JUDGMENT OF THE COURT (Grand Chamber)

26 January 2010 *

In Case C-362/08 P,

APPEAL under Article 56 of the Statute of the Court of Justice, brought on 7 August 2008,

Internationaler Hilfsfonds eV, established in Rosbach (Germany), represented by H. Kaltenecker and R. Karpenstein, Rechtsanwälte,

appellant,

the other party to the proceedings being:

European Commission, represented by P. Costa de Oliveira and S. Fries and by T. Scharf, acting as Agents, with an address for service in Luxembourg,

defendant at first instance,

* Language of the case: German.

THE COURT (Grand Chamber),

composed of V. Skouris, President, A. Tizzano, J. N. Cunha Rodrigues, K. Lenaerts, R. Silva de Lapuerta and C. Toader, Presidents of Chambers, C.W.A. Timmermans, A. Rosas, K. Schiemann (Rapporteur), M. Ilešič, J. Malenovský, U. Lõhmus, J.-J. Kasel, Judges,

Advocate General: P. Mengozzi,
Registrar: L. Hewlett, Principal Administrator,

having regard to the written procedure and further to the hearing on 30 June 2009,

after hearing the Opinion of the Advocate General at the sitting on 15 September 2009,

gives the following

Judgment

1 By its appeal, Internationaler Hilfsfonds eV ('IH') seeks to have set aside the judgment of the Court of First Instance of the European Communities (now 'the General Court') of 5 June 2008 in Case T-141/05 *Internationaler Hilfsfonds* v *Commission* ('the judgment under appeal'), by which the Court of First Instance dismissed as inadmissible IH's action seeking the annulment of a decision of the Commission of the European Communities of 14 February 2005, refusing it access to certain documents in the Commission's possession ('the contested measure').

Legal framework

2 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) is intended to define the principles, conditions and limits governing the right of access to the documents of those institutions laid down by Article 255 EC.

3 Under the heading 'Beneficiaries and scope', Article 2(1) of the regulation grants any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, a right of access to documents of the institutions, 'subject to the principles, conditions and limits defined in this Regulation'.

4 Under the heading 'Exceptions', Article 4(3) of the regulation provides:

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

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

5 Article 4(7) of Regulation No 1049/2001 provides as follows:

‘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. …’

6 Article 6(1) of the regulation, under the heading ‘Applications’, provides:

‘Applications for access to a document shall be made in any written form, including electronic form, in one of the languages referred to in Article [314 EC] and in a sufficiently precise manner to enable the institution to identify the document. The applicant is not obliged to state reasons for the application.’

7 With regard to the processing of initial applications, Article 7(1) and (2) of the regulation provide:

‘1. An application for access to a document shall be handled promptly. An acknowledgement of receipt shall be sent to the applicant. Within 15 working days from registration of the application, the institution shall either grant access to the document requested and provide access in accordance with Article 10 within that period or, in a written reply, state the reasons for the total or partial refusal and inform

the applicant of his or her right to make a confirmatory application in accordance with paragraph 2 of this Article.

2. In the event of a total or partial refusal, the applicant may, within 15 working days of receiving the institution's reply, make a confirmatory application asking the institution to reconsider its position.'

8 With regard to the processing of confirmatory applications, Article 8(1) and (3) of Regulation No 1049/2001 provide:

'1. A confirmatory application shall be handled promptly. Within 15 working days from registration of such an application, the institution shall either grant access to the document requested and provide access in accordance with Article 10 within that period or, in a written reply, state the reasons for the total or partial refusal. In the event of a total or partial refusal, the institution shall inform the applicant of the remedies open to him or her, namely instituting court proceedings against the institution and/or making a complaint to the Ombudsman, under the conditions laid down in Articles [230 EC] and [195 EC], respectively.

...

3. Failure by the institution to reply within the prescribed time limit shall be considered as a negative reply and entitle the applicant to institute court proceedings against the institution and/or make a complaint to the Ombudsman, under the relevant provisions of the EC Treaty.'

Factual background to the dispute

9 IH is a non-governmental organisation established under German law which is active in the field of humanitarian aid. On 28 April 1998, it signed with the Commission a contract named 'LIEN 97-2011' ('the contract'), with a view to the joint funding of a medical assistance programme organised by it in Kazakhstan.

10 On 1 October 1999, the Commission terminated the contract unilaterally and on 6 August 2001, it informed IH of its decision, taken further to that termination, to recover a certain sum paid to IH under that contract.

11 On 9 March 2002, IH made an application to the Commission seeking access to the documents relating to the contract.

12 By letter of 8 July 2002, the Commission sent IH a list of documents contained in four files ('the letter of 8 July 2002'). In that letter, referring to Article 4(3) of Regulation No 1049/2001, it rejected IH's application in so far as it related to some of the documents contained in the first three files and all the documents contained in the fourth file.

13 By letter of 11 July 2002, addressed to the President of the Commission, IH applied for full access to the documents relating to the contract.

14 By letter of 26 July 2002, signed by the Director of the 'Europe, Caucasus and Central Asia' Directorate of the EuropeAid Office ('letter of 26 July 2002'), the Commission replied to that request as follows:

'I refer to your letter to President Prodi, dated the 11 July 2002, to which I have been asked to reply.

…

In the last correspondence received by you from the Commission dated 8th July 2002, following your request to know the content of the files relating to the contract …, an inventory of the said contents was made available to you. On the basis of this inventory you were asked to inform the Commission services of the documents you would like to have copied.

Following such a request you may have immediate access to those documents that are not subject to any restriction. In the case of documents that are subject to restrictions, as described under Article 4 of the Regulation 1049/2001, access to these documents would normally be decided upon a case by case basis.

I reiterate the attention and priority that the Commission services are giving to your request.'

15 On 26 August 2002, IH consulted the documents to which the Commission had agreed to give it access.

16 Thereafter, the Commission and IH attempted to reach a friendly solution concerning the recovery of the sum claimed by the Commission under the contract. However, at the beginning of October 2003, the Commission and IH concluded that they were not able to reach such a solution.

17 On 6 October 2003, IH lodged a complaint with the European Ombudsman criticising the Commission's refusal to grant it full access to the documents relating to the contract. The complaint was registered under the reference 1874/2003/GG ('the complaint lodged by IH').

18 On 15 July 2004, the Ombudsman made a draft recommendation to the Commission in which he concluded that the Commission had not handled the application for full access to the documents relating to the contract made by IH properly and called upon that institution to re-consider the application. Furthermore, he recommended to the Commission that it grant access to those documents, unless it could show that they were covered by one of the exceptions provided for in Regulation No 1049/2001.

19 On 12 and 21 October 2004, the Commission sent the Ombudsman a detailed opinion, drafted in English, followed by a version of the same in German ('the detailed opinion'). In that opinion, it stated inter alia the following:

'The Commission accepts the European Ombudsman's draft recommendation and it has reconsidered [IH's] request for access to the file [relating to the contract]. It has reconsidered the question whether the documents contained in files Nos 1, 2 and 3 to which access had been refused and all the documents in file No 4 should be disclosed in full or in part in accordance with the provisions of Regulation … No 1049/2001.'

20 Following that re-examination, the Commission agreed to disclose five of the documents to which it had previously refused IH access and attached copies of them to its detailed opinion.

21 With regard to the rest of the documents covered by the application for access, however, it maintained its refusal to grant IH such access.

22 The Ombudsman sent IH copies of the English and German versions of the detailed opinion, on 18 and 25 October 2004 respectively, inviting comments, which IH submitted on 22 October 2004.

23 On 14 December 2004, the Ombudsman adopted a definitive decision on the complaint lodged by IH. In conclusion, in paragraph 3.1 of his decision, the Ombudsman made a critical remark on the administrative practice of the Commission in the instant case. In that regard, he found that the fact that the Commission did not provide valid reasons capable of justifying its refusal to grant IH access to several documents relating to the contract constituted an instance of maladministration. However, having considered that the European Parliament was not able to take action to support his and IH's position in the case before it, the Ombudsman decided that it was not appropriate to submit a special report to the Parliament and, in paragraph 3.5 of its decision, he decided to close the case relating to the complaint.

24 On 22 December 2004, acting on the basis of the conclusions of that definitive decision, IH made an application to the President of the Commission for full access to the documents relating to the contract, in the following terms:

'… I have the honour hereby to submit to you a formal application [seeking] permission for [IH] to access without restriction the Commission files concerning the [contract], including all the documents to which access has to date been refused by your services. I

respectfully request you to give the necessary instructions with a view to agreeing … on a date in the near future for compliance with this application …

In support of this application, I [refer] to the decision of the Ombudsman … of 14 December 2004 …

I hope that no legal proceedings will be required and that you will give instructions to your services [in order to] ensure full access to the files in question. …

I have noted 21 January 2005 as the date on which I hope to have received a reply from you.

…'

25 On 21 January 2005, replying to that application, the Commission sent IH a letter which was drafted as follows:

'Thank you for your letter of 22 December 2004 …, by which you requested access to documents [relating to the contract], in accordance with Regulation [No] 1049/2001 ….

Since the Commission has not yet adopted a definitive position [with regard] to the Ombudsman's decision of 14 December 2004, kindly note that your application will be processed as soon as possible.

Thank you in advance for your understanding.

Yours faithfully.'

26 By the contested measure, signed by the Director of the 'Operational support' Directorate at the EuropeAid Co-operation Office, the Commission responded, on 14 February 2005, to the application made by IH on 22 December 2004 as follows:

'Thank you for your letter of 22 December 2004 …, by which you request access to the documents [relating to the contract], under Regulation [No] 1049/2001 ….

On 21 January 2005, I informed you that the Commission would have to adopt a definitive position [with regard] to the Ombudsman's decision of 14 December 2004 before replying to your application.

Following the position adopted by the Commission [with regard] to that decision, according to which that institution does not share the Ombudsman's interpretation of [Article 4(1)(b), and (3), second subparagraph] of the abovementioned regulation and of Regulation [(EC) No] 45/2001 [of the European Parliament and of the Council of 18 December 2000] on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies [and on the free movement of such data (OJ 2001 L 8, p. 1)], it has decided not to grant access to the documents which — according to the Commission — fall under the exceptions provided for in that regulation, as relied upon by the Commission in its letter to the Ombudsman of 12 October 2004.

I therefore regret to have to inform you [that], with the exception of the documents made available when your client gained access to the file [relating to the contract] on 26 [August] 2002 and the [five] documents which the Commission annexed to that letter to the Ombudsman — the content of which has been notified … — the Commission does not intend to place other documents at your disposal …'

Proceedings before the Court of First Instance and the judgment under appeal

27 By application lodged at the Registry of the Court of First Instance on 11 April 2005, IH brought an action for annulment of the contested measure.

28 By a separate document, the Commission raised a plea of inadmissibility under Article 114(1) of the Rules of Procedure of the Court of First Instance. On 26 June 2005, IH submitted observations on that plea.

29 In support of that plea of inadmissibility, the Commission argued in particular that the contested measure merely confirmed a decision taken in July 2002, contained in its letters of 8 and 26 July 2002, which had not been subject to any legal action by IH within the prescribed period. Therefore, that measure did not constitute a measure which was open to challenge in the context of an action for annulment brought under Article 230 EC.

30 First, the Court of First Instance, in paragraphs 72 to 75 of the judgment under appeal, classified the letter of 8 July 2002 as an initial reply to an application for access to documents relating to the contract, for the purposes of Article 7(1) of Regulation No 1049/2001.

31 Second, the Court of First Instance, in paragraphs 76 to 79 of the judgment under appeal, classified the letter of 26 July 2002 as a reply to a confirmatory application, within the meaning of Article 8 of that regulation, sent to the Commission by IH on 11 July 2002.

32 Third, the Court of First Instance, in paragraph 81 of the judgment under appeal, held that, since it had not been contested within the prescribed period, the decision contained in the letter of 26 July 2002 had already become definitive by the date on which IH brought its action.

33 In the light of the case-law according to which an action for annulment brought against a decision which merely confirms an earlier decision which was not challenged within the period prescribed for that purpose is inadmissible, the Court of First Instance, accordingly, examined whether the contested measure constituted an act which merely confirmed the decision of 26 July 2002.

34 In that context, it took into account, in paragraph 82 of the judgment under appeal, the case-law according to which a decision is a mere confirmation of an earlier decision if it contains no new factors as compared with the earlier measure and is not preceded by any re-examination of the situation of the addressee of the earlier measure. It cited in that regard Case 23/80 *Grasselli* v *Commission* [1980] ECR 3709, paragraph 18, the order in Case T-84/97 *BEUC* v *Commission* [1998] ECR II-795, paragraph 52; and Case T-365/00 *AICS* v *Parliament* [2002] ECR II-2719, paragraph 30.

35 In that regard, the Court of First Instance, first, in paragraphs 83 to 92 of the judgment under appeal, examined whether the matters relied upon by IH were capable of constituting a 'new factor' with the meaning of that case-law. It held that neither the Ombudsman's conclusions in his decision of 14 December 2004 nor the developments and the results arising from the Ombudsman's inquiry into IH's complaint constituted new factors capable of distinguishing the contested measure from the letter of 26 July 2002.

36 The Court of First Instance then examined whether the contested measure had been preceded by a 're-examination', within the meaning of the case-law cited in paragraph 34 of the present case, of IH's situation. It excluded that possibility in paragraphs 93 to 100 of the judgment under appeal.

37 Consequently, the Court of First Instance, in paragraph 102 of the judgment under appeal, held the Commission's argument that the contested measure was merely confirmatory to be well-founded and therefore accepted its plea of inadmissibility.

38 Finally, for the sake of completeness, the Court of First Instance stated, in paragraphs 103 to 110 of the judgment under appeal, that even if the contested measure did not constitute mere confirmation of the letter of 26 July 2002, it could not be regarded either as a measure which was open to challenge, on the ground that it would then have to be classified as an initial reply, for the purposes of Article 7(1) of Regulation No 1049/2001, which could not be the subject of an action for annulment under Article 230 EC.

39 Taking all those considerations into account, the Court of First Instance, in the judgment under appeal, dismissed IH's action as inadmissible.

Forms of order sought by the parties and procedure before the Court

40 By its appeal, IH claims that the Court should:

— set aside the judgment under appeal;

— rule definitively on the substance and annul the contested measure or, in the alternative, refer the case back to the General Court to rule again on the case, and

— order the Commission to pay the costs.

41 The Commission contends that the Court should:

— dismiss the appeal as partially inadmissible or as unfounded, and

— order IH to pay the costs.

42 By a document received by the Registry of the Court of Justice on 21 October 2009, IH suggested to the Court that it order the oral procedure to be reopened, pursuant to Article 61 of the Rules of Procedure of the Court, which is applicable to the appeals procedure by virtue of Article 118 of those Rules.

The request to reopen the oral procedure

43 The Court may of its own motion, or on a proposal from the Advocate General, or at the request of the parties, order the reopening of the oral procedure in accordance with Article 61 of the Rules of Procedure if it considers that it lacks sufficient information, or

that the case must be dealt with on the basis of an argument which has not been debated between the parties (Case C-42/07 *Liga Portuguesa de Futebol Profissional and Bwin International* [2009] ECR I-7633, paragraph 31, and case-law cited).

44 On the other hand, neither the Statute of the Court of Justice of the European Union nor its Rules of Procedure make provision for the parties to submit observations in response to the Advocate General's Opinion.

45 In its request, IH restricted itself to claiming that the Advocate General's Opinion was based on an erroneous interpretation of Regulation No 1049/2001.

46 The Court considers, having heard the Advocate General, that it has all the material necessary for it to decide the dispute before it and that the case does not have to be examined in the light of an argument that has not been the subject of discussion before it.

47 Therefore, there is no need to reopen the oral procedure.

The appeal

48 In the judgment under appeal, the Court of First Instance, essentially, accepted the plea of inadmissibility raised before it by the Commission on the ground that the contested measure did not constitute a measure which was open to challenge.

49 IH relies on three pleas in law in support of its appeal. The first plea alleges that the Commission's decision of 26 July 2002 was wrongly classified as a reply to a confirmatory application, within the meaning of Article 8 of Regulation No 1049/2001. The second and third pleas, which concern the contested measure, allege, respectively, that the measure was wrongly classified as an act which merely confirmed the decision of 26 July 2002 or as an initial reply, for the purposes of Article 7(1) of that regulation.

50 First of all, the second and third pleas should be examined together.

51 According to settled case-law, only measures the legal effects of which are binding on, and capable of affecting the interests of, the applicant by bringing about a distinct change in his legal position may be the subject of an action for annulment (see, inter alia, Case C-131/03 P *Reynolds Tobacco and Others* v *Commission* [2006] ECR I-7795, paragraph 54, and the case-law cited).

52 It is also apparent from settled case-law concerning the admissibility of actions for annulment that it is necessary to look to the substance of the contested acts, as well as the intention of those who drafted them, to classify those acts. In that regard, it is in principle those measures which definitively determine the position of the Commission upon the conclusion of an administrative procedure, and which are intended to have legal effects capable of affecting the interests of the complainant, which are open to challenge and not intermediate measures whose purpose is to prepare for the definitive decision, or measures which are mere confirmation of an earlier measure which was not challenged within the prescribed period (see, to that effect, Case C-521/06 P *Athinaïki Techniki* v *Commission* [2008] ECR I-5829, paragraph 42).

53 With regard to Regulation No 1049/2001, it should be pointed out that Articles 7 and 8 of that regulation, by providing for a two-stage procedure, aim to achieve, first, the swift and straightforward processing of applications for access to documents of the institutions concerned and, second, as a priority, a friendly settlement of disputes which

may arise. For cases in which such a dispute cannot be resolved by the parties, the abovementioned Article 8(1) provides two remedies, namely the institution of court proceedings or the lodging of a complaint with the Ombudsman.

54 That procedure, in so far as it provides for the making of a confirmatory application, enables in particular the institution concerned to re-examine its position before taking a definitive refusal decision which could be the subject of an action before the courts of the Union. Such a procedure makes it possible to process initial applications more promptly and, consequently, more often than not to meet the applicant's expectations, while also enabling the institution to adopt a detailed position before definitively refusing access to the documents sought by the applicant, in particular where the applicant reiterates the request for disclosure of those documents notwithstanding a reasoned refusal by that institution.

55 In order to ascertain whether a measure can be the subject of an action under Article 230 EC, it is necessary to look to its substance, rather than to the form in which it is presented (see Case 60/81 *IBM* v *Commission* [1981] ECR 2639, paragraph 9).

56 It should moreover be noted that Regulation No 1049/2001 confers a very extensive right of access to the documents of the institutions concerned, there being, in accordance with Article 6(1) of the regulation, no requirement to state reasons for the application in order to enjoy that right. In addition, under Article 4(7) of the regulation, the exceptions as laid down in paragraphs 1 to 3 of that article are to apply only for the period during which protection is justified on the basis of the content of the document.

57 It follows that a person may make a new demand for access relating to documents to which he has previously been denied access. Such an application requires the institution concerned to examine whether the earlier refusal of access remains justified in the light of a change in the legal or factual situation which has taken place in the meantime.

58 It must be held, in that regard, that the contested measure constitutes, in the light both of its content, which refers explicitly to a 'definitive position' of the Commission, and of the context in which it was adopted, a definitive refusal, by the Commission, to disclose all the documents requested by IH. That refusal brought to an end a long series of successive steps taken by IH over approximately three years, referred to in paragraphs 11 to 26 of the present judgment, seeking to obtain access to the documents relating to the contract and including several applications by it to that end.

59 As stated in paragraph 57 of the present judgment, it was open to IH to submit new applications for access to those documents without the Commission being able to oppose them on the basis of the earlier refusals to grant access.

60 Equally, in circumstances such as those of the present case, the Commission cannot reasonably claim that, once it had received notification of the contested measure, IH should have made a new application and waited until that institution refused its application again before it could be regarded as a definitive measure and, thus, open to challenge. Apart from the fact that the Commission did not, in the contested measure, inform IH of its right to make a confirmatory application, such a step by IH could not have led to the desired result, in the light of the fact that the Commission had, as made clear by the detailed opinion and by the disclosure of five documents in the case instituted before the Ombudsman, examined IH's application for access in detail and had clearly and definitively adopted its position with regard to the refusal of access to the documents sought.

61 To require such a step to be taken would moreover have been contrary to the objective of the procedure established by Regulation No 1049/2001, which aims to guarantee swift and straightforward access to the documents of the institutions concerned.

62 In the light of all those factors, it must be held that the Court of First Instance was wrong to hold that the contested measure did not constitute a measure open to challenge which could be the subject of an action for annulment under Article 230 EC. It follows

from the above considerations that, contrary to what was held by the Court of First Instance, an action against such a measure is admissible.

63 It follows that the second and third pleas in law are well-founded. Without it being necessary to examine the first plea in law, the appeal should therefore be allowed and the judgment appealed against set aside.

The action at first instance

64 Under the first paragraph of Article 61 of the Statute of the Court of Justice of the European Union, the Court, where the judgment of the Court of First Instance is quashed, may itself give final judgment in the matter, where the state of the proceedings so permits.

65 However, the Court is not in a position, at this stage of the proceedings, to give judgment on the substance of IH's action before the Court of First Instance. That aspect of the case requires an examination of pleas and matters that were not argued before the Court of First Instance, which ruled on a plea of inadmissibility made in a separate document. The state of the proceedings does not, therefore, permit judgment to given as regards the substance of the dispute. By contrast, the Court does have the information necessary to give final judgment on the plea of inadmissibility raised by the Commission in the proceedings at first instance.

66 On the grounds stated in paragraphs 51 to 62 of the present judgment, that plea of inadmissibility, based on the argument that the contested measure cannot be the subject of an action for annulment, must be rejected.

67 Consequently, the case must be referred back to the General Court so that it may examine IH's action for annulment of the contested measure.

Costs

68 Under the first paragraph of Article 122 of the Rules of Procedure, where the appeal is well-founded and the Court itself gives final judgment in the case, it is to make a decision as to costs. Under Article 69(2) of the Rules of Procedure, which is applicable to the procedure on appeal under Article 118 of those Rules, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings.

69 Since the appeal has been allowed and the Court has rejected the plea of inadmissibility raised by the Commission, the Commission must be ordered to pay the costs relating to the appeal and those arising at first instance relating to the plea of inadmissibility, as applied for by IH, and as to the remainder the costs must be reserved.

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

1. **Sets aside the judgment of the Court of First Instance of 5 June 2008 in Case T-141/05 *Internationaler Hilfsfonds* v *Commission*;**

2. **Rejects the plea of inadmissibility raised by the Commission of the European Communities before the Court of First Instance of the European Communities;**

3. Refers the case back to the General Court of the European Union for judgment on the claims of Internationaler Hilfsfonds eV seeking annulment of the decision of the Commission of the European Communities of 14 February 2005 refusing it access to certain documents in the Commission's possession;

4. Orders the European Commission to pay the costs of the present proceedings and those arising at first instance relating to the plea of inadmissibility;

5. Orders the costs to be reserved as to the remainder.

[Signatures]