

(Appeal – Regulation (EC) No 1049/2001 – Right of access to documents of the institutions – Documents originating from a Member State – Objection of the Member State to disclosure of the documents – Scope of the institutions' review of the reasons for the Member State's objection – Scope of the judicial review and access by the General Court to the disputed documents)

1. The first of the two grounds of the present appeal, brought against the judgment of the General Court of 13 January 2011 in *IFAW Internationaler Tierschutz-Fonds v Commission* ('the judgment under appeal'), (2) will enable the Court of Justice to consider in detail the case-law on access to documents originating from a Member State, laid down in its judgment in *Sweden v Commission*. (3) Figuratively speaking, this appeal could almost be said to be seeking enforcement of the judgment in *Sweden v Commission* and it therefore provides the Court with the opportunity to engage in the difficult task of interpreting Article 4(5) of Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents. (4)

2. The second ground of appeal will enable the Court to rule on two more general matters: first, the scope of the judicial review of acts of the European Union, where the substantive content of those acts was determined, to a greater or lesser degree, by reference in the drafting process to documents originating from a Member State and, second, the degree of immediacy which may be required for the judicial review of a document whose disclosure is contested.

I – Legal framework

3. Under Article 2 of Regulation No 1049/2001:

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

...

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

...'

4. Article 3 of Regulation No 1049/2001 lays down the following definitions:

'For the purposes of this Regulation:

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

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

5. Pursuant to Article 4 of Regulation No 1049/2001, the following exceptions apply to this field:

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

a) the public interest as regards:

- public security,
- defence and military matters,
- international relations,
- the financial, monetary or economic policy of the Community or a Member State;

...

3. ...

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

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

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

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

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

II – Background

A – *The first request for access to documents originating from a Member State held in a Commission file*

6. IFAW Internationaler Tierschutz-Fonds gGmbH ('IFAW') is a non-governmental organisation active in the field of the preservation of animal welfare and nature conservation.

7. Having received a request from the Federal Republic of Germany on the basis of the second subparagraph of Article 6(4) of Directive 92/43/EEC ('Directive 92/43'), (5) the Commission delivered on 19 April 2000 an opinion in favour of the carrying out of an industrial project on the Mühlenberger Loch site, a protected zone under Directive 92/43. The project consisted in the expansion of the factory belonging to Company D for the purposes of the final assembly of the Airbus A3XX.

8. By letter of 20 December 2001 to the Commission, IFAW requested access to various documents received by the Commission in connection with the examination of the abovementioned industrial project, namely the correspondence originating from the Federal Republic of Germany, the City of Hamburg and the German Chancellor.

9. Taking the view that Article 4(5) of Regulation No 1049/2001 prohibited it from disclosing the documents in question, the Commission refused access to certain documents by decision of 26 March 2002.

10. The action for the annulment of that decision brought by IFAW was dismissed by judgment of the General Court of 30 November 2004. (6)

11. The Kingdom of Sweden, an intervener in the action for annulment, lodged an appeal before the Court of Justice against the judgment of the General Court.

12. By the judgment in *Sweden v Commission*, the Court of Justice set aside the judgment of the General Court and annulled the decision of 26 March 2002. According to the Court of Justice, 'where a Member State has made use of the option given to it by Article 4(5) of Regulation No 1049/2001 to request that a specific document originating from that State should not be disclosed without its prior agreement, disclosure of that document by the institution requires ... the prior agreement of that Member State to be obtained' (paragraph 50). The Court of Justice held that 'to interpret Article 4(5) of Regulation No 1049/2001 as conferring 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 a Community institution simply because it originates from that Member State, is not compatible with the objectives' of Regulation No 1049/2001 (paragraph 58). Therefore, an objection by a Member State must be based on one of the substantive exceptions laid down in Article 4(1) to (3) of Regulation No 1049/2001, and 'it is within the jurisdiction of the Community judicature to review, on application by a person to whom the institution has refused to grant access, whether that refusal was validly based on those exceptions, regardless of whether the refusal results from an assessment of those exceptions by the institution itself or by the relevant Member State. From the point of view of the person concerned, the Member State's intervention does not affect the Community nature of the decision that is subsequently addressed to him by the institution in reply to the request he has made for access to a document in its possession' (paragraph 94).

B – *A fresh request for access to the refused documents*

13. As a result of the judgment in *Sweden v Commission*, IFAW repeated its request for access to the documents received by the Commission in relation to the examination of the Mühlenberger Loch project and originating from the German authorities.

14. After a number of exchanges of correspondence, by decision of 19 June 2008, the Commission disclosed all the documents requested by IFAW, with the exception of a letter of 15 March 2000 from the German Chancellor to the President of the Commission ('the German Chancellor's letter'), as the German authorities objected to disclosure of that document. (7)

15. According to the decision of 19 June 2008, the German authorities had stated that disclosure of the German Chancellor's letter would undermine the protection of the public interest as regards the international relations and the economic policy of the Federal Republic of Germany within the meaning of the third and fourth indents of Article 4(1)(a) of Regulation No 1049/2001.

16. In addition, the German authorities had stated that disclosure of the German Chancellor's letter would seriously undermine the protection of the Commission's decision-making process within the meaning of the second subparagraph of Article 4(3) of Regulation No 1049/2001.

17. IFAW brought an action for the annulment of the decision of 19 June 2008, which gave rise to the judgment under appeal in the present proceedings. That action was based on the infringement of the third and fourth indents of Article 4(1)(a) and of the second subparagraph of Article 4(3) of Regulation No 1049/2001.

C – *The judgment of the General Court under appeal in the present proceedings*

18. The General Court examined the scope of the objection raised by the German authorities under Article 4(5) of Regulation No 1049/2001, pointing out that Article 4(5) makes the prior agreement of the Member State a necessary condition for disclosure of a document, although, in accordance with the

line of authority devolving from *Sweden v Commission* ('the *Sweden v Commission* case-law'), Article 4 (5) of Regulation No 1049/2001 does not confer on the Member State a general and unconditional right of veto, permitting it arbitrarily to oppose, 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.

19. Applying the *Sweden v Commission* case-law (according to which, moreover, it must be recalled that the request for information by the person concerned is addressed to the European Union and therefore results in a Community act), the General Court elaborated on a Member State's duty to state reasons and on the scope of the powers of the European Union to carry out a review of those reasons. The General Court concluded that the review carried out by the Courts of the European Union is not limited to a *prima facie* review, and that there is nothing to prevent a complete review being carried out of the Commission's refusal decision, which must, in particular, respect the obligation to give reasons and be based on the substantive assessment made by the Member State concerned of the applicability of the exceptions laid down in Article 4(1) to (3) of Regulation No 1049/2001.

20. Next, the General Court examined the reason for refusal based on the exception concerning the protection of the public interest as regards the economic policy of a Member State, laid down in the fourth indent of Article 4(1)(a) of the regulation, stating that, in the case before it, the Federal Republic of Germany had to be recognised as enjoying a broad discretion in that connection, and that the review of the legality of such a decision by the Courts of the European Union must be limited to verifying whether the procedural rules and the duty to state reasons have been complied with, whether the facts have been accurately stated, and whether there has been a manifest error of assessment or a misuse of powers.

21. With regard to the exception concerning the protection of the public interest as regards the economic policy of a Member State, laid down in the fourth indent of Article 4(1)(a) of Regulation No 1049/2001, the General Court held that, despite its brevity, the statement of reasons provided by the German authorities was sufficient to enable IFAW to ascertain the reasons for the refusal and the Courts of the European Union to carry out the review of legality incumbent upon them.

22. The General Court found that consideration of the request for access to the documents was carried out in respect of each document mentioned in the request. The Court observed in particular that the passage of time had not affected the reasons of confidentiality put forward by the German authorities.

III – The appeal: procedure before the Court of Justice

23. On 18 March 2011, IFAW lodged an appeal against the judgment of the General Court. Its appeal is based on two grounds:

(a) The General Court erred in law by failing to hold that the Commission ought to have carried out a full review of Germany's refusal in order to establish whether its reasons came within the exceptions in Article 4 of Regulation No 1049/2001.

(b) The General Court erred in law with regard to the nature and the scope of the review which it is required to carry out in connection with a Member State's refusal. This ground is divided into two parts: (1) the unsuitability of a limited review confined to verifying the procedural aspects, whether there has been compliance with the duty to state reasons, whether the facts have been accurately stated, and whether there has been a manifest error or a misuse of powers, and (2) the need for the General Court to have direct access to the disputed document.

24. IFAW submits, first of all, that the General Court failed to take proper account of the fact that – as the Court of Justice held in paragraph 76 of the judgment in *Sweden v Commission* – under Article 4 of Regulation No 1049/2001 the Member State is merely given 'a power to take part in the Community decision', pointing out that the decision is ultimately a European Union decision. IFAW maintains that, following *Sweden v Commission*, that decision must be adopted in accordance with the following guidelines: (a) initiation of a genuine dialogue between the institution and the Member State concerned; (b) agreement or objection of the Member State based on the exceptions in Article 4(1) to (3) of Regulation No 1049/2001; (c) closure of the genuine dialogue; (d) checking by the institution that the reasons relied on exist and reference to them in the final decision; and (e) adoption of the final decision. IFAW goes on to state that, during that procedure, the Court of Justice requires the institution to carry out a full and complete review of the reasoned objection of the Member State. That review comprises three stages: (a) checking whether the objection is based on the exceptions laid down in Article 4 of Regulation No 1049/2001; (b) checking that the Member State has stated reasons for its position; and (c) assessing whether the exceptions and the reasons relied on are applicable to the document in question.

25. IFAW submits that the General Court omitted the third and final step and concluded – contrary to what was stated by the Court of Justice – that 'it is not necessary to deal with the question whether the Commission was obliged ... to carry out a *prima facie* review or a full review of the reasons on which the Member State bases its objection' (paragraph 84 of the judgment under appeal). In IFAW's submission, the General Court incorrectly applied the judgment of the Grand Chamber of the Court of Justice, thereby introducing, implicitly, a right of veto on the part of the Member State, to which the decision not to disclose the document requested will ultimately fall.

26. IFAW adds that, without a full review, the institution risks refusing the public access to documents in respect of which the exceptions put forward by the Member State do not actually exist. In IFAW's opinion, that was the case of the contested decision, where the 'international relations'

exception put forward by the Member State, and therefore by the Commission, did not exist at all, since no third State was involved in the negotiations in connection with which the requested document was produced.

27. In the alternative, IFAW submits that the General Court is required to carry out a complete review in the correct and proper form. In the judgment under appeal, it is stated that the real question to be considered does not concern 'the type of review which the Commission is entitled to carry out' but rather 'the type of review ... which the EU judicature is entitled to carry out in regard to the Commission's decision to refuse access to the document in question' (paragraph 86). Thus, in IFAW's submission, the General Court stresses that if the Commission does not carry out a complete review of the Member State's objection, the General Court itself is entitled to do so. Assuming that the Commission is not obliged to carry out a complete review (a proposition which IFAW rejects), the General Court must observe the three stages referred to in point 24 above. That necessarily implies that the General Court must order the production of the document so that it may verify for itself the existence and, therefore, the applicability of the exceptions put forward by the institution and originally invoked by the Member State.

28. According to IFAW, if the General Court is the only institution required to carry out a full review, then it must guarantee the lawfulness and the authenticity of the Commission's decision and it cannot fulfil that obligation without having seen or analysed the document in question.

29. IFAW submits that the General Court not only found that it was not necessary to order the production of the letter but that it also contradicted itself. That is because, after noting that it is the only institution entitled to carry out a full review, the General Court took a step back by stating that when it is faced with a Member State's refusal it must respect the broad discretion of that Member State, thereby limiting the scope of its own review which is confined to an examination of whether the procedural rules have been followed, whether the duty to state reasons has been complied with, whether the facts have been accurately stated, and whether there has been a manifest error of assessment or a misuse of powers. In short, that approach ultimately allows the Member State a right of veto.

30. Accordingly, IFAW requests that the judgment under appeal be set aside, that the Commission's decision be annulled, and that the Commission be ordered to pay the costs.

31. In its response, the Commission begins by stating that it does not take issue with IFAW's analysis of *Sweden v Commission* in relation to the Commission's obligations to carry out a review, although, with regard to the three stages of the review procedure, the Commission reiterates the position it adopted before the General Court, which was as follows: (a) the Commission consulted the national authorities, which (b) objected by invoking a number of the exceptions laid down in Regulation No 1049/2001, and (c) once the Commission had established that the exceptions and the statement of reasons were *prima facie* lawful, it issued a reasoned decision.

32. As regards the complaint that the General Court omitted the third stage of the procedure, the Commission submits that that complaint is unfounded and that it reveals that IFAW has failed to understand the General Court's position. According to the Commission, the General Court faithfully followed the judgment in *Sweden v Commission*.

33. The Commission states that, in paragraph 81 of the judgment under appeal, the General Court observed that '[i]n so far as the Commission does not object to disclosure of the document in question and sets out in its decision the reasons relied on by the Member State, it is the reasons put forward by that Member State and repeated in the said decision which are to be considered by the EU judicature.' Therefore, when the General Court stated that 'it is not necessary to deal with the question whether the Commission was obliged ... to carry out a *prima facie* review or a full review of the reasons on which the Member State bases its objection' (paragraph 84) or that that question is 'irrelevant', what the General Court was actually doing was not so much establishing a right of veto but rather saying that the decision of the institution must be based on the exceptions laid down by Regulation No 1049/2001, regardless of whether those exceptions are based on an assessment by the institution itself or by the Member State concerned. When, for the purposes of review, the institution checks whether the exceptions and reasons relied on by the Member State are *prima facie* lawfully invoked in the light of the circumstances of the case, and presents those reasons in the final refusal decision, those reasons are the institution's reasons and may be the subject of judicial review, regardless of their origin. The Commission contends that the General Court therefore took a very classic position when it stated that the institution must make clear the reasons for its decision and the Courts of the European Union must review those reasons. In the Commission's view, that is consistent with the guidelines laid down in *Sweden v Commission*.

34. As regards the second ground of appeal, the Commission contends that this is based on a misunderstanding. In the Commission's view, IFAW appears to confuse the notion of 'review' with that of 'discovery'. That would mean that the Courts of the European Union cannot carry out a full review without examining the documents at issue. The Commission maintains that, quite apart from the burden which that would place on the Courts of the European Union and quite apart from the fact that such a contention does not take account of the discretionary nature of the power to decide on measures of inquiry, including the production of documents, that contention would amount to a distortion of the nature of an action for annulment and the review carried out by the Courts of the European Union in relation to the measures laid down in Article 263 of the Treaty. Essentially, the second ground of appeal

would require the Courts of the European Union to put themselves systematically in the place of the institution authorised to adopt the decision.

35. Given the nature of the review carried out by the General Court, the Commission contends that IFAW misunderstands the General Court's position, since the latter does not consider that it must confine itself to a limited review that must respect the broad discretion of the Member State. The Commission contends that, on the contrary, as is clear from paragraphs 87 and 88 of the judgment under appeal, the General Court does not consider that it is not entitled to carry out a complete review.

36. The Commission concludes by stating that the exception which was cited in the refusal decision and examined by the General Court is contained in Article 4(1)(a) of Regulation No 1049/2001, namely 'the financial, monetary or economic policy of the Community or a Member State'. In *Sisión v Council*, (8) dealing with the refusal by the Council to disclose a document on the basis of an Article 4(1)(a) exception, the Court of Justice observed that 'the Council must be recognised as enjoying a wide discretion for the purpose of determining whether the disclosure of documents relating to the fields covered by those exceptions could undermine the public interest' (paragraph 34), and went on to state that the Court's review of such a decision must be limited to verifying whether the procedural rules and the duty to state reasons have been complied with, whether the facts have been accurately stated, and whether there has been a manifest error of assessment or a misuse of powers. The Commission notes that the judgment under appeal refers to that position in paragraphs 104 and 105. Accordingly, it was by reason of the nature of the exception invoked that the General Court accepted the broad discretion of the Member State. Therefore, the Commission submits that the second ground of appeal should also be rejected.

37. For the reasons stated, the Commission requests that the appeal be dismissed and that IFAW be ordered to pay the costs.

IV – Assessment

38. The present appeal essentially raises a problem concerning the review of administrative activity from two different perspectives. On the one hand (the first ground of appeal), there is the 'review' which the European Union institutions are entitled or required to carry out of decisions of the Member States relating to access to their own documents which are in the possession of the European Union. On the other hand (the second ground of appeal), there is the judicial review which the Courts of the European Union are entitled or required to carry out of the final decision on a request to the European Union institutions for access to those documents.

A – First ground of appeal: nature and scope of the Commission's review of the reasons on which the Member State bases its objection to disclosure

39. As I indicated in point 23(a), in its first ground of appeal IFAW submits that the General Court erred in law by failing to find that the Commission ought to have carried out a full review of Germany's refusal in order to establish whether its reasons came within the exceptions in Article 4 of Regulation No 1049/2001.

40. It is appropriate to begin by noting that, in accordance with Regulation No 1049/2001, only the European Union institutions are competent to determine whether documents of the institutions are covered, in a particular case, by the exceptions laid down in Article 4 of the regulation. However, as regards 'third-party documents', Article 4(4) grants the third party concerned the right to be consulted 'with a view to assessing whether an exception in paragraph 1 or 2 [of Article 4] is applicable'.

41. Lastly, where the third party in question is a Member State, Article 4(5) of the regulation grants that Member State the right to 'request the institution not to disclose ... without its prior agreement' a document in the possession of the European Union. It is, once again, the interpretation of that particular provision with which the present appeal is concerned.

42. The Court of Justice addressed many of the difficult issues raised by Article 4(5) in the judgment in *Sweden v Commission*, which led directly to the judgment of the General Court now under appeal. However, while the Court may have addressed those issues, it cannot equally be said to have resolved them, since the provision concerned raises significant difficulties of interpretation. (9)

43. Article 4(5) of Regulation No 1049/2001 grants Member States the right to *request* that documents originating from them are not disclosed without their agreement. At first sight, it only seems possible to construe the provision as referring to two possible courses of action which, furthermore, are mutually exclusive: (A) the provision refers to a simple request, which may or may not be valid, or (B) the provision refers to a request which is in itself a right of veto the exercise of which is dependent only on the wishes of the Member State concerned.

44. To my mind, however, the Court sought in *Sweden v Commission* to proceed beyond that dichotomy. It did so by means of a ruling which in turn raises its own difficulties of interpretation. Leaving that to one side, it should be noted that the judgment in question represented a step forward in the streamlining of the relevant European Union legal provisions. (10) Essentially, the Court sought to deduce from the spirit of Regulation No 1049/2001 the legislative and conceptual basis needed to steer an intermediate course capable of reconciling the terms of that contradiction.

45. While acknowledging that it is a risky venture, I believe that the *Sweden v Commission* case-law may be summarised broadly in the following points.

46. First of all, the Court construes Article 4(5) as a provision creating a procedure, rather than a division of powers (paragraph 93). In short, that procedure is one in which the Member State and the

Commission 'play a part' (paragraph 93). However, it must be emphasised that the refusal of access to the document is an act strictly attributable to the Commission (paragraph 94).

47. Second, in line with the foregoing, the Member State's 'request' is not by its nature a 'general and [insurmountable]' right of veto (paragraph 75). Consequently, the Member State is required, in particular, to 'state reasons' for its refusal (paragraph 87). Furthermore, the reasons for the refusal must be based on one of the exceptions laid down in Article 4(1) to (3) of Regulation No 1049/2001 (paragraph 88).

48. The third and unquestionably the most problematic point, and the one which is at the heart of this ground of appeal, is that the Court of Justice appears to have limited the Commission's participation to 'verifying' (paragraph 89) compliance with the aforementioned conditions imposed on the Member State. In other words, the Commission must check that the reasoning exists, that it has been set out and that it is based on the exceptions. Admittedly, the Commission is required to state its own reasons but, ultimately, those reasons may or perhaps must be the ones submitted to it by the Member State concerned (paragraph 90).

49. Fourth and finally, the decision issued by the Commission is subject to judicial review (paragraphs 89 and 90). However, this final point is connected with the second ground of appeal.

50. IFAW claims that the judgment of the General Court under appeal reintroduces a right of veto which should have been regarded as removed when the 'authorship rule' was abolished as a result of the entry into force of Regulation No 1049/2001, as expressly stated at paragraph 59 of the judgment in *Sweden v Commission*. According to IFAW, that backward step arises from the fact that the General Court held that it is perfectly possible to limit the Commission's 'review' of a Member State's refusal to disclose a document originating from that Member State to an examination of formal and procedural matters, without the need to carry out a comprehensive and rigorous examination of the grounds for the refusal in the light of the exceptions laid down in Regulation No 1049/2001.

51. To my mind – and I agree with the Commission on this point – that contention results from a misunderstanding of the judgment under appeal. IFAW has focused its attention on the General Court's statement that 'it is not necessary to deal with the question whether the Commission was obliged ... to carry out a *prima facie* review or a full review of the reasons on which the Member State bases its objection' (paragraph 84 of the judgment under appeal), from which IFAW concludes that the General Court held that the Commission is not obliged to check whether the exceptions laid down in Regulation No 1049/2001, on which the Member State has relied, actually exist in the case before it.

52. However, in my opinion, that is not the conclusion which follows from the wording of the judgment under appeal.

53. The General Court begins by stating, in paragraph 79 of its judgment, that '[t]he Commission, as author of the decision to refuse access to documents, is responsible for the lawfulness of that decision.'

54. The lawfulness of that decision is conditional on the existence of one of the exceptions laid down in Regulation No 1049/2001 and a proper statement of reasons in that regard. It is obviously for the Commission, as the 'author' of the refusal decision, to assess whether or not any of those exceptions exist. For that purpose, the Commission may either form its own view or adopt as its own the view of the Member State concerned. In both cases, it is clear that, regardless of their origin, the reasons on which the refusal decision is based must be sufficient for the purposes of constituting a statement of reasons for a decision attributable to the European Union. It is precisely that point on which the General Court focused its attention, pointing out that where, as in the situation under review, the Commission has adopted as its own the reasons put forward by the Member State, it is obliged to set them out in the refusal decision.

55. Therefore, the General Court strictly adhered to the ruling of the Grand Chamber in *Sweden v Commission*.

56. The Court of Justice made clear in paragraph 88 of the judgment in *Sweden v Commission* that, following the genuine dialogue between the institution and the Member State concerned with regard to the possible application of the exceptions laid down in the regulation, '[t]he 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 put forward in terms of the exceptions listed in Article 4(1) to (3) of Regulation No 1049/2001. Where, despite an express request by the institution to the Member State to that effect, the State still fails to provide the institution with such reasons, the institution must, if for its part it considers that none of those exceptions applies, give access to the document that has been asked for.'

57. Paragraph 89 of the judgment in *Sweden v Commission* states that 'the institution is itself obliged to give reasons for a decision to refuse a request for access to a document.' That means that it is essential to state reasons for the refusal. If the reasons on which the refusal is based in the final decision are the ones put forward by the Member State, 'the institution must, in its decision, not merely record the fact that the Member State concerned has objected to disclosure of the document asked 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 in Article 4(1) to (3) of the regulation applies. That information will allow 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' (paragraph 89 of *Sweden v Commission*).

58. Therefore, as regards the provision of reasons for the refusal decision, it is necessary, but also sufficient, for the institution to set out the reasons put forward by the Member State to justify the existence of one of the exceptions laid down in Regulation No 1049/2001. That is what occurred in the instant case, since the Commission set out the reasons invoked by Germany, adopting them as its own and as sufficient for the purposes of justifying the final refusal decision for which, as an act of the European Union, the Commission is responsible.

59. Against that background, the statement in paragraph 86 of the judgment under appeal must be construed as meaning, in the circumstances, that what matters is not so much the type of review carried out by the Commission with regard to the reasons put forward by the Member State but rather the substantive judicial review of those reasons.

60. In short, it is clear, in my opinion, that the Commission adhered to the *Sweden v Commission* case-law when, in the light of the reasons invoked by the Federal Republic of Germany, it adopted those reasons as the statement of reasons for the final refusal decision, thus allowing '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', in the terms of paragraph 89 of the judgment in *Sweden v Commission*.

61. I believe, as a consequence, that the first ground of appeal must be dismissed, since, contrary to IFAW's claim, in holding that the Commission had acted lawfully by stating the reasons put forward by the Member State for refusing access to the document requested, the General Court followed the *Sweden v Commission* case-law. According to that case-law, it is in that statement of reasons that the Commission discharges its duty under the decision-making procedure provided for by Article 4(5) of Regulation No 1049/2001, and in accordance with which it must not refer to any reasons other than those based on the exceptions provided for in that regulation.

B – *Second ground of appeal: nature and scope of the judicial review*

62. By the second ground of appeal IFAW submits that, in the judgment under appeal, the General Court erred in law as to the nature and scope of the review which it is itself required to carry out in relation to the Member State's refusal. The first part of the ground criticises the limited nature of the review of the refusal decision carried out by the General Court, which, in IFAW's submission, was improperly limited to the formal aspects of the decision-making procedure and to ascertaining that the statement of reasons was consistent with the facts and did not constitute an error of assessment or a misuse of powers.

63. The judgment in *Sweden v Commission* dispelled any possible doubt as to the legal protection afforded to a person who has made a request for access which is refused by an institution. In paragraph 90, the Grand Chamber stated that, 'if the Member State gives a reasoned refusal to allow access to the document in question and the institution is consequently obliged to refuse the request for access, the person who has made that request enjoys judicial protection, contrary to the fears expressed by IFAW in particular.'

64. As judicial protection which is consistent with the content of the right to an effective remedy guaranteed by Article 47 of the Charter of Fundamental Rights of the European Union, that protection comprises a material and substantive appraisal of the lawfulness of the contested act or measure, because crucially the Grand Chamber points out that, ultimately, the refusal decision is an act of the European Union, and therefore subject, in its entirety, to European Union law.

65. That is precisely the tenor of the judgment now under appeal, paragraph 87 of which states: '[w]ith regard to judicial review of the legality of a decision refusing access, it is clear from paragraph 94 of the judgment in *Sweden v Commission* ... that it is within the jurisdiction of the EU judicature to review, on application by a person to whom the institution has refused to grant access, whether that refusal was *validly based* [(11)] on the exceptions laid down in Article 4(1) to (3) of Regulation No 1049/2001, regardless of whether the refusal results from an assessment of those exceptions by the institution itself or by the relevant Member State.'

66. It follows that, contrary to the Commission's claim, [as a result of the application of Article 4(5) of Regulation No 1049/2001,] the review carried out by the EU judicature is not limited to a *prima facie* review. The application of that provision does not therefore prevent a complete review being carried out of the Commission's refusal decision, which must, in particular, respect the obligation to give reasons and be based on the substantive assessment made by the Member State concerned of the applicability of the exceptions laid down in Article 4(1) to (3) of Regulation No 1049/2001.'

67. None of the foregoing makes it possible to support IFAW's contention that the General Court held that its judicial review of the refusal decision does not need to be as incisive and extensive as a review of any of the acts or measures of the European Union which are subject to its jurisdiction. Indeed, nor could it be otherwise in view of the importance of the fundamental right involved, since it must be borne in mind that the right to an effective remedy against the administrative authorities is, together with the principle of legality, one of the fundamental pillars in the historical process of the assertion of the rule of law, the tradition and principles of which also underpin the European Union (Article 2 TEU).

68. A different question is whether, in this particular case, the General Court actually undertook a judicial review worthy of that name inasmuch as it is part of the right to an effective remedy now guaranteed by Article 47 of the Charter of Fundamental Rights. That brings me to the second part of the

second ground of appeal, which requires, first of all, consideration of another question: was it necessary for the General Court to have direct access to the disputed document?

69. On this point, it is my view that the appeal should be allowed.

70. In my opinion, IFAW rightly asserts that, for the purposes of its review *in camera*, the General Court should have ordered the production of the disputed document so that it could verify for itself the existence and, therefore, the applicability of the exceptions put forward by the institution and originally invoked by the Member State.

71. In those terms, the question is not, as IFAW claims, whether the General Court ought to have carried out a full review or, as the General Court held, whether, in a situation of the kind at issue, it is necessary to afford the Member State concerned a wide discretion for the purposes of invoking exceptions to the duty to disclose a document. The question at issue here precedes those concerns.

72. Without there being any need to specify the intensity of the judicial review of the decision to refuse access, it is quite clear that, however low its intensity may be, that review must always be carried out in the light of the disputed document in question. Otherwise, it would be impossible to determine whether the reasons relied on by the Member State concerned, no matter how broad an assessment may be sought to be given, correspond to some extent to the real substantive content of the document whose disclosure is refused.

73. In its review of the refusal decision, the Court must refer to the reasoning on which the decision is based. Further, if that reasoning consists in an assessment of the effects which disclosure of the document would have on certain rights and interests, review will be possible in so far as the General Court is able to form its own view concerning the substantive content of the document. Only if it is aware of the content of the document will the General Court be able to assess the validity of the reasons put forward by the Commission and the Member State concerned to prevent the disclosure of that document. Otherwise, the General Court would merely form a view by reference to an interested party, basing its decision, ultimately, on the authority of a person whose decision must, however, be subject to an effective judicial review.

74. Once the General Court has, in the light of the document, been able to form a view as to the extent of the possible consequences of that document's disclosure, it will then be in a position to examine and assess the reasons relied on by the Commission and the Member State concerned in order to prevent disclosure. It is at that point that the issue will arise as to whether the General Court must attribute a greater or a lesser measure of discretion to the Commission and the Member State: in other words, as to whether the assessment ultimately to be taken into account should be an assessment undertaken by the General Court or the assessment carried out by the Commission. That is the typical alternative in any judicial review of administrative activity. (12) However, for that alternative to arise it is obvious that there must be two independent assessments: that of the court and that of the public authority whose actions are under review. Both are based on the direct and immediate appraisal of the event or the conduct whose consequences are referred to as justification for the content of the legal act subject to review by the court.

75. Therefore, in my opinion, it is inappropriate to state, as the Commission does, that requiring the General Court to carry out a direct examination of the document – in addition to placing an undue burden on the General Court and being at odds with the discretionary nature of its powers regarding the adoption of measures of inquiry – would amount to a 'distortion of the nature of an annulment action ... [and] would ask the Union judicature systematically to put itself in the place of the deciding institution' (paragraph 10 of the Commission's response).

76. The contrary is true for the following reasons. First of all, the argument relating to the burden which would be placed on the General Court cannot place conditions on the proper exercise of jurisdiction. Second, this case does not concern the adoption of a measure of inquiry aimed at the production of a document which is required for the purposes of forming a view on the positions put forward by the parties regarding the subject-matter of the proceedings, but rather a measure of inquiry which is required in order to ascertain precisely what the subject-matter of the dispute between the parties to the proceedings is. Lastly, it is in the 'nature' of an action for annulment for the lawfulness of a decision of the European Union to be determined by the Courts of the European Union through an examination of the reasons on which that decision is based. In the instant case, that examination is possible only if the General Court is able to form its own opinion on the content of the disputed document, because it is only on the basis of that opinion that it will be in a position to assess the validity of the reasons invoked by the institution which has objected to disclosure.

77. In short, I believe that the second part of the second ground of appeal must be upheld.

V – The question whether the Court of Justice may give final judgment in the matter

78. Under Article 61 of the Statute of the Court of Justice, '[i]f the appeal is well founded, the Court of Justice shall quash the decision of the General Court' and 'may itself give final judgment in the matter, where the state of the proceedings so permits, or refer the case back to the General Court for judgment.'

79. In my opinion, this is not a case where the Court of Justice may give final judgment in the matter. In view of the terms in which I propose that the appeal be upheld, it is appropriate to set aside the judgment under appeal and refer the case back to the General Court for judgment following a direct examination of the disputed document.

VI – Costs

80. Pursuant to Article 69(2) of the Rules of Procedure, I propose that the Court order each party to bear its own costs.

VII – Conclusion

81. In the light of the foregoing considerations, I propose that the Court should: Allow the appeal in part by upholding the second part of the second ground of appeal, alleging misinterpretation of Article 4(5) of Regulation (EC) No 1049/2001 and consequently:

- (1) Set aside the judgment of the General Court of 13 January 2011 in Case T-362/08 *IFAW Internationaler Tierschutz-Fonds v Commission* dismissing the action for annulment of the decision of the Commission of 19 June 2008 refusing access to a document sent to the Commission by the German authorities in connection with a procedure for the declassification of a site protected under Directive 92/43;
- (2) Refer the case back to the General Court for judgment following a direct examination of the disputed document;
- (3) Order the parties to bear their own costs.

1– Original language: Spanish.

2 – Case T-362/08 [2011] ECR II-0000.

3 – Case C-64/05 P [2007] ECR I-11389.

4 – OJ 2001 L 145, p. 43.

5 – Council Directive of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (OJ 1992 L 206, p. 7).

6 – Case T-168/02 *IFAW Internationaler Tierschutz-Fonds v Commission* [2004] ECR II-4135.

7 – Eight documents in total were provided, from the City of Hamburg and the Federal Republic of Germany.

8 – Case C-266/05 P [2007] ECR I-1233.

9 – As Advocate General Poiares Maduro stated at point 32 of his Opinion in *Sweden v Commission*, the Danish Government rightly described the insuperable ambiguity of the wording of Article 4(5) as a ‘constructive ambiguity’ the use of which was necessary to enable its adoption by the Community legislature. While that necessity is a sufficient reason for the ‘political’ interpretation of the provision, it cannot be a sufficient reason for its legal interpretation, which is the only interpretation that a court can be expected to provide. Moreover, academic legal writers are unanimous in their assessment of the difficulties relating to the interpretation of the provision. In addition to the article cited by Advocate General Poiares Maduro in footnote 20 of his Opinion (Heliskoski, J. and Leino, P., ‘Darkness at the break of noon: the case law on Regulation No 1049/2001 on access to documents’, *CMLR*, vol. 43 (2006), p. 735 et seq.), see Guichot, E., *Transparencia y acceso a la información en el Derecho Europeo*, Cuadernos Universitarios de Derecho Administrativo, Seville, 2011, p. 123 et seq., who also gives an account of the prospects for reform of the current legislation. In that connection, see Leino, P., ‘Case C-64/05 P, *Kingdom of Sweden v Commission of the European Communities and Others*, Judgment of the European Court of Justice (Grand Chamber) of 18 December 2007’, *CMLR*, vol. 45 (2008), p. 1469 et seq.

10 – The judgment in *Sweden v Commission* has been the subject of numerous articles, describing and examining the solution adopted by the Court. In addition to the articles cited in the previous footnote, see, *inter alia*, Diamandouros, N., ‘Openness and Access to Documents’, *EStAL*, 4/2008; Schadtler, K., ‘Informationsfreiheit und Verwaltungstransparenz in Europa: Das Recht auf Zugang zu Dokumenten aus den EG-Mitgliedstaaten auf dem Prüfstand – Zugleich eine Besprechung des Urteils des Europäischen Gerichtshofs vom 18. Dezember 2007, Rs. C-64/05 P’, *DöV* (2008), p. 455 et seq.; and Wegener, W.B., ‘Art. 15, Rn. 19-22’, in Callies/Ruffert, *EUV. EGV Kommentar*, C.H. Beck, Munich, 4th ed., 2011.

11 – Emphasis added.

12– See, for example, Santamaria Pastor, J.A., *Principios de Derecho Administrativo General*, vol. II, 2nd ed., Iustel, Madrid, 2009, p. 686 et seq.