JUDGMENT OF THE COURT OF FIRST INSTANCE (Second Chamber)
26 April 2005 *

In Joined Cases T-110/03, T-150/03 and T-405/03,

Jose Maria Sison, residing in Utrecht (Netherlands), represented by J. Fermon, A. Comte, H. Schultz and D. Gurses, lawyers,

applicant,

v

Council of the European Union, represented by M. Vitsentzatos, M. Bauer and M. Bishop, acting as Agents,

defendant,

APPLICATIONS for annulment of the three Council decisions of 21 January, 27 February and 2 October 2003 refusing access to documents relating to Council Decisions 2002/848/EC, 2002/974/EC and 2003/480/EC of 28 October 2002, 12 December 2002 and 27 June 2003 respectively implementing Article 2(3) of Regulation (EC) No 2580/2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism and repealing Decisions 2002/460/EC, 2002/848/EC and 2002/974/EC respectively,

* Language of the case: English.

THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES (Second Chamber),

composed of J. Pirrung, President, N.J. Forwood and S. Papasavvas, Judges,

Registrar: J. Plingers, Administrator,

having regard to the written procedure and further to the hearing on 17 November 2004,

gives the following

Judgment

Legal framework and background to the dispute

1 Article 4 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) provides:

'Exceptions

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

(a) the public interest as regards:

— public security,

— ...

— international relations,

...

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

— ...

— court proceedings and legal advice,

— ...

unless there is an overriding public interest in disclosure.

...'

2 On 28 October 2002, the Council of the European Union adopted Decision 2002/848/EC implementing Article 2(3) of Regulation (EC) No 2580/2001 on

specific restrictive measures directed against certain persons and entities with a view to combating terrorism and repealing Decision 2002/460/EC (OJ 2002 L 295, p. 12). That decision included the applicant in the list of persons whose funds and financial assets are to be frozen pursuant to that regulation ('the list at issue'). That list was updated, inter alia, by Council Decision 2002/974/EC of 12 December 2002 (OJ 2002 L 337, p. 85) and Council Decision 2003/480/EC of 27 June 2003 (OJ 2003 L 160, p. 81), repealing the previous decisions and establishing a new list. The applicant's name was retained on that list on each occasion.

3 Under Regulation No 1049/2001, the applicant requested, by confirmatory application of 11 December 2002, access to the documents which had led the Council to adopt Decision 2002/848 and disclosure of the identity of the States which had provided certain documents in that connection. By confirmatory application of 3 February 2003, the applicant requested access to all the new documents which had led the Council to adopt Decision 2002/974 maintaining him on the list at issue and disclosure of the identity of the States which had provided certain documents in that connection. By confirmatory application of 5 September 2003, the applicant specifically requested access to the report of the proceedings of the Permanent Representatives Committee (Coreper) 11311/03 EXT 1 CRS/CRP concerning Decision 2003/480, and to all the documents submitted to the Council prior to the adoption of Decision 2003/480, which form the basis of his inclusion and maintenance on the list at issue.

4 The Council's response to each of those applications, given by confirmatory decisions of 21 January 2003, 27 February 2003 and 2 October 2003 respectively ('the first decision refusing access', 'the second decision refusing access' and 'the third decision refusing access' respectively), was a refusal of even partial access.

5 As regards the first and second decisions refusing access, the Council stated that the information which had led to the adoption of the decisions establishing the list at issue was to be found in the summary reports of the Coreper proceedings of 23 October 2002 (13441/02 EXT 1 CRS/CRP 43) and 4 December 2002 (15191/02 EXT 1 CRS/CRP 51) respectively, which were classified as 'CONFIDENTIEL UE'.

6 The Council refused to grant access to those reports, invoking the first and third indents of Article 4(1)(a) of Regulation No 1049/2001. It stated, first, that 'disclosure of [those reports] and of the information in possession of the authorities of the Member States combating terrorism, could give the persons, groups or entities which are the subject of this information the opportunity to prejudice the efforts of these authorities and would thus seriously undermine the public interest as regards public security'. Secondly, in the Council's view, the 'disclosure of the information concerned would also undermine the protection of the public interest as regards international relations because third States' authorities [we]re also involved in the action taken in the fight against terrorism'. The Council refused to grant partial access to that information on the ground that it was 'all ... covered by the aforesaid exceptions'. The Council also refused to disclose the identity of the States which had provided the relevant information, stating that 'the originating authority(ies) of this information, after consultation in accordance with Article 9(3) of Regulation No 1049/2001, is (are) opposed to the disclosure of the information requested'.

7 As regards the third decision refusing access, the Council first stated that the applicant's request concerned the same document as that in respect of which disclosure had been refused to him by the first decision refusing access. The Council

confirmed its first decision refusing access and added that access to report 13441/02 also had to be refused on the basis of the exception relating to court proceedings (second indent of Article 4(2) of Regulation No 1049/2001). The Council then acknowledged that it had by mistake identified report 11311/03, relating to Decision 2003/480, as relevant. It explained in that regard that it had received no further information or documents justifying the revocation of Decision 2002/848 in so far as it concerns the applicant.

8 The applicant brought an action for annulment of Decision 2002/974, which was lodged at the Court Registry under number T-47/03.

Procedure and forms of order sought by the parties

9 By applications lodged at the Court Registry on 24 March 2003 (Case T-110/03), 30 April 2003 (Case T-150/03) and 12 December 2003 (Case T-405/03), the applicant brought the present actions challenging the first, second and third decisions refusing access respectively.

10 By orders of the President of the Second Chamber of the Court of First Instance of 5 December 2003 and 27 April 2004, Cases T-110/03, T-150/03 and T-405/03 were joined for the purposes of the written procedure, the oral procedure and the judgment, pursuant to Article 50 of the Rules of Procedure of the Court of First Instance.

11 The applicant claims that the Court should:

— annul the first (Case T-110/03), second (Case T-150/03) and third (Case T-405/03) decisions refusing access;

— order the Council to pay the costs.

12 The Council contends that the Court should:

— dismiss the actions;

— order the applicant to pay the costs.

Law

1. *Scope of the actions*

13 The Court observes at the outset that, in its first and second decisions refusing access (Cases T-110/03 and T-150/03), the Council, first, refused altogether to grant

access to reports 13441/02 and 15191/02 concerning the adoption of Decisions 2002/848 and 2002/974 respectively, relying on the exceptions relating to the public interest provided for by the first and third indents of Article 4(1)(a) of Regulation No 1049/2001. Second, the Council refused to disclose the identity of the States which had provided documents relating to the adoption of Decisions 2002/848 and 2002/974, relying on Article 9(3) of that regulation, relating to the treatment of sensitive documents.

14 The Court also observes that, in its third decision refusing access (Case T-405/03), the Council replied, as its principal consideration, that it had not had before it any new documents concerning the applicant since the adoption of Decision 2002/848, that is to say documents other than that to which it had refused him access by the first decision refusing access.

15 In the first place, the applicant argues in his plea alleging breach of the duty to state reasons that the reasons stated for the decisions refusing access are in contradiction with the Council's argument in Case T-47/03 that the basis for the applicant's inclusion in the list at issue consists of a public document, namely the decision of the Rechtseenheidskamer of the Arrondissementsrechtbank (District Court) te 's-Gravenhage (Netherlands) of 11 September 1997, annexed to the Council's defence in Case T-47/03.

16 The failure to state reasons alleged by the applicant actually constitutes a substantive complaint. The absence of a statement of reasons relating to the decision of 11 September 1997 in the decisions refusing access simply reflects a possible error of law relating to the Council's failure to grant access to the decision of 11 September 1997.

17 However, there is no need or no longer any need to rule on that possible error of law under Regulation No 1049/2001, since it is common ground that the applicant is in possession of the decision of 11 September 1997 (see, to that effect, Case T-311/00 *British American Tobacco (Investments)* v *Commission* [2002] ECR II-2781, paragraph 45).

18 In the second place, still in the context of his plea alleging breach of the duty to state reasons, the applicant claims, in Case T-405/03, that the third decision refusing access is inconsistent with the second decision refusing access. Thus, the third decision refusing access states that there have been no new documents concerning him since the adoption of Decision 2002/848, whereas the second decision refusing access indicates as relevant report 15191/02 relating to Decision 2002/974 and certain documents provided by various States.

19 In its written documents, the Council concedes that the second decision refusing access is erroneous in so far as it indicates the existence of relevant documents. Decision 2002/974 was adopted, so far as concerns the applicant, solely in the light of the documents which constituted the reason for the adoption of the previous decision, namely Decision 2002/848. Report 15191/02 therefore contains no new information concerning the applicant.

20 At the hearing, the applicant stated that he was requesting access to documents only in so far as those documents related to him. That statement is recorded in the minutes of the hearing.

21 The Court takes the view that there was no inconsistency, on the dates of adoption of the second and third decisions refusing access, between those two decisions. The

applicant's second request for access could well have been construed, at the time, as seeking access to all new documents which had led to the adoption of Decision 2002/974, thus including those not concerning the applicant, such as, according to the Council, report 15191/02. Indeed, Regulation No 1049/2001 does not relate only to access to documents concerning the requesting party, but organises a system of access which may be independent of that circumstance. It follows that the Council was properly entitled to attribute such a meaning to that request. However, the applicant's third request for access could very well be construed, in respect of its most important part, as referring only to documents concerning him. It follows that different replies could legitimately be given to different requests.

22 However, having regard to the applicant's statement at the hearing, the Court is of the opinion that the applicant is seeking access to report 15191/02 and to the identity of the States which provided documents relating to the adoption of Decision 2002/974 only in so far as those documents concern him.

23 It follows, in Case T-150/03, that the framework of the dispute depends on whether or not the new documents or information to which access was refused by the second decision refusing access concern the applicant. Such a question must be resolved by examining the validity of the third decision refusing access, according to which there are no new documents concerning the applicant other than those to which access was refused by the first decision refusing access.

24 Moreover, the Court notes that, in Case T-405/03, the applicant does not contest the implied refusal of access to report 11311/03, even though such access was specifically requested in the conclusions of the third confirmatory application for access. Access to that report is therefore not part of the dispute.

25 In the third place, the applicant complains that the Council failed, in Case T-405/03, to reply in detail to his arguments relating to the exceptions to access to documents, that it was wrong to rely on the exceptions to access to documents, in particular that relating to court proceedings as regards report 13441/02, and that it refused partial access to that document.

26 The Court observes, in this regard, that the third decision refusing access is purely confirmatory as regards the refusal of access to report 13441/02, access to which had already been refused by the first decision refusing access. It follows that the action brought in Case T-405/03, in so far as it relates to report 13441/02, is inadmissible (see, to that effect, order of the Court of First Instance in Case T-354/00 *Métropole télévision M6* v *Commission* [2001] ECR II-3177, paragraphs 34 and 35, and judgment in Case T-365/00 *AICS* v *Parliament* [2002] ECR II-2719, paragraph 30).

27 Consequently, the dispute in Case T-110/03 is limited to the refusal of access to report 13441/02 and to the refusal to disclose the identity of certain States which provided documents relating to the adoption of Decision 2002/848. The dispute in Case T-405/03 is limited to whether the Council had at its disposal new documents concerning the applicant, other than those which it had at its disposal for the adoption of Decision 2002/848. The dispute in Case T-150/03 hinges on whether report 15191/02 and the documents provided by certain States in relation to the adoption of Decision 2002/974 concern the applicant.

2. *The action in Case T-405/03*

28 In its third decision refusing access, the Council stated, in essence, that there were no new documents concerning the applicant other than the documents and information to which he had already been refused access by the first decision refusing access.

29 According to settled case-law, a presumption of legality attaches to any statement of the institutions relating to the non-existence of documents requested. Consequently, a presumption of veracity also attaches to such a statement. That is, however, a simple presumption which the applicant may rebut in any way by relevant and consistent evidence (see, to that effect, Case T-123/99 *JT's Corporation* v *Commission* [2000] ECR II-3269, paragraph 58, and *British American Tobacco (Investments)* v *Commission*, cited in paragraph 17 above, paragraph 35).

30 In that regard, the only evidence adduced by the applicant derives, first, from the Council's obligation to re-examine his case whenever it adopts any new decision maintaining him on the list at issue and, second, from the inconsistency between the second and third decisions refusing access.

31 First, as the Court has held in paragraph 21 above, there is no inconsistency between the second and third decisions refusing access. However, that does not prevent the Council, in the light of its new understanding of the applicant's request, as confirmed at the hearing, from taking the view that the reply given in the third decision is also valid with respect to the applicant's second request for access, as reinterpreted. Such a modification of the Council's position does not adversely affect the applicant, since the latter confirmed that the scope of his request was to that effect. Consequently, that modification constitutes neither evidence showing the existence of documents concerning the applicant and relating to Decision 2003/480 nor failure to state reasons affecting the third decision refusing access.

32 Second, the third decision refusing access states, firstly, that the statement that report 11311/03 contained material which was used as a basis for the adoption of Decision 2003/480 in so far as that decision concerns the applicant was erroneous (point 3) and, secondly, that the Council had received no new documents justifying the revocation of Decision 2002/848 as regards the applicant (point 4). It is apparent from this that the Council claims to have adopted Decision 2003/480 maintaining the applicant on the list at issue without taking into account any new documents

concerning him. A possible obligation on the Council to re-examine the applicant's case whenever it adopts a new decision does not constitute sufficient evidence to permit the inference that the Council examined new documents concerning the applicant. It must again be pointed out that the question whether the Council was entitled to adopt Decision 2003/480 in the circumstances of this case does not concern the present dispute relating to access to documents.

33 It follows that, in the absence of relevant and consistent evidence to the contrary, the Council's statement — to the effect that no new documents concerning the applicant had been taken into account by the Council since the adoption of Decision 2002/848 — must be regarded as correct.

34 It must therefore be held that the non-existence of the documents requested by the applicant in his third request for access is established to the requisite legal standard.

35 Consequently, in so far as it is admissible, the action in Case T-405/03 is dismissed as unfounded.

3. *The action in Case T-150/03*

36 As has been held in paragraph 33 above, there is no evidence for the existence of new documents concerning the applicant which had been taken into account by the Council since the adoption of Decision 2002/848. Moreover, there is no evidence that the Council's new statement — which appears in the defence lodged in Case T-405/03 — that report 15191/02 contained 'no new information concerning [the applicant]' is erroneous. First, as has been held in paragraph 21 above, the Council's new position is not inconsistent with that set out in the second decision refusing

access, in that it can be explained by the Council's new understanding of the correct scope of the applicant's request. Second, no evidence, other than that purported inconsistency, capable of calling in question that new statement by the Council has been adduced by the applicant.

37 It follows that the existence of new documents concerning the applicant for the purpose of adopting Decision 2002/974, including material in report 15191/02, has not been proved.

38 Having regard to the applicant's statement at the hearing, to the effect that he seeks only documents concerning him, it must be held that the non-existence of the documents requested in connection with the adoption of Decision 2002/974 has been proved to the requisite legal standard.

39 Likewise, having regard to the applicant's statement at the hearing, there is no longer any need to examine the lawfulness of the second decision refusing access in the light of the reasons for refusing access which are set out in it.

40 Consequently, the action in Case T-150/03 is dismissed as unfounded.

4. *The action in Case T-110/03*

41 The applicant puts forward three pleas in law, alleging infringement of the right of access to documents, breach of the duty to state reasons and breach of the general principles of law relating to the rights of the defence. In view of the fact that essentially identical pleas in law were put forward in Case T-150/03 and of the fact that the cases were joined for the purposes of the written procedure, giving rise to written pleadings common to Cases T-110/03 and T-150/03, account must also be taken of the applicant's arguments in Case T-150/03.

42 The Court finds that the third plea is in fact a horizontal plea the premiss of which forms part of the other two pleas. It is therefore appropriate to examine the applicant's pleas in the reverse order from that in which they were put forward.

43 However, it is first necessary to deal with the question of the scope of the Court's review in this case.

Scope of the review of legality

44 The Council submits that the Court's review concerning access to the type of documents at issue in this case is restricted (Case T-14/98 *Hautala* v *Council* [1999] ECR II-2489). The applicant rejects that contention on the ground that the present cases display appreciable differences from the case which gave rise to the judgment in *Hautala* v *Council*.

45 The Court recalls that the rule, in law, is that the public is to have access to the documents of the institutions and the power to refuse access is the exception. A decision refusing access is valid only if it is founded on one of the exceptions provided for by Article 4 of Regulation No 1049/2001. According to settled case-law, those exceptions must be construed and applied strictly so as not to defeat the application of the general principle enshrined in that regulation (see, by analogy, Case T-211/00 *Kuijer* v *Council* [2002] ECR II-485, paragraph 55, and the case-law cited).

46 With regard to the scope of the Court's review of the legality of a decision refusing access, it should be noted that, in *Hautala* v *Council*, cited in paragraph 44 above, paragraph 71, and *Kuijer* v *Council*, cited in paragraph 45 above, paragraph 53, the Court recognised that the Council enjoys a wide discretion in the context of a decision refusing access founded, as in this case, in part, on the protection of the public interest concerning international relations. In *Kuijer* v *Council*, such a discretion was conferred on an institution when it justifies its refusal of access by reference to the protection of the public interest in general. Thus, in areas covered by the mandatory exceptions to public access to documents, provided for in Article 4(1)(a) of Regulation No 1049/2001, the institutions enjoy a wide discretion.

47 Consequently, the Court's review of the legality of decisions of the institutions refusing access to documents on the basis of the exceptions relating to the public interest provided for in Article 4(1)(a) of Regulation No 1049/2001 must be limited to verifying whether the procedural rules and the duty to state reasons have been complied with, the facts have been accurately stated, and whether there has been a manifest error of assessment of the facts or a misuse of powers (see, by analogy, *Hautala* v *Council*, paragraphs 71 and 72, confirmed on appeal, and *Kuijer* v *Council*, paragraph 53).

The third plea in law, alleging breach of the general principles of law relating to the rights of the defence

Arguments of the parties

48 By his third plea, the applicant claims that the Council acted in breach of the general principles of Community law enshrined in Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and the principle of proportionality. He submits that his inclusion on the list at issue is tantamount to a criminal charge (Eur. Court H.R., judgment of 27 February 1980 Deweer, Series A no. 35). The refusal to grant access to the documents requested constitutes a serious infringement of the right to a fair trial and particularly of the guarantees provided for by Article 6(3) of the ECHR in the context of the applicant's action for annulment of Decision 2002/974 (Case T-47/03). The Council also acted in breach of the principle of proportionality by disregarding the applicant's right to be informed of the reasons for his inclusion on the list at issue.

49 The Council contends that the applicant's arguments fall outside the scope of the present proceedings since these cases do not concern the lawfulness of Regulation No 2580/2001 as the basis for the applicant's inclusion on the list at issue. For the purpose of the exceptions laid down by Article 4(1) of Regulation No 1049/2001, the situation of the person requesting access is irrelevant.

Findings of the Court

50 It should be recalled, first, that, under Article 2(1) of Regulation No 1049/2001, the beneficiaries of the right of access to documents of the institutions are '[a]ny citizen of the Union, and any natural or legal person residing or having its registered office

in a Member State'. That provision makes it clear that the purpose of the regulation is to guarantee access for everyone to public documents and not only access for the requesting party to documents concerning him.

51 Second, the exceptions to access to documents, provided for by Article 4(1)(a) of Regulation No 1049/2001, are framed in mandatory terms. It follows that the institutions are obliged to refuse access to documents falling under any one of those exceptions once the relevant circumstances are shown to exist (see, by analogy, Case T-105/95 *WWF UK* v *Commission* [1997] ECR II-313, paragraph 58, and Case T-20/99 *Denkavit Nederland* v *Commission* [2000] ECR II-3011, paragraph 39).

52 Consequently, the particular interest which may be asserted by a requesting party in obtaining access to a document concerning him personally cannot be taken into account when applying the mandatory exceptions provided for by Article 4(1)(a) of Regulation No 1049/2001.

53 The applicant claims, in essence, that the Council was obliged to grant him access to the documents requested in so far as those documents are necessary in order for him to secure his right to a fair trial in Case T-47/03.

54 Since the Council relied on the mandatory exceptions provided for by Article 4(1)(a) of Regulation No 1049/2001 in the first decision refusing access, it cannot be accused of not having taken into account any particular need of the applicant to have the requested documents made available to him.

55 Consequently, even if those documents prove necessary for the applicant's defence in Case T-47/03, which is a question to be considered in that case, that circumstance is not relevant for the purpose of assessing the validity of the first decision refusing access.

56 Accordingly, the third plea in law must be rejected as unfounded.

The second plea in law, alleging failure to state reasons

Arguments of the parties

57 By his second plea, the applicant maintains that the Council confined itself to giving a short and formulaic response in refusing access on the basis of prejudice to the public interest or the 'authorship rule' and in refusing partial access. In so doing, the Council failed to identify either the information contained in each document or the documents attributable to certain States. Nor did it make clear the reasons for its refusals in spite of the requirements laid down in the case-law (Case T-174/95 *Svenska Journalistförbundet* v *Council* [1998] ECR II-2289, paragraph 112, and Case T-188/98 *Kuijer* v *Council* [2000] ECR II-1959, paragraphs 37 and 38). Thus, the applicant was not able to ascertain the reasons put forward by the Council and the Court is not able to review them.

58 The Council notes, as a preliminary point, that the statements of reasons for the first and second decisions refusing access are identical since the context of both cases is essentially the same. As regards the reasons pertaining to the public interest, the Council relies on Article 9(4) of Regulation No 1049/2001, under which any decision refusing access to a sensitive document is to give reasons in a manner which does not harm the interests protected in Article 4. Moreover, the statement of reasons for

the first and second decisions refusing access complies with the requirements of the case-law, regard being had, in particular, to the factual and legal context of the present cases. As to application of the 'authorship rule', the decisions refusing access clearly identify the relevant documents. The refusal of the originators of those documents is a sufficient reason to refuse to grant access to them.

Findings of the Court

59 According to settled case-law, the statement of reasons required by Article 253 EC must be appropriate to the act at issue and must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted the measure in question in such a way as to enable the persons concerned to ascertain the reasons for the measure and to enable the competent Community Court to exercise its power of review. It is not necessary for the reasoning to go into all the relevant facts and points of law, since the question whether the statement of reasons meets the requirements of that article 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, inter alia, Case C-41/00 P *Interporc* v *Commission* [2003] ECR I-2125, paragraph 55, and the case-law cited).

60 In the case of a request for access to documents, where the institution in question refuses such access, it must demonstrate in each individual case, on the basis of the information at its disposal, that the documents to which access is sought do indeed fall within the exceptions listed in Regulation No 1049/2001 (see, by analogy, Joined Cases C-174/98 P and C-189/98 P *Netherlands and Van der Wal* v *Commission* [2000] ECR I-1, paragraph 24). However, it may be impossible to give reasons justifying the need for confidentiality in respect of each individual document without disclosing the content of the document and, thereby, depriving the exception of its very purpose (see, by analogy, *WWF UK* v *Commission*, cited in paragraph 51 above, paragraph 65).

61 Under that case-law, it is therefore for the institution which has refused access to a document to provide a statement of reasons from which it is possible to understand and ascertain, first, whether the document requested does in fact fall within the sphere covered by the exception relied on and, second, whether the need for protection relating to that exception is genuine.

62 In this case, with regard to report 13441/02, the Council clearly specified the exceptions on which it was basing its refusal by relying on both the first and third indents of Article 4(1)(a) of Regulation No 1049/2001. It set out in what respects those exceptions were relevant in relation to the documents concerned by referring to the fight against terrorism and to the involvement of third States. Moreover, it provided a brief explanation relating to the need for protection relied on. Thus, as regards public security, it explained that disclosure of the documents would give the persons who were the subject of that information the opportunity to undermine the action taken by the public authorities. As regards international relations, it briefly referred to the involvement of third States in the fight against terrorism. The brevity of that statement of reasons is acceptable in light of the fact that mentioning additional information, in particular making reference to the content of the documents concerned, would negate the purpose of the exceptions relied on.

63 With regard to the refusal of partial access to those documents, the Council expressly stated, firstly, that it had considered that possibility and, secondly, the reason for the rejection of that possibility, namely that the documents in question were covered in their entirety by the exceptions relied on. For the same reasons as before, the Council could not identify precisely the information contained in those documents without negating the purpose of the exceptions relied on. The fact that that statement of reasons appears formulaic does not, in itself, constitute a failure to state reasons since it does not prevent either the understanding or the ascertainment of the reasoning followed.

64 With regard to the identity of the States which provided relevant documents, it must be noted that the Council itself drew attention to the existence of documents from

third States in its original decisions refusing access. First, the Council specified the exception put forward in that regard, namely Article 9(3) of Regulation No 1049/2001. Second, it provided the two criteria used for the application of that exception. In the first place, it implicitly but necessarily took the view that the documents in question were sensitive documents. That factor appears comprehensible and ascertainable in the light of the relevant context, and in particular in the light of the classification of the documents in question as 'CONFIDENTIEL UE'. In the second place, the Council explained that it had consulted the authorities concerned and had taken note of their opposition to any disclosure of their identity.

65 Despite the relative brevity of the statement of reasons for the first decision refusing access (two pages), the applicant was fully able to understand the reasons for the refusals given to him and the Court has been able to carry out its review. The Council therefore duly provided statements of reasons for those decisions.

66 Accordingly, the second plea in law must be rejected as unfounded.

The first plea in law, alleging infringement of the right of access to documents

Arguments of the parties

67 By his first plea, the applicant claims that the Council infringed the second paragraph of Article 1 EU, Article 6(1) EU, Article 255 EC and Article 4(1)(a) and (6) and Article 9(3) of Regulation No 1049/2001. By the first part of this plea, the applicant submits that the Council never conducted a concrete assessment of whether disclosure of the information requested was likely to harm the public interest. The short and very general explanations given in that regard do not comply with the principle that exceptions to the right of access to documents, as deriving

from Article 255 EC and from Regulation No 1049/2001, are to be interpreted strictly. The applicant must have the right to know the reasons for his inclusion on the list at issue and those reasons cannot therefore be regarded as undermining public security. The mere fact that the activities of the institutions entail the involvement of third countries is not sufficient for those institutions to justify their refusal of access by reference to the protection of international relations. The Council acted in breach of its duty to balance its own interests and those of the applicant.

68 By the second part of this plea, the applicant submits that the formulaic explanation put forward by the Council for refusing partial access to the documents could be reproduced systematically in every decision refusing this type of access. In the present case, the Council did not seriously examine the possibility of granting partial access.

69 By the third part of this plea, the applicant argues that a strict interpretation of the 'authorship rule' required the Council to identify the authors of the documents mentioned and the exact nature of the documents concerned in order to put him in a position to make an application to those authors for access.

70 The Council points first of all to the specific rules provided for by Article 9(2) of Regulation No 1049/2001 for 'sensitive documents'. In this instance, the fight against terrorism requires a particularly cautious approach. The Council explains the procedure for handling an application for access to this type of document, showing that the applications for access and partial access were the subject of a concrete assessment. The Council makes it clear that the decisions refusing access were adopted unanimously. The applicant has not shown that there was a manifest error of assessment in this case. A refusal of access based on Article 4(1) of Regulation No 1049/2001 does not require the requesting party's situation to be taken into account

and thus requires no balancing of interests. As regards the authorship rule, the Council points out that the originator of a document classified as sensitive has complete control over that document, including information about its very existence.

Findings of the Court

— The exceptions relating to the public interest

71 It must be pointed out, at the outset, that the Council was not obliged, under the exceptions provided for in Article 4(1)(a) of Regulation No 1049/2001, to take into account the applicant's particular interest in obtaining the documents requested (see paragraphs 52 and 54 above).

72 It should be noted that the document requested, namely report 13441/02, relates to Decision 2002/848. Since that decision falls directly within the scope of the fight against terrorism, the document requested, which was used as a basis for that decision, plainly falls within the same category.

73 It must further be observed that the document requested is classified as 'CONFIDENTIEL UE'. It thus falls within the category of sensitive documents, provisions for the treatment of which are laid down in Article 9 of Regulation No 1049/2001. However, although that classification confirms the nature of the document requested and makes it subject to special treatment, it cannot, on its own, justify application of the grounds for refusal provided for in Article 4(1) of Regulation No 1049/2001.

74 With regard, in the first place, to the protection of the public interest as regards public security, it must be stated that the document requested does in fact relate to that sphere since, according to the request for access itself, it was used as a basis for a decision identifying persons, groups or entities suspected of terrorism.

75 However, the fact that the document requested concerns public security cannot in itself justify application of the exception invoked (see, by analogy, *Denkavit Nederland* v *Commission*, cited in paragraph 51 above, paragraph 45).

76 It is therefore for the Court to ascertain whether, in this case, the Council made a manifest error of assessment in considering that disclosure of the document requested could undermine the protection of the public interest in question.

77 In that regard, it must be accepted that the effectiveness of the fight against terrorism presupposes that information held by the public authorities on persons or entities suspected of terrorism is kept secret so that that information remains relevant and enables effective action to be taken. Consequently, disclosure to the public of the document requested would necessarily have undermined the public interest in relation to public security. In that regard, the distinction put forward by the applicant between strategic information and information concerning him personally cannot be accepted. Any personal information would necessarily reveal certain strategic aspects of the fight against terrorism, such as the sources of information, the nature of that information or the level of surveillance to which persons suspected of terrorism are subjected.

78 The Council did not, therefore, make a manifest error of assessment in refusing access to report 13441/02 for reasons of public security.

79 With regard, in the second place, to the protection of the public interest as regards international relations, it is obvious, in the light of Decision 2002/848 and Regulation No 2580/2001, that its purpose, namely the fight against terrorism, falls within the scope of international action arising from United Nations Security Council resolution 1373 (2001) of 28 September 2001. As part of that global response, States are called upon to work together. The elements of that international cooperation are very probably, or even necessarily, to be found in the document requested. In any event, the applicant has not disputed the fact that third States were involved in the adoption of Decision 2002/848. On the contrary, he has requested that the identity of those States be disclosed to him. It follows that the document requested does fall within the scope of the exception relating to international relations.

80 That international cooperation concerning terrorism presupposes a confidence on the part of States in the confidential treatment accorded to information which they have passed on to the Council. In view of the nature of the document requested, the Council was therefore able to consider, rightly, that disclosure of that document could compromise the position of the European Union in international cooperation concerning the fight against terrorism.

81 In that regard, the applicant's argument — to the effect that the mere fact that third States are involved in the activities of the institutions cannot justify application of the exception in question — must be rejected for the reasons set out above. Contrary to what that argument assumes, the cooperation of third States falls within a particularly sensitive context, namely the fight against terrorism, which justifies keeping that cooperation secret. Moreover, read as a whole, the decision makes it clear that the States concerned even refused to allow their identity to be disclosed.

82 It follows that the Council did not make a manifest error of assessment in considering that disclosure of the document requested was likely to undermine the public interest as regards international relations.

83 In so far as the applicant claims, generally, that the Council never concretely examined whether disclosure of the information requested was likely to undermine the public interest, that argument must be rejected. First, it follows from the foregoing that the Council correctly applied the exceptions relating to the protection of the public interest. Second, the Council described, without this being called in question by the applicant, the procedure for considering requests for access to sensitive documents, under which both the officials authorised for that purpose and the delegations of the Member States were able to examine the documents in question and to express their views on the response to be given to the applicant's requests for access. Following the conclusion of that procedure, the Council unanimously approved the refusal of access to the documents requested. It follows that the mere fact, put forward by the applicant, that the statement of reasons is short does not mean that the Council's concrete examination was deficient.

84 In so far as the applicant claims that the brevity and formulaic character of the statement of reasons provided in that regard are indicative of failure to carry out a concrete examination, that argument must also be rejected. It is true that the statement of reasons on this point appears to be broadly identical in the first and second decisions refusing access. However, account must be taken of the fact that it may be impossible to give the reasons justifying the refusal of access to each document, or in this instance to each piece of information in the documents, without disclosing the content of the document or an essential aspect of it and thereby depriving the exception of its very purpose (see, to that effect, *WWF UK* v *Commission*, cited in paragraph 51 above, paragraph 65). In this case, because the document requested was covered by the public interest exceptions relating to public security and international relations, any more complete and individualised demonstration as regards its content could only jeopardise the confidentiality of information intended, on the basis of those exceptions, to remain secret.

85 Consequently, the first part of the first plea must be rejected.

— Partial access

86 The applicant claims that the Council did not genuinely examine the possibility of partial access to the document requested.

87 The Court finds, in the first place, that the first decision refusing access shows that the Council did in fact examine the possibility of partial access to the documents requested. In the absence of solid evidence to the contrary, a presumption of legality must be made in favour of the Council's statement to that effect in the contested decision (see, in that respect, the case-law cited in paragraph 29 above).

88 In the second place, the brevity and formulaic character of the statement of reasons provided in that regard by the first decision refusing access cannot be taken as evidence of a failure to carry out a concrete examination. Again, it is true that the statement of reasons appears broadly identical in that respect in the first and second decisions refusing access. However, in this case, because all the passages of the document requested are covered by the exceptions put forward, any demonstration which was more complete and individualised as regards its content could only jeopardise the confidentiality of information intended, on the basis of those exceptions, to remain secret.

89 Consequently, the second part of the first plea must be rejected.

— Disclosure of the identity of the States responsible for certain documents

90 The applicant claims, in essence, that a strict interpretation of the authorship rule would require the Council to indicate the identity of the third States which

submitted documents relating to Decision 2002/848 as well as the exact nature of those documents in order to enable him to make applications to their authors for access to those documents.

91 It should be noted at the outset that the applicant's argument is essentially based on old case-law relating to the Code of conduct of 6 December 1993 concerning public access to Council and Commission documents (OJ 1993 L 340, p. 41; 'the code of conduct') implemented by Council Decision 93/731/EC of 20 December 1993 on public access to Council documents (OJ 1993 L 340, p. 43) and by Commission Decision 94/90/ECSC, EC, Euratom of 8 February 1994 on public access to Commission documents (OJ 1994 L 46, p. 58).

92 Under the code of conduct, where the author of the document held by an institution was a third person, the application for access was to be sent direct to that person. The Court concluded from this that the institution was required to inform the person concerned of the identity of the author of the document so that he could contact that author directly (*Interporc* v *Commission*, cited in paragraph 59 above, paragraph 49).

93 However, under Article 4(4) and (5) of Regulation No 1049/2001, it is for the institution in question itself to consult the third party who is the author unless the correct response, affirmative or negative, to the request for access is inherently obvious. In the case of the Member States, they may request that their agreement be provided.

94 The authorship rule, as referred to in the code of conduct, therefore underwent a fundamental change in Regulation No 1049/2001. As a result, the identity of the author assumes much less importance than under the previous rules.

95 In addition, for sensitive documents, Article 9(3) of Regulation No 1049/2001 provides that such documents 'shall be recorded in the register or released only with the consent of the originator'. It must therefore be held that sensitive documents are covered by a derogation the purpose of which is clearly to guarantee the secrecy of their content and even of their existence.

96 The Council was therefore not obliged to disclose the documents in question, of which States are the authors, relating to the adoption of Decision 2002/848, including the identity of those authors, in so far as, firstly, those documents are sensitive documents and, secondly, the States responsible for them have refused to agree to their disclosure.

97 It must be observed that the applicant disputes neither the legal basis put forward by the Council, namely Article 9(3) of Regulation No 1049/2001, which implies that the documents concerned are considered to be sensitive, nor the fact that the Council obtained an adverse opinion from the States responsible for the documents concerned.

98 For the sake of completeness, there is no doubt that the documents in question are sensitive documents. First, the report of the Coreper meeting at which the documents were discussed was classified as 'CONFIDENTIEL UE', as Article 9(1) of Regulation No 1049/2001 provides. It follows that those documents acquire such a classification presumptively. Second, documents communicated by third States in connection with the fight against terrorism could only fail to be so classified in the light of an express statement to that effect, which does not exist in this case. Moreover, in view of the presumption of legality attaching to any statement of an institution, it should be noted that the applicant has not adduced any evidence that the Council's statement — that it had received an adverse opinion from the States concerned — is erroneous.

99 Consequently, the Council was fully entitled to refuse to disclose the documents in question, including the identity of their authors.

100 Accordingly, the third part of the first plea in law must be rejected.

101 It follows from all the foregoing that the application must be dismissed in its entirety.

Costs

102 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, he must be ordered to pay the costs in accordance with the form of order sought by the Council.

On those grounds,

THE COURT OF FIRST INSTANCE (Second Chamber)

hereby:

1. Dismisses the applications in Cases T-110/03 and T-150/03 as unfounded;

2. **Dismisses part of the application in Case T-405/03 as inadmissible and the remainder as unfounded;**

3. **Orders the applicant to pay the costs in Cases T-110/03, T-150/03 and T-405/03.**

Pirrung Forwood Papasavvas

Delivered in open court in Luxembourg on 26 April 2005.

H. Jung
Registrar

J. Pirrung
President

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