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OPINION OF ADVOCATE GENERAL
Geelhoed
delivered on 22 June 2006 (1)
Case C-266/05 P
Jose Maria Sison
(Appeal against the decision of the Court of First Instance (Second Chamber) of 26 April 2005, Sison v Council (Joined Cases T 110/03, T 150/03 and T 405/03), in which the Court dismissed an application for annulment of the Council's decision refusing the applicant's request for access to certain documents on which the Council relied when taking Decision 2002/848/EC implementing Article 2(3) of Regulation (EC) No 2580/2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism and repealing Decision 2002/460/EC)

I – **Introduction**

1. By judgment of 26 April 2005 in Joined Cases T 110/03, T 150/03 and T 405/03, *José Maria Sison* v *Council*, (2) the Court of First Instance (hereinafter: CFI) dismissed the appellant's action for the annulment of three Council decisions refusing him access to documents underlying the Council's decision to include him on the list of persons subject to specific restrictive measures aimed at the combating of terrorism, as provided for in Article 2(3) of Regulation No 2580/2001. (3) By the present action the appellant seeks the annulment of the CFI's judgment.

2. Parallel to this action, the appellant instituted proceedings under Article 230 EC for the partial annulment of Council Decision 2002/974, which retained his name on the list of persons whose assets are to be frozen pursuant to Regulation No 2580/2001. In these proceedings he also seeks a declaration of the invalidity of Regulation No 2580/2001 under Article 241 EC and compensation on the basis of Articles 235 and 288 EC. This case was registered under number T 47/03 and is currently pending before the CFI. (4)

II – **Relevant provisions**

3. Article 2(1) and (3) to (6) of Regulation No 1049/2001 regarding public access to European Parliament, Council and Commission documents (5) describe the scope *ratione personae* and *ratione materiae* of the regulation in the following terms:

'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. Without prejudice to Articles 4 and 9, documents shall be made accessible to the public either following a written application or directly in electronic form or through a register. In particular, documents drawn up or received in the course of a legislative procedure shall be made directly accessible in accordance with Article 12.

5. Sensitive documents as defined in Article 9(1) shall be subject to special treatment in accordance with that Article.

6. This Regulation shall be without prejudice to rights of public access to documents held by the institutions which might follow from instruments of international law or acts of the institutions implementing them.'

4. Exceptions to the right of access to documents held by Community institutions are laid down in Article 4 of Regulation No 1049/2001. The following provisions are relevant to the present case:

‘1. The institutions shall refuse access to a document where disclosure would undermine the protection of:
(a) the public interest as regards:
– public security,
– ...
– international relations,
– ...
– ...
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.
... .’
5. Article 9 of Regulation No 1049/2001 contains the following provisions on the treatment of sensitive documents:
‘1. Sensitive documents are documents originating from the institutions or the agencies established by them, from Member States, third countries or International Organisations, classified as “TRÈS SECRET/TOP SECRET”, “SECRET” or “CONFIDENTIEL” in accordance with the rules of the institution concerned, which protect essential interests of the European Union or of one or more of its Member States in the areas covered by Article 4(1)(a), notably public security, defence and military matters.
...
3. Sensitive documents shall be recorded in the register or released only with the consent of the originator.
4. An institution which decides to refuse access to a sensitive document shall give the reasons for its decision in a manner which does not harm the interests protected in Article 4.
... .’
III – **Facts**
6. The factual background to this case was summarised by the CFI at paragraphs 2 to 7 of the contested judgment as follows:
‘2. On 28 October 2002, the Council of the European Union adopted Decision 2002/848/EC implementing Article 2(3) of Regulation (EC) No 2580/2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism and repealing Decision 2002/460/EC (OJ 2002 L 295, p. 12). That decision included the applicant in the list of persons whose funds and financial assets are to be frozen pursuant to that regulation (“the list at issue”). That list was updated, inter alia, by Council Decision 2002/974/EC of 12 December 2002 (OJ 2002 L 337, p. 85) and Council Decision 2003/480/EC of 27 June 2003 (OJ 2003 L 160, p. 81), repealing the previous decisions and establishing a new list. The applicant’s name was retained on that list on each occasion.
3. Under Regulation No 1049/2001, the applicant requested, by confirmatory application of 11 December 2002, access to the documents which had led the Council to adopt Decision 2002/848 and disclosure of the identity of the States which had provided certain documents in that connection. By confirmatory application of 3 February 2003, the applicant requested access to all the new documents which had led the Council to adopt Decision 2002/974 maintaining him on the list at issue and disclosure of the identity of the States which had provided certain documents in that connection. By confirmatory application of 5 September 2003, the applicant specifically requested access to the report of the proceedings of the Permanent Representatives Committee (Coreper) 11 311/03 EXT 1 CRS/CRP concerning Decision 2003/480, and to all the documents submitted to the Council prior to the adoption of Decision 2003/480, which form the basis of his inclusion and maintenance on the list at issue.
4. The Council’s response to each of those applications, given by confirmatory decisions of 21 January 2003, 27 February 2003 and 2 October 2003 respectively (“the first decision refusing access”, “the second decision refusing access” and “the third decision refusing access” respectively), was a refusal of even partial access.
5. As regards the first and second decisions refusing access, the Council stated that the information which had led to the adoption of the decisions establishing the list at issue was to be found in the summary reports of the Coreper proceedings of 23 October 2002 (13 441/02 EXT 1 CRS/CRP 43) and 4 December 2002 (15 191/02 EXT 1 CRS/CRP 51) respectively, which were classified as “CONFIDENTIEL UE”.
6. The Council refused to grant access to those reports, invoking the first and third indents of Article 4(1)(a) of Regulation No 1049/2001. It stated, first, that “disclosure of [those reports] and of the information in

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

7. As regards the third decision refusing access, the Council first stated that the applicant's request concerned the same document as that in respect of which disclosure had been refused to him by the first decision refusing access. The Council confirmed its first decision refusing access and added that access to report 13 441/02 also had to be refused on the basis of the exception relating to court proceedings (second indent of Article 4(2) of Regulation No 1049/2001). The Council then acknowledged that it had by mistake identified report 11 311/03, relating to Decision 2003/480, as relevant. It explained in that regard that it had received no further information or documents justifying the revocation of Decision 2002/848 in so far as it concerns the applicant.

IV – **Form of order sought**

7. In the contested judgment, the CFI dismissed the applications in Cases T 110/03 and T 150/03 as unfounded. In case T 405/03 it dismissed part of the application as inadmissible and the remainder as unfounded.

8. The appellant submits, for the reasons given below, that the Court should:

– annul the Judgment of the Court of First Instance (Second Chamber) of 26 April 2005 in Joined Cases T 110/03, T 150/03 and T 405/03.

– annul, on the basis of Article 230 EC, the following: (a) Council Decision of 2nd February 2003 (06/c/01l03): Answer adopted by the council on the 2nd February 2003 to the confirmatory application of Mr Jan Fermon sent by fax on the 3rd February 2002 under Article 7(2) of the Regulation No 1049/2001, notified to the appellant's counsel on 28 February 2003; (b) Council Decision of 21 January 2003 (411c/01/02): Answer adopted by the Council on the 21st of January 2003 to the confirmatory application of Mr Jan Fermon sent by fax on the 11 of December 2002 under Article 7(2) of the Regulation No 104912001, notified to the appellant's counsel on 23 January 2003; and (c) Council Decision of 2 October 2003 (36/c/02/03): Reply adopted by the council on 2 October 2003 to the confirmatory application by Mr Jan Fermon (2/03) made to the Council by telefax on 5 September 2003 registered by the General Secretariat of the Council on 8 September 2003, pursuant to Article 7(2) of Regulation No 104912001, for access to documents.

– require the Council to bear the costs of suit.

9. The Council asks the Court to

– dismiss the appeal as unfounded. and

– order the Appellant to pay the costs of these proceedings.

V – **Pleas in law**

10. The appellant advances five pleas in law which may be summarised as follows:

1. By unduly limiting the scope of its review of legality of the Council's decisions refusing access, the CFI infringed Articles 220, 225 and 230 EC, the general principles of Community law enshrined in Articles 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter: ECHR) and the rights of defence.

2. The interpretation given by the CFI to the exceptions to the right to (partial) access to documents in effect leads to complete discretion of the Council and to a complete denial of the right of access to documents and thus infringes Article 1, second paragraph, EU, Article 6(1) EU, Article 255 EC and Article 4(1)(a) and Article 4(6) of Regulation No 1049/2003, as well as Articles 220, 225 and 230 EC.

3. By accepting the brief and formulaic reasons given by the Council in respect of the refusal to grant (partial) access to the requested documents, the CFI infringed the obligation to state reasons laid down in Article 253 EC.

4. By limiting the scope of the application, the CFI infringed the right of access to documents, guaranteed by Article 255 EC, the presumption of innocence guaranteed by Article 6(2) ECHR and the right to an effective remedy to violations of the rights enshrined in the ECHR, guaranteed by Article 13 ECHR.

5. The CFI misinterpreted Article 4(5) and Article 9(3) of Regulation No 1049/2001 by holding that these provisions only refer to ‘documents’ and that, consequently, the Council was justified in refusing to disclose the identity of the Member States which had communicated them where these States were opposed this.

VI – **Analysis**

A – *Preliminary remarks*

11. I would observe at the outset that to the extent that the appellant requests the Court to annul the Council's decisions refusing access to the documents requested, it must in the way it is presented be dismissed as manifestly inadmissible in view of the fact that it is only the CFI’s judgment which can be the subject of an appeal. (6)

12. Secondly, it should be noted that, as the reasons given for dismissing the applications in Cases T 150/03 and T 405/03 are not challenged in the appellant’s pleas of law, the present appeal must be regarded as concerning the CFI’s judgment in Case T 110/03 relating to the first decision refusing access.

B – *First plea in law: infringement of Articles 220, 225 and 230 EC and the rights of the defence as guaranteed by Article 6 and 13 ECHR*

1. The CFI’s judgment

13. As regards the scope of its review of the legality of the Council’s decisions refusing access on the basis of the mandatory exceptions laid down in Article 4(1)(a) of Regulation No 1049/2001, the CFI held:

‘46. With regard to the scope of the Court’s review of the legality of a decision refusing access, it should be noted that, in *Hautala* v *Council*, (7) ... and *Kuijer* v *Council* (8) ..., the Court recognised that the Council enjoys a wide discretion in the context of a decision refusing access founded, as in this case, in part, on the protection of the public interest concerning international relations. In *Kuijer* v *Council*, such a discretion was conferred on an institution when it justifies its refusal of access by reference to the protection of the public interest in general. Thus, in areas covered by the mandatory exceptions to public access to documents, provided for in Article 4(1)(a) of Regulation No 1049/2001, the institutions enjoy a wide discretion.

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

2. Appellant

14. According to the appellant the CFI, in the paragraphs cited above, erroneously restricted the scope of its powers of reviewing the legality of the Council’s decisions refusing access to the requested documents by holding that the Council enjoys a wide discretion in invoking the grounds related to the public interest under Article 4(1)(a) of Regulation No 1049/2001 and by inferring from this that its own role is restricted to verifying whether the procedural rules and the duty to state reasons have been complied with, the facts have been accurately stated, and whether there has been a manifest error of assessment of the facts or a misuse of powers. This interpretation, which amounts to unfettered discretion of the Council in applying the exception on grounds related to the public interest, goes against the will of the Community legislator which was aimed at establishing complete judicial control of the legality of decisions refusing access in the interest of ensuring transparency. He refers in this regard to Article 67(3) of the Rules of Procedure of the CFI, (9) which enables the CFI to consult the requested documents.

15. The appellant observes that his case must be distinguished from that of *Hautala*, (10) which the CFI relied on for guidance. He points out that, unlike the documents involved in *Hautala*, the requested documents in his case fall within the scope of the EC Treaty and not of that of Title V of the Treaty on European Union on the common foreign and security policy. In addition, in *Hautala* the document concerned was produced for internal use, not for publication. By contrast, the documents to which he seeks access were adopted in the context of a legislative process leading to a decision of the Council and did not contain information the disclosure of which would risk causing tension with third countries. Finally, his case must be distinguished from *Hautala* as the appellant is personally concerned with the requested documents. By holding, at paragraph 52 of the contested judgment, that the particular interest which may be asserted by a requesting party in obtaining access to a document concerning him personally cannot be taken into account when applying the mandatory exceptions provided for by Article 4(1)(a) of Regulation No 1049/2001, the CFI contradicted its

case law according to which the Council is required to carry out a ‘genuine examination of the particular circumstances of the case’. (11)

16. The appellant maintains that by limiting the scope of its review, the CFI violated his rights of the defence as guaranteed by Article 6 ECHR. He also complains that the CFI did not respond to his arguments based on Article 6(3) ECHR according to which everyone charged with a criminal offence has the right to be informed in detail, of the nature and cause of the accusation against him. As a result, the CFI denied him an effective remedy in respect of the protection of these rights as guaranteed by Article 13 ECHR.

3. Respondent

17. The Council considers that the differences between *Hautala* and the present case referred to by the appellant are irrelevant. It takes the view that the contested judgment is wholly consistent with the CFI’s judgment in *Hautala* and that the limits to the extent of judicial review which follow from that case are applicable in the present case.

18. The CFI was correct in ruling that there is no need to take the appellant’s particular interest in the documents requested into account. The Council’s refusal was based on Article 4(1), first and third indents, of Regulation No 1049/2001, for which no balance of interests is required. Where disclosure of the document would undermine the protection of the public interest as regards public security and/or international relations, the Council is duty bound to refuse access without examining whether the applicant might have an overriding personal interest in the document. In response to the appellant’s assertion that the decision refusing access should be based on a ‘genuine examination of the particular circumstances of the case’, as required by *Hautala*, (12) the Council states that this can only relate to objective circumstances, such as the content of the document and the risk of prejudice to the interests to be protected which its disclosure would entail.

19. The Council rejects the appellant’s argument based on Article 67(3) of the Rules of Procedure of the CFI. That provision is of a purely procedural nature and is aimed at enabling the CFI to examine a litigious document. It has no bearing on the scope of the CFI’s powers of review.

4. Assessment

20. The first question raised by the first plea in law put forward by the appellant concerns the extent of the judicial review of decisions refusing access to documents on the grounds of the mandatory exceptions laid down in Article 4(1) of Regulation No 1049/2001. Is this review restricted in the manner indicated by the CFI in *Hautala* and, in its wake, the contested judgment to determining whether procedural requirements and the duty to state reasons have been complied with, whether the facts have been accurately stated, whether there has been a manifest error of assessment of the facts or a misuse of powers? Or should it, as is suggested implicitly by the appellant, extend to assessing whether the public interest ground was correctly invoked, i.e. whether the Council was correct in maintaining that the public interests involved would be damaged if access to the requested documents were granted?

21. Although the CFI’s judgment in *Hautala* was appealed against, (13) the aspect of the scope of the judicial review in respect of the Council’s reliance on the mandatory exceptions in denying access to documents was not dealt with by the Court in its judgment. This can be explained by the fact that it was the Council, which obviously did not have an interest in raising this point, and not the original applicant who was the appellant party. This question, therefore, remains to be considered by the Court.

22. The scope of the judicial review of decisions refusing access to documents held by one of the institutions of the EU on the basis of the exceptions provided for in Article 4 of Regulation No 1049/2001 must be determined in function of the nature of the interests covered by these exceptions and the system established by the regulation as a whole.

23. As the latter aspect is more general in character, it should be dealt with first. The basic principle established by Regulation No 1049/2001 is that the widest possible access to documents held by the institutions should be guaranteed. This principle serves the twofold purpose of creating the conditions for enabling citizens to exercise their rights of participation in public affairs, on the one hand, and of ensuring that citizens whose interests have been adversely and of affected by decisions taken by the institutions are in a position to defend their interests, on the other hand. (14)

24. Where the preamble to the regulation states that its objective is ‘to give the fullest *possible* effect to the right of the public access to documents’ (15) and that ‘[*i*]*n principle*, all documents of the institutions should be accessible to the public’ (16), it is clear that there can be no absolute right of access to documents. Regulation No 1049/2001 recognises various public and private interests which require special protection and

which, therefore, can be invoked by the institutions to refuse access to documents. These interests have been defined in Article 4 in various categories of exceptions to the right of access to documents.

25. The exceptions provided for in Article 4(1), (2) and (3) of Regulation No 1049/2001 are all, as such, drafted in mandatory terms: the institutions *shall* refuse access to a document where disclosure would undermine the protection of the interests concerned. However, in contrast with the exceptions in Article 4(1), those provided for in Article 4(2) and (3) make allowance for disclosure of the documents to which access has been requested if this is justified by an overriding public interest.

26. For the purpose of the present discussion on the scope of judicial review, two inferences can be drawn from this difference between the exceptions contained in Article 4(1) and those contained in Article 4(2) and (3).

27. The first is that it is clear from the explicit wording of the latter two provisions that they require institutions, in considering whether access to documents should be refused, to balance the particular interest to be protected by refusing disclosure (e.g. protection of commercial interests, court proceedings or the institutions decision making process) against the general, public interest in the document concerned being made accessible. No such balancing of interests has been provided for in Article 4(1) of the regulation. On the contrary, it is apparent that balancing of interests was made by the Community legislator and has been laid down in the regulation itself: as the interests listed in that provision are deemed to be of overriding importance themselves there is no other interest which could outweigh them. This implies that if one of these interests is involved, the exception applies automatically.

28. The second inference to be drawn is that, in view of the fact that the interests protected under the exceptions in Article 4(2) of the regulation can only be outweighed by an overriding public interest, the personal interest an applicant may have in gaining access to a document is not relevant in that context. *Ipso facto* this must also apply in the context of Article 4(1) of the regulation which does not provide for a balancing of interests.

29. This is a first indication that the scope of judicial review is more restricted in the context of Article 4(1), than it is in the context of Article 4(2) of the regulation.

30. As regards the nature of the interests protected by the exceptions provided for in Article 4(1)(a) of Regulation No 1049/2001, notably public security and international relations, it should be recognised that these are interests for which the Council bears primary political responsibility, as is also apparent from Articles 11 to 28 EU. A decision whether or not to grant access to a document which has a bearing on these interests necessarily depends on policy considerations and must be taken on the basis of information which is available only to the competent political authorities. As the efficacy of policy in this area in many cases depends on confidentiality being observed, the Community institutions involved must have complete discretion in respect of determining whether one of the interests listed in Article 4(1)a could be undermined by disclosure of documents. If it considers that granting access to a document would undermine the interests of the European Union in these respects, it is under an obligation to refuse access, irrespective of the interests which the applicant may have in gaining access.

31. As it would transcend the nature of the judicial function for the Community courts to replace the assessment of the responsible political institutions by its own judgment, it follows that judicial review of decisions refusing access on the grounds listed in Article 4(1)(a) of Regulation No 1049/2001 is, in principle, restricted. I would, therefore, conclude that the CFI was correct in holding that the scope of judicial review in respect of decisions refusing access under Article 4(1) of the regulation must be limited to verifying whether the procedural rules and the duty to state reasons have been complied with, the facts have been accurately stated, and whether there has been a manifest error of assessment of the facts or a misuse of powers.

32. I would add, that this restriction of the scope of judicial review does not amount to unfettered discretion, as is alleged by the appellant, of an institution relying on Article 4(1)(a) of the regulation in refusing access to a document. Where review is focussed on the aspects indicated by the CFI, particularly on the statement of reasons given to justify the refusal to grant access, it can effectively be established whether the reliance on the mandatory exceptions by the institution concerned is genuine and that that institution was entitled to consider that disclosure of a document would pose a threat to the public interest.

33. I do not agree with the appellant where he states that it was the aim of the Community legislator to establish complete judicial control in respect of decisions refusing access to documents under Regulation and that this is apparent from Article 67(3) of the CFI's Rules of Procedure. That provision merely determines that, where the document to which access has been denied is produced before the CFI in proceedings relating

to the legality of that denial, the document shall not be communicated to the other parties. Indeed, the fact that the document concerned has been produced by the institution or has been requested by the CFI under Article 65 of its Rules of Procedure does not entitle the CFI to replace the Council's assessment by its own. It does enable the CFI to verify whether or not the institution concerned made a manifest error in invoking the exceptions of Article 4(1)(a) of the Regulation.

34. Where appellant seeks to distinguish his case from *Hautala* on the grounds mentioned in paragraph 15 above, it is debatable whether these grounds are either relevant or even correct. Firstly, it is apparent that although the decision refusing access related to documents underlying a decision adopted under the EC Treaty as distinct from Title V of the EU Treaty, it is obvious that it was closely connected to Common Position 2001/931/CFSP. Be that as it may, Regulation No 1049/2001 applies equally to documents relating to the common foreign and security policy. The contention that the document concerned was not drawn up for internal use is untenable in view of its obvious confidential character. The decisions implementing Article 2(3) of Regulation No 2580/2001 cannot, moreover, be regarded as being legislative in character. The fact that the appellant was personally concerned, as distinct from the situation in *Hautala*, is irrelevant in view of the fact that, as was concluded in paragraph 28 above, personal interest plays no role in the assessment of whether access should be granted to documents. The fact that the appellant's personal interest was not taken into account does not, therefore, imply that there was no genuine examination of the circumstances relating to the possible disclosure of the document requested.

35. Finally, the refusal to grant access to a document covered by one of the mandatory exceptions of Article 4(1)(a) cannot in itself be regarded as an infringement of the appellant's rights of defence. What is relevant in this context that he is adequately informed of the reasons for his inclusion on the list of persons, to whom the restrictive measures imposed under Regulation No 2580/2001 apply. This can be done by other means than granting access to a document which is considered by the Council to be confidential. This is, however, a matter to be considered in the context of the action challenging the legality of the inclusion and maintenance of his name on the list referred to above which is currently pending before the CFI.

36. I, therefore, conclude that the first plea in law must fail.

C – *Second plea in law: infringement of the right of access to documents resulting from a too restrictive interpretation of the exceptions to that right*

1. The CFI's judgment

37. On the question as to whether, the Council made a manifest error of assessment in considering that disclosure of the document requested could undermine the protection of public security and the public interest as regards international relations, the CFI ruled:

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

78. The Council did not, therefore, make a manifest error of assessment in refusing access to report 13 441/02 for reasons of public security.

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

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

document could compromise the position of the European Union in international cooperation concerning the fight against terrorism.
81. In that regard, the applicant's argument – to the effect that the mere fact that third States are involved in the activities of the institutions cannot justify application of the exception in question – must be rejected for the reasons set out above. Contrary to what that argument assumes, the cooperation of third States falls within a particularly sensitive context, namely the fight against terrorism, which justifies keeping that cooperation secret. Moreover, read as a whole, the decision makes it clear that the States concerned even refused to allow their identity to be disclosed.
82. It follows that the Council did not make a manifest error of assessment in considering that disclosure of the document requested was likely to undermine the public interest as regards international relations.'
2. Appellant
38. The appellant alleges that the CFI infringed the right of access to documents and Article 230 EC by ignoring the principle that exceptions to such a fundamental right have to be interpreted and applied strictly. The CFI should have determined the applicability of each exception itself and should not have confined itself to declaring that the Council did not make any manifest errors of assessment. This applies in particular in respect of the Council's denial of partial access to the documents requested.
39. As to the exception on grounds of public security, the CFI's analysis in paragraphs 77 and 78 of the contested judgment, according to which any information held by authorities in respect of persons suspected of terrorism should remain confidential, so as not to reveal strategic information on the fight against terrorism, would deprive the principle of transparency of all effect in the field of the fight against terrorism, making access to documents, even partial access, officially impossible.
40. As to the exception on grounds of the protection of international relations, the CFI's reasoning in paragraph 79 of the contested judgment amounts to permitting the institutions to systematically refuse on the basis of vague and general criteria access to documents where they concern third countries. The argument that cooperation with third countries in this field should remain secret is manifestly wrong as it is a public fact that it exists.
41. More significantly, although paragraphs 80 and 81 of the contested judgment emphasise the fact that states must be able to rely on the confidentiality of information they share, it appears from the dossier that only Member States and not third countries had provided information regarding the appellant. The CFI therefore misinterpreted the notion of international relations as this cannot apply to relations between the Member States, but only to those with third countries. For this reason the CFI failed to give reasons why revealing the identity of the Member States providing information would harm international relations.
3. Respondent
42. The Council submits that the CFI committed no error of law in finding that the Council had not exceeded the margin of discretion connected with its political responsibilities under Title V of the Treaty on European Union in considering that the requested document was covered by the public interest exception and that, hence, not even partial access to the requested documents could be granted. The CFI did not conclude that the Council could have come to another conclusion.
43. As regards the exception on grounds of the protection of international relations, the Council agrees with the appellant that the CFI's findings in paragraphs 80 and 81 of the contested judgment appear to be based on the erroneous assumption that the requested document contained information submitted to the Council by third countries. It is apparent from the file that the documents concerned were submitted by Member States and it was these Member States whose identity the Council, at their request, refused to divulge. Despite this misunderstanding, the Council maintains that the CFI's assessment of what was at stake in the area of international cooperation in combating terrorism is correct. The high sensitivity of this subject matter justifies a particularly cautious approach being adopted when it comes to protecting information the disclosure of which would allow inferences to be drawn on the organisational structure and the efficiency of the cooperation between the European Union and third countries in this field and would prejudice the very purpose of the international efforts to fight terrorism.
44. The Council denies that its approach negates the right of access to documents, as is claimed by the appellant In fact, it examines each document in the light of its content and a risk assessment and has already wholly or partially disclosed a large number of documents dealing with those subjects.
45. In any event, even if the Court were to find that the CFI's assessment regarding the exception relating to the protection of international relations was flawed, this would not alter the result of the case as the decision to

refuse the document in question was based cumulatively the grounds relating to the protection of public security and international relations. If it were to be found that the Council could not rely on one of these exceptions, its decision would still stand on the basis of the other one. The Council adds that the confusion as to whether it was third States or Member States which had submitted documents to the Council in the course of the procedure is irrelevant since these documents were returned to the Member States concerned and thus were no longer held by the Council.

4. Assessment

46. By his second plea in law the appellant criticises the CFI's assessment of the question whether the Council's decision refusing (partial) access to the documents requested could be justified on the grounds of the protection of public security and international relations.

47. As I already found above, the scope of judicial review in respect of the application of the exceptions relating to the public interests listed in Article 4(1)(a) of Regulation No 1049/2001 is restricted to a number of aspects, including the questions whether the institution concerned made a manifest error of assessment of the facts or it misused its powers.

48. As regards the exception relating to the protection of public security, the CFI first established that the document requested did indeed relate to that sphere in view of the fact that it was used as a basis for identifying persons, groups or entities suspected of terrorism. Next, it observed that the sole fact that the document concerns public security cannot in itself justify the application of the exception. It therefore went on to examine whether the Council had a made a manifest error of assessment in considering that disclosure of the document requested could undermine the protection of public security. In this context it observed that it must be accepted that the effectiveness of the fight against terrorism presupposes that information held by the public authorities on persons or entities suspected of terrorism is kept secret so that that information remains secret and enables effective action to be taken. Disclosure would necessarily have undermined the public interest in relation to public security. The CFI concluded that the Council had not made any manifest error of assessment in refusing access to the document requested. (17)

49. In reaching this conclusion on the basis of this, the CFI did not in my view commit any error in law. It did not merely accept the fact that the refusal to grant access to the document was based on the ground that the document pertained to the area of the protection of public security, it proceeded to examining that the plausibility of that claim and to confirming that disclosure of the document could potentially undermine the protection of public security. It, therefore, correctly carried out its task of reviewing the legality of the Council's decision refusing access within the limits inherent to that function in the context of Article 4(1)(a) of Regulation No 1049/2001.

50. Contrary to what the appellant asserts, the approach adopted by the CFI does not amount to a negation of the right of access to documents where these relate to the fight against terrorism. Where it is apparent that such documents concern operational aspects of the policy in this field it is evident that they are covered by the ground concerning the protection of public security. It is the task of the Community courts to verify that the document in question does indeed relate to this field of activity and that the Council is not invoking this exception gratuitously.

51. As regards the CFI's assessment of the applicability of the exception relating to the protection of international relations, both parties agree that the CFI erroneously assumed that the document requested contained information provided by third countries and that consequently the Council was entitled to invoke the exception regarding the protection of international relations. Indeed, to the extent that it is not disputed that the document underlying the decisions to which access was refused was based on information provided by Member States only, the reasoning adopted by the CFI is indeed flawed. The exception relating to the protection of international relations clearly refers only to relations with non Member States and international organisations and can be invoked only where disclosure of a document is likely to put those relations at risk.

52. It is the question which consequences should be attached to this error. In my view there are two reasons, why the flaw in the CFI's reasoning should not lead to the annulment of the contested judgment. The first is that, even though no information apparently was provided by directly by third countries, it cannot be excluded that disclosure of the document requested nevertheless could have revealed details on the fight against terrorism in a more general sense, which by its very nature involves many states and organisations outside the European Union. This clearly could have repercussions on the relations with these states and bodies. The CFI referred to this dimension of the exception on grounds of protecting international relations in its introductory observations to this point in paragraph 79 of the contested judgment.

53. The second, more operational, reason is that, as the Council correctly points out, the decision refusing access was based cumulatively on the grounds relating to the protection of public security and international relations. As the former was properly invoked by the Council as the basis for its refusal to grant access to the document requested, partially annulling the contested judgment in respect of the error made in respect of the latter would serve no practical purpose. Indeed, I would suggest, in the light of my observations in the previous paragraph, there are good grounds for substituting the reasons given by the CFI in respect of the exception relating to the protection of international relations, in that disclosure of a document containing information on persons and entities suspected of involvement in terrorist activities by its very nature could damage the international effort to combat terrorism.

54. The appellant claims, next, that even if the public interest grounds could be invoked by the Council, this cannot reasonably cover the entirety of the document requested and that partial access should have been granted. The Council asserts that the reasons for denying access apply to the entirety of the document concerned.

55. On this point the contested judgment focuses on the question whether the Council examined whether partial access could have been granted to the document requested. The CFI that there was no evidence that the Council had not concretely considered that possibility. In addition, the CFI held, at paragraph 88 of the contested judgment, that 'because all the passages of the document requested are covered by the exceptions put forward, any demonstration which was more complete and individualised as regards its content could only jeopardise the confidentiality of information intended, on the basis of those exceptions, to remain secret.'

56. The appellant has not advanced any argument challenging this consideration by the CFI. There is no reason to find that it is inaccurate.

57. Finally under this heading, the appellant maintains that by confusing Member States with third countries, the CFI misapplied the law by concluding that even a request for disclosure of the identity of the Member States that provided documents could be turned down.

58. As regards this point the CFI referred to Article 9(3) of Regulation which provides that sensitive documents, i.e. 'documents originating from the institutions or the agencies established by them, Member States, third countries or international organisations classified as ... "CONFIDENTIAL" ... ', shall be released only with the consent of the originator. It went on to find that '[t]he Council was therefore not obliged to disclose the documents in question, of which States are the authors, ... relating to the adoption of Decision 2002/848, including the identity of those authors, in so far as, firstly, those documents are sensitive documents and, secondly, the States responsible for them have refused to agree to their disclosure.'

59. As this consideration applies equally to documents originating in Member States and third countries, there are no grounds for accepting the appellant's claim that as a result of the confusion regarding the origin of the information in the requested document, the CFI misapplied the law regarding the refusal to reveal the identity of the Member States involved.

60. In the light of the foregoing considerations, I am of the opinion that the second plea in law must be rejected.

D – *Third plea in law: infringement of the duty to state reasons in contravention of Article 253 EC*

1. The CFI's judgment

61. As regards the question whether the Council, in refusing access to the requested documents provided a statement of reasons from which it was possible to understand and ascertain, first, whether the document requested does in fact fall within the sphere covered by the exception relied on and, second, whether the need for protection relating to that exception is genuine, the CFI held:

'62. In this case, with regard to report 13 441/02, the Council clearly specified the exceptions on which it was basing its refusal by relying on both the first and third indents of Article 4(1)(a) of Regulation No 1049/2001. It set out in what respects those exceptions were relevant in relation to the documents concerned by referring to the fight against terrorism and to the involvement of third States. Moreover, it provided a brief explanation relating to the need for protection relied on. Thus, as regards public security, it explained that disclosure of the documents would give the persons who were the subject of that information the opportunity to undermine the action taken by the public authorities. As regards international relations, it briefly referred to the involvement of third States in the fight against terrorism. The brevity of that statement of reasons is acceptable in light of the fact that mentioning additional information, in particular making reference to the content of the documents concerned, would negate the purpose of the exceptions relied on.

63. With regard to the refusal of partial access to those documents, the Council expressly stated, firstly, that it had considered that possibility and, secondly, the reason for the rejection of that possibility, namely that the documents in question were covered in their entirety by the exceptions relied on. For the same reasons as before, the Council could not identify precisely the information contained in those documents without negating the purpose of the exceptions relied on. The fact that that statement of reasons appears formulaic does not, in itself, constitute a failure to state reasons since it does not prevent either the understanding or the ascertainment of the reasoning followed.
64. With regard to the identity of the States which provided relevant documents, it must be noted that the Council itself drew attention to the existence of documents from third States in its original decisions refusing access. First, the Council specified the exception put forward in that regard, namely Article 9(3) of Regulation No 1049/2001. Second, it provided the two criteria used for the application of that exception. In the first place, it implicitly but necessarily took the view that the documents in question were sensitive documents. That factor appears comprehensible and ascertainable in the light of the relevant context, and in particular in the light of the classification of the documents in question as "CONFIDENTIEL UE". In the second place, the Council explained that it had consulted the authorities concerned and had taken note of their opposition to any disclosure of their identity.
65. Despite the relative brevity of the statement of reasons for the first decision refusing access (two pages), the applicant was fully able to understand the reasons for the refusals given to him and the Court has been able to carry out its review. The Council therefore duly provided statements of reasons for those decisions.'
2. Appellant
62. The appellant asserts that by accepting that the Council's statement of reasons for refusing (partial) access to the requested documents was very brief, formulaic and non-individualised and that by even providing, at paragraph 77 of the contested judgment, supplementary reasons for the Council's decisions, the CFI's judgment amounts to a denial of the duty to state reasons laid down in Article 253 EC.
63. As to the Council's refusal to divulge the identity of the States which provided relevant documents or information, by confusing Member States with third countries, the CFI deprived the appellant of any explanation why the Council refused to disclose the identity of the Member States concerned. In addition, the CFI's interpretation of Article 253 EC in this regard resulted in an unacceptable limitation of its review powers and consequently violates Article 230 EC.
3. Respondent
64. The Council takes the view that the CFI correctly examined the statement of reasons for its refusal to grant access to the requested documents in paragraphs 59 to 65 of the contested judgment. It points out that the CFI's reasoning in paragraphs 77, 80 and 81 of the contested judgment relates to the question whether the Council made a manifest error of assessment in considering that disclosure of the requested document could undermine the protection of the public interest relating respectively to public security and international relations. In this context the CFI is not necessarily bound by the explicit arguments and reasons given in the decision refusing access. It can also rely on considerations which are common general knowledge in a given context and which thus can he legitimately presumed to underlie the institution's decision.
65. As to the aspect of partial access, the Council observes that, in particular as regards sensitive documents, it may be extremely difficult to state in detail for each element of the document the reasons why it cannot be disclosed without revealing the content of the passages concerned and thereby depriving the exception of its very purpose.
66. As regards the reasons for the non disclosure of the identity of the Member States which provided relevant documents, the Council indicates that where documents are classified 'CONFIDENTIEL UE' and are thus sensitive documents within the meaning of Article 9(1) of Regulation No 1049/2001, according to Article 9(3) of that regulation, the originator has complete control over that document, including the information about its very existence. It follows that in providing reasons for refusing access to such a sensitive document, it is sufficient to refer to the originator's opposition to its disclosure.
4. Assessment
67. The third plea of law put forward by the appellant attacks the CFI's assessment of the Council's statement of reasons regarding its refusal to grant (partial) access to the requested documents.
68. The basic test regarding the adequacy, in conformity with Article 253 EC, of the statement of reasons given by an institution for decisions taken by it is, first, whether it enables the persons concerned to ascertain the reasons for the measure and, second, to enable the competent Community Court to exercise its power of

review. In that context, it is not necessary for the reasoning to go into all the relevant facts and points of law, since the question whether the statement of reasons meets the requirements of Article 253 EC must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question. (18) These basic principles were reiterated by the CFI at paragraph 59 of the contested judgment as the point of departure for its assessment.

69. Focusing on the decisions refusing access to documents, the CFI, in line with existing case law, in paragraphs 60 and 61 of the contested judgment pointed out that where an institution refuses such access, 'it must demonstrate in each individual case, on the basis of the information at its disposal, that the documents to which access is sought do indeed fall within the exceptions listed in Regulation No 1049/2001. However, it may be impossible to give reasons justifying the need for confidentiality in respect of each individual document without disclosing the content of the document and, thereby, depriving the exception of its very purpose.' (19) 'It that case law, it is therefore for the institution which has refused access to a document to provide a statement of reasons from which it is possible to understand and ascertain, first, whether the document requested does in fact fall within the sphere covered by the exception relied on and, second, whether the need for protection relating to that exception is genuine.'

70. Applying these criteria, the CFI subsequently thoroughly examined the statement of reasons provided by the Council on the points of the application of the exceptions of Article 4(1)(a) of Regulation No 1049/2001, its refusal to grant partial access and the refusal to disclose the identity of the states which provided relevant documents. In paragraph 65 of the contested judgment, it reached the conclusion that 'despite the relative brevity of the statement of reasons for the first decision refusing access ..., the applicant was fully able to understand the reasons for the refusals given to him and the Court has been able to carry out its review. The Council therefore duly provided statements of reasons for those decisions.'

71. To my mind there is nothing to fault in the analysis carried out by the CFI in paragraphs 59 to 65 on this point. Although accepting in the present case that brief and even formulaic statements of reasons complied with Article 253 EC, it did not do so without first verifying whether the statement of reasons met the two basic criteria set out above, namely were they sufficient in order enable the appellant to understand why access had been refused to the documents requested and did they permit the CFI to exercise judicial control? There is therefore no question of the CFI permitting the Council to arbitrarily refuse granting access to documents either regarding the activities of third countries or otherwise regarding the protection of public security.

72. The appellant's allegation that the CFI supplemented the reasoning provided by the Council in paragraph 77 of the contested judgment is misleading. As the Council correctly observes, this consideration was made in the context of assessing whether the exception relating to the protection of public security had been properly invoked. It certainly was not intended to supplement the statement of reasons for the decisions refusing access.

73. As regards the fact that no reasons were given explaining why the disclosure of the identity of Member States which provided documents would constitute a threat to the protection of public security and international relations, I refer to my observations on this same point, in paragraphs 57 to 59 above, in the context of the discussion of the second plea in law.

74. Consequently, I consider that the third plea in law must be rejected.

E – *Fourth plea in law: infringement of the right of access to documents, the right to the presumption of innocence and the right to an effective judicial remedy*

1. The CFI's judgment

75. As to the appellant's claim that by refusing him access to the documents requested, the Council acted in breach of the general principles of Community law enshrined in Article 6 ECHR, the CFI responded as follows:

'50. It should be recalled, first, that, under Article 2(1) of Regulation No 1049/2001, the beneficiaries of the right of access to documents of the institutions are "[a]ny citizen of the Union, and any natural or legal person residing or having its registered office in a Member State". That provision makes it clear that the purpose of the regulation is to guarantee access for everyone to public documents and not only access for the requesting party to documents concerning him.

51. Second, the exceptions to access to documents, provided for by Article 4(1)(a) of Regulation No 1049/2001, are framed in mandatory terms. It follows that the institutions are obliged to refuse access to documents falling under any one of those exceptions once the relevant circumstances are shown to exist (see,

by analogy, Case T 105/95 *WWF UK* v *Commission* [1997] ECR II 313, paragraph 58, and Case T 20/99 *Denkavit Nederland* v *Commission* [2000] ECR II 3011, paragraph 39).
52. Consequently, the particular interest which may be asserted by a requesting party in obtaining access to a document concerning him personally cannot be taken into account when applying the mandatory exceptions provided for by Article 4(1)(a) of Regulation No 1049/2001.
53. The applicant claims, in essence, that the Council was obliged to grant him access to the documents requested in so far as those documents are necessary in order for him to secure his right to a fair trial in Case T 47/03.
54. Since the Council relied on the mandatory exceptions provided for by Article 4(1)(a) of Regulation No 1049/2001 in the first decision refusing access, it cannot be accused of not having taken into account any particular need of the applicant to have the requested documents made available to him.
55. Consequently, even if those documents prove necessary for the applicant's defence in Case T 47/03, which is a question to be considered in that case, that circumstance is not relevant for the purpose of assessing the validity of the first decision refusing access.
56. Accordingly, the third plea in law must be rejected as unfounded.'
2. Appellant
76. The appellant maintains that the CFI, at paragraphs 50 to 56 of the contested judgment, misinterprets the scope of his request and, consequently, violates the presumption of innocence and the right to an effective judicial remedy, as guaranteed by Articles 6(2) and 13 ECHR. The CFI erroneously deduced from a statement made by appellant's counsel at the hearing that the appellant was only requesting access to the documents concerned in order to assure his rights of defence in Case T 47/03. However, his application was aimed at obtaining access to the documents underlying his inclusion on the list at issue, both for himself and for the general public. Given the social stigmatisation resulting from his name being included on that list, it was important for him to be able to react publicly to the facts of which he is accused.
77. The possibility for the appellant to request access to the documents in the context of Case T 47/03 does not constitute an effective remedy as provided by Article 13 EHRC. In view of the fact that the accusations of his involvement in terrorist activities were widely published in the international press, an effective remedy of this infringement of the presumption of innocence, his right to the protection of his honour and his reputation and his right to be considered innocent until proven guilty can only be protected if he can publicly answer these accusations, not only in general terms, but by discussing the alleged specific evidence brought against him about his pretended involvement in specific crimes. In this context he refers to the judgment of the European Court of Human Rights in *Allenet de Ribemont* v *France* (20) according to which all public authorities are under an obligation to respect the presumption of innocence and to refrain from making any statements which might encourage the public to believe him guilty.
3. Respondent
78. According to the Council, the CFI's findings, at paragraphs 50 to 56 of the contested judgment, on the purpose of Regulation No 1049/2001 and its interpretation of the mandatory exceptions laid down in Article 4(1)(a) of that regulation are entirely correct. As the refusal of access was based on these mandatory exceptions, the CFI was right in disregarding the particular interests asserted by the appellant. The appellant's contention according to which he was requesting access to documents only in so far as they related to him did not affect the CFI's judgment on this point.
79. Contrary to what the appellant claims, access to the documents underlying the Council's decision to include him in the lists established by Council Decisions 2002/848, 2002/974 and 2003/480 cannot be regarded as a more effective means enabling him to publicly contradict accusations of his involvement in terrorist activities than asserting his rights of defence in pending Case T 47/03.
4. Assessment
80. The appellant's fourth plea in law raises two points, both of which have been dealt with in the context of my discussion of the first plea in law.
81. By his first point, the appellant asserts essentially that that the CFI misinterpreted the scope of his application by assuming that his application to gain access to the requested document was intended to support his defence in the context of Case T 47/03, whereas he sought access to this document in order to assist him in defending himself in public.
82. However, as I already observed in paragraph 27 above and the Council, too, submits, in the context of the application of Article 4(1)(a) of Regulation No 1049/2001 there is no place for the balancing of the public

interest in respecting the confidential character of certain documents against the personal interests a citizen or entity may have in the disclosure of that document. The fact that the appellant's application to gain access to the document in question was inspired by other motives than those mentioned by the CFI, at paragraph 53 of the contested judgment is irrelevant for the assessment made by the CFI and cannot affect its validity.

83. The appellant submits in his second point that the possibility of gaining access to the document requested in the context of the proceedings of Case T 47/03 cannot be considered to be an effective remedy within the meaning of Article 13 ECHR. He states that he should be in a position to answer the specific accusations against him in public.

84. In paragraph 35 above, I found that where a document relates to one of the public interests covered by the mandatory exceptions of Article 4(1)(a) of Regulation No 1049/2001, the refusal to grant access to that document cannot in itself be regarded as an infringement of the rights of defence, or more specifically, as a denial of the right to an effective remedy. The fact that an effective remedy is available under Community law is evidenced by the fact that the appellant has the opportunity under Article 230 EC to challenge the validity of his inclusion on the list of persons, groups and entities to whom the special measures of Regulation No 2580/2001 apply and that he has availed himself of the opportunity.

85. Finally, I do not consider that the position of the appellant can be likened to that which was at issue in *Allenet de Ribemont* before the European Court of Human Rights. In that case, as the person involved was publicly branded by certain public authorities as having instigated a murder, there was a probability that this could undermine the presumption of innocence. By contrast, although it is true that the persons included on the list referred to are publicly suspected of being involved in terrorist activities, it must be recognised that the object of this Community measure is to prevent terrorist activity by combating the funding of terrorism. As the freezing of funds which this entails can only be achieved with the co operation with public and private financial institutions, it is inevitable that the list of persons, groups and entities concerned be made public.

86. In view of these observations, the fourth plea in law must be rejected.

F – *Fifth plea in law: violation of Article 4(5) and Article 9(3) of Regulation No 1049/2001*

1. The CFI's judgment

87. The CFI considered the aspect of the statement of reasons given for refusing to disclose the identity of the Member States having provided documents in paragraph 64 of the contested judgment, cited in paragraph 61above. As to the obligation of the Council to disclose the identity of the Member States concerned, the CFI ruled as follows:

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

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

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

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

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

96. The Council was therefore not obliged to disclose the documents in question, of which States are the authors, relating to the adoption of Decision 2002/848, including the identity of those authors, in so far as,

firstly, those documents are sensitive documents and, secondly, the States responsible for them have refused to agree to their disclosure.'

2. Appellant

88. The appellant claims that the CFI erroneously considered, at paragraphs 64 and 96 of the contested judgment, that Articles 4(5) and 9(3) of Regulation No 1049/2001 apply both to 'information' as well as to 'documents', thereby justifying the Council's refusal to disclose the identity of the Member States which had furnished the documents concerned. This constitutes a disproportionate restriction on the rights of interested parties to address themselves directly to the authorities of the Member States to obtain access to documents, which obviously implies that their identity be disclosed. Furthermore, the CFI omitted examining the appellant's plea that the Council did not state reasons on the question how disclosure of the identities of the Member States that provided information could in any way harm public interest in relation to public security and/or international relations.

3. Respondent

89. The Council maintains that the CFI was correct in holding, at paragraphs 95 and 97 of the contested judgment that the purpose of Article 9(3) of Regulation No 1049/2001 is to guarantee the secrecy of the content of documents and even of their existence. As the Court has made clear, the rules on access to documents do not concern only access to documents as such, but rather the information contained in them. (21) The identity of the author of a document is clearly an element of information contained in the document and thus subject to the same rules as the document as such.

90. As regards the appellant's submission that the CFI did not examine his plea that the Council did not state reasons how disclosure of the identity of the Member States that provided information could harm the public interest, the Council reiterates that it is sufficient to indicate that the national authorities had requested that it not be disclosed, as the institution is bound by such a request. (22) It is neither obliged to assess the reasons given by the author, nor is it under any duty to explain the reasons which led the Member State in question to make the request pursuant to Article 4(5) of Regulation No 1049/2001, since that provision does not oblige Member States to give reasons for such a request. These considerations apply *a fortiori* to sensitive documents which are protected by law under Article 9(3) of the regulation, without an express request by the Member State concerned.

4. Assessment

91. The issue raised by the fifth plea in law is whether there is an obligation on the part of the Council to disclose the identity of Member States having provided documents following its decision to deny access to them on the grounds that they are covered by the mandatory exceptions of Article 4(1)(a) of Regulation No 1049/2001.

92. The appellant essentially contends that as the identity of a Member State is 'information' and not a 'document' and the regulation only concerns access to documents, there were no grounds for the Council's refusal to reveal the identity of the Member States concerned. The Council opposes this interpretation and agrees with the CFI that, where under Article 9(3) of Regulation No 1049/2001 the originator of a sensitive document may prevent this document being included recorded in the public register referred to in Article 11 of the regulation, the purpose of this provision is to guarantee the secrecy of their content and even of their existence.

93. Although the appellant may be correct in pointing out that there is no provision in Regulation No 1049/2001 prohibiting the Council to disclose the identity of a Member State having provided a document, the question raised by the fifth plea in law should be answered having regard to the system laid down in the regulation in respect of sensitive documents.

94. As regards third party documents, which are defined as documents originating outside the institutions and therefore include documents provided by the Member States, Article 4(4) of Regulation No 1049/2001 provides that the institution shall consult with the third party concerned with a view to assessing whether an exception laid down in Article 4(1) or (2) of the regulation applies to that document. Article 4(5) of the regulation permits the Member States to request that a document originating from it not be disclosed without its prior agreement. Sensitive documents, according to Article 9(3) of the regulation, may only be recorded in the public register or released with the consent of the originator.

95. It is clear from these provisions that where access to a document originating in a Member State and held by an institution is sought, rather than referring the applicant to the Member State concerned, it is the institution which must consult with that Member State in order to determine whether the application can be

granted. This procedure already indicates that the identity of the Member State having provided the document is regarded as an element which is covered by the exceptions laid down in Article 4 of the regulation.
96. Where the document is sensitive in character, the originator of the document retains complete control over the question of disclosure and even of its being registered. As this necessarily entails, as was established at paragraph 95 of the contested judgment, that the very existence of the document is not made known, it evidently means that the identity of the originator cannot be disclosed.
97. In addition, the distinction made by the appellant between 'information' and 'documents' is artificial, as access to a document is obviously only requested in order gain access to its contents. The Council observes correctly that the identity of the author of a document is itself an element of information contained in it. As the identity of the author may be one of the reasons for maintaining the confidentiality of the document, its disclosure must be subject to the same rules as those regarding the disclosure of the document itself.
98. Although this implies that the appellant is denied access to information enabling him to apply to the national authorities concerned, I do not consider that this unduly restricts his right to legal protection. This is adequately guaranteed by the procedure under Regulation No 1049/2001 and the subsequent scrutiny by the Community courts.
99. I conclude therefore that the fifth plea in law cannot be upheld.
VII – **Conclusion**
100. In view of the foregoing observations, I would suggest that the Court:
– dismiss the application as unfounded in so far as it seeks the annulment of the Judgment of the Court of First Instance of 26 April 2005 in Joined Cases T 110/03, T 150/03 and T 405/03;
– dismiss the application as inadmissible in so far as it seeks the annulment of the Council's decisions refusing access to the documents requested;
– order the appellant to pay the costs.

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1 – Original language: English.

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2 – [2005] ECR II 000.

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3 – Council Regulation No 2580/2001 of 27 December 2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism, OJ 2002 L 344, p. 70.

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4 – OJ 2003 C 101, p. 41.

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5 – Regulation 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

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6 – Cf, inter alia, C 199/92 P *Hüls* v *Commission* [1999] ECR I 4287, paragraph 92 and C 198/99 P *Ensidesa* v *Commission* [2003] ECR I 11111, paragraph 32.

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7 – Case T 14/98 *Hautala* v *Council* [1999] ECR II 2489, at paragraph 71.

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8 – Case T 211/00 *Kuijer* v *Council* [2002] ECR II 485, at paragraph 53.

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9 – The third paragraph of this Article provides: 'Where a document to which access has been denied by a Community institution has been produced before the Court of First Instance in proceedings relating to the legality of that denial, that document shall not be communicated to the other parties.'

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10 – Cited in footnote 7.

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11 – See *Hautala*, at paragraph 67 of the CFI's judgment.

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12 – See the previous footnote.

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13 – Case C 353/99 P *Council* v *Hautala* [2001] ECR I 9565.

14 – Cf. paragraph 2 of the preamble to Regulation No 1049/2001: ‘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.’

15 – Paragraph 4 of the preamble to Regulation No 1049/2001 (emphasis added).

16 – Paragraph 11 of the preamble to Regulation No 1049/2001 (emphasis added).

17 – See paragraphs 74 to 78 of the contested judgment.

18 – See, inter alia, Case C 41/00 P *Interporc* v *Commission* [2003] ECR I 2125, paragraph 55.

19 – The CFI cites by analogy, Joined Cases C 174/98 P and C 189/98 P *Netherlands and Van der Wal* v *Commission* [2000] ECR I 1, paragraph 24 and T 105/95 *WWF UK* v *Commission*, [1997] ECR II 313, paragraph 65.

20 – Judgment of the European Court of Human Rights of 10 February 1995, Series A, No 308, § 36.

21 – *Hautala*, cited in footnote 13, at paragraph 23 of the judgment.

22 – Case T 187/03 *Scippacercola* v *Commission* [2005] ECR II 000, at paragraphs 68 to 70 of the judgment.

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