



Reports of Cases

JUDGMENT OF THE COURT (Third Chamber)

21 June 2012*

((Appeals — Public access to documents of the institutions — Regulation (EC) No 1049/2011 — Article 4(5) — Scope — Documents originating from a Member State — Objection by the Member State to disclosure of the documents — Extent of review by the institution and the European Union judicature of the Member State's reasons for objecting — Production of the document to the European Union judicature))

In Case C-135/11 P,

APPEAL under Article 56 of the Statute of the Court of Justice of the European Union, brought on 16 March 2011,

IFAW Internationaler Tierschutz-Fonds gGmbH, established in Hamburg (Germany), represented by S. Crosby and S. Santoro, advocaten,

appellant,

the other parties to the proceedings being:

European Commission, represented by C. O'Reilly and P. Costa de Oliveira, acting as Agents, with an address for service in Luxembourg,

defendant at first instance,

Kingdom of Denmark,

Republic of Finland,

Kingdom of Sweden,

interveners at first instance,

THE COURT (Third Chamber),

composed of K. Lenaerts, President of the Chamber, J. Malenovský (Rapporteur), R. Silva de Lapuerta, E. Juhász and D. Šváby, Judges,

Advocate General: P. Cruz Villalón,

Registrar: A. Calot Escobar,

having regard to the written procedure,

* Language of the case: English.

after hearing the Opinion of the Advocate General at the sitting on 1 March 2012,
gives the following

Judgment

- 1 By its appeal IFAW Internationaler Tierschutz-Fonds gGmbH ('IFAW') asks the Court to set aside the judgment of the General Court of the European Union of 13 January 2011 in Case T-362/08 *IFAW Internationaler Tierschutz-Fonds v Commission* [2011] ECR II-11 ('the judgment under appeal') dismissing its application for the annulment of the decision of the European Commission of 19 June 2008 ('the contested decision') refusing to grant it access to a document transmitted to that institution by the German authorities in connection with a procedure for the declassification of a site protected under Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (OJ 1992 L 206, p. 7).

Legal context

- 2 Article 255(1) and (2) EC provides:

'1. Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, shall have a right of access to European Parliament, Council and Commission documents, subject to the principles and the conditions to be defined in accordance with paragraphs 2 and 3.

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

- 3 Declaration No 35 on Article [255(1) EC] attached to the Final Act of the Treaty of Amsterdam states:

'The Conference agrees that the principles and conditions referred to in Article [255(1) EC] 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.'

- 4 Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (OJ 2001 L 145, p. 43) is applicable, in accordance with the second paragraph of Article 19, from 3 December 2001.

- 5 Recitals 2, 4 and 10 in the preamble to Regulation No 1049/2001 read as follows:

'(2) Openness enables citizens to participate more closely in the decision-making process and guarantees that the administration enjoys greater legitimacy and is more effective and more accountable to the citizen in a democratic system. Openness contributes to strengthening the principles of democracy and respect for fundamental rights as laid down in Article 6 of the EU Treaty and in the Charter of Fundamental Rights of the European Union.

...

- (4) The purpose of this Regulation is to give the fullest possible effect to the right of public access to documents and to lay down the general principles and limits on such access in accordance with Article 255(2) of the EC Treaty.

...

(10) In order to bring about greater openness in the work of the institutions, access to documents should be granted by the European Parliament, the Council and the Commission not only to documents drawn up by the institutions, but also to documents received by them. In this context, it is recalled that Declaration No 35 ... provides that a Member State may request the Commission or the Council not to communicate to third parties a document originating from that State without its prior agreement.'

6 Indent (a) of Article 1, 'Purpose', of Regulation No 1049/2001 provides:

'The purpose of this Regulation is:

(a) to define the principles, conditions and limits on grounds of public or private interest governing the right of access to European Parliament, Council and Commission (hereinafter referred to as "the institutions") documents provided for in Article 255 of the EC Treaty in such a way as to ensure the widest possible access to documents.'

7 In accordance with Article 2(1) and (3) of that regulation:

'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.'

8 Article 3 of that regulation provides:

'For the purpose of this Regulation:

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

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

9 Article 4 of that regulation, which lists the exceptions to the right of access, reads as follows:

'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.'

Background to the dispute

10 IFAW is a non-governmental organisation active in the field of the protection of animal welfare and nature conservation. Since it objected to an industrial project ('the industrial project') being carried out on a protected site in Germany, it requested access to a number of documents the Commission had received in connection with the examination of the industrial project, in particular certain documents originating from various authorities of the Federal Republic of Germany.

IFAW's first request for access to the documents

11 By letter to the Commission of 20 December 2001, IFAW requested access to various documents received by the Commission in connection with the examination of the industrial project, namely certain documents originating from the Federal Republic of Germany and the City of Hamburg and a letter of 15 March 2000 from the German Chancellor to the President of the Commission ('the German Chancellor's letter').

12 Since it considered that Article 4(5) of Regulation No 1049/2001 prohibited it, in the absence of the prior agreement of the Member State concerned, from disclosing the documents to which access was sought, the Commission on 26 March 2002 adopted a decision refusing IFAW access to the documents requested.

13 By application lodged at the Registry of the Court of First Instance (now the General Court) on 4 June 2002, IFAW brought an action for the annulment of that decision.

14 By judgment of 30 November 2004 in Case T-168/02 *IFAW Internationaler Tierschutz-Fonds v Commission* [2004] ECR II-4135, the action was dismissed as unfounded.

15 On 10 February 2005 the Kingdom of Sweden, which had intervened in that case, appealed against that judgment to the Court of Justice.

16 By judgment of 18 December 2007 in Case C-64/05 P *Sweden v Commission* [2007] ECR I-11389, the Court set aside the judgment in *IFAW Internationaler Tierschutz-Fonds v Commission* and annulled the Commission's decision of 26 March 2002.

IFAW's second request for access to the documents

17 Following the judgment in *Sweden v Commission*, IFAW, by letter to the Commission of 13 February 2008, repeated its request for access to the documents received by the Commission in connection with the examination of the industrial project and originating from the German authorities.

18 By letter of 20 February 2008, the Commission acknowledged receipt of IFAW's letter of 13 February 2008.

19 On 26 March 2008 IFAW asked the Commission to reply to its request of 13 February 2008.

20 By letter of 7 April 2008, the Commission informed IFAW that consultation was in progress with the German authorities concerning disclosure of the documents requested.

21 On 9 April 2008 IFAW once again asked the Commission to reply to its request of 13 February 2008, and to do so by 22 April 2008.

22 In the absence of a reply from the Commission by that date, IFAW made a confirmatory request by letter of 29 April 2008.

23 On 19 May 2008 the Commission wrote to IFAW, acknowledging receipt of the confirmatory request and stating that IFAW would receive a reply within the period laid down by Regulation No 1049/2001.

24 On 19 June 2008 the Commission adopted the contested decision relating to IFAW's confirmatory request, which was communicated to IFAW on the same day. By that decision the Commission disclosed all the documents requested by IFAW, namely eight documents originating from the City of Hamburg and the Federal Republic of Germany, but refused to grant access to the German Chancellor's letter because the German authorities had objected to disclosure of that document.

25 According to the contested decision, first, the German authorities had stated that disclosure of the German Chancellor's letter would undermine the protection of the public interest as regards 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.

26 That letter concerned a confidential statement drawn up exclusively for internal use and related to the economic policy of the Federal Republic of Germany and other Member States. Disclosure of that document would not only undermine confidentiality, to the detriment of international relations between the Federal Republic of Germany, the institutions and other Member States, but would also compromise German economic policy and that of other Member States. Consequently, access to the German Chancellor's letter had to be refused under the third and fourth indents of Article 4(1)(a) of Regulation No 1049/2001.

27 Secondly, 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.

28 That letter concerned a confidential statement, addressed to the Commission and drawn up exclusively for internal use in connection with the discussions relating to the Commission's examination of the industrial project. Disclosure of that document would seriously undermine the Commission's decision-making process. Consequently, the exception provided for in the second subparagraph of Article 4(3) of Regulation No 1049/2001 applied to the German Chancellor's letter.

- 29 The Commission, in the contested decision, accepted the substance of the reasons put forward by the German authorities. It also examined whether there was an overriding public interest in disclosure of the letter within the meaning of the first subparagraph of Article 4(3) of Regulation No 1049/2001. It considered in the present case that it had no evidence to suggest the existence of a possible overriding public interest within the meaning of that provision prevailing over the requirement to protect the Commission's decision-making process.
- 30 As regards the question of partial access to the document in question, the Commission stated in the contested decision that by virtue of the judgment in *Sweden v Commission* it was compelled to accept the outcome of the consultation process and to refuse access to the German Chancellor's letter on the basis of the exceptions claimed by the German authorities and the reasons they gave. As the German authorities opposed disclosure of the whole of the German Chancellor's letter, partial access to that document could not be granted pursuant to Article 4(6) of Regulation No 1049/2001.

Proceedings before the General Court and the judgment under appeal

- 31 IFAW on 28 August 2008 brought an action for the annulment of the contested decision, which was dismissed by the judgment under appeal.
- 32 The General Court, in paragraphs 67 to 88 of the judgment under appeal, recalled essentially that Article 4(5) of Regulation No 1049/2001 makes the prior agreement of the Member State a necessary condition for disclosure of a document originating from it.
- 33 However, the General Court also recalled that, as the Court of Justice held in *Sweden v Commission*, Regulation No 1049/2001 does not confer on the Member State a general and unconditional right of veto, permitting it to oppose, arbitrarily 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. Article 4(5) of that regulation entitles the Member State to object to the disclosure of documents originating from it only on the basis of the substantive exceptions laid down in Article 4(1) to (3) and if it gives proper reasons for its position.
- 34 According to the General Court, before refusing access to a document originating from a Member State, the Commission must therefore examine whether that State has based its objection on the substantive exceptions laid down in Article 4(1) to (3) of Regulation No 1049/2001 and whether it has provided a proper statement of reasons in that regard.
- 35 Finally, the General Court held, in paragraphs 84 to 88 of the judgment under appeal, that, in the present case of a refusal of access to a document originating from a Member State based on the reasons for objecting put forward by that State, it was not necessary to deal with the question whether the Commission was obliged, in addition to the purely formal review as to whether the Member State has given reasons for its refusal to grant access and done so in terms of the exceptions listed in Article 4(1) to (3) of Regulation No 1049/2001, to carry out a *prima facie* review or a full review of the reasons on which the Member State bases its objection.
- 36 The General Court considered that, where the Commission's decision regarding disclosure of a document originating from a Member State corresponds to that State's position pursuant to Article 4(5) of Regulation No 1049/2001, the only type of review that is relevant is that which the European Union judicature is entitled to carry out in regard to the Commission's decision to refuse access to the document in question.
- 37 In a second part of the judgment under appeal, paragraphs 101 to 127, the General Court assessed whether the Commission's refusal to grant access to the German Chancellor's letter was well founded.

- 38 First, it recalled, in paragraph 103 of the judgment under appeal, that, in the present case of the Commission's refusal to grant access to a document originating from a Member State pursuant to Article 4(5) of Regulation No 1049/2001, application of the exceptions relating to the public interest provided for in Article 4(1)(a) of that regulation was based on the substantive assessment made by the Member State and not that of the Commission.
- 39 Next, it observed, in paragraphs 105 and 106 of the judgment under appeal, that, with regard to the extent of the review of the legality of such a decision by the European Union judicature, in connection with the application of one of the substantive exceptions provided for in Article 4(1)(a) of that regulation, the Federal Republic of Germany had to be recognised as enjoying a broad discretion for the purpose of determining whether the disclosure of documents relating to the fields covered by those exceptions could undermine the public interest.
- 40 The General Court concluded, in paragraph 107 of the judgment under appeal, that review by the European Union judicature 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.
- 41 After carrying out that review, the General Court reached the conclusion that the assessment that disclosure of the German Chancellor's letter could undermine the protection of the public interest as regards the economic policy of the Federal Republic of Germany was not based on a manifest error on the part of the German authorities. In paragraph 138 of the judgment under appeal, it therefore concluded that the Commission had correctly refused that disclosure following the objection raised by that Member State pursuant to Article 4(5) of Regulation No 1049/2001 on the basis of the exception concerning the protection of the public interest as regards the economic policy of a Member State provided for in the fourth indent of Article 4(1)(a) of that regulation.
- 42 Finally, although IFAW had requested it to order the Commission, by way of measures of inquiry, to produce the German Chancellor's letter, the General Court, taking the view that it was able to rule on the application on the basis of the forms of order sought, the pleas in law and the arguments put forward during the proceedings, refused to order production of that document.

Forms of order sought by the parties

- 43 IFAW claims that the Court should:
- set aside the judgment under appeal and annul the contested decision;
 - order the Commission to pay the costs of the proceedings at first instance and on appeal.
- 44 The Commission contends that the Court should:
- dismiss the appeal;
 - order IFAW to pay the costs.

The appeal

- 45 In support of its claim that the judgment under appeal should be set aside, the appellant relies on two grounds of appeal, alleging that the General Court erred in law, first, in relation to the interpretation of Article 4(5) of Regulation No 1049/2001 and, secondly, by not carrying out a complete examination of the German Chancellor's letter in order to ascertain whether the reasons for refusing access to that document were well founded.

First ground of appeal

- 46 By its first ground of appeal IFAW argues essentially that the General Court erred in law by not acknowledging that the Commission was required, with respect to the document whose disclosure was refused by the Member State concerned, to carry out an exhaustive assessment of the reasons for objecting put forward by that State on the basis of the exceptions in Article 4 of Regulation No 1049/2001.

Arguments of the parties

- 47 IFAW submits that the General Court erred in law by considering that it was neither necessary nor material for the Commission to carry out a thorough assessment of the reasons for objecting put forward by the Member State concerned, thereby breaching Article 4(5) of Regulation No 1049/2001 as interpreted by the Court of Justice. In the appellant's view, it was for the Commission, in addition to verifying whether the Member State had given reasons for its objection, first to check whether those reasons related to the exceptions in Article 4 of Regulation No 1049/2001 and secondly to assess in the particular case whether those objections and reasons applied to the document concerned.
- 48 In its defence, the Commission submits that it examined whether the exceptions and reasons were *prima facie* properly relied on in the light of the circumstances of the case, and, since that was so, it submits that it gave reasons for its refusal.

Findings of the Court

- 49 It should be recalled at the outset that Regulation No 1049/2001, as is apparent from recital 4 in the preamble and from Article 1, is intended to give the fullest possible effect to the right of public access to documents held by an institution. Under Article 2(3) of the regulation, that right extends not only to documents drawn up by an institution but also to documents received by an institution from third parties, including the Member States, as expressly stated in Article 3(b) of the regulation.
- 50 However, Article 4 of Regulation No 1049/2001 lays down exceptions to the right of access to a document. In particular, Article 4(5) provides that a Member State may request an institution not to disclose a document originating from that State without its prior agreement.
- 51 In the present case, the Federal Republic of Germany made use of the possibility offered by Article 4(5) and requested the Commission not to disclose the German Chancellor's letter. It based its objection on the exceptions concerning the protection of the public interest as regards international relations and the economic policy of a Member State laid down in the third and fourth indents of Article 4(1)(a) of the regulation, and the exception concerning the protection of the Commission's decision-making process laid down in the second subparagraph of Article 4(3) of the regulation. Consequently, in the contested decision, the Commission based its refusal to grant access to the German Chancellor's letter on the objection raised by the German authorities pursuant to Article 4(5) of Regulation No 1049/2001.
- 52 The Court has previously had occasion, in *Sweden v Commission*, to clarify the scope of an objection made by a Member State pursuant to that provision.
- 53 Thus the Court held that that provision is procedural in nature, since it confines itself to requiring the prior agreement of the Member State concerned where that State has made a specific request to that effect, and that it is a provision dealing with the process of adoption of the Community decision (see *Sweden v Commission*, paragraphs 78 and 81).
- 54 Unlike Article 4(4) of Regulation No 1049/2001, which gives third parties only a right to be consulted, with respect to documents originating from them, by the institution concerned as regards the application of one of the exceptions in Article 4(1) and (2), Article 4(5) makes the prior agreement of the Member State a necessary condition for disclosure of a document originating from it, if that State so requests.

- 55 The Court thus held that, 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 (*Sweden v Commission*, paragraph 50).
- 56 It follows, conversely, that an institution which does not have the agreement of the Member State concerned is not entitled to disclose the document (see *Sweden v Commission*, paragraph 44). In the present case, the Commission's decision on the request for access to the German Chancellor's letter thus depended on the decision taken by the German authorities as part of the process of adoption of the contested decision.
- 57 However, according to *Sweden v Commission*, paragraph 58, Article 4(5) of Regulation No 1049/2001 does not confer on the Member State concerned 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.
- 58 According to *Sweden v Commission*, paragraph 76, the exercise of the power conferred on the Member State concerned by Article 4(5) of Regulation No 1049/2001 is delimited by the substantive exceptions set out in Article 4(1) to (3), with the Member State merely being given in this respect a power to take part in the institution's decision. The prior agreement of the Member State referred to in Article 4(5) thus resembles not a discretionary right of veto but a form of assent confirming that none of the grounds of exception under Article 4(1) to (3) is present. The decision-making process thus established by Article 4(5) of the regulation therefore requires the institution and the Member State involved to confine themselves to the substantive exceptions laid down in Article 4(1) to (3) (*Sweden v Commission*, paragraph 83).
- 59 It follows that 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 substantive exceptions laid down in Article 4(1) to (3) and if it gives proper reasons for its position (*Sweden v Commission*, paragraph 99).
- 60 With regard, in the present case, to the scope of Article 4(5) of Regulation No 1049/2001 as regards the institution concerned, it must be recalled that the Court has previously held in *Sweden v Commission*, paragraph 94, that, from the point of view of the person requesting access, the Member State's intervention does not affect the nature of a European Union act of the decision subsequently addressed to him by the institution in reply to the request he has made to it for access to a document in its possession.
- 61 The institution to which the request is made, as the maker of a decision to refuse access to documents, is therefore responsible for the lawfulness of the decision. The Court has thus held that 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 relied on by that State for refusing access to the document in question do not refer to the exceptions listed in Article 4(1) to (3) of Regulation No 1049/2001 (*Sweden v Commission*, paragraph 88).
- 62 It follows that, before refusing access to a document originating from a Member State, the institution concerned must examine whether that State has based its objection on the substantive exceptions in Article 4(1) to (3) of Regulation No 1049/2001 and has given proper reasons for its position. Consequently, in the procedure for the adoption of a decision to refuse access, the Commission must make sure that those reasons exist and refer to them in the decision it makes following that procedure (*Sweden v Commission*, paragraph 99).
- 63 On the other hand, contrary to IFAW's argument, the institution to which the request is made does not have to carry out an exhaustive assessment of the Member State's decision to object by conducting a review going beyond the verification of the mere existence of reasons referring to the exceptions in Article 4(1) to (3) of Regulation No 1049/2001.

64 To insist on such an exhaustive assessment could lead to the institution being able, after carrying out the assessment, wrongly to communicate the document in question to the person requesting access, notwithstanding the objection, duly reasoned in accordance with paragraphs 61 and 62 above, of the Member State from which the document originates.

65 It follows that IFAW is not correct in submitting that the General Court erred in law by not acknowledging that the Commission was required, with respect to the document whose disclosure was refused, to carry out an exhaustive assessment of the reasons for objecting put forward by the Member State on the basis of the exceptions in Article 4 of Regulation No 1049/2001.

66 The first ground relied on by IFAW in support of its appeal must therefore be rejected.

Second ground of appeal

67 By its second ground of appeal IFAW argues essentially that the General Court erred in law by considering that it was in a position to carry out the review required of it without itself consulting the document which the Commission had refused to disclose.

Arguments of the parties

68 The appellant argues that the General Court was wrong to refuse to order production of the German Chancellor's letter in the possession of the Commission, since production of that document was essential for the General Court to be able itself to verify in fact the existence and therefore the applicability of the exceptions put forward by that institution to justify its refusal to communicate the document, which were originally relied on by the Federal Republic of Germany. It submits that the General Court could not perform its task without sight and analysis of the document in question.

69 The Commission, in reply, submits that the General Court has a discretion as regards measures of inquiry, including the production of documents.

Findings of the Court

70 According to paragraph 87 of the judgment under appeal, the General Court considers that the application of Article 4(5) of Regulation No 1049/2001 does not prevent it from carrying out a review of the Commission's refusal decision that goes beyond a prima facie review and involves a substantive assessment of the applicability in the particular case of the exceptions laid down in Article 4(1) to (3) of Regulation No 1049/2001.

71 That assessment is not vitiated by any error of law.

72 If the Member State gives a reasoned refusal to allow access to the document in question and the institution concerned is consequently obliged to refuse the request for access, the person who has made the request enjoys judicial protection. It is within the jurisdiction of the European Union judicature to review, on application by a person to whom the institution has refused to grant access, whether that refusal could have been validly based on those exceptions, regardless of whether the refusal results from an assessment of those exceptions by the institution itself or by the Member State concerned (see, to that effect, *Sweden v Commission*, paragraphs 90 and 94).

73 Ensuring such judicial protection for the person who has made the request and to whom the institution has refused to grant access to one or more documents originating from a Member State following an objection by that State means that the European Union judicature must assess the lawfulness of the decision to refuse access in the specific case (see, in that respect, Case C-266/05 P

Sison v Council [2007] ECR I-1233, paragraphs 33 to 39), in the light of all relevant factors, among the most important of which are the documents whose disclosure has been refused. To comply with the prohibition of disclosure of the documents in question without the prior agreement of the Member State concerned, the General Court must consult the documents *in camera*, so that the parties themselves do not have access to them, as provided for by the third indent of Article 67(3) of the Rules of Procedure of the General Court.

- 74 It is apparent from paragraphs 152 and 153 of the judgment under appeal that the General Court did not find it necessary to order production of the document whose disclosure was refused in the present case, namely the German Chancellor's letter.
- 75 It follows that, not having itself consulted that letter, the General Court was not in a position to assess in the specific case whether access to the document could validly be refused on the basis of the exceptions set out in Article 4(1) to (3) of Regulation No 1049/2001 or, consequently, to review the lawfulness of the contested decision, contrary to the requirement stated in paragraph 73 above.
- 76 Accordingly, the appellant is right to submit that, by considering that it was in a position to carry out the review required of it without itself consulting the document which the Commission had refused to disclose, the General Court erred in law.
- 77 The second ground of appeal must therefore be upheld, and the judgment under appeal set aside in its entirety.

Costs

- 78 Under the first paragraph of Article 61 of the Statute of the Court of Justice, if the appeal is well founded, the Court is to quash the decision of the General Court. It 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 the present case, the state of the proceedings does not so permit, and the case must therefore be referred back to the General Court for it to give judgment, after having sight of the German Chancellor's letter, on the application brought before it by IFAW for the annulment of the contested decision.

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

- 1. Sets aside the judgment of the General Court of the European Union of 13 January 2011 in Case T-362/08 *IFAW Internationaler Tierschutz-Fonds v Commission*;**
- 2. Refers the case back to the General Court of the European Union for it to give judgment on the application brought by IFAW Internationaler Tierschutz-Fonds gGmbH for the annulment of the decision of the European Commission of 19 June 2008 refusing to grant it access to a document transmitted to the European Commission by the German authorities in connection with a procedure for the declassification of a site protected under Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora;**
- 3. Reserves the costs.**

[Signatures]