JUDGMENT OF THE COURT OF FIRST INSTANCE
(Fifth Chamber, Extended Composition)

30 November 2004 *

In Case T-168/02,

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

applicant,

supported by

Kingdom of the Netherlands, represented by H. Sevenster, S. Terstal, N. Bel and C. Wissels, acting as Agents, with an address for service in Luxembourg,

by

Kingdom of Sweden, represented by A. Kruse and K. Wistrand, acting as Agents, with an address for service in Luxembourg,

* Language of the case: English.

and by

Kingdom of Denmark, represented initially by J. Bering Liisberg, and subsequently J. Molde, acting as Agents, with an address for service in Luxembourg,

interveners,

v

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

defendant,

supported by

United Kingdom of Great Britain and Northern Ireland, represented by R. Caudwell, acting as Agent, and M. Hoskins, Barrister, with an address for service in Luxembourg,

intervener,

APPLICATION for annulment of the Commission's decision of 26 March 2002 refusing to grant the applicant access to certain documents, relating to the

declassification of a protected site, in accordance with Article 4(5) of Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (OJ 2001 L 145, p. 43),

THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES
(Fifth Chamber, Extended Composition),

composed of: P. Lindh, President, R. García-Valdecasas, J.D. Cooke, P. Mengozzi and M.E. Martins Ribeiro, Judges,

Registrar: D. Christensen, Administrator,

having regard to the written procedure and further to the hearing on 1 April 2004,

gives the following

Judgment

Legal background

1 Article 255 EC provides:

'1. Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, shall have a right of access to European

Parliament, Council and Commission documents, subject to the principles and the conditions to be defined in accordance with paragraphs 2 and 3.

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

...'

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

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

3 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, 'the Regulation') defines the principles, conditions and limits governing the right of access to the documents of those institutions provided for in Article 255 EC. The Regulation has been applicable since 3 December 2001.

4 Article 2 of the Regulation provides:

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

...

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

...'

5 Article 3 of the Regulation states:

'For the purpose of this Regulation:

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

(b) "third" party shall mean any natural or legal person, or any entity outside the institution concerned, including the Member States, other Community or non-Community institutions and bodies and third countries.'

6 Article 4 of the Regulation, which lays down exceptions to the aforementioned right of access, states the following:

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

(a) the public interest as regards:

— public security,

— defence and military matters,

— international relations,

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

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

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

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

— court proceedings and legal advice,

— the purpose of inspections, investigations and audits,

unless there is an overriding public interest in disclosure.

...

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

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

...

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

7 Article 9 of the Regulation, which governs the treatment of sensitive documents, provides:

'1. Sensitive documents are documents originating from the institutions or the agencies established by them, from Member States, third countries or international organisations, classified as "TRÈS SECRET/TOP SECRET", "SECRET" or "CONFIDENTIEL" in accordance with the rules of the institution concerned, which protect essential interests of the European Union or of one or more of its Member States in the areas covered by Article 4(1)(a), notably public security, defence and military matters.

2. Applications for access to sensitive documents under the procedures laid down in Articles 7 and 8 shall be handled only by those persons who have a right to acquaint themselves with those documents. These persons shall also, without prejudice to Article 11(2), assess which references to sensitive documents could be made in the public register.

3. Sensitive documents shall be recorded in the register or released only with the consent of the originator.

...'

Facts

8 The applicant is a non-governmental organisation active in the field of protection of animal welfare and nature conservation.

9 On 19 April 2000, the Commission issued an opinion ('the Opinion') authorising the Federal Republic of Germany to declassify the Mühlenberger Loch site, an area protected under Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (OJ 1992 L 206, p. 7).

10 Between 11 May and 7 September 2001, the applicant exchanged correspondence with the Commission with a view to being granted access to certain documents relating to a project concerning the Mühlenberger Loch site which consisted of the enlargement of the Daimler Chrysler Aerospace Airbus GmbH factory and the reclamation of part of the estuary for a runway extension ('the project'). The correspondence was exchanged in accordance with the rules on access to documents laid down in Commission Decision 94/90/ECSC, EC, Euratom of 8 February 1994 on public access to Commission documents (OJ 1994 L 46, p. 58), which was then in force.

11 In the course of that correspondence, the Commission communicated certain documents to the applicant.

12 By letter of 20 December 2001, the applicant requested access to a series of additional documents pursuant to the Regulation. In Annex III to that letter, the applicant listed the documents requested in three categories: category 'A', which concerned a note sent by the Directorate-General (DG) 'Environment' to the Legal Service of the Commission on 12 November 1999; category 'B', which concerned documents originating from the German authorities; and category 'C', which concerned documents originating from other third parties.

13 By fax of 24 January 2002, Mr Verstrynge, the acting Director-General of DG 'Environment' of the Commission, informed the applicant that 'the Commission is obliged to receive the agreement from the German authorities before disclosing any documents received from the latter (see Article 4(5) of the Regulation)'.

14 On 29 January 2002, the applicant replied that it did not accept that interpretation of Article 4(5) of the Regulation. It stated that 'the German authorities may request the Commission not to disclose a document originating in that Member State without its prior agreement' but 'the final decision concerning disclosure remains with the Commission and must be based upon one of the exceptions (Article 4) where there is no overriding public interest in the disclosure'.

15 On 12 February 2002, the Federal Republic of Germany asked the Commission not to disclose the correspondence between it and the City of Hamburg in relation to the Mühlenberger Loch site and the project or the correspondence of the German Chancellor. On 13 February 2002, the applicant received a fax from Mr Verstrynge

in which he granted it access to the documents listed in categories 'A' and 'C' (see paragraph 12 above). In the same fax, Mr Verstrynge informed the applicant that the documents in category 'B', namely those originating from the German authorities, could not be made available to it.

16 On 6 March 2002, the applicant submitted a confirmatory application to the Secretary-General of the Commission pursuant to Article 7(2) of the Regulation, requesting him to review the refusal to disclose the documents listed in category 'B'. In particular, the applicant reiterated its objection to the Commission's interpretation of Article 4(5) of the Regulation.

17 By letter of 26 March 2002, the Secretary-General of the Commission informed the applicant that he upheld the refusal to disclose the documents originating from the German authorities ('the contested decision').

Procedure and forms of order sought

18 By application lodged at the Registry of the Court of First Instance on 4 June 2002, the applicant brought the present action.

19 By letters registered at the Registry of the Court of First Instance on 9 September, 30 September and 2 October 2002, the Kingdom of the Netherlands, the Kingdom of Sweden and the Kingdom of Denmark applied for leave to intervene in the present proceedings in support of the form of order sought by the applicant.

20 By letter registered at the Registry of the Court of First Instance on 10 October 2002, the United Kingdom of Great Britain and Northern Ireland applied for leave to intervene in the present proceedings in support of the form of order sought by the Commission.

21 By order of the President of the Fifth Chamber of the Court of 15 November 2002, the parties to the main proceedings having been heard, those applications for leave to intervene were granted.

22 By letter of 24 September 2003, the applicant requested that the case be referred to the Court sitting in plenary session or to the Grand Chamber pursuant to Article 51(1) of the Court's Rules of Procedure. The Commission objected to such a reference.

23 By decision of 10 December 2003, the interveners having been heard, the Court referred the case to the Fifth Chamber, Extended Composition.

24 Upon hearing the report of the Judge-Rapporteur, the Court (Fifth Chamber, Extended Composition) decided to open the oral procedure.

25 The parties presented oral argument and replied to the questions put by the Court at the hearing on 1 April 2004.

26 The applicant, supported by the Kingdom of the Netherlands, the Kingdom of Sweden and the Kingdom of Denmark, claims that the Court should:

— annul the contested decision;

— order the Commission to pay the costs.

27 The Commission, supported by the United Kingdom of Great Britain and Northern Ireland, contends that the Court should:

— dismiss the action as unfounded;

— order the applicant to pay the costs.

Law

28 The applicant raises two pleas in law in support of the present action. The first plea alleges infringement of Article 4 of the Regulation. The second plea alleges infringement of Article 253 EC.

29 As a general submission, the applicant submits that, in the present case, there is a clear public interest in the disclosure of the documents from the German

authorities. The Mühlenberger Loch site was an internationally important nature reserve and the refuge of certain species of flora and fauna protected under Community law in the Natura 2000 network and under an international convention. The applicant claims that the Commission sanctioned the effective declassification of this area solely in order to allow the destruction of the Mühlenberger Loch site to permit the enlargement of a factory and the reclamation of part of the estuary for a runway extension. It observes that, despite the fact that the Opinion in favour of allowing the destruction of the Mühlenberger Loch site was said to be justified for imperative reasons of overriding public interest, the critical information which formed the basis for that opinion must, according to the Commission and the Federal Republic of Germany, remain secret.

30 The Commission claims to have disclosed to a large extent the pertinent documentation originating from its services or received by them. It maintains that the file of documents disclosed to the applicant sets out in great detail the background to the Community decision-making process in the case underlying the present dispute. It points out that the file contains its correspondence with the German authorities, including that sent by the President of the Commission to the German Chancellor, and that the only documents at issue are those originating from the Member State concerned, which has refused to consent to their disclosure.

The first plea: infringement of Article 4 of the Regulation

Arguments of the parties

31 First, the applicant, supported by the Netherlands, Swedish and Danish Governments, submits that the assertion made by the Secretary-General of the Commission in the contested decision that Article 4(5) of the Regulation is 'mandatory' is based

on a misinterpretation of that provision. It concedes that, in accordance with Article 4(5) of the Regulation, the German authorities are entitled to request the Commission not to disclose their correspondence but takes the view that the word 'request' has a very different meaning from that which the Commission seeks to give it.

32 The applicant submits that 'a request is the act or instance of asking for something'. This implies that there is the expectation of a response to the request on the part of the party which lodged it and the exercise of some sort of discretion on the part of the party answering it. It adds that Article 4(5) of the Regulation is an exception clause and that the necessarily restrictive construction which it must be given rules out the possibility of understanding 'request' to mean 'command'.

33 The Netherlands and Danish Governments submit that Article 4(5) of the Regulation cannot be interpreted as conferring a 'right of veto' on a Member State. The Swedish Government considers that the Regulation lays down as a principle that it is for the holder of a document to decide whether or not it can be disclosed. It also argues that the Commission's interpretation of Article 4(5) of the Regulation, which departs from that principle, would have to be explicitly and unequivocally clear from the very wording of that article.

34 The applicant also claims that it was not informed of the fact that the documents requested were confidential. It argues that, whilst Article 9(3) of the Regulation states that the consent of the originator is required for the disclosure of sensitive documents, this is not the case with respect to the documents referred to in Article 4(4) and (5) of the Regulation. According to the Netherlands Government, if the Community legislature had intended to lay down in Article 4(5) of the Regulation a right of veto with regard to the disclosure of non-sensitive documents, it would have chosen wording similar to that of Article 9(3) of the Regulation.

35 It is manifestly wrong to suggest that the documents requested in this case are to be considered as subject to a special procedure or '*lex specialis*' in the sense that, within the terms of the Regulation, they are subject to national law and administrative practice. The applicant challenges the argument that the Member States enjoy a 'privileged position' under Article 4(5) of the Regulation. According to the Netherlands Government, all documents held by the institutions must, in principle, be accessible to the public. To construe Article 4(5) as meaning that Member States enjoy a right of veto would unduly restrict the right of access to documents and be incompatible with the objectives of the Regulation.

36 Secondly, the applicant submits that Article 4(5) of the Regulation cannot be interpreted in isolation from the other provisions of that regulation.

37 It states that the request of the German authorities not to disclose the documents originating from them followed the Commission's consultation of those authorities on 5 February 2002. The applicant submits that this consultation could only have been conducted pursuant to Article 4(4) of the Regulation, which obliges the Commission to consult third parties 'with a view to assessing whether an exception in paragraph 1 or 2 is applicable, unless it is clear that the document shall or shall not be disclosed'.

38 The applicant claims that the purpose of that consultation could only have been to obtain information from the German authorities which would enable the Commission to assess whether an exception in Article 4(1) or (2) of the Regulation was applicable to the documents from those authorities. It submits that the wording of Article 4(4) of the Regulation indicates that it is solely for the institution concerned to make that assessment. The party consulted is to give its views on the applicability of an exception listed in Article 4(1) or (2), but that party cannot conduct the assessment on behalf of the Commission.

39 The applicant observes that Article 4(5) of the Regulation introduces a procedure that allows the German authorities to put forward to the Commission their objections concerning the release of the documents in question, in the form of a request for non-disclosure. It states that the views of the German authorities are not, however, the only factor which the Commission must take into account when assessing whether or not to release the documents from those authorities. There may be some higher rule, norm or constraint acting on the Commission such as, for example, an overriding public interest in disclosure.

40 It argues that the right of access to the documents of the institutions may be restricted only by a refusal justified by one of the limited number of exceptions listed in Article 4(1) or (2) of the Regulation. Where the exceptions might be applicable, they must be construed narrowly and with prudence, as is the case with respect to any exception to a fundamental general principle (Joined Cases C-174/98 P and C-189/98 P *Netherlands and Van der Wal* v *Commission* [2000] ECR I-1, paragraph 27; Case T-309/97 *Bavarian Lager* v *Commission* [1999] ECR II-3217, paragraph 39; Case T-111/00 *British American Tobacco International (Investments)* v *Commission* [2001] ECR II-2997, paragraph 40; and Case T-191/99 *Petrie and Others* v *Commission* [2001] ECR II-3677, paragraph 66). It adds that the exceptions must be interpreted in the light of Article 4(6) of the Regulation, which provides that 'if only parts of the requested document are covered by any of the exceptions, the remaining parts of the document shall be released'. A different interpretation would defeat the wording and structure of Article 4 of the Regulation and of the Regulation as a whole. Article 4(5) of the Regulation does not form part of the list of exceptions to the 'fundamental right of access'. That interpretation is supported by the fact that Article 4(7) of the Regulation does not refer to any exception other than those in paragraphs 1 to 3 of that article and the case of sensitive documents.

41 The applicant maintains that it is contrary to Community law to confer on a Member State the power to decide whether or not to grant access to documents when it is neither the addressee of the application for access nor the addressee of the Regulation. Only the addressee of an application for access can be challenged for refusing to release a requested document.

42 According to the applicant, the Commission is seeking, in the contested decision, to re-apply 'the authorship rule' by the back door. Applicants would know that the Commission would be powerless to overturn a 'Member State veto', which would force them to address their applications directly to the Member States. In those circumstances, there would be no uniform approach since access to Member State documents of relevance to the Community decision-making process would vary from one Member State to another. The applicant takes the view that the Commission's contention that national transparency legislation is applicable to the request for documents concerned in this case is unacceptable because it would lead to a chaotic, incoherent and absurd result.

43 The Commission, supported by the United Kingdom Government, takes the view that Article 4(5) of the Regulation creates, within the Community rules on access to documents of the institutions, a specific procedure governing the treatment of requests for documents originating from a Member State. It submits that access to those documents is governed by national law and policy and that the Community legislature intended to take account of this element when it drafted Article 4(5), not least in the light of Declaration No 35.

44 The Commission argues that Article 4(4) of the Regulation envisages the 'standard case' of documents from third parties, while Article 4(5) lays down the *'lex specialis'* governing the specific situation of 'national' documents originating from Member States, access to which is subject to national law and policy on transparency. With respect to the applicant's claim that the Commission is seeking to reintroduce the authorship rule (see paragraph 42 above), the Commission submits that the situations before and after the application of the Regulation are very different. It argues that Article 4(5) of the Regulation applies the obligations laid down in Article 4(4) with regard to one specific category of privileged third parties, namely the Member States, as opposed to all third parties, and authorises the Commission to handle Member States' documents in the manner provided for, as opposed to the general prohibition on handling third-party documents which existed before.

45 The Commission contends that Article 4(4) of the Regulation deals with requests for documents emanating from all third parties and provides, in essence, that the institution is required to seek the opinion of the third parties concerned only if it is not already clear whether or not the document should be disclosed.

46 The Commission submits that, unlike Article 4(2), Article 4(5) of the Regulation does not make any provision for weighing up the public interest in disclosure. It claims that, in contrast to Article 4(4) of the Regulation, there is no obligation to disclose a document in the absence of doubt as to whether the provisions in Article 4(1) and (2) of the Regulation are applicable. Article 4(5) of the Regulation is not limited to specifying that the Commission should seek the opinion of the Member State but provides expressly that the Member State has the right to request the Commission not to disclose its document without its permission. It submits that, once such a request has been made, the document cannot be disclosed.

47 As regards the applicant's argument referred to in paragraph 34 above and relating to Article 9(3) of the Regulation, the Commission points out that the considerations dictating the drafting of that provision and that of Article 4(5) of the Regulation were very different. Article 9(3) of the Regulation provides that 'sensitive documents should be recorded in the register or released only with the consent of the originator'. The Commission maintains that the legislature could not have drafted that provision to provide for the consent of the originator only with regard to entry on the register but not with regard to release. In that regard, the Commission states that the concept of 'originator' is much wider than Member States and that it embraces the institutions, agencies established by them, Member States, third countries and international organisations. It observes that it would have been inappropriate to omit a reference to Member States in this list.

48 The Commission contends that the right of a Member State to refuse to consent to the disclosure by the Commission of a document originating from that Member State was not intended to restrict access to such documents entirely, but only to restrict access to them under the Community rules. It submits that that restriction is

designed to take into account the status of the document under national law and policy and thus avoid discrepancies between the Community system and the various national systems of access to documents. The Commission disputes the applicant's argument that the refusal to disclose a 'national' document cannot be challenged at all (see paragraph 41 above). It submits that the refusal to permit the Commission to disclose that document cannot be challenged under Community law. Otherwise, a 'national' document might have to be disclosed when disclosure might be contrary to national law and policy on transparency. The Commission vigorously denies the applicant's claims set out in paragraph 42 above and takes the view that legal differences will arise as a matter of law, both national and Community, and not as a result of geography or the 'whim' of a Member State.

49 The United Kingdom Government submits that if the construction of the Regulation advanced by the applicant were accepted, it would deprive Article 4(5) of the Regulation of any effect inasmuch as that provision would be entirely subsumed within the procedure set out in Article 4(4). In that regard, it maintains that if a Community institution were obliged by Community law to ignore the lack of consent of a Member State, the Community legislature would in effect have the power to frustrate any rules of national legislation which precluded disclosure. In the absence of rules harmonising the laws of the Member States on access to documents, that would offend against the principle of subsidiarity.

Findings of the Court

50 The applicant submits, in essence, that, whilst the Member State from which a document originates may request the institution in possession of that document not to disclose it under Article 4(5) of the Regulation, it does not have a right of veto with respect to such disclosure, as the final decision is a matter for the institution.

51 That argument is based on a misinterpretation of the provisions of the Regulation and cannot be upheld.

52 First of all, the right of access to documents of the institutions, provided for in Article 2 of the Regulation, covers all documents held by the European Parliament, the Council and the Commission ('the institutions') (see Article 1(a) of the Regulation), that is to say, documents drawn up or received by them and in their possession within the meaning of Article 2(3). Accordingly, the institutions may be required, in appropriate cases, to make available documents originating from third parties, including, in particular, the Member States, in accordance with the definition of 'third party' in Article 3(b) of the Regulation.

53 Next, it should be observed that, before the entry into force of the Regulation, public access to the documents of the Commission was governed by Decision 94/90. By virtue of Article 1 of Decision 94/90, the code of conduct on public access to Council and Commission documents (OJ 1993 L 340, p. 41, 'the code of conduct'), annexed to that decision and approved by the Council and the Commission on 6 December 1993, was formally adopted. The code of conduct provided, in the section headed 'Processing of initial applications', that 'where the document held by an institution was written by a natural or legal person, a Member State, another Community institution or body [or] any other national or international body, the application must be sent direct to the author' ('the authorship rule'). Therefore, under the authorship rule, an institution was not authorised to disclose documents originating from a wide category of third parties, including the Member States, and the person requesting access was obliged, where necessary, to make his request directly to the third party in question.

54 The authorship rule was not incorporated into the Regulation, which confirms in its 11th recital that, in principle, all documents held by the institutions are to be accessible to the public.

55 Moreover, with respect to third-party documents, Article 4(4) of the Regulation places the institutions under an obligation to consult the third party concerned with a view to assessing whether an exception in Article 4(1) or (2) is applicable, unless it is clear that the document should or should not be disclosed. It follows that the institutions are under no obligation to consult the third party concerned if it is clearly apparent whether the document should or should not be disclosed. In all other cases, the institutions must consult the relevant third party. Accordingly, consultation of the third party is, as a general rule, a precondition for determining whether the exceptions to the right of access provided for in Article 4(1) and (2) of the Regulation are applicable in the case of third-party documents.

56 Moreover, as the applicant rightly points out, the Commission's duty to consult third parties under Article 4(4) of the Regulation does not affect its power to decide whether one of the exceptions provided for in Article 4(1) and (2) of the Regulation is applicable.

57 However, it follows from Article 4(5) of the Regulation that the Member States are subject to special treatment. That provision confers on a Member State the power to request the institution not to disclose documents originating from it without its prior agreement. It is appropriate to point out that Article 4(5) of the Regulation reflects Declaration No 35, by which the Conference agreed that the principles and conditions set out in Article 255 EC would allow a Member State to request the Commission or the Council not to communicate to third parties a document originating from that State without its prior agreement. The power conferred on the Member States by Article 4(5) of the Regulation is explained by the fact that it is neither the object nor the effect of that regulation to amend national legislation on access to documents (see the 15th recital in the preamble to the Regulation and Case T-76/02 *Messina* v *Commission* [2003] ECR II-3203, paragraphs 40 and 41).

58 Article 4(5) of the Regulation places the Member States in a different position from that of other parties and lays down a *lex specialis* to govern their position. Under

that provision, the Member State has the power to request an institution not to disclose a document originating from it without its 'prior agreement'. The obligation imposed on the institution to obtain the Member State's prior agreement, which is clearly laid down in Article 4(5) of the Regulation, would risk becoming a dead letter if the Commission were able to decide to disclose that document despite an explicit request not to do so from the Member State concerned. Thus, contrary to what the applicant argues, a request made by a Member State under Article 4(5) does constitute an instruction to the institution not to disclose the document in question.

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

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

61 The Court holds that, as the Commission rightly argues, where access to a document in respect of which a Member State has made a request under Article 4(5) is not governed by the Regulation, it is governed by the relevant national provisions of the Member State concerned, which were unaffected by the adoption of the Regulation. Accordingly, it is for the national administrative and judicial authorities,

in applying national law, to assess whether access to documents originating from a Member State should be granted and whether the right of interested parties to a legal remedy will then be assured by the application of national rules.

62 As regards the argument of the applicant set out in paragraph 34 above, which is based on the wording of Article 9(3) of the Regulation, it should be observed that Article 9 lays down specific rules to govern the treatment of 'sensitive' documents originating from, in particular, the institutions, the Member States, third countries or international organisations in the areas covered by Article 4(1)(a) of the Regulation, notably public security, defence and military matters. Article 9 refers, inter alia, to the persons authorised to handle such documents and provides that sensitive documents are to be recorded in the register or released only with the consent of the originator. Given the specific character of the situation governed by that article, it is clear that it is not linked to Article 4(5) of the Regulation and that the wording of Article 9(3) cannot properly be relied on for the purpose of interpreting Article 4(5).

63 As the parties agree, the documents which are the subject of dispute in the present case are documents originating from a Member State within the meaning of Article 4(5) of the Regulation. Similarly, it is undisputed that, on 12 February 2002, the Federal Republic of Germany asked the Commission not to disclose its correspondence with the City of Hamburg in relation to Mühlenberger Loch and the project or the correspondence of the German Chancellor.

64 Accordingly, the Court concludes that the Commission did not infringe Article 4 of the Regulation by adopting the contested decision following a request from that Member State under Article 4(5) of that regulation.

65 The first plea is therefore unfounded.

The second plea: infringement of Article 253 EC

Arguments of the parties

66 The applicant claims that the contested decision effectively restates the position adopted by the acting Director-General of DG 'Environment', that is to say, that the German authorities requested the Commission not to release the documents originating from them, but without explaining the reasons for the refusal. It maintains that it does not know whether the contested decision is grounded in law or is arbitrary and that it has been denied the opportunity to examine the contested decision's legal basis (*Petrie*, cited above, paragraph 77, and Case T-123/99 *JT's Corporation* v *Commission* [2000] ECR II-3269, paragraph 63). The applicant states that it knows only that the German authorities requested that the documents not be disclosed and that the Commission followed that request blindly.

67 The applicant claims that there was a failure, prior to adoption of the contested decision, to weigh up its interest in obtaining access to the documents against the Commission's interest in treating those documents as secret (*British American Tobacco International (Investments)*, cited above, paragraph 53). It submits that the Commission knew how important the documents requested were to it but refused access to the documents of the German authorities without differentiating between the documents identified under seven specific headings in the initial application. In that regard, it claims that the contested decision does not state why partial access to those documents was denied to it in accordance with Article 4(6) of the Regulation.

68 The Commission points out that the contested decision clearly states that it consulted the German authorities and that they requested it not to disclose their correspondence. It argues that, as a result, pursuant to Article 4(5) of the Regulation, it was not in a position to disclose that correspondence.

69 The Commission maintains that, in view of the above discussion as regards the first plea, that reasoning was complete and described the reason for the refusal of access. It maintains that this statement of reasons is consistent with the approach adopted by the acting Director-General of DG 'Environment' in his fax of 13 February 2002 (see paragraph 15 above).

Findings of the Court

70 It is settled case-law that the purpose of the obligation to state the reasons for an individual decision is to provide the person concerned with sufficient information to make it possible to determine whether the decision is well founded or whether it is vitiated by an error which may permit its validity to be contested and to enable the Community judicature to review the lawfulness of the decision. The extent of that obligation depends on the nature of the measure at issue and the context in which it was adopted (Joined Cases T-551/93 and T-231/94 to T-234/94 *Industrias Pesqueras Campos and Others* v *Commission* [1996] ECR II-247, paragraph 140; Joined Cases T-46/98 and T-151/98 *CEMR* v *Commission* [2000] ECR II-167, paragraph 46; and Case T-80/00 *Associação Comercial de Aveiro* v *Commission* [2002] ECR II-2465, paragraph 35).

71 In the contested decision, the Commission explained the reasons for its refusal to disclose the documents specified by the applicant in its letter of 6 March 2002 by referring to the request made by the Federal Republic of Germany that it not disclose them and by stating that, under Article 4(5) of the Regulation, it is not authorised to disclose a document originating from a Member State without its prior agreement. It observed that that article places it under a duty not to disclose and that it was not obliged to apply a public-interest test. Such a statement of reasons is sufficiently clear to enable the applicant to understand why the Commission did not disclose to it the documents in question and to enable the Court to review the lawfulness of the contested decision.

72 Moreover, whilst the restrictions imposed in the present case on the access to the documents originating from the Federal Republic of Germany did not affect the Commission's duty to state sufficient reasons for the contested decision, the Commission was not required to explain why the Federal Republic of Germany had made a request under Article 4(5) of the Regulation, since there is no obligation on the Member States to state the reasons for such a request under that provision (see paragraph 59 above).

73 The second plea must therefore be rejected.

74 In the light of all the foregoing, the action must be dismissed in its entirety.

Costs

75 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 applicant has been unsuccessful, it must be ordered to pay, in addition to its own costs, those of the Commission, in accordance with the form of order sought by the latter.

76 According to the first subparagraph of Article 87(4) of the Rules of Procedure, the Member States which intervene in the proceedings are to bear their own costs. The Kingdom of the Netherlands, the Kingdom of Sweden, the Kingdom of Denmark and the United Kingdom of Great Britain and Northern Ireland must therefore bear their own costs.

On those grounds,

THE COURT OF FIRST INSTANCE
(Fifth Chamber, Extended Composition)

hereby:

1. **Dismisses the action;**

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

3. **Orders the Kingdom of the Netherlands, the Kingdom of Sweden, the Kingdom of Denmark and the United Kingdom of Great Britain and Northern Ireland to bear their own costs.**

Lindh García-Valdecasas Cooke

Mengozzi Martins Ribeiro

Delivered in open court in Luxembourg on 30 November 2004.

H. Jung P. Lindh

Registrar President