JUDGMENT OF THE GENERAL COURT (Fourth Chamber)
14 February 2012 (*)

(Access to documents – Regulation (EC) No 1049/2001 – Documents relating to an infringement procedure which has been closed – Documents originating from a Member State – Grant of access – Prior agreement of the Member State)

In Case T–59/09,

Federal Republic of Germany, represented by M. Lumma, B. Klein and A. Wiedmann, acting as Agents,

applicant,

supported by

Kingdom of Spain, represented by M. Muñoz Pérez, and subsequently by S. Centeno Huerta, acting as Agents,

and by

Republic of Poland, represented initially by M. Dowgielewicz, and subsequently by M. Szpunar and B. Majczyna, acting as Agents,

interveners,

v

European Commission, represented by B. Smulders, P. Costa de Oliveira and F. Hoffmeister, acting as Agents,

defendant,

supported by

Kingdom of Denmark, represented initially by J. Bering Liisberg and B. Weis Fogh, and subsequently by S. Juul Jørgensen and C. Vang, acting as Agents,

by

Republic of Finland, represented by J. Heliskoski, acting as Agent,

and by

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

interveners,

APPLICATION for annulment of Commission Decision SG.E.3/RG/mbp D (2008) 10067 of 5 December 2008 granting some citizens access to certain documents submitted by the Federal Republic of Germany in infringement procedure No 2005/4569,

THE GENERAL COURT (Fourth Chamber),

composed of I. Pelikánová, President, K. Jürimäe and M. van der Woude (Rapporteur), Judges,

Registrar: T. Weiler, Administrator,

having regard to the written procedure and further to the hearing on 13 September 2011,

gives the following

Judgment

Background to the dispute

By letter of 19 July 2008, the Commission of the European Communities received an application for access to various documents under 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 documents requested had been drawn up in the context of infringement procedure No 2005/4569, which the Commission had initiated in respect of the Federal Republic of Germany on the view that a German administrative provision, relating to the conditions for the registration of imported second-hand private cars, was in breach of Articles 28 EC and 30 EC. After sending the Federal Republic of Germany a letter of formal notice on 18 October 2005, the Commission closed the procedure on 28 June 2006.

Disclosure of the following documents was sought: (i) the letter from the Federal Republic of Germany of 16 February 2006 in response to the Commission's letter of formal notice of 18 October 2005; (ii) the minutes of the meeting on 27 March 2006 between representatives of the German authorities and representatives of the Commission; and (iii) a summary for the Commission's internal use concerning the progress of the procedure. Documents (ii) and (iii) contained references to the letter from the Federal Republic of Germany of 16 February 2006.

By email of 23 July 2008, the Commission informed the German authorities of the application for access to the documents.

By email of 31 July 2008, the Federal Republic of Germany informed the Commission that it objected to access being granted to those documents, on the basis of the exceptions provided for in the third indent of Article 4(1)(a) of Regulation No 1049/2001, concerning protection of the public interest as regards international relations, and in the third indent of Article 4(2) of that regulation, concerning protection of the purpose of inspections, investigations and audits. According to the German authorities, disclosure would adversely affect the cooperation in good faith between the Federal Republic of Germany and the Commission in the context of the infringement procedure. The German authorities also contended that, under German law, relations between the institutions of the European Union and the Federal Republic of Germany were covered by the concept of 'international relations'.

By letter of 5 August 2008, the Commission informed the requesting parties that the Federal Republic of Germany objected to disclosure and advised them of the reasons put forward by that Member State in support of its objection. The Commission told the requesting parties that it was therefore unable to grant their request. Nevertheless, referring to Case C-64/05 P *Sweden* v *Commission* [2007] ECR I-11389, the Commission left it open to the requesting parties to seek a review of the decision.

The requesting parties submitted a confirmatory application, challenging the validity of the reasons given by the Federal Republic of Germany.

By letter of 15 September 2008, the Commission asked the Federal Republic of Germany to reconsider its position on the basis of Case C-266/05 P *Sison* v *Council* [2007] ECR I-1233, paragraphs 67 to 72, as regards the exception concerning protection of international relations, and on the basis of Joined Cases T-391/03 and T-70/04 *Franchet and Byk* v *Commission* [2003] ECR II-2023, paragraph 113, and Case T-194/04 *Bavarian Lager* v *Commission* [2007] ECR II-4523, paragraphs 148 and 149, as regards the exception concerning protection of the purpose of inspections, investigations and audits.

By letter of 23 September 2008, the German authorities re-stated their position that no access should be granted to the documents at issue, giving the reasons on which that position was based.

By Decision SG.E.3/RG/mbp D (2008) 10067 of 5 December 2008 ('the contested decision'), the Commission decided to grant the requesting parties access to the documents. In support of its decision, the Commission claimed that the arguments put forward by the Federal Republic of Germany as justification for its objection to disclosure of the documents were, prima facie, unfounded and that, in consequence, it was necessary to conclude that the German authorities had not provided sufficient evidence to justify application of either of the exceptions relied upon. In accordance with Article 5(6) of Commission Decision 2001/937/EC, ECSC, Euratom of 5 December 2001 amending its rules of procedure (OJ 2001 L 345, p. 94), the Commission informed the German authorities of its intention to disclose the documents at issue after a period of 10 working days and drew their attention to the remedies available if they wished to contest such disclosure.

By letter of 18 December 2008, the Federal Republic of Germany notified the Commission of its objection to disclosure of the requested documents. The Federal Republic of Germany announced that it intended to bring an action for annulment and requested that the documents not be handed over before those proceedings were concluded.

By letter of 30 January 2009, the Commission informed the Federal Republic of Germany that it was entitled to apply to the General Court for an interim order to prevent disclosure of the documents sought. However, the Federal Republic of Germany did not apply for interim relief.

The Commission handed over the documents at issue to the requesting parties.

Procedure and forms of order sought

By document lodged at the Court Registry on 11 February 2009, the Federal Republic of Germany brought the present action.

By documents lodged at the Court Registry on 8 June and 7 July 2009, respectively, the Kingdom of Spain and the Republic of Poland applied for leave to intervene in support of the form of order sought by the Federal Republic of Germany.

By documents lodged at the Court Registry on 18 June, 29 June and 1 July 2009, respectively, the Kingdom of Sweden, the Kingdom of Denmark and the Republic of Finland applied for leave to intervene in support of the form of order sought by the Commission.

By order of 3 September 2009, the President of the Sixth Chamber of the General Court granted those applications for leave to intervene.

Following a change in the composition of the Chambers of the Court, the Judge-Rapporteur was assigned to the Fourth Chamber, to which the present case was accordingly allocated.

The Federal Republic of Germany, supported by the Kingdom of Spain and the Republic of Poland, claims that the Court should:

annul the contested decision;

order the Commission to pay the costs.

The Commission, supported by the Kingdom of Denmark, the Republic of Finland and the Kingdom of Sweden, contends that the Court should:

dismiss the action;

order the Federal Republic of Germany to pay the costs.

Law

The Federal Republic of Germany puts forward a single plea, alleging infringement of Article 4(1), (2), (3) and (5) of Regulation No 1049/2001, read in the light of the principle of cooperation in good faith, laid down in Article 10 EC.

The principal submission made by the Federal Republic of Germany is in essence that, by failing to respect the objection of that Member State to disclosure of the documents at issue, the Commission exceeded its powers of review as defined by the Court of Justice in *Sweden* v *Commission*, paragraph 6 above, thereby infringing Article 4(5) of Regulation No 1049/2001.

In the alternative, the Federal Republic of Germany submits that the reasons which it gave for objecting to disclosure of the documents at issue – an objection based on the exceptions provided for in Article 4(1), (2) and (3) of Regulation No 1049/2001 – cannot in any event be considered to be manifestly incorrect.

The procedure under Article 4(5) of Regulation No 1049/2001

The parties differ as to the extent to which, in the context of the procedure under Article 4(5) of Regulation No 1049/2001, an institution – in the present case, the Commission – must review the reasons given by a Member State where it objects, on the basis of the exceptions provided for in Article 4(1), (2) and (3) of that regulation, to disclosure of the documents requested.

The Federal Republic of Germany, supported by the Kingdom of Spain, maintains that the institution is not entitled to review the validity of the reasons given by the Member State concerned. Whilst supporting the form of order sought by the Federal Republic of Germany, the Republic of Poland states that the Commission may, at the very most, determine whether, in relying on an exception, the Member State has misapplied the provisions of Regulation No 1049/2001, manifestly and beyond all doubt.

The Commission, supported by the Kingdom of Denmark, the Republic of Finland and the Kingdom of Sweden, contends that it is required to examine whether, in the light of the circumstances of the case and of case-law, the reasons given by the Member State are, prima facie, valid.

It should be noted that, in accordance with Article 2(3) of Regulation No 1049/2001, the right of access to documents held by the institutions extends not only to documents drawn up by those institutions but also to those received from third parties, including the Member States, as expressly stated in Article 3 (b) of that regulation.

By so providing, the European Union ('EU') legislature abolished the authorship rule which had applied prior to the adoption of Regulation No 1049/2001. Under that rule, where the author of a document held by an institution was a third party, the request for access to the document had to be made directly to the author of the document.

Since the entry into force of Regulation No 1049/2001, all documents held by the institutions, whether drawn up by those institutions or originating from Member States or other third parties, fall within the scope of that regulation and, as a consequence, the provisions of Regulation No 1049/2001 – including those relating to the substantive exceptions to the right of access – must be complied with in respect of those documents.

As regards documents originating from a third party, Article 4(4) of Regulation No 1049/2001 states that, unless it is clear that the document must or must not be disclosed, the institution is to consult the third party with a view to assessing whether the exceptions provided for in Article 4(1) or (2) of that regulation are applicable.

As regards documents originating from a Member State, Article 4(5) of Regulation No 1049/2001 provides that a Member State may request an institution not to disclose a document originating from that State without its prior agreement. According to case-law, Article 4(5) of Regulation No 1049/2001 thus gives the Member State the opportunity to participate in the taking of the decision which the institution is required to adopt, and to that end establishes a decision-making process for determining whether the substantive exceptions listed in Article 4(1), (2) and (3) preclude access being given to the document concerned (see, to that effect, *Sweden* v *Commission*, paragraph 6 above, paragraphs 76, 81, 83 and 93).

Article 4(5) of Regulation No 1049/2001 entrusts the implementation of those rules of EU law jointly to the institution and the Member State which has made use of the possibility under that provision and they are obliged, in accordance with their duty under Article 10 EC to cooperate in good faith, to act and cooperate in such a way that those rules are effectively applied (see, to that effect, *Sweden* v *Commission*, paragraph 6 above, paragraph 85).

It follows, first, that an institution which receives a request for access to a document originating from a Member State must, as soon as it has notified the request to the Member State, commence without delay a genuine dialogue with that Member State concerning the possible application of the exceptions provided for in Article 4(1), (2) and (3) of Regulation No 1049/2001, with attention being paid in particular to the need for the institution to be able to adopt a position within the time-limits within which Articles 7 and 8 of the regulation require it to decide on the request for access (see, to that effect, *Sweden* v *Commission*, paragraph 6 above, paragraph 86).

If, following that dialogue, the Member State concerned objects to disclosure of the document in question, it is obliged to state the reasons for that objection with reference to those exceptions. The institution cannot accept a Member State's objection to disclosure of a document originating from that State if the objection gives no reasons at all or if the reasons are not framed in terms of the exceptions listed in Article 4(1), (2) and (3) of Regulation No 1049/2001. Where, despite an express request to that effect from the institution to the Member State, the State still fails to provide the institution with such reasons, the institution must – if, for its part, it finds that none of those exceptions applies – allow access to the document applied for (*Sweden* v *Commission*, paragraph 6 above, paragraphs 87 and 88).

In that regard, it should be noted that Article 4(5) of Regulation No 1049/2001 does not in any way confer on the Member State a general and unconditional right of veto, so that it can oppose, in an entirely discretionary manner and without having to give reasons for its decision, the disclosure of any document held by an institution simply because it originates from that Member State (*Sweden* v *Commission*, paragraph 6 above, paragraph 58).

Lastly, as is apparent in particular from Articles 7 and 8 of Regulation No 1049/2001, the institution is itself obliged to give reasons for a decision refusing a request for access to a document. Such an obligation means that the institution must, in its decision, not merely record the fact that the Member State concerned has objected to disclosure of the document applied for, but also set out the reasons relied on by that Member State to show that one of the exceptions to the right of access, provided for in Article 4(1), (2) and (3) of the regulation, applies. That information will enable the person who has asked for the document to understand the origin and grounds of the refusal of his request and the competent court to exercise, if need be, its power of review (*Sweden* v *Commission*, paragraph 6 above, paragraph 89).

It follows from the above that, according to case-law, Article 4(5) of Regulation No 1049/2001 entitles the Member State concerned to object to the disclosure of documents originating from it only on the basis of the exceptions listed in Article 4(1), (2) and (3) of the regulation and if it gives proper reasons for its position (*Sweden* v *Commission*, paragraph 6 above, paragraph 99).

It should also be noted that, under Article 4(4) of Regulation No 1049/2001, if the institution concerned considers that it is clear that access to a document originating from a Member State must be refused on the basis of the exceptions provided for under Article 4(1) or (2), it is to refuse the request for access without even having to consult the Member State from which the document originates, whether or not that Member State has previously made a request under Article 4(5) of the regulation. In such cases, it is thus obvious that the decision on the request for access is to be taken by the institution, regard being had solely to the exceptions which derive directly from the rules of EU law (*Sweden* v *Commission*, paragraph 6 above, paragraph 68).

In the present case, the Federal Republic of Germany claims that, in accordance with *Sweden* v *Commission*, paragraph 6 above, paragraph 88, there are only two situations in which the Commission may override a Member State's objection to disclosure of documents: (i) if no reasons at all, for the purposes of Article 253 EC, are stated for the objection; and (ii) if the reasons put forward are not framed in terms of the exceptions listed in Article 4(1), (2) and (3) of Regulation No 1049/2001. The Federal Republic of Germany refers in that regard to the principle of cooperation in good faith and to the clear distinction between, on the one hand, Article 4(4) of Regulation No 1049/2001, which makes provision, in respect of third-party documents other than those from Member States, for a simple consultation procedure and, on the other hand, Article 4(5) of that regulation, which gives Member States the right to make access to a document conditional upon their consent.

At the hearing, the Federal Republic of Germany also argued that Article 255(1) EC and Article 42 of the Charter of Fundamental Rights of the European Union, proclaimed at Nice on 7 December 2000 (OJ 2000 C 364, p. 1; 'the Charter of Fundamental Rights'), refer to access to documents of the institutions and not to documents originating from Member States.

As regards, in the first place, the reference made by the Federal Republic of Germany to Article 255 EC and to Article 42 of the Charter of Fundamental Rights, it should be pointed out first of all that Article 255(2) EC confers responsibility on the Council for determining general principles and limits governing the right of access to documents. However, Regulation No 1049/2001, which was adopted by the European Parliament and the Council and the legality of which is not challenged by the Federal Republic of Germany, expressly extends the right of access to all documents held by an institution (see paragraphs 27 and 28 above).

Also, it is common ground that Member States are closely involved in the legislative and executive processes of the European Union, both in their capacity as members of the Council and as participants in many committees set up by the latter (see, to that effect, *Sweden* v *Commission*, paragraph 6 above, paragraph 63). The exclusion of a great many documents originating from the Member States from the scope of the right of access under Article 255(1) EC would conflict with the objective of transparency sought by that provision and established by Article 42 of the Charter of Fundamental Rights, subject to certain exceptions which must be narrowly construed (*Sison* v *Council*, paragraph 8 above, paragraph 63, and *Sweden* v *Commission*, paragraph 6 above, paragraph 66).

Lastly, Declaration No 35 on Article 255(1) EC, appended to the Final Act of the Treaty of Amsterdam, states that the Conference agrees that the principles and conditions referred to in that provision 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. It follows that the authors of that treaty did not intend to exclude documents of the Member States from the scope of Article 255(1) EC.

Accordingly, the argument put forward by the Federal Republic of Germany to the effect that, by virtue of EU primary law, the right of access to documents originating from Member States must be narrowly construed cannot succeed.

As regards, secondly, the extent to which an institution is entitled to review the reasons given by a Member State as justification for its objection to the disclosure of a document, it should be noted that Article 4(5) of Regulation No 1049/2001 entrusts the implementation of the objectives of that regulation jointly to the institution and the Member State. It establishes for that purpose a decision-making

process within the framework of which the two are obliged to cooperate in good faith, as required under Article 10 EC, in order to ensure that the provisions of Regulation No 1049/2001 are effectively applied in a manner consistent with the case-law.

Against that background, it must be held that the position of the Federal Republic of Germany is incompatible with the broad logic and the objectives of Regulation No 1049/2001 in so far as it seeks to establish a situation in which, in the context of Article 4(5) of that regulation, the institution complies as a matter of course with the Member State's refusal, provided that the refusal is based on any reasons whatsoever and that those reasons are framed in terms of the exceptions listed in Article 4(1), (2) and (3) of that regulation. However, such a situation does not correspond to the genuine dialogue which the institution and the Member State are obliged to enter into for the purposes of ensuring that Regulation No 1049/2001 is implemented effectively.

It should be recalled also that, under Article 8 of Regulation No 1049/2001, ultimate responsibility for the proper application of that regulation lies with the institution and it is for the latter to defend the validity of the decision before the Courts of the European Union or the Ombudsman. If the institution were required to accept automatically the reasons given by the Member State, it would be forced to defend – vis-à-vis the person making the request for access and, in some cases, before those review bodies – positions which it does not itself consider to be defensible.

In that regard, it should be stated that the provisions of Regulation No 1049/2001 establishing, subject to the exceptions which it lists, a right of access to all documents held by an institution must be implemented effectively by the institution to which the request for access is addressed, and not only following proceedings before a Court of the European Union. The argument put forward by the Federal Republic of Germany that the possibility of bringing such proceedings divests the institution concerned of its power to review the reasons given by the Member State cannot therefore be accepted.

Lastly, if review were limited to the purely formal aspects of the Member State's objection, the latter would be able to prevent any disclosure, even in the absence of genuine reasons justifying derogation from the principle set out in Article 2(1) of Regulation No 1049/2001, simply by providing a statement of reasons formally framed in terms of the substantive exceptions listed in Article 4(1), (2) and (3) of that regulation. Such a review, focusing on purely formal aspects, would amount to reintroducing in practice the authorship rule which Regulation No 1049/2001 abolished, and would be inconsistent with the principle that the substantive exceptions provided for in Article 4(1), (2) and (3) of Regulation No 1049/2001 delimit the exercise of the power conferred by Article 4(5) of that regulation on the Member State concerned (*Sweden* v *Commission*, paragraph 6 above, paragraph 76).

It is clear from the above that the Federal Republic of Germany is wrong in arguing that, after a Member State has raised an objection under Article 4(5) of Regulation No 1049/2001, the institution must, before adopting pursuant to Article 8(1) of that regulation a decision setting out the reasons for its refusal to allow access to the document requested, review merely the formal aspects of the Member State's objection, that is to say, it need ascertain only that the objection is not entirely unaccompanied by a statement of reasons and that the reasons given are framed in terms of the substantive exceptions listed in Article 4(1), (2) and (3) of Regulation No 1049/2001.

On the contrary, the decision-making process established by Article 4(5) of Regulation No 1049/2001 requires both the Member State concerned and the institution to focus solely on the substantive exceptions provided for in Article 4(1), (2) and (3) of the regulation (*Sweden* v *Commission*, paragraph 6 above, paragraph 83). The institution is therefore empowered to make sure that the grounds relied upon as justification for the Member State's objection to disclosure of the document requested, which must be given in the decision refusing access, adopted in accordance with Article 8(1) of Regulation No 1049/2001, are not unfounded.

In that regard, it cannot be held that – as the Federal Republic of Germany claims in the alternative, by analogy with the criteria established in Case 283/81 *Cilfit and Others* [1982] ECR 3415, paragraph 13 – review by the institution may take place only in cases where the situation at issue has already given rise to a judgment by a Court of the European Union in an identical or similar case, or where the correct application of the law is so obvious as to leave no room for any reasonable doubt. Nor is it a matter – as the Republic of Poland claims – of determining whether the reasons given by the Member State concerned are incorrect beyond all possible doubt.

Review by the institution consists in determining whether, in the light of the circumstances of the case and of the relevant rules of law, the reasons given by the Member State for its objection are capable of justifying prima facie such refusal (see, by analogy, order of the President of the Court of 23 February 2001 in Case C-445/00 R *Austria* v *Council* [2001] ECR I-1461, paragraphs 73 and 74) and, accordingly, whether those reasons make it possible for that institution to assume the responsibility conferred on it under Article 8 of Regulation No 1049/2001.

It should be noted that it is not a matter, for the institution, of imposing its view or of substituting its own assessment for that of the Member State concerned, but of preventing the adoption of a decision which it does not consider to be defensible. The institution, as author of the decision granting or refusing access, is responsible for the lawfulness of that decision. In consequence, before refusing access to a document originating from a Member State, it must examine whether the latter has based its objection on the substantive exceptions provided for in Article 4(1), (2) and (3) of Regulation No 1049/2001 and whether it has provided a proper statement of reasons with regard to those exceptions (see, to that effect, *Sweden* v *Commission*, paragraph 6 above, paragraph 99).

It is important to point out that that examination must be undertaken in the context of the genuine dialogue which is a feature of the decision-making process established under Article 4(5) of Regulation No 1049/2001, the institution being obliged to allow the Member State to set out its reasons more clearly or reassess those reasons so that they may be regarded, prima facie, as defensible (see paragraph 53 above).

In undertaking that examination, due account must also be taken of the principle that the exceptions listed in Article 4 of Regulation No 1049/2001 to the public right of access to documents of the institutions must be narrowly construed and applied, given the objectives pursued by that regulation and, in particular, the fact noted in recital 2 thereto that that right of access is connected with the democratic nature of the EU institutions and the fact that, as is stated in recital 4 to the regulation and reflected in Article 1 thereof, the purpose of the regulation is to give the public the widest possible right of access (*Sison* v *Council*, paragraph 8 above, paragraph 63, and *Sweden* v *Commission*, paragraph 6 above, paragraph 66).

Accordingly, it is necessary to reject as unfounded the argument put forward by the Federal Republic of Germany to the effect that, in examining whether the reasons which that State had put forward as justification for its objection were valid, the Commission went beyond the limits of its powers of review under the procedure laid down in Article 4(5) of Regulation No 1049/2001.

The reasons given by the Federal Republic of Germany as justification for its objection to disclosure of the documents

It follows from the foregoing considerations (see paragraphs 32, 33, 45, 46 and 55 above) that implementation of Article 4(5) of Regulation No 1049/2001 – for the purposes of determining whether refusal to give access to a document originating from a Member State can be justified in the light of the exceptions provided for in Article 4(1), (2) and (3) – is based on cooperation in good faith between the institution and the Member State concerned. Accordingly, it is only upon conclusion of an open and constructive dialogue regarding the possibility of justifying refusal of access pursuant to Article 4(1), (2) or (3) of Regulation No 1049/2001 that the institution can decide to reject the reasons given by the Member State as justification for its objection, if it finds that those reasons are not defensible.

In the present case, several exchanges took place between the Federal Republic of Germany and the Commission before the contested decision was adopted. In particular, in its letter of 15 September 2008, the Commission asked the Federal Republic of Germany to reconsider its position, giving the reasons for that request. The Federal Republic of Germany did not, however, reconsider its refusal. It was not until after those exchanges that the Commission adopted the contested decision. Contrary to the assertions made by the Federal Republic of Germany, the Commission did not therefore merely substitute its own assessment for that of the German authorities. On the contrary, the contested decision was adopted following a genuine dialogue in accordance with the decision-making process laid down in Article 4(5) of Regulation No 1049/2001.

It must also be determined whether the Commission was – as it claims – right in finding that the reasons given by the Federal Republic of Germany as justification for its objection to disclosure of the documents requested were not, prima facie, valid.

As regards, in the first place, the exception provided for under the third indent of Article 4(1)(a) of Regulation No 1049/2001, concerning protection of international relations, the Federal Republic of Germany maintains that the arguments which it put to the Commission in support of its objection were at the very least defensible.

In that regard, it should be noted first of all that the concept of 'international relations' to which the third indent of Article 4(1)(a) of Regulation No 1049/2001 refers is a concept peculiar to EU law and is not therefore dependent on the meaning attributed to it by the national laws of the Member States. Article 4(5) of that regulation – in common with Article 4(1) to (4) – does not contain any reference to national law (*Sweden* v *Commission*, paragraph 6 above, paragraph 69).

It should also be pointed out that, as the Commission observes, unlike ordinary international treaties, the European Union's founding treaties established a new legal order, with its own institutions, for the benefit of which the States have limited their sovereign rights in ever wider fields and the subjects of which comprise not only Member States but also their nationals (Case 26/62 *Van Gend & Loos* [1963] ECR 1, 3, and Opinion 1/91 of the Court of Justice of 14 February 1991 [1991] ECR I-6079, paragraph 21). For the purposes of achieving the objectives of the European Union in the fields which it covers, relations between the Member States and the institutions of the European Union come under the constitutional charter which the treaties have established.

That is particularly true as regards communication between a Member State and the Commission in the context of an infringement procedure initiated in order to ensure that a Member State fulfils its obligations under the treaties.

Lastly, it must be observed that the position argued for by the Federal Republic of Germany that communications between it and the EU institutions are covered by the concept of 'international relations', referred to in the third indent of Article 4(1)(a) of Regulation No 1049/2001, would make it possible for a significant proportion of the documents relating to EU activities to be removed from the scope of the public right of access to documents of the institutions. That would undermine the objective of transparency pursued by Regulation No 1049/2001 and would be incompatible with the principle set out above that the exceptions listed in Article 4(1), (2) and (3) of Regulation No 1049/2001 must be narrowly construed and applied (see paragraphs 42 and 56 above).

The Commission was thus right in stating that the reason put forward by the Federal Republic of Germany concerning protection of international relations, as referred to in the third indent of Article 4(1)(a) of Regulation No 1049/2001, was not, prima facie, valid.

It should also be stated in that regard that that finding does not exclude the possibility that national law protecting a public or private interest may be regarded as an interest deserving of protection on the basis of the exceptions provided for in Regulation No 1049/2001. The concepts of national law and those of EU law may coincide; or complement each other; or serve as a point of reference, each for the other (see, to that effect, Joined Cases C-46/93 and C-48/93 *Brasserie du pêcheur and Factortame* [1996] ECR I-1029, paragraph 27, and *Sweden* v *Commission*, paragraph 6 above, paragraph 84).

As regards, in the second place, the exception concerning protection of the purpose of inspections, investigations and audits, provided for under the third indent of Article 4(2) of Regulation No 1049/2001 and also relied upon by the Federal Republic of Germany, it should be stated first of all that infringement procedures initiated by the Commission under Article 226 EC constitute investigations covered by that provision.

It should also be noted that where it is decided to refuse access to a document, the disclosure of which has been requested, it is for the institution to explain how access to that document might specifically undermine the interest referred to in Article 4(1), (2) and (3) of Regulation No 1049/2001. In that connection, the institution may, in some cases, take as its basis general presumptions which apply to certain categories of document, since considerations of a generally similar kind are likely to apply to requests for disclosure relating to documents of the same nature (Joined Cases C-39/05 P and C-52/05 P *Sweden and Turco* v *Council* [2008] ECR I-4723, paragraphs 49 and 50, and Case C-139/07 P *Commission* v *Technische Glaswerke Ilmenau* [2010] ECR I-0000, paragraphs 53 and 54).

Lastly, where a Member State objects, under the procedure laid down in Article 4(5) of Regulation No 1049/2001, to disclosure of documents originating from it, it must provide the institution with all the evidence needed to justify a decision to refuse access to those documents.

In the present case, it is apparent from the documents before the Court that the Federal Republic of Germany relied, in support of its objection to disclosure of the documents requested, on the fact that their disclosure to third parties would undermine the relationship of trust and cooperation which is a feature of the relationship between the Federal Republic of Germany and the Commission in their search for an outcome which is consistent with EU law in the context of infringement procedures. In that regard, the Federal Republic of Germany referred to Case T-191/99 *Petrie and Others* v *Commission* [2001] ECR II-3677, paragraphs 68 and 69, and to Case T-309/97 *Bavarian Lager* v *Commission* [1999] ECR II-3217, paragraph 46).

The Federal Republic of Germany stated that that consideration applied also after the infringement procedure had been closed, in so far as such a procedure provided a forum for negotiating tactics, compromises and strategies which could be used in future procedures of that nature. In the view of the Federal Republic of Germany, such a range of interests deserves protection, even where there is no specific risk in a particular infringement procedure. The Federal Republic of Germany explained that, in the present case, the documents requested contained summaries of a factual nature and indications as to the procedural stages embarked upon or envisaged, which it was not appropriate to disclose, in order to ensure that there would be cooperation in good faith between it and the Commission and that the search for flexible, rapid solutions would not be hindered.

In that regard, it should be pointed out that, according to case-law, the exception provided for under the third indent of Article 4(2) of Regulation No 1049/2001 is designed not to protect investigations as such but the purpose of those investigations, which, in the case of infringement procedures, consists in leading the Member State concerned to comply with Community law (see, to that effect, Case T-36/04 *API* v *Commission* [2007] ECR II-3201, paragraphs 127 and 133, and *Bavarian Lager*, paragraph 8 above, paragraph 149).

It is for that reason that various acts of investigation may remain covered by the exception in question so long as that goal has not been attained, even if the particular investigation or inspection which gave rise to the document to which access is sought has been brought to a close (*Franchet and Byk* v *Commission*, paragraph 8 above, paragraph 110; see, by analogy, as regards the application of the 1993 Code of Conduct, Case T-20/99 *Denkavit Nederland* v *Commission* [2000] ECR II-3011, paragraph 48).

However, it should be noted that, in order to justify application of the exception provided for under the third indent of Article 4(2) of Regulation No 1049/2001, it is necessary to prove that disclosure of the documents concerned is actually likely to undermine the protection of the purpose of the Commission's investigations concerning the infringements in question (see, to that effect, *Franchet and Byk*, paragraph 8 above, paragraphs 105 and 109, and *API* v *Commission*, paragraph 73 above, paragraph 127). The assessment required for processing an application for access to documents must be of a specific nature and the risk of a protected interest being adversely affected must be reasonably foreseeable and not merely hypothetical (*Franchet and Byk* v *Commission*, paragraph 8 above, paragraph 115; *Bavarian Lager*, paragraph 8 above, paragraph 151; and *Sweden and Turco* v *Council*, paragraph 69 above, paragraphs 43 and 63).

In the present case, it is common ground that the infringement procedure in which the documents requested were produced was closed on 28 June 2006, that is to say, more than two years before the request for access to the documents was made on 19 July 2008. The Federal Republic of Germany

cannot therefore rely on *Petrie and Others* v *Commission* and *Bavarian Lager* v *Commission*, both cited in paragraph 71 above, since those judgments were delivered in cases in which infringement proceedings were still under way, at either the administrative or the judicial stage, at the time when the contested decisions were adopted.

Accordingly, it cannot be argued in the present case that there was any investigation going on, the purpose of which could have been jeopardised by disclosure of the documents concerned, at the time when the request for access to the documents was received in July 2008.

As regards the argument of the Federal Republic of Germany that it was necessary to refuse access to the documents because of the need to protect the confidentiality of communication between the Commission and itself during infringement procedures (see paragraphs 71 and 72 above), it should first be pointed out that, by contrast with an infringement procedure which is still under way, there is no general presumption that the disclosure of exchanges between the Commission and a Member State in the context of an infringement procedure which has been closed would adversely affect the purposes of the investigations, as referred to in the third indent of Article 4(2) of Regulation No 1049/2001.

Secondly, it should be pointed out that the Federal Republic of Germany has not provided any evidence to show that disclosure of the documents requested, two years after the infringement procedure was closed, would have actually and specifically jeopardised the purpose of the investigation at issue or of other related investigations. In particular, the Federal Republic of Germany has not claimed that there was any likelihood that the procedure closed by the Commission on 28 June 2006 would be re-opened or that there was any related infringement procedure the conduct of which could have been adversely affected by disclosure of the documents requested.

In that context, it is also necessary to reject the argument of the Kingdom of Spain that, since the Commission is entirely free to re-open infringement procedures, exchanges between the Commission and the Member States in the context of such procedures must always fall within the exception, provided for under the third indent of Article 4(2) of Regulation No 1049/2001, relating to protection of the purpose of investigations. The reasoning on which that argument is based is purely hypothetical, since the Kingdom of Spain has not shown that there was a reasonable prospect that the infringement procedure would be re-opened in the present case.

In those circumstances, it must be held that the reasons given by the Federal Republic of Germany as justification for its objection to disclosure of the documents were abstract and purely hypothetical and, in consequence, not capable of providing an adequate legal basis on which the Commission could have justified a refusal under the third indent of Article 4(2) of Regulation No 1049/2001.

The Commission was accordingly fully entitled to find that the reasons given by the Federal Republic of Germany as justification for its objection to disclosure of the documents requested were, prima facie, unfounded.

The action must therefore be dismissed.

Costs

Under Article 87(2) of the Rules of Procedure of the General Court, 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 Federal Republic of Germany has been unsuccessful, it must be ordered to pay its own costs and those of the Commission, as applied for by the latter.

Under the first subparagraph of Article 87(4) of the Rules of Procedure of the General Court, the Member States which intervened in the proceedings are to be ar their own costs. Accordingly, the Kingdom of Denmark, the Kingdom of Spain, the Republic of Finland, the Republic of Poland et the Kingdom of Sweden must bear their own costs.

On those grounds,

THE GENERAL COURT (Fourth Chamber)

hereby:

Dismisses the action.

Orders the Federal Republic of Germany to bear its own costs and those of the European Commission.

Orders the Kingdom of Denmark, the Kingdom of Spain, the Republic of Finland, the Republic of Poland and the Kingdom of Sweden to bear their own costs.

Pelikánová Jürimäe Van der Woude

Delivered in open court in Luxembourg on 14 February 2012.

[Signatures]

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* Language of the case: German.