Reports of Cases

JUDGMENT OF THE COURT (Grand Chamber)

14 February 2012 *

(Reference for a preliminary ruling — Aarhus Convention — Directive 2003/4/EC — Access to environmental information — Bodies or institutions acting in a legislative capacity — Confidentiality of the proceedings of public authorities — Condition that the confidentiality must be provided for by law)

In Case C-204/09,

REFERENCE for a preliminary ruling under Article 234 EC from the Bundesverwaltungsgericht (Germany), made by decision of 30 April 2009, received at the Court on 8 June 2009, in the proceedings

Flachglas Torgau GmbH

v

Federal Republic of Germany,

THE COURT (Grand Chamber),

composed of V. Skouris, President, A. Tizzano, J. N. Cunha Rodrigues, K. Lenaerts, J.-C. Bonichot (Rapporteur), J. Malenovský and U. Lõhmus, Presidents of Chambers, A. Rosas, M. Ilešič, E. Levits, A. Ó Caoimh, L. Bay Larsen and M. Berger, Judges,

Advocate General: E. Sharpston,

Registrar: B. Fülöp, Administrator,

having regard to the written procedure and further to the hearing on 1 September 2010, after considering the observations submitted on behalf of:

— Flachglas Torgau GmbH, by S. Altenschmidt and M. Langner, Rechtsanwälte,

— the German Government, by M. Lumma and T. Henze, acting as Agents,

— the European Commission, by P. Oliver and B. Schima, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 22 June 2011,

gives the following

* Language of the case: German.

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Articles 2 and 4 of Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC (OJ 2003 L 41, p. 26).

2 The reference has been made in proceedings between Flachglas Torgau GmbH ('Flachglas Torgau') and the Federal Republic of Germany concerning the rejection by the latter of Flachglas Torgau's request for access to information relating to the Law on the national allocation plan for greenhouse gas emission licences in the allocation period 2005-2007 (Gesetz über den nationalen Zuteilungsplan für Treibhausgas Emissionsberechtigungen in der Zuteilungsperiode 2005 bis 2007) ('Zuteilungsgesetz 2007').

Legal context

International law

3 The Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters was signed on 25 June 1998 and approved on behalf of the European Community by Council Decision 2005/370/EC of 17 February 2005 (OJ 2005 L 124, p. 1) ('the Aarhus Convention').

4 Article 2(2) of the Aarhus Convention defines 'public authority' as follows:

'"Public authority" means:

(a) government at national, regional and other level;

(b) natural or legal persons performing public administrative functions under national law, including specific duties, activities or services in relation to the environment;

…

This definition does not include bodies or institutions acting in a judicial or legislative capacity.'

5 Article 4(1) of the Convention provides that, subject to a number of reservations and conditions, each party is to ensure that public authorities, in response to a request for environmental information, make such information available to the public, within the framework of national legislation.

6 Article 4(4) of the Convention states:

'A request for environmental information may be refused if the disclosure would adversely affect:

(a) the confidentiality of the proceedings of public authorities, where such confidentiality is provided for under national law;

…

The aforementioned grounds for refusal shall be interpreted in a restrictive way, taking into account the public interest served by disclosure and taking into account whether the information requested relates to emissions into the environment.'

7 Article 8 of the Convention, 'Public participation during the preparation of executive regulations and/or generally applicable legally binding normative instruments', provides:

'Each Party shall strive to promote effective public participation at an appropriate stage, and while options are still open, during the preparation by public authorities of executive regulations and other generally applicable legally binding rules that may have a significant effect on the environment.

…'

8 The Declaration by the European Community concerning certain specific provisions under Directive 2003/4, annexed to Decision 2005/370, states:

'In relation to Article 9 of the Aarhus Convention, the European Community invites Parties to the Convention to take note of Article 2(2) and Article 6 of Directive [2003/4]. These provisions give Member States of the European Community the possibility, in exceptional cases and under strictly specified conditions, to exclude certain institutions and bodies from the rules on review procedures in relation to decisions on requests for information.

Therefore the ratification by the European Community of the Aarhus Convention encompasses any reservation by a Member State of the European Community to the extent that such a reservation is compatible with Article 2(2) and Article 6 of Directive [2003/4].'

European Union law

9 Recitals 1, 5, 11 and 16 in the preamble to Directive 2003/4 state:

'(1) Increased public access to environmental information and the dissemination of such information contribute to a greater awareness of environmental matters, a free exchange of views, more effective participation by the public in environmental decision-making and, eventually, to a better environment.

…

(5) … Provisions of Community law must be consistent with [the Aarhus Convention] with a view to its conclusion by the European Community.

…

(11) To take account of the principle in Article 6 of the Treaty, that environmental protection requirements should be integrated into the definition and implementation of Community policies and activities, the definition of public authorities should be expanded so as to encompass government or other public administration at national, regional or local level whether or not they have specific responsibilities for the environment. The definition should likewise be expanded to include other persons or bodies performing public administrative functions in relation to the environment under national law, as well as other persons or bodies acting under their control and having public responsibilities or functions in relation to the environment.

…

(16) The right to information means that the disclosure of information should be the general rule and that public authorities should be permitted to refuse a request for environmental information in specific and clearly defined cases. Grounds for refusal should be interpreted in a restrictive way, whereby the public interest served by disclosure should be weighed against the interest served by the refusal.

…'

10 Article 1 of Directive 2003/4 defines its objectives as follows:

'The objectives of this Directive are:

(a) to guarantee the right of access to environmental information held by or for public authorities and to set out the basic terms and conditions of, and practical arrangements for, its exercise; and

(b) to ensure that, as a matter of course, environmental information is progressively made available and disseminated to the public in order to achieve the widest possible systematic availability and dissemination to the public of environmental information. To this end the use, in particular, of computer telecommunication and/or electronic technology, where available, shall be promoted.'

11 Article 2(1) of Directive 2003/4 defines 'environmental information' within the meaning of the directive as follows:

'"Environmental information" means any information in written, visual, aural, electronic or any other material form on:

(a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;

(b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);

(c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect those elements;

(d) reports on the implementation of environmental legislation;

(e) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c);

(f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in (a) or, through those elements, by any of the matters referred to in (b) and (c).'

12 Article 2(2) of Directive 2003/4 defines 'public authority' as follows:

'"public authority" means:

(a) any government or other public administration, including public advisory bodies, at national, regional or local level;

…

Member States may provide that this definition shall not include bodies or institutions when acting in a judicial or legislative capacity. If their constitutional provisions at the date of adoption of this Directive make no provision for a review procedure within the meaning of Article 6, Member States may exclude those bodies or institutions from that definition.'

13 Article 3(1) of Directive 2003/4 provides:

'Member States shall ensure that public authorities are required, in accordance with the provisions of this Directive, to make available environmental information held by or for them to any applicant at his request and without his having to state an interest.'

14 After Article 4(1) of Directive 2003/4, which allows Member States to provide for a request for environmental information to be refused in certain situations, Article 4(2) of the directive also offers Member States that possibility in the following terms:

'Member States may provide for a request for environmental information to be refused if disclosure of the information would adversely affect:

(a) the confidentiality of the proceedings of public authorities, where such confidentiality is provided for by law;

…

The grounds for refusal mentioned in paragraphs 1 and 2 shall be interpreted in a restrictive way, taking into account for the particular case the public interest served by disclosure. In every particular case, the public interest served by disclosure shall be weighed against the interest served by the refusal. Member States may not, by virtue of paragraph 2(a), (d), (f), (g) and (h), provide for a request to be refused where the request relates to information on emissions into the environment.

…'

15 Article 6 of Directive 2003/4, 'Access to justice', requires Member States to ensure that any applicant for environmental information who considers that his request for information has been ignored, wrongfully refused, inadequately answered or otherwise not dealt with can seek administrative or judicial review of the acts or omissions of the public authority concerned.

National law

16 The Law on environmental information (Umweltinformationsgesetz) of 22 December 2004 (BGBl. 2004 I, p. 3704) transposed Directive 2003/4 into German law.

17 Paragraph 2(1) of that law provides:

‘The authorities required to provide information are:

1. the government and other public administrative bodies. … The following shall not be required to provide information:

(a) the highest Federal authorities, when acting in the context of a legislative process or issuing regulatory instruments, …’

18 As regards the exception relating to the confidentiality of proceedings, paragraph 8(1) of that law states:

‘If the disclosure of the information would adversely affect

…

2. the confidentiality of proceedings of authorities which are required to provide information within the meaning of Paragraph 2(1),

…

the request shall be refused unless the public interest in disclosure is overriding...’

19 Paragraph 28(1) of the Law on administrative procedure (Verwaltungsverfahrensgesetz) of 23 January 2003 (BGBl. 2003 I, p. 102) provides:

‘Before an administrative measure affecting a party’s rights is adopted, that person shall be given an opportunity to state his position with regard to the facts material to the decision.’

20 Paragraph 29 of that law states:

‘(1) An administrative authority must permit interested parties to consult the files concerning the procedure at issue, in so far as a knowledge of those files is necessary to protect or defend their legal interests. Until the conclusion of the administrative procedure, the first sentence does not apply to draft decisions, nor to work directly linked to their drafting. …

(2) An administrative authority is not obliged to permit the consultation of files when this would affect the normal performance of its tasks or where disclosure of the contents of the files would adversely affect the Federation or a Land, or where the facts must be kept secret by virtue of a law or by virtue of their nature, having regard in particular to the legitimate interests of the parties involved or of third parties.

…’

21 Paragraph 68(1) of that law, concerning hearings before an administrative authority in a formal administrative procedure, states:

‘The hearing shall not take place in public. Representatives of the supervisory authorities and persons who are undergoing training with the authority may take part. Other persons may be permitted by the hearing officer to attend, unless a party objects.’

The dispute in the main proceedings and the questions referred for a preliminary ruling

22 Flachglas Torgau seeks information about the conditions under which the Umweltbundesamt (Federal Office for the Environment), which is the authority responsible for greenhouse gas emissions trading, adopted allocation decisions for emissions licences during 2005 to 2007.

23 To that end, Flachglas Torgau asked the Bundesministerium für Umwelt, Naturschutz und Reaktorsicherheit (Federal Ministry for the Environment, Protection of Nature and Reactor Safety) ('the Bundesministerium für Umwelt') to provide it with information relating to the legislative process in which the Zuteilungsgesetz 2007 was adopted and the implementation of that law. In particular it requested access to internal memoranda and comments produced by the Ministry and correspondance, including electronic mail, between it and the Umweltbundesamt.

24 The Bundesministerium für Umwelt refused that request, considering, first, for the information relating to the legislative process, that it was exempt from the duty to provide that information because it participated in that process, and, secondly, for the information relating to the implementation of the Zuteilungsgesetz 2007, that the information was covered by the confidentiality of the proceedings of public authorities.

25 The Verwaltungsgericht Berlin (Administrative Court, Berlin) allowed in part the claim brought by Flachglas Torgau against that refusal. On appeal, the Oberverwaltungsgericht Berlin-Brandenburg (Higher Administrative Court, Berlin-Brandenburg) held that the Bundesministerium für Umwelt was entitled to rely on its participation in the legislative process, but that it could not rely on the confidentiality of proceedings as a ground for refusing to provide the information requested without giving detailed reasons why disclosure of that information would in fact have adversely affected that confidentiality.

26 Both Flachglas Torgau and the Bundesministerium für Umwelt appealed on a point of law against that decision before the Bundesverwaltungsgericht (Federal Administrative Court), where that company claims that the contested refusal is contrary to European Union law. In particular, it submits that European Union law does not allow the national legislature to exempt ministries from the duty to provide environmental information where they act in the context of the legislative process and that, in any event, that derogation must end when the law in question is promulgated.

27 Flachglas Torgau also considers that the Bundesministerium für Umwelt cannot rely on the protection of the confidentiality of the proceedings of public authorities, since European Union law requires such protection to be expressly provided for by a specific provision of national law, distinct from the general laws relating to environmental information.

28 In that regard, the Bundesverwaltungsgericht considers that, if there is such an obligation under European Union law, it must be determined whether a general unwritten legal principle to the effect that the administrative proceedings of public authorities do not take place in public, such as that provided for in national law, is sufficient to comply with that obligation.

29 It is on that basis that the Bundesverwaltungsgericht decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'1 (a) Is the [first sentence of the second subparagraph] of Article 2(2) of Directive [2003/4] to be interpreted as meaning that only bodies and institutions for whom it is, under the law of the Member State, to take the final (binding) decision in the legislative process act in a legislative capacity, or do bodies and institutions which have been given certain functions and rights of involvement in the legislative process by the law of the Member State, in particular to table a draft law and to give opinions on draft laws, also act in a legislative capacity?

(b) May the Member States exclude bodies and institutions acting in a judicial or legislative capacity from the definition of "public authority" only if their constitutional provisions at the date of the adoption of the directive made no provision for a review procedure within the meaning of Article 6 of Directive [2003/4]?

(c) Are bodies and institutions, when acting in a legislative capacity, excluded from the definition of "public authority" only for the period until the conclusion of the legislative process?

2 (a) Is the confidentiality of proceedings within the meaning of indent (a) [of the first subparagraph] of Article 4(2) of Directive [2003/4] provided for by law where the national-law provision enacted to implement Directive [2003/4] lays down generally that a request for access to environmental information is to be refused if the disclosure of the information would adversely affect the confidentiality of the proceedings of authorities which are required to provide information, or is it necessary, for that purpose, for a separate statutory provision to provide for the confidentiality of the proceedings?

(b) Is the confidentiality of proceedings within the meaning of indent (a) [of the first subparagraph] of Article 4(2) of Directive [2003/4] provided for by law where under national law there is a general unwritten legal principle that the administrative proceedings of public authorities are not public?'

Consideration of the questions referred

30 It should be recalled as a preliminary point that, by becoming a party to the Aarhus Convention, the European Union undertook to ensure, within the scope of European Union law, a general principle of access to environmental information held by the public authorities (see, to that effect, Case C-524/09 *Ville de Lyon* [2010] ECR I-14115, paragraph 35).

31 In adopting Directive 2003/4, the European Union intended to ensure the compatibility of European Union law with that convention in view of its conclusion by the Community by providing for a general scheme to ensure that any natural or legal person in a Member State has a right of access to environmental information held by or on behalf of the public authorities, without that person having to show an interest (see, to that effect, *Ville de Lyon*, paragraph 36).

32 It should also be noted that the right of access guaranteed by Directive 2003/4 only applies to the extent that the information requested satisfies the requirements for public access laid down by that directive, which requires inter alia that the information is 'environmental information' within the meaning of Article 2(1) of the directive, which is for the referring court to determine in the main proceedings.

Question 1(a) and (b)

33 By question 1(a) and (b), the referring court asks, in essence, whether the first sentence of the second subparagraph of Article 2(2) of Directive 2003/4 must be interpreted as meaning that the option given to Member States by that provision of not regarding 'bodies or institutions acting in a … legislative capacity' as public authorities may be applied to ministries to the extent that they participate in the legislative process, in particular by tabling draft laws or giving opinions, and whether that option is also subject to the conditions set out in the second sentence of the second subparagraph of Article 2(2) of that directive.

34 It is apparent from the order for reference and from the written and oral submissions made to the Court that this question refers only to the legislative process *stricto sensu* and not to that leading to the adoption of a provision of a lower rank than a law.

35 In addition, Flachglas Torgau's argument based on the document published in 2000 by the United Nations Economic Commission for Europe, 'The Aarhus Convention: An Implementation Guide', must be rejected. Flachglas Torgau refers in that regard to the clarifications contained in that document, according to which '[a]s the activities of public authorities in drafting regulations, laws and normative acts is expressly covered by [Article 8 of the Aarhus Convention], it is logical to conclude that the [Convention] does not consider these activities to be acting in a "legislative capacity". Thus, executive branch authorities engaging in such activities are public authorities under the [Convention].'

36 Apart from the fact that that document's interpretation of the Aarhus Convention is not binding, Article 8 of the Convention, to which it refers, in any event does not expressly mention the participation of public authorities in drafting 'laws', so that an interpretation such as that adopted by that document cannot be derived from the wording of that article.

37 According to settled case-law, the need for the uniform application of European Union law and the principle of equality require that the terms of a provision of European Union law which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given an autonomous and uniform interpretation throughout the European Union, which must take into account the context of that provision and the purpose of the legislation in question (see, in particular, Case C-236/01 *Monsanto Agricoltura Italia and Others* [2003] ECR I-8105, paragraph 72).

38 Moreover, the first sentence of the second subparagraph of Article 2(2) of Directive 2003/4, which permits Member States to derogate from the general rules laid down by that directive, may not be interpreted in such a way as to extend its effects beyond what is necessary to safeguard the interests which it seeks to secure, and the scope of the derogations which it lays down must be determined in the light of the aims pursued by the directive (see, by analogy, Case C-321/96 *Mecklenburg* [1998] ECR I-3809, paragraph 25).

39 As regards the aims pursued by Directive 2003/4, Article 1 states in particular that it seeks to guarantee the right of access to environmental information held by public authorities and that, as a matter of course, environmental information is progressively made available and disseminated to the public.

40 It is apparent from both the Aarhus Convention itself and Directive 2003/4, the purpose of which is to implement the Convention in European Union law, that in referring to 'public authorities' the authors intended to refer to administrative authorities, since within States it is those authorities which are usually required to hold environmental information in the exercise of their functions.

41 In addition, Article 2(2) of the Aarhus Convention expressly provides that the expression 'public authorities' which it employs 'does not include bodies or institutions acting in a judicial or legislative capacity', without restriction.

42 In accordance with that provision, the first sentence of the second subparagraph of Article 2(2) of Directive 2003/4 expressly authorises the Member States to exclude from the scope of 'public authorities' bodies or institutions acting in a judicial or legislative capacity.

43 The purpose of the first sentence of the second subparagraph of Article 2(2) of Directive 2003/4 is to allow Member States to lay down appropriate rules to ensure that the process for the adoption of legislation runs smoothly, taking into account the fact that, in the various Member States, the provision of information to citizens is, usually, adequately ensured in the legislative process.

44 In that regard, it may also be noted that the European Union legislature takes into account the specific nature of the legislative and judicial organs of the Member States. Thus, in the different context of the rules on the assessment of the effects of certain public and private projects on the environment, Council Directive 85/337/EEC of 27 June 1985 (OJ 1985 L 175, p. 40) excludes from the duty to carry out an assessment projects the details of which are adopted by a specific legislative act where the objectives of the directive, including that of supplying information, are achieved through the legislative process (see, in particular, to that effect, Joined Cases C-128/09 to C-131/09, C-134/09 and C-135/09 *Boxus and Others* [2011] ECR I-9711, paragraph 36).

45 It is true that, as the referring court noted, the second sentence of the second subparagraph of Article 2(2) of Directive 2003/4 provides that if their constitutional provisions at the date of adoption of that directive make no provision for a review procedure within the meaning of Article 6 of that directive, Member States may exclude those bodies or institutions from that definition.

46 However, that provision was intended to deal with the specific situation of certain national authorities, and in particular authorities acting in an administrative capacity, whose decisions, at the date of adoption of Directive 2003/4, could not, according to the national law in force in certain Member States, be subject to review in accordance with the requirements of that directive.

47 That interpretation is supported by the Declaration by the European Community concerning certain specific provisions under Directive 2003/4.

48 Therefore, that provision has neither the aim nor the effect of limiting the option given to the Member States to exclude bodies and institutions acting in a legislative capacity from the scope of the directive, an option which is, moreover, provided for without restriction by the Aarhus Convention itself.

49 Those considerations point therefore to a functional interpretation of the phrase 'bodies or institutions acting in a … legislative capacity', according to which ministries which, pursuant to national law, are responsible for tabling draft laws, presenting them to Parliament and participating in the legislative process, in particular by formulating opinions, can be considered to fall within that definition, within the meaning of and for the application of Directive 2003/4.

50 That functional approach is all the more justified because the legislative process is likely to differ significantly between Member States and it is therefore necessary to adopt an interpretation which ensures a uniform application of Directive 2003/4 in those Member States.

51 In the light of the foregoing, the answer to Question 1(a) and (b) is therefore that the first sentence of the second subparagraph of Article 2(2) of Directive 2003/4 must be interpreted as meaning that the option given to Member States by that provision of not regarding 'bodies or institutions acting in a … legislative capacity' as public authorities may be applied to ministries to the extent that they participate in the legislative process, in particular by tabling draft laws or giving opinions, and that option is not subject to the conditions set out in the second sentence of the second subparagraph of Article 2(2) of that directive.

Question 1(c)

52 By question 1(c), the referring court asks, in essence, whether the first sentence of the second subparagraph of Article 2(2) of Directive 2003/4 must be interpreted as meaning that the option given to Member States by that provision of not regarding bodies or institutions acting in a legislative capacity as public authorities can no longer be exercised where the legislative process in question has ended.

53 Neither Directive 2003/4 nor the Aarhus Convention gives any guidance on that point.

54 This question must be answered in the light of the objectives of the provision in question which, as stated in paragraph 43 above, is justified by the need to allow Member States to ensure the smooth running of the legislative process as provided for by national constitutional rules.

55 While making environmental information available during the course of the legislative process, under the conditions set out in Article 3 of Directive 2003/4, may impede the smooth running of that process, that is in principle no longer the case once that process has come to an end. Furthermore, the documents relating to that process, and, in particular, parliamentary reports are, generally, available to the public.

56 In those circumstances, although, in order to ensure the effectiveness of the first sentence of the second subparagraph of Article 2(2) of Directive 2003/4, a broad interpretation of 'legislative process' should be adopted, including the different stages of that process until the promulgation of any law that may be adopted in that process, prolonging the derogation from the principle, set out in Article 1 of the directive, of the right of access to environmental information beyond the end of that process does not appear to be justified.

57 That is all the more the case because, as the Advocate General noted in points 77 and 78 of her Opinion, that restriction on the possibility of derogation provided for in the first sentence of the second subparagraph of Article 2(2) of Directive 2003/4 to only the duration of the legislative process applies without prejudice to the discretion of the institution or body having participated in that process to refuse to provide environmental information on other grounds, and in particular to make use of, where relevant, one of the exceptions provided for in Article 4 of that directive.

58 In the light of the foregoing, the answer to question 1(c) is that the first sentence of the second subparagraph of Article 2(2) of Directive 2003/4 must be interpreted as meaning that the option given to Member States by that provision of not regarding bodies or institutions acting in a legislative capacity as public authorities can no longer be exercised where the legislative process in question has ended.

Question 2(a) and (b)

59 By question 2(a) and (b) the referring court asks, in essence, whether indent (a) of the first subparagraph of Article 4(2) of Directive 2003/4 must be interpreted as meaning that the condition that the confidentiality of the proceedings of public authorities must be provided for by law can be regarded as fulfilled by the existence, in the national law of the Member State concerned, of a rule such as that at issue in the main proceedings which provides, generally, that the confidentiality of the proceedings of public authorities is a ground for refusing access to environmental information held by those authorities, or whether that condition requires specific provisions on the confidentiality of those proceedings to be adopted. In the latter case, the referring court also asks the Court to specify whether a general legal principle, such as that existing in German law, under which administrative proceedings of public authorities are not public, meets those requirements.

60 According to settled case-law, while it is essential that the legal situation resulting from national implementing measures is sufficiently precise and clear to enable the individuals concerned to know the extent of their rights and obligations, it is none the less the case that, according to the very words of the third paragraph of Article 288 TFEU, Member States may choose the form and methods for implementing directives which best ensure the result to be achieved by the directives, and that provision shows that the transposition of a directive into national law does not necessarily require legislative action in each Member State.

61 However, while it is true that transposing a directive into national law does not require the provisions of the directive to be formally enacted in an express and specific legal provision, since the general legal context may be sufficient for its implementation, depending on its content (see, in particular, Case 29/84 *Commission* v *Germany* [1985] ECR 1661, paragraphs 22 and 23; Case C-217/97 *Commission* v *Germany* [1999] ECR I-5087, paragraphs 31 and 32; and Case C-233/00 *Commission* v *France* [2003] ECR I-6625, paragraph 76), it should be noted that by specifying in indent (a) of the first subparagraph of Article 4(2) of Directive 2003/4 that the protection of the confidentiality of public proceedings must be 'provided for by law', a condition which corresponds to the requirement laid down in Article 4(4) of the Aarhus Convention that the confidentiality of proceedings must be 'provided for under national law', the European Union legislature clearly wanted an express provision to exist in national law with a precisely defined scope, and not merely a general legal context.

62 However, that specification cannot be interpreted as requiring all the conditions for application of that ground for refusing access to environmental information to be determined in detail since, by their very nature, decisions taken in that domain are heavily dependant on the actual context in which they are adopted and necessitate an assessment of the nature of the documents in question and the stage of the administrative procedure at which the request for information is made (see, by analogy, *Commission* v *France*, paragraphs 81 and 82).

63 None the less, public authorities should not be able to determine unilaterally the circumstances in which the confidentiality referred to in Article 4(2) of Directive 2003/4 can be invoked, which means in particular that national law must clearly establish the scope of the concept of 'proceedings' of public authorities referred to in that provision, which refers to the final stages of the decision-making process of public authorities.

64 Lastly and in any event, the requirement that the confidentiality of the proceedings of public authorities must be provided for by law applies without prejudice to the other obligations imposed by Article 4 of Directive 2003/4, in particular the obligation of the public authority concerned to balance the interests involved in each particular case (see, in that regard, Case C-266/09 *Stichting Natuur en Milieu and Others* [2010] ECR I-13119, paragraph 58).

65 In those conditions, the answer to question 2(a) and (b) is that indent (a) of the first subparagraph of Article 4(2) of Directive 2003/4 must be interpreted as meaning that the condition that the confidentiality of the proceedings of public authorities must be provided for by law can be regarded as fulfilled by the existence, in the national law of the Member State concerned, of a rule which provides, generally, that the confidentiality of the proceedings of public authorities is a ground for refusing access to environmental information held by those authorities, in so far as national law clearly defines the concept of 'proceedings', which is for the national court to determine.

Costs

66 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

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

1. **The first sentence of the second subparagraph of Article 2(2) of Directive 2003/4/EC of the European Parliament and the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC must be interpreted as meaning that the option given to Member States by that provision of not regarding 'bodies or institutions acting in a … legislative capacity' as public authorities may be applied to**

ministries to the extent that they participate in the legislative process, in particular by tabling draft laws or giving opinions, and that option is not subject to the conditions set out in the second sentence of the second subparagraph of Article 2(2) of that directive.

2. **The first sentence of the second subparagraph of Article 2(2) of Directive 2003/4 must be interpreted as meaning that the option given to Member States by that provision of not regarding bodies or institutions acting in a legislative capacity as public authorities can no longer be exercised where the legislative process in question has ended.**

3. **Indent (a) of the first subparagraph of Article 4(2) of Directive 2003/4 must be interpreted as meaning that the condition that the confidentiality of the proceedings of public authorities must be provided for by law can be regarded as fulfilled by the existence, in the national law of the Member State concerned, of a rule which provides, generally, that the confidentiality of the proceedings of public authorities is a ground for refusing access to environmental information held by those authorities, in so far as national law clearly defines the concept of 'proceedings', which is for the national court to determine.**

[Signatures]