JUDGMENT OF THE COURT
30 April 1996 *

In Case C-58/94,

Kingdom of the Netherlands, represented by A. Bos, Legal Adviser in the Ministry of Foreign Affairs, and J. W. de Zwaan, Assistant Legal Adviser in that ministry, acting as Agents, with an address for service in Luxembourg at the Netherlands Embassy, 5 Rue C. M. Spoo,

applicant,

supported by

European Parliament, represented by G. Garzón Clariana, Jurisconsult, C. Pennera and E. Vandenbosch, of the Legal Service, acting as Agents, with an address for service in Luxembourg at the General Secretariat of the European Parliament, Kirchberg,

intervener,

v

Council of the European Union, represented by J.-P. Jacqué, Director of the Legal Service, and G. Houttuin, of the Legal Service, acting as Agents, with an address for service in Luxembourg at the office of Bruno Eynard, Director of the Legal Affairs Directorate of the European Investment Bank, 100 Boulevard Konrad Adenauer,

defendant,

* Language of the case: Dutch.

supported by

Commission of the European Communities, represented by P. Van Nuffel and S. Van Raepenbusch, of the Legal Service, acting as Agents, with an address for service in Luxembourg at the office of Carlos Gómez de la Cruz, of the Legal Service, Wagner Centre, Kirchberg,

and by

French Republic, represented by C. de Salins, Deputy Director of the Legal Affairs Directorate of the Ministry of Foreign Affairs, and H. Renié, Secretary for Foreign Affairs in that directorate, acting as Agents,

APPLICATION for the annulment of Council Decision 93/731/EC of 20 December 1993 on public access to Council documents (OJ 1993 L 340, p. 43), Article 22 of the Rules of Procedure of the Council as amended by Council Decision 93/662/EC of 6 December 1993 (OJ 1993 L 304, p. 1) and the Code of Conduct (93/730/EC) concerning public access to Council and Commission documents (OJ 1993 L 340, p. 41) in so far as that act is to be regarded as an act having legal effects,

THE COURT,

composed of: G. C. Rodríguez Iglesias, President, C. N. Kakouris, D. A. O. Edward, J.-P. Puissochet and G. Hirsch (Presidents of Chambers), G. F. Mancini, F. A. Schockweiler, J. C. Moitinho de Almeida (Rapporteur),

P. J. G. Kapteyn, C. Gulmann, J. L. Murray, P. Jann, H. Ragnemalm, L. Sevón and M. Wathelet, Judges,

Advocate General: G. Tesauro,
Registrar: H. A. Rühl, Principal Administrator,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 10 October 1995, at which the Kingdom of the Netherlands was represented by M. A. Fierstra, Assistant Legal Adviser in the Ministry of Foreign Affairs, acting as Agent, the European Parliament by C. Pennera and E. Vandenbosch, the Council by J.-P. Jacqué and G. Houttuin, the Commission by P. Van Nuffel, and the French Government by J.-F. Dobelle, Deputy Director in the Legal Affairs Directorate of the Ministry of Foreign Affairs, acting as Agent,

after hearing the Opinion of the Advocate General at the sitting on 28 November 1995,

gives the following

Judgment

1 By application lodged at the Court Registry on 10 February 1994, the Kingdom of the Netherlands brought an action under Article 173 of the EC Treaty for the annulment of Council Decision 93/731/EC of 20 December 1993 on public access to Council documents (OJ 1993 L 340, p. 43), Article 22 of the Rules of Procedure of the Council as amended by Council Decision 93/662/EC of 6 December 1993 (OJ 1993 L 304, p. 1) and the Code of Conduct (93/730/EC) concerning

public access to Council and Commission documents (OJ 1993 L 340, p. 41, hereinafter 'the Code of Conduct') in so far as that act is to be regarded as an act having legal effects.

2 According to the declaration on the right of access to information (OJ 1992 C 191, p. 101), annexed (as Declaration 17) to the Final Act of the Treaty on European Union, signed in Maastricht on 7 February 1992, 'The Conference considers that transparency of the decision-making process strengthens the democratic nature of the institutions and the public's confidence in the administration. The Conference accordingly recommends that the Commission submit to the Council no later than 1993 a report on measures designed to improve public access to the information available to the institutions'.

3 At the meeting of Heads of State or of Government of the Member States held in Birmingham on 16 October 1992, the European Council, after detailed discussion of how to bring the Community closer to its citizens, adopted a declaration entitled 'Birmingham Declaration — A Community close to its citizens'. In that declaration, the European Council called upon the Foreign Ministers to suggest, before the Edinburgh European Council of December 1992, ways of 'opening up the work of the Community's institutions, including the possibility of some open Council discussion'. It also asked the Commission 'to complete (by early 1993) its work on improving public access to the information available to it and to other Community institutions' (*Bulletin of the European Communities*, 10-1992, p. 9, Annex I). At the meeting of Heads of State or of Government held in Edinburgh on 12 December 1992, the European Council repeated the request made to the Commission at Birmingham (*Bulletin of the European Communities*, 12-1992, p. 10, point I.5).

4 In response to that request, the Commission adopted on 5 May 1993 Communication 93/C 156/05 entitled 'Public access to the institutions' documents', OJ 1993 C 156, p. 5. In that communication, the Commission suggested, among other things, that the general principle be that access to documents of the institutions

should be allowed, subject to certain exceptions. It also put forward a number of minimum requirements and fundamental principles for implementing a policy of access to documents. Lastly, the Commission invited the other institutions to cooperate with this development and suggested that the policy might take the form of an inter-institutional agreement.

5 In Annex II to Communication 93/C 166/04 of 2 June 1993 entitled 'Openness in the Community' (OJ 1993 C 166, p. 4), the Commission formulated the basic principles and requirements which should govern access to documents, with a view subsequently to discussing them with the other institutions.

6 At the meeting of Heads of State or of Government held in Copenhagen on 22 June 1993, the European Council invited 'the Council and the Commission to continue their work based on the principle of citizens' having the fullest possible access to information. The aim should be to have all necessary measures in place by the end of 1993' (*Bulletin of the European Communities*, 6-1993, p. 16, point I.22).

7 It was in this context that the Council and the Commission adopted by common agreement on 6 December 1993 the Code of Conduct enumerating the principles governing public access to documents in their possession in which they agreed that each of the two institutions would implement those principles by means of specific regulations before 1 January 1994.

8 On the same date, the Council adopted Decision 93/662 adopting its Rules of Procedure, which, in the version in force since 7 December 1993, include an Article 22 providing that 'The detailed arrangements for public access to Council documents disclosure of which is without serious or prejudicial consequences shall be adopted by the Council'.

9 By Decision 93/731, the Council, acting on the basis of Article 151(3) of the EC Treaty, which empowers it to adopt its Rules of Procedure, and Article 22 of its Rules of Procedure, adopted provisions for the implementation of the principles set out in the Code of Conduct. Under Article 10, that decision entered into force on 1 January 1994.

10 Article 1(1) of Decision 93/731 declares that the public is to have access to Council documents under the conditions laid down in the decision. According to Article 1(2), 'Council document' means 'any written text, whatever its medium, containing existing data and held by the Council, subject to Article 2(2)'. Article 2(2) provides that, where the requested document was written by a natural or legal person, a Member State, another Community institution or body, or any other national or international body, the application must be sent directly to the author. The requirements as to the form in which an application has to be made are set out in Article 2(1). Article 3 states that access to documents is to be either by consultation of the requested document on the spot or by provision of a copy.

11 Article 4(1) lists the grounds on which access to a Council document may not be granted, namely 'where its disclosure could undermine:

— the protection of the public interest (public security, international relations, monetary stability, court proceedings, inspections and investigations),

— the protection of the individual and of privacy,

— the protection of commercial and industrial secrecy,

— the protection of the Community's financial interests,

— the protection of confidentiality as requested by the natural or legal person who supplied any of the information contained in the document or as required by the legislation of the Member State which supplied any of that information.'

In addition, Article 4(2) allows the Council to refuse access to a document in order to protect the confidentiality of its proceedings.

12 Articles 5, 6 and 7 deal with the authority empowered to reply to an application for access, the time within which a reply must be given and the form of reply, and the effects associated with the reply. In the event that a request is definitively rejected, the applicant is to be informed of the content of Articles 138e and 173 of the Treaty, relating respectively to the conditions for referral to the Ombudsman and review by the Court of Justice of the legality of Council acts. Failure to reply is equivalent to refusal.

13 Article 8 of Decision 93/731 provides that the decision is to apply with due regard for provisions governing the protection of classified information.

The European Parliament's application to intervene

14 The Council claims principally that the intervention by the Parliament in support of the form of order sought by the Netherlands Government should be declared inadmissible in its entirety inasmuch as it is concerned essentially with the alleged breach of the principle of the openness of legislative proceedings and the content of the rules governing access to Council documents and certain of the implementing rules appertaining thereto, whereas the applicant government's argument is that the measures adopted by the Council go beyond the confines of its internal organization and are intended to have legal effects outside those confines.

15 In the alternative, the Council claims that the Parliament's intervention should be declared inadmissible only in so far as it does not have the same object as the Netherlands Government's application and is based on different grounds.

16 Those arguments cannot be accepted.

17 The Parliament argues essentially that, by basing the rules on public access to documents in its possession on its power to organize its internal operation, the Council arrogated to itself the power to determine to what extent its legislative proceedings are accessible to the public and thereby misused the powers conferred on it by Article 151(3) of the Treaty.

18 In this connection, the Parliament avers that, whilst it is competent for the institutions to adopt appropriate measures for their internal organization with a view to ensuring their sound operation and the proper conduct of their procedures, the principle of openness of the legislative process and the access to legislative documents entailed thereby constitute essential requirements of democracy and therefore cannot be treated as organizational matters purely internal to the institutions. In this context, the Parliament adverts to the democratic nature of the Community legal order. It maintains moreover that the requirement for openness constitutes a general principle common to the constitutional traditions of the Member States which is also enshrined in Community law. Lastly, it argues that the right to information, of which access to documents constitutes the corollary, is a fundamental human right recognized by various international instruments.

19 The Parliament further submits that Decision 93/731 and the Code of Conduct are in breach of the requirements inherent in the principle of the openness of legislative proceedings and the right of access to legislative documents, which confirms that the Council treated rules relating to a fundamental principle as a question of internal organization and therefore exceeded its powers under Article 151(3) of the Treaty. Accordingly, the fact that, under Article 4 of Decision 93/731, the Council may refuse all access to a legislative document in order to protect the confidentiality of its proceedings renders the general principle set out in Article 1 nugatory

nd infringes the principle of the openness of legislative proceedings as it is guarnteed in the Member States. The same objections may be levelled against Article ' of the decision, which, in the event of an express refusal or a failure to reply, which is treated as an express refusal, lays down a time-limit within which the applicant must make a confirmatory application for that position to be reconsidered. Such a provision may, on a merely formal ground, deprive the citizen of a fundamental right of pluralist democratic systems. Lastly, by prohibiting the reproduction or circulation of a requested document for commercial purposes through direct sale without prior authorization from the Secretary General, Article 3(3) of Decision 93/731 has the effect of restricting the subsequent use of legislative — and hence public — documents by making them, quite simply, unavailable for commercial purposes.

20 Under the fourth paragraph of Article 37 of the Statute of the Court of Justice of the EC, 'Submissions made in an application to intervene shall be limited to supporting the submissions of one of the parties'.

21 Although the Parliament's intervention is based on arguments differing in part from those put forward by the applicant government, the fact nevertheless remains that, as can be seen from paragraphs 17, 18 and 19 of this judgment, the Parliament seeks by those arguments to show, in common with that government, that, in basing the contested rules on Article 151(3) of the Treaty, the Council exceeded the powers of its internal organization conferred upon it by that provision.

22 Since the intervention is intended to support the submissions of one of the parties to the proceedings, it must be declared admissible.

The main application

The Code of Conduct

23 The applicant government considers that the Code of Conduct does not constitute an act having legal effects on the ground that it is not an act within the meaning of Article 189 of the EC Treaty or any act provided for elsewhere in the Treaties, but a text of a political nature setting out political agreements concluded between the Commission and the Council. The Netherlands Government submits, however, in the event that the Code should be held to be a decision in its own right having legal effects, that it should be annulled in so far as, contrary to the requirements of Article 190 of the EC Treaty, it contains no reference to its legal basis.

24 According to the Court's case-law (see, in particular, Case C-135/93 *Spain* v *Commission* [1995] ECR I-1651, paragraph 20), an action for annulment must be available in the case of all measures adopted by the institutions, whatever their nature or form, which are intended to have legal effects.

25 It appears, however, in particular from the preamble and the penultimate paragraph of the Code of Conduct, entitled 'Implementation', that the Code reflects the agreement reached between the Commission and the Council on the principles governing access to the documents of the two institutions, while inviting the institutions to implement those principles by means of specific regulations.

26 In those circumstances, the Code of Conduct merely foreshadows subsequent decisions intended, unlike the Code, to have legal effects. In so far as it traces out the general lines on the basis of which the two institutions are to adopt measures relating to the confidentiality and disclosure of papers held by them, the Code responds to the concern of the Council and the Commission to prevent major divergences in their subsequent actions in this field.

27 The application must be dismissed as inadmissible in so far as it as directed against the Code of Conduct, since the Code is an act which is the expression of purely voluntary coordination and is therefore not intended in itself to have legal effects.

Decision 93/731

28 The Netherlands Government argues, firstly, that the Council wrongly used, as the legal basis of Decision 93/731, Article 151(3) of the Treaty and Article 22 of its Rules of Procedure, both of which are concerned solely with the Council's internal organization.

29 The Netherlands Government argues that the contested decision goes far beyond the sphere of application of the rules on the internal organization and management of the Council and constitutes an act expressly designed to have legal effects vis-à-vis citizens. The applicant government observes in this regard that public access to Council documents constitutes the basic principle of the decision (Article 1) and that legal effects may arise vis-à-vis individuals in particular where actual applications for access to a document are made (Article 2), where such applications are refused (Article 4) and by reason of the opportunities for appealing against decisions refusing access to a document (Article 7).

30 Although it concedes that internal measures may exceptionally have external effects, the Netherlands Government considers that where, as in this case, the very purpose of the rules is to create rights in individuals, the rules in question may not be adopted on the basis of provisions authorizing the Council to adopt measures relating to its internal organization and functioning.

31 In this regard, the Netherlands Government observes that, in its statement in intervention, the Parliament rightly stresses the democratic nature of the Community legal order and the fact that openness is a fundamental characteristic of a democratic system. This confirms that the Council wrongly categorized as a matter of

internal organization something which in fact constitutes a fundamental right, namely the public's right of access to information, the rules governing which must be accompanied by the necessary safeguards.

32 Secondly, the Netherlands Government argues that, in view of the importance of the matter to which the rules at issue relate and hence of the need also to involve the Parliament, the Council's manner of proceeding, which consisted in dealing with the question of open government by means of cooperation between two institutions, to the exclusion of the Parliament, also infringes the balance between the institutions defined in Article 4 of the EC Treaty.

33 The Netherlands Government's arguments cannot be accepted.

34 As the Advocate General emphasized in sections 14 and 15 of his Opinion, the domestic legislation of most Member States now enshrines in a general manner the public's right of access to documents held by public authorities as a constitutional or legislative principle.

35 In addition, at Community level, the importance of that right has been reaffirmed on various occasions, in particular in the declaration on the right of access to information annexed (as Declaration 17) to the Final Act of the Treaty on European Union, which links that right with the democratic nature of the institutions. Moreover, as appears from paragraphs 3 and 6 of this judgment, the European Council has called on the Council and the Commission on several occasions to implement that right.

36 It was in order to conform to this trend, which discloses a progressive affirmation of individuals' right of access to documents held by public authorities, that the Council deemed it necessary to amend the rules governing its internal organization, which had hitherto been based on the principle of confidentiality.

37 So long as the Community legislature has not adopted general rules on the right of public access to documents held by the Community institutions, the institutions must take measures as to the processing of such requests by virtue of their power of internal organization, which authorizes them to take appropriate measures in order to ensure their internal operation in conformity with the interests of good administration.

38 The fact that Decision 93/731 has legal effects vis-à-vis third parties cannot call in question its categorization as a measure of internal organization. There is nothing to prevent rules on the internal organization of the work of an institution having such effects (see, in particular, Case C-69/89 *Nakajima* v *Council* [1991] ECR I-2069, paragraphs 49 and 50, and Case C-137/92 P *Commission* v *BASF and Others* [1994] ECR I-2555, paragraphs 75 and 76).

39 Consequently, as Community law stands at present, the Council is empowered to adopt measures intended to deal with requests for access to documents in its possession.

40 Since, as a result, the Council was entitled to adopt Decision 93/731 on the basis of Article 151(3) of the Treaty, it has not, as the Netherlands Government alleges, circumvented any procedure specially provided for by the Treaty in order to deal with circumstances of this kind and hence is not guilty of any misuse of power (see, in particular, Case C-156/93 *Parliament* v *Commission* [1995] ECR I-2019).

41 As regards the plea alleging infringement of the principle of institutional balance, suffice it to say that, in so far as the decision at issue is one of the acts which the Council is empowered to adopt by virtue of its power of internal organization, the fact that it did not involve the Parliament in its adoption cannot detract from the Parliament's prerogatives, which include participation, where provided for in the Treaties, in the process of the drafting of legislative measures (see, in particular, Case C-70/88 *Parliament* v *Council* [1990] ECR I-2041, paragraphs 21 and 28).

Article 22 of the Council's Rules of Procedure

42 The Netherlands Government argues that the purpose of Article 22 of the Rules of Procedure, as amended, greatly exceeds the confines of the rules governing the internal organization of the Council, with the result that it cannot form part of a body of provisions intended solely to set out rules on the internal organization and management of an institution. In those circumstances, it maintains that the Council has infringed Articles 151(3) of the EC Treaty, Article 30(3) of the ECSC Treaty and Article 121(3) of the EAEC Treaty, or at least misused the power conferred on it by those provisions.

43 That plea cannot be upheld. As appears from paragraphs 34 to 39 of this judgment, the measures in question are among those which, as Community law stands at present, an institution is empowered to take pursuant to its power of internal organization.

44 It follows from the whole of the foregoing that the application must be dismissed.

Costs

45 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Kingdom of the Netherlands has been unsuccessful and the Council has asked that it be ordered to pay the costs, that State must be ordered to pay the costs. In accordance with the first subparagraph of Article 69(4) of those Rules, the French Republic, the European Parliament and the Commission of the European Communities, which intervened in the proceedings, must be ordered to bear their own costs.

On those grounds,

THE COURT

hereby:

1. **Dismisses the application;**

2. **Orders the Kingdom of the Netherlands to pay the costs;**

3. **Orders the French Republic, the European Parliament and the Commission of the European Communities to bear their own costs.**

Rodríguez Iglesias Kakouris Edward

Puissochet Hirsch Mancini Schockweiler

Moitinho de Almeida Kapteyn Gulmann Murray

Jann Ragnemalm Sevón Wathelet

Delivered in open court in Luxembourg on 30 April 1996.

R. Grass G. C. Rodríguez Iglesias

Registrar President