search using the tools available for that purpose.

175 Lastly, in so far as concerns the ECB's assertion in the contested decision that 'such a procedure [, namely the further organisation and analysis of the data,] would represent a significant burden of work', it must be observed that this is not an independent ground for the refusal of the applicant's request for access. It is merely an incidental remark lacking any direct connection with that refusal.

176 That is all the more true since, as is clear from the considerations set out in paragraphs 121 to 124 above and the case-law cited therein, the mere mention of the 'significant burden of work' required in order to grant an application for access to documents made under Decision 2004/258 is manifestly insufficient to justify rejection of that application.

177 According to those same considerations, rejecting an application, which must be done only in exceptional cases, implies for the institution concerned a duty to provide proof of the scale of the task otherwise required, something which was wholly lacking in the contested decision, and must be preceded by an attempt to find a 'fair solution' with the applicant, in accordance with Article 6(3) of Decision 2004/258, which was also lacking in the present case.

178 It follows that the refusal of the applicant's request for access was instead based on the view that any additional organisation and analysis of data contained in a database is beyond the scope of Decision 2004/258, a view which in turn rests on the premiss that, so long as they are held in a database, data do not constitute a document within

the meaning of that decision. That premiss, however, runs counter to the conclusion drawn in paragraph 164 above and is thus mistaken, so much so that the contested decision is vitiated by an error of law.

179 In so far as concerns the question whether a database 'as such' is a document within the meaning of Article 3(a) of Decision 2004/258, it must be observed, first, that the applicant's request for access was to some degree ambiguous, in that the contents of the databases, that is to say, the data, were not distinguished clearly from the databases themselves (see paragraphs 96 to 99 above). It is thus in no way certain that the applicant sought to obtain access to the databases 'as such', as the Commission contends (see paragraph 74 above). It is, in any event, clear both from the assertions which the applicant made in his reply, to the effect that his application referred to 'raw data', and from the oral explanations which he provided at the hearing (see paragraphs 98 and 99 above respectively) that, even if one were to accept that access to the data contained in the ECB's databases might not have been the sole objective of his application for access, it was certainly one of them, if not the main one.

180 Secondly, it must be observed that, in his application for access, the applicant clearly departed from the premiss that there were specific ECB databases designed to serve as a basis for the drafting of the reports. It was only before the Court that the ECB demonstrated, by means of explanations which the applicant did not in any way challenge, that that premiss was false (see paragraphs 32 to 34 above).

181 Whilst the additional explanations offered by the ECB do not in any way whatever support the conclusion that the applicant had no interest in seeking the annulment of the contested decision (see paragraph 35 above), they must nevertheless be taken into consideration in order to determine how a reply might have been made to his request for access.

182 Regardless of the precise terms used by the applicant in his application for access, it is clear, in light of the ECB's additional explanations, that no separate database 'as such' existed to which the application might refer. Instead, it is clear from those additional explanations that the data in which the applicant was interested were contained in several ECB databases, which also contain other data of no interest to the applicant. It should be observed in this connection that, in his reply, the applicant stated that he was only interested in data relating to persons who had actually been taken on by the ECB, to the exclusion of any data on candidates who had not been employed.

183 It follows from all the foregoing considerations that it is in no way necessary in the present case to establish whether an ECB database may 'as such' form the subject of an application for access brought on the basis of Decision 2004/258. Since no single ECB database exists which the applicant might obtain 'as such' by means of his application, the view that the entirety of the data contained in a database constitutes a document within the meaning of Article 3(a) of the decision is sufficient to enable the applicant to obtain, in response to his application for access and subject to any application of one or other of the exceptions to the right of access laid down in Article 4 of the decision, both the specific data of interest to him and the right to use, in the manner described in paragraphs 146 to 153 above, the tools available for the various ECB databases containing those data. In so far as those tools, in particular, are concerned, the applicant may obtain the right to use them in the sense that he may ask the ECB to use them in order to carry out searches in its databases, in accordance with search criteria that he himself would define, and communicate the results thereof to him (see paragraph 150 above).

184 Consequently, without it being necessary to examine the other pleas in law raised by the applicant in support of his claim for annulment, the second plea must be upheld and the contested decision annulled.

3. *The claim for damages*

Arguments of the parties

185 The applicant argues that the ECB's refusal to grant him access to the databases referred to in his application for access is delaying the completion of his doctoral thesis, which he was supposed to submit before 1 February 2011. He also takes issue with the ECB's contention that his claim for damages is inadmissible.

186 The ECB maintains that the claim for damages does not comply with the requirements of Article 21 of the Statute of the Court of Justice or Article 44(1)(c) of the Rules of Procedure of the General Court and must be declared inadmissible. The application, it argues, fails to mention any causal link between the allegedly improper conduct of the ECB and the harm which the applicant has sustained. Nor is it supported by any documents, the applicant merely asserting that the contested decision has hindered his progress in the preparation of his doctoral thesis.

187 The ECB adds that it has responded favourably to several other requests from the applicant for access to documents. He therefore has in his possession sufficient information to prepare his thesis and there can be no question of there having been any systematic refusal of his requests. Moreover, the applicant has failed to explain to what extent his inability to access the databases in question has hindered his progress in preparing his doctoral thesis.

Findings of the Court

188 It should be recalled at the outset that, pursuant to the second paragraph of Article 288 EC, which applies to the facts in issue, which predate the entry into force of the Lisbon Treaty on 1 December 2009, the European Community must, in accordance with the general principles common to the laws of the Member States, make good any damage caused by its institutions or by its servants in the performance of their duties. The third paragraph of that article states that the second paragraph applies under the same conditions to damage caused by the ECB or by its servants in the performance of their duties. Thus, despite the fact that, pursuant to Article 107(2) EC, the ECB has legal personality, the second and third paragraphs of Article 288 EC provide that it is the Community (and from the date of entry into force of the Lisbon Treaty, the European Union, which, by virtue of the third sentence of the third paragraph of Article 1 TEU, replaced and succeeded the European Community) that must make good any damage caused by the ECB (order in Case T-295/05 *Document Security Systems* v *ECB* [2007] ECR II-2835, paragraph76).

189 It is settled case-law that, in order for the European Union to incur non-contractual liability within the meaning of the second paragraph of Article 288 EC by reason of the unlawful conduct of its institutions, a number of requirements must be satisfied, namely that the alleged conduct of the institutions is unlawful, that the damage is real and that there is a causal link between the conduct alleged and the damage in question (see Joined Cases T-3/00 and T-337/04 *Pitsiorlas* v *Council and ECB* [2007] ECR II-4779, paragraph 290 and the case-law cited).

190 As regards the first of those conditions, the case-law requires there to be a sufficiently serious breach of a rule of law intended to confer rights on individuals (Case C-352/98 P *Bergaderm and Goupil* v *Commission* [2000] ECR I-5291, paragraph 42). As regards the requirement that the breach must be sufficiently serious, the decisive

test for determining whether that requirement is met is whether the Community institution concerned has manifestly and gravely disregarded the limits on its discretion. Where that institution has only a considerably reduced or even no discretion, the mere infringement of Community law may be sufficient to establish the existence of a sufficiently serious breach (*Pitsiorlas* v *Council and ECB*, cited in paragraph 189 above, paragraph 291 and the case-law cited).

191 As regards the condition concerning the causal link, the European Union may be held responsible only for damage which is a sufficiently direct consequence of the misconduct of the institution concerned (see *Pitsiorlas* v *Council and ECB*, cited in paragraph 189 above, paragraph 292 and the case-law cited).

192 As regards the damage suffered, it is important to emphasise that that damage must be actual and certain and quantifiable. By contrast, purely hypothetical and indeterminate damage does not give rise to compensation. It is for the applicant to produce to the Court the evidence to establish the existence and the extent of the damage suffered (see *Pitsiorlas* v *Council and ECB*, cited in paragraph 189 above, paragraphs 293 and 294 and the case-law cited.

193 Moreover, where one of the conditions is not satisfied, the application must be dismissed in its entirety without it being necessary to examine the other preconditions (see *Pitsiorlas* v *Council and ECB*, cited in paragraph 189 above, paragraph 295 and the case-law cited).

194 Lastly, according to Article 44(1)(c) of the Rules of Procedure, applications must state the subject-matter of the action and give a summary of the pleas advanced. An

application seeking compensation for damage caused by a Community institution must, in order to satisfy those requirements, state the evidence on which, in particular, the damage claimed to have been suffered may be identified as well as the nature and extent of that damage (Case C-327/97 P *Apostolidis and Others* v *Commission* [1999] ECR I-6709, paragraph 37).

195 In the present case, in support of his claim for compensation, the applicant maintains that, as a result of the ECB's refusal to grant him access to the databases referred to in his application for access, the completion of his doctoral thesis is being delayed and that, in addition, once it has been completed, its scientific quality will be adversely affected.

196 It must, for that reason, be concluded that, in substance, by his claim for damages the applicant is seeking to obtain compensation in respect of non-material harm allegedly arising from the adoption of the contested decision, and that he has identified, to the requisite legal standard, the nature and extent of that harm. It follows that, contrary to the ECB's submission, that claim is admissible.

197 As to the merits, however, it is premature and must be rejected on that ground (see, to that effect, Case T-478/93 *Wafer Zoo* v *Commission* [1995] ECR II-1479, paragraphs 49 and 50, and Case T-300/97 *Latino* v *Commission* [1999] ECR-SC I-A-259 and II-1263, paragraphs 95 and 101). Indeed, at the hearing, the applicant stated, in response to a question from the Court, that the submission of his doctoral thesis had been postponed and was due in September 2012. He added that that delay was due not only to the lack of information that he might have obtained, but also to other factors. Note was taken of these statements in the transcript of the hearing.

198 Since the contested decision must be annulled (see paragraph 184 above), the ECB will be required to re-examine the applicant's request for access. It cannot, a priori, be ruled out that, following such re-examination, the ECB will provide access to the data contained in its databases, including those which the applicant allegedly requires in order to write his thesis, and within such period of time as will allow the thesis to be submitted in September 2012. Nor may it be ruled out that, for some legitimate reason, the ECB will refuse him such access, wholly or in part. It follows that, at the present moment, the Court is not in a position to examine whether the applicant will suffer any damage as a result of the refusal in the contested decision of his request for access to documents, or whether such hypothetical damage could be attributed to unlawful conduct on the part of the ECB.

199 Consequently, the claim for damages must be dismissed.

Costs

200 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the ECB has been essentially unsuccessful, it must be ordered to pay the costs, in accordance with the form of order sought by the applicant.

201 The Kingdom of Denmark, the Republic of Finland, the Kingdom of Sweden and the Commission must bear their own respective costs, in accordance with Article 87(4) of the Rules of Procedure.

On those grounds,

THE GENERAL COURT (Third Chamber)

hereby:

1. **Annuls the decision of the Executive Board of the European Central Bank (ECB), notified to Mr Julien Dufour by letter of the President of the ECB of 2 September 2009;**

2. **Dismisses the action as to the remainder;**

3. **Orders the ECB to bear its own costs and to pay the costs incurred by Mr Dufour;**

4. **Orders the Kingdom of Denmark, the Republic of Finland, the Kingdom of Sweden and the European Commission to bear their own respective costs.**

Czúcz Labucka Gratsias

Delivered in open court in Luxembourg on 26 October 2011.

[Signatures]

Table of contents

Legal context ..... II - 7739

Background to the dispute ..... II - 7748

Procedure and forms of order sought ..... II - 7750

The application for annulment ..... II - 7752

1. Admissibility ..... II - 7752

Arguments of the parties ..... II - 7752

Findings of the Court ..... II - 7755

2. Substance ..... II - 7758

The statement of reasons for the contested decision ..... II - 7759

Arguments of the parties ..... II - 7759

Findings of the Court ..... II - 7759

The second plea in law, alleging an error of law in that, in the contested decision, the ECB wrongly took the view that the databases were not documents within the meaning of Article 3(a) of Decision 2004/258 ..... II - 7762

Arguments of the parties ..... II - 7762

Findings of the Court ..... II - 7770

— The term 'database' ..... II - 7770

— Analysis of the definition of the term 'document', appearing in Article 3(a) of Decision 2004/258 ..... II - 7772

— The subject-matter of the applicant's request for access ..... II - 7774

— Classification of the entirety of the data contained in a database as a document within the meaning of Article 3(a) of Decision 2004/258 ..... II - 7776

— The alleged practical difficulties ensuing from a right of access to an institution's databases ..... II - 7781

— The arguments derived from the preparatory work for Regulation No 1049/2001 and from the other documents relied on by the parties ..... II - 7792

— Conclusion ..... II - 7793

3. The claim for damages ..... II - 7800

Arguments of the parties ..... II - 7800

Findings of the Court ..... II - 7801

Costs ..... II - 7804