JUDGMENT OF THE COURT OF FIRST INSTANCE
(Second Chamber, Extended Composition)
19 October 1995 *

In Case T-194/94,

John Carvel, residing in Brussels, and

Guardian Newspapers Ltd, a company governed by English law, whose registered office is in Manchester, United Kingdom,

represented by Onno W. Brouwer and Frédéric P. Louis, of the Brussels Bar, assisted by Deirdre Curtin, of the University of Utrecht, with an address for service in Luxembourg at the Chambers of Marc Loesch, 11 Rue Goethe,

applicants,

supported by

Kingdom of Denmark, represented by Peter Biering, Head of Division at the Ministry of Foreign Affairs, acting as Agent, with an address for service in Luxembourg at the Danish Embassy, 4 Boulevard Royal,

* Language of the case: English.

by

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

and by

European Parliament, represented by Gregorio Garzon Clariana, Jurisconsult, and François Vainker, of its Legal Service, acting as Agents, with an address for service in Luxembourg at the General Secretariat of the European Parliament, Kirchberg,

interveners,

v

Council of the European Union, represented by Jill Aussant and Giorgio Maganza, Legal Advisers, acting as Agents, with an address for service in Luxembourg at the office of Bruno Eynard, Manager of the Legal Directorate of the European Investment Bank, 100 Boulevard Konrad Adenauer,

defendant,

APPLICATION for the annulment of decisions of the Council adopted pursuant to Council Decision 93/731/EC of 20 December 1993 on public access to Council documents (OJ 1993 L 340, p. 43),

THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES
(Second Chamber, Extended Composition),

composed of: B. Vesterdorf, President, D. P. M. Barrington, A. Saggio, H. Kirschner and A. Kalogeropoulos, Judges,

Registrar: H. Jung,

having regard to the written procedure and further to the hearing on 5 July 1995,

gives the following

Judgment

Legal background

1 The Final Act of the Treaty on European Union signed at Maastricht on 7 February 1992 contains a Declaration (No 17) on the right to access to information, which states: '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 to improve the public access to the information available to the institutions.'

2 At the close of the European Council held in Birmingham on 16 October 1992, the Heads of State and of Government issued a declaration entitled 'A Community close to its citizens' (Bull. EC 10-1992, p. 9), in which they stressed the necessity to make the Community more open. That commitment was reaffirmed by the European Council at Edinburgh on 12 December 1992 and the Commission was again invited to continue to work on improving access to the information available to Community institutions (Bull. EC 12-1992, p. 7).

3 On 5 May 1993, the Commission adopted Communication 93/C 156/05 on public access to the institutions' documents (OJ 1993 C 156, p. 5), which contained the results of a survey on public access to documents in different Member States, and which concluded that there was a case for developing further the access to documents at Community level.

4 On 2 June 1993, the Commission adopted Communication 93/C 166/04 on openness in the Community (OJ 1993 C 166, p. 4). In it the Commission elaborated the basic principles governing access to documents.

5 On 6 December 1993, within the framework of these preliminary steps towards implementing the principle of transparency, the Council and the Commission approved a Code of Conduct concerning public access to Council and Commission documents (OJ 1993 L 340, p. 41, hereinafter 'the Code of Conduct'), aimed at establishing the principles to govern access to Council and Commission documents.

6 The Code of Conduct provides, *inter alia*:

'The public will have the widest possible access to documents held by the Commission and the Council.

"Document" means any written text, whatever its medium, which contains existing data and is held by the Council or the Commission.'

7 The Code of Conduct further provides that the institutions are to refuse access to any document whose disclosure could undermine specified interests, including the protection of the public interest, of the individual and of privacy, and may refuse access to documents in order to protect the institution's interest in the confidentiality of its proceedings. It goes on to state: 'The Commission and the Council will severally take steps to implement these principles before 1 January 1994.'

8 On the same day, 6 December 1993, the Council adopted its Rules of Procedure by Decision 93/662/EC (OJ 1993 L 304, p. 1). Article 4 of those Rules provides that meetings of the Council are not to be public except in the cases referred to in Article 6. Article 5 provides:

'1. Without prejudice to Article 7(5) and other applicable provisions, the deliberations of the Council shall be covered by the obligation of professional secrecy, except in so far as the Council decides otherwise.

...

2. The Council may authorize the production of a copy or an extract from its minutes for use in legal proceedings.'

9 Article 9 of the Council's Rules of Procedure provides, *inter alia*, that minutes of Council meetings are as a general rule to indicate, in respect of each item on the agenda, the documents submitted to the Council, the decisions taken or the conclusions reached by the Council and the statements made by the Council and those whose entry has been requested by a member of the Council or the Commission. Article 22 states: 'The detailed arrangements for public access to Council documents disclosure of which is without serious or prejudicial consequences shall be adopted by the Council.'

10 On 20 December 1993, the Council adopted Decision 93/731/EC on public access to Council documents (OJ 1993 L 340, p. 43, hereinafter 'Decision 93/731'), the aim of which was to implement the principles established by the Code of Conduct. Under Article 1 of that decision: 'The public shall have access to Council documents under the conditions laid down in this Decision. ... "Council document" means any written text, whatever its medium, containing existing data and held by the Council, subject to Article 2(2).'

11 Article 4(1) of Decision 93/731 provides:

'Access to a Council document shall not be granted 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.'

12 Under Article 4(2): 'Access to a Council document may be refused in order to protect the confidentiality of the Council's proceedings.'

13 Article 7 provides:

'1. The applicant shall be informed in writing within a month by the relevant departments of the General Secretariat either that his application has been approved or that the intention is to reject it. In the latter case, the applicant shall also be informed of the reasons for this intention and that he has one month to make a confirmatory application for that position to be reconsidered, failing which he will be deemed to have withdrawn his original application.

2. Failure to reply to an application within a month of submission shall be equivalent to a refusal, except where the applicant makes a confirmatory application, as referred to above, within the following month.

3. Any decision to reject a confirmatory application, which shall be taken within a month of submission of such application, shall state the grounds on which it is based. The applicant shall be notified of the decision in writing as soon as possible and at the same time informed of the content of Articles 138e and 173 of the Treaty establishing the European Community, relating respectively to the conditions for referral to the Ombudsman by natural persons and review by the Court of Justice of the legality of Council acts.

4. Failure to reply within a month of submission of the confirmatory application shall be equivalent to a refusal.'

Facts

14 On 2 February 1994, the applicant John Carvel, in his capacity as European Affairs Editor of The Guardian newspaper, published by the applicant Guardian Newspapers Ltd, a company limited by shares governed by English law, wrote to the Secretary-General of the Council of the European Union seeking access to a number of documents, including the Coreper preparatory reports, the minutes, the attendance and voting records and the decisions of both the Councils of Ministers for Social Affairs ('the Social Affairs Councils') of 12 October and 23 November 1993 and of the Council of Ministers for Justice ('the Justice Council') of 29 and 30 November 1993, as well as the minutes of the Council of Ministers for Agriculture ('the Agriculture Council') of 24 and 25 January 1994.

15 On 28 February 1994, the applicants received from the General Secretariat of the Council a copy of the preparatory reports, the minutes and the attendance and voting records of the Social Affairs Councils of 12 October and 23 November 1993. For the decisions taken by the Council on the dates in question, they were referred to the issues of the *Official Journal of the European Communities* in which those decisions appeared.

16 However, they were refused access to the minutes, the attendance and voting records and the decisions of the Justice Council of 29 and 30 November 1993, on the ground that the documents in question 'directly refer to the deliberations of the Council and cannot, under its Rules of Procedure, be disclosed'. The Council also refused access to the preparatory reports to the Justice Council of 29 and 30 November 1993 on its future work programme, on the ground that these were 'preliminary texts preceding the decision of the Council (Justice and Home Affairs) to recommend the adoption by the European Council of 10/11 December 1993 of the plan of action to be taken in the fields of Justice and Home Affairs'. Instead, the Council sent the definitive texts which had been adopted.

17 With regard to the minutes of the Agriculture Council of 24 and 25 January 1994, the applicants were informed that these were not yet available.

18 In the same letter of 28 February 1994, the Council informed the applicants of their right to make a confirmatory application within one month against the refusal of the Council to supply them with the documents that they had sought.

19 On 14 March 1994, the applicants made a confirmatory application, in which, *inter alia*, they reiterated their request for access to the documents relating to the Justice Council of 29 and 30 November 1993 and pointed out that they had already received similar documents from the Council relating to the Social Affairs Councils of 12 October and 23 November 1993. They also repeated their request for access to the minutes of the Agriculture Council of 24 and 25 January 1994.

20 The applicants received no response within the time-limit of one month laid down by Article 7(3) of Decision 93/731.

21 On 29 April 1994, the applicants wrote to the Secretary-General of the Council for clarification of the practice followed by the Council in relation to access to Council minutes and records of voting during deliberations. In the same letter they made a confirmatory application, pursuant to Article 7(2) of Decision 93/731, in relation to the minutes of the Agriculture Council of 24 and 25 January 1994.

22 In a letter of 17 May 1994, the Council replied to the applicants in the following terms:

'1. With regard to the documents relating to the preparation and meeting of the Justice and Home Affairs Council of 29 and 30 November 1993 (points 6 to 11 in your letter of 2 February), the Council takes the view that access to these documents cannot be allowed since they refer directly to the deliberations of the Council and its preparatory instances. If it did allow access, the Council would fail to protect the confidentiality of its proceedings. The documents in question contain confidential information relating to the position taken by the members of the Council during its deliberations.

Nevertheless, much of the information contained in these documents is available in the press release and other documents sent to you. For example, the preparatory documents (points 6 and 7 of your letter of 2 February) reflected a provisional situation, subject to development and the definitive texts on the Council's working programme have been communicated to you. Equally, the principal decisions taken at the Justice and Home Affairs Council on 29 and 30 November 1993, as well as a list of the Ministers and Commissioners who attended (points 10 and 11 respectively in your letter of 2 February) are recorded in the press release.

2. The same considerations of confidentiality indeed apply to the preparatory reports for and the minutes and voting records of the Social Affairs Councils of 12 October and 23 November 1993 (points 1, 2 and 3 in your letter of 2 February)

and which in fact should not have been sent to you. However, owing to the novelty of the procedure for allowing public access to documents of the Council and its practical implementation, this information was sent to you because of an administrative error.

3. Access to the minutes of the Agriculture Council of 24 January 1994 (point 13 of your letter of 2 February) cannot be allowed for the same reasons.'

Procedure and forms of order sought

23 The applicants then brought the present action on 19 May 1994.

24 By order of the President of the Second Chamber (Extended Composition) of 14 December 1994, the Danish Government, the Netherlands Government and the European Parliament were granted leave to intervene in support of the applicants.

25 The written procedure closed on 19 April 1995. Upon hearing the report of the Judge-Rapporteur, the Court of First Instance decided to open the oral procedure without any preparatory inquiry. It nevertheless put a question to the Council and asked it to produce certain documents, if they existed. The Council complied with that request.

26 The hearing took place on 5 July 1995. The parties presented oral argument and answered questions put by the Court.

27 The applicants claim that the Court should:

— annul the decision whereby the Council refuses to grant them access to the preparatory reports, the minutes, attendance and voting records of the Justice Council of 27 and 30 November 1993;

— annul the decision of 17 May 1994 whereby the Council refuses to grant them access to the minutes of the Agriculture Council of 24 and 25 January 1994;

— annul the decision of 17 May 1994 whereby the Council denies them free access to the preparatory reports, minutes and voting records of the Social Affairs Councils of 12 October and 23 November 1993;

— order the Council to pay the applicants' costs pursuant to Article 87 of the Rules of Procedure of the Court of First Instance.

The applicants have also requested an order that the Council produce to the Court the full tape recordings or verbatim transcripts of all meetings of the Council and its subsidiary bodies at which their case was discussed and the report of the

Council's Legal Service to the Coreper/Council (document 6853/94 JUR 110 of 5 May 1994, hereinafter 'the report of the Legal Service of 5 May 1994').

28 The Council contends that the Court should:

— dismiss the application as unfounded;

— order the applicants to pay the costs of these proceedings.

29 The Danish Government claims that the Court should:

— annul the Council's decisions refusing access;

— order the Council to pay the costs.

It has also requested an order that the Council produce to the Court the report of the Legal Service of 5 May 1994.

30 The Netherlands Government claims that the Court should:

— allow the application.

31 The European Parliament claims that the Court should:

— grant the form of order sought by the applicants and annul the Council's decisions of refusal.

Admissibility

32 The applicants contest the decision which they consider to be contained in the Council's letter of 17 May 1994, refusing them access, *inter alia*, to the preparatory reports, minutes and voting records of the Social Affairs Councils of 12 October and 23 November 1993.

33 However, on 28 February 1994, the applicants in fact received from the General Secretariat of the Council a copy of the preparatory reports, the minutes, attendance and voting records of the Social Affairs Councils.

34 Subsequently, in its letter of 17 May 1994, the Council stated that the documents relating to the Social Affairs Councils had been sent because of an administrative

error. However, that statement was intended merely to explain why the Council had sent the documents and was not a request for their return.

35 The letter of 17 May 1994 does not, therefore, contain any decision of the Council refusing the applicants access to the documents in question. Their claim for the annulment of the decision of 17 May 1994 is thus inadmissible in so far as it relates to the documents pertaining to the Social Affairs Councils, since no decision to refuse them access thereto was ever adopted by the Council.

Substance

36 In support of their application, the applicants put forward five pleas in law, alleging: breach of the fundamental principle of Community law of access to the documents of the institutions of the European Union; breach of the principle of the protection of legitimate expectations; infringement of Article 4(2) of Decision 93/731 inasmuch as the contested decisions are the expression of a blanket refusal to allow access to certain types of document; infringement of Article 7(3) of Decision 93/731 and of Article 190 of the Treaty inasmuch as the decisions do not state the reasons on which they are based; and, finally, misuse of powers.

37 However, before those pleas are examined, it is first necessary to establish the precise dates of the decisions challenged as unlawful. The applicants seek annulment of the decision whereby the Council refused to grant them access to the preparatory reports, minutes and attendance and voting records of the Justice Council of 29 and 30 November 1993 and annulment of the decision of 17 May 1994 whereby the Council refused to grant them access to the minutes of the Agriculture Council of 24 and 25 January 1994. They have not, however, specified the date of the decision refusing them access to the documents relating to the Justice Council.

38 As regards the date of the Council's refusal to allow access to the minutes of the Agriculture Council, the applicants requested communication of those documents on 2 February 1994 but were informed that they were not yet available (see paragraph 17 above). On 14 March 1994, the applicants reiterated their request. They received no reply within the one-month period. On 29 April 1994, the applicants made a confirmatory application covering the same documents. On 17 May 1994, within the time-limit laid down by Article 7(3) of Decision 93/731, the Council wrote to the applicants explaining why it had decided not to allow them access to the minutes of the Agriculture Council.

39 The letter of 17 May 1994 therefore constitutes the decision refusing the applicants access to the minutes of the Agriculture Council.

40 As regards the date of the Council's decision refusing access to the preparatory reports, minutes and attendance and voting records of the Justice Council, it must be borne in mind that Article 7(3) of Decision 93/731 provides that any decision to reject a confirmatory application must be taken within a month of submission of such application and that Article 7(4) provides that a failure to reply within one month of submission of the confirmatory application is to be equivalent to a refusal.

41 The applicants submitted a confirmatory application on 14 March 1994, to which the Council did not reply until 17 May 1994. The Council therefore failed to reply to the confirmatory application within the period laid down by Article 7(3) of Decision 93/731 and the refusal to allow access to the documents in question must thus be deemed to be an implied refusal taking effect one month after 14 March 1994.

42 Having established the precise dates of the Council's decisions of refusal, the Court will examine first the applicants' third plea in law.

Arguments of the parties

43 The applicants claim that the Council has expressed a blanket refusal to grant access to documents which relate to its deliberations, and claim that such a refusal infringes Article 4(2) of Decision 93/731, which provides that access to a document of the Council 'may' be refused in order to protect the confidentiality of its proceedings. In their view, that provision implies that the Council must carefully balance the interests involved before deciding whether access to a document is to be refused. They state that the operation of a blanket refusal is confirmed by the statement made by the Danish Government and the Netherlands Government following the Council meeting of 16 and 17 May 1994, which confirms, in their view, that no balancing of interests took place before the Council decided to reject their confirmatory application.

44 The Code of Conduct adopted by the Council and the Commission makes it clear, the applicants submit, that the confidentiality of deliberations is only one of the interests to be taken into account when applying the general principle of access to the institutions' documents. They stress that Article 4(2) of Decision 93/731 must be interpreted in the light of that consideration and add that a blanket refusal of access to certain documents on the ground that they refer to Council deliberations whose confidentiality must be protected — as stated by the Council in its letter of 17 May 1994 — infringes Article 4(2).

45 In response to the Council's argument that access to its minutes would damage the Community's decision-making process, the applicants state that they are not claiming that Decision 93/731 entitles them to automatic access to Council documents.

Furthermore, they find the Council's argument implausible, since the minutes of the Council merely contain an account of the conclusions arrived at by the Council, together with the formal statements which a delegation makes and then asks to have entered in the minutes. It is therefore unlikely that access to the minutes of the Council would result in national positions being made public.

46 The Council contends that the applicants have adduced no evidence to support their allegation that the Council did not balance the interests involved and that it is for the applicants, who bear the burden of proof, to substantiate their allegation.

47 It maintains that Decision 93/731 must be construed in accordance with the Council's Rules of Procedure. It points out that Decision 93/731, being based on those Rules, in no way overrides their provisions but should be construed in conjunction with them. Under Article 5(1) of its Rules of Procedure, the deliberations of the Council are in principle protected against disclosure, although the Council may decide otherwise.

48 The Council rejects the applicants' assertions to the effect that Article 4(2) of Decision 93/731 has led it to consider itself entitled to apply a blanket refusal, and states that it is always open to it to make use of the derogation provided for in its Rules of Procedure and to decide to disclose documents relating to its proceedings. The mere fact that it decided not to do so in the present case cannot serve to found a presumption that it will not do so in the future.

49 As regards the specific refusal at issue, the Council claims that it made a proper evaluation of the interests to be balanced. It rejects the applicants' allegation that it infringed Article 4(2) of the Decision by giving as its reason for refusing access to

a particular document the fact that the document belonged to a category of documents referring to Council deliberations whose confidentiality must be protected.

50 The Council describes in some detail the decision-making process which resulted in the refusal at issue. An introductory note of 25 March 1994 containing a draft refusal of the applicants' request was considered, *inter alia*, by Coreper on 30 March 1994 but the issue was not put to the Council. At a subsequent Coreper meeting, on 13 April 1994, the issue was put on the Council agenda of 18 and 19 April 1994, but in the Council a delegation requested that the item be withdrawn from the agenda. That request meant that the Council could not comply with the time-limit of one month laid down in Decision 93/731. On 22 April 1994, Coreper confirmed its previous decision to invite the Council to reject the applicants' request. The issue was again put on the Council agenda of 16 and 17 May 1994, for decision as an 'A' item. Then, on 16 May 1994, the Council decided to reject the applicants' request. Upon request by the Kingdom of Denmark the result of the vote was made public.

51 The Council emphasizes that the draft answer to the applicants' request was submitted to the Group which prepares the proceedings of Coreper I before it was put to Coreper, although in fact decisions may be taken by the Council without prior consideration by any Working Party. Moreover, decisions taken under the 'A' item part of the Council's agendas should not be regarded as not having been as fully considered as all other Council decisions. All confirmatory applications are now examined on a regular basis by the Information Working Party.

52 Outlining the reasons underlying the principle of the confidentiality of its proceedings, the Council points out that it works through a process of negotiation and compromise, in the course of which its members freely express their national

preoccupations and positions. It is essential that those positions remain confidential, particularly if the members are forced to move away from them in order that agreement may be reached, sometimes to the extent of abandoning their national instructions on a particular point. This process of compromise and negotiation is vital to the adoption of Community legislation, and would be jeopardized if delegations were constantly mindful of the fact that the positions they were taking, as recorded in Council minutes, could at any time be made public through the granting of access to those documents, whether or not the Council had authorized such access.

53 The Council states that both in the case of the documents relating to the Justice Council of 29 and 30 November 1993, which detail the positions of certain members of the Council and which contain a statement by one member, and in the case of the minutes of the Agriculture Council of 24 January 1994, which refer to detailed positions taken by almost all the members of the Council, it was not considered appropriate that use should be made of the provision in its Rules of Procedure allowing it to derogate from the principle of the confidentiality of its proceedings by disclosing the documents concerned.

54 The Council points out that the declaration made by the Danish Government and the Netherlands Government following the Council meeting of 16 and 17 May 1994, in which they stated that no comparative analysis had taken place of the interests involved, does not establish the truth of that statement but is merely evidence of the existence and content of a minority view.

55 The Danish Government notes that the Council's refusal in this case was based on the fact that the documents sought referred directly to the deliberations of the Council and were therefore treated as confidential. In the Danish Government's opinion, no specific evaluation of the interests in question was carried out, notwithstanding the applicants' legitimate expectation that this would be done.

56 In support of its arguments, the Danish Government refers to the declaration it made following the Council meeting of 16 and 17 May 1994, in which it stated 'that no comparative analysis has taken place of, on the one hand, the interests of the citizens seeking information, and, on the other hand, the criteria of secrecy of Council deliberations, as is required in the opinion of the Danish and Dutch Governments in case the Council bases its rejection on this specific criteria'. It emphasizes the fact that, together with the Netherlands Government, it voted against refusing access to the applicants.

57 The Danish Government points out that, under Article 4(2) of Decision 93/731, the decision to refuse access is optional. This means, in its submission, that the Council must carry out a specific evaluation, in respect of each individual request for access, on a case-by-case and document-by-document basis, that is to say that it must apply the 'subjective' approach.

58 The Netherlands Government points out that, under Article 4(2), the Council has a discretion to refuse a request for access to its documents. When exercising that discretion, the Council must balance the interest of the citizen in being able to secure access to Council documents against the Council's interest in protecting the confidentiality of its deliberations.

59 The Netherlands Government submits, however, that in the present case the Council did not balance the interests in question as it was required to do. It refers in that regard to the discussions within the Council as a result of the applicants' request and to the terms of the Council's letter of 17 May 1994.

60 With particular regard to the discussions within the Council, the Netherlands Government refers to the declaration which it made with the Danish Government following the Council meeting of 16 and 17 May 1994 (see paragraph 56 above).

61 The European Parliament considers that there is nothing in the letter of 17 May 1994 to suggest that the Council balanced the interests of citizens who request access to documents against its own interest in maintaining the confidentiality of its deliberations. In the Parliament's view, that analysis is confirmed by the declaration made by the Danish and Netherlands Governments following the Council meeting of 16 and 17 May 1994.

Findings of the Court

62 In interpreting Article 4(2) of Decision 93/731, it must first of all be borne in mind that Decision 93/731 is the last of the three measures adopted in December 1993 containing provisions relating to the implementation of the principle of transparency (see paragraphs 5 to 13 above). Of those three, it is the only legislative measure which deals with public access to documents. Decision 93/731 is, therefore, the only measure governing citizens' rights of access to documents; the Council's Rules of Procedure, on the other hand, regulate its own internal operating mechanisms.

63 Article 1 of Decision 93/731 provides that the public is to have access to Council documents under the conditions laid down in the decision, and Article 4 lays down exceptions to that principle. Under Article 4(1), access to a Council document 'shall' not be granted where its disclosure could undermine certain interests (see paragraph 11 above). Under Article 4(2), access to a Council document 'may' be refused in order to protect the confidentiality of the Council's proceedings.

64 The Council is therefore obliged under Article 4(1) to refuse access to documents where certain circumstances exist. Under Article 4(2), however, the Council enjoys

a discretion as to whether or not to refuse a request for access to documents relating to its proceedings.

65 It is clear both from the terms of Article 4 of Decision 93/731 and from the objective pursued by that decision, namely to allow the public wide access to Council documents, that the Council must, when exercising its discretion under Article 4(2), genuinely balance the interest of citizens in gaining access to its documents against any interest of its own in maintaining the confidentiality of its deliberations.

66 Such an interpretation of Article 4(2) is, moreover, consistent with the provisions of the Code of Conduct (see paragraphs 6 and 7 above) which Decision 93/731 was intended to implement.

67 It follows that, whenever access to documents is requested, the Council must balance the interests defined above and reach a decision in accordance with the applicable procedure.

68 The Council also has a margin of discretion under its Rules of Procedure which it should, in a proper case, use to give effect to its decision under Article 4(2) of Decision 93/731. It cannot, simply by not exercising its discretion under Article 5(1) of its Rules of Procedure, defeat the citizens' rights under Article 4(2) of Decision 93/731.

69 The scope of Article 4(2) of Decision 93/731 having thus been defined, it must now be considered whether in the present case the Council exercised its discretion in compliance with that article.

70 The applicants, the Danish Government, the Netherlands Government and the European Parliament all maintain that the Council automatically refused the applicants' requests inasmuch as it at no time balanced the interests involved before concluding that access to the documents in question must be refused. In support of that contention they refer, *inter alia*, to the Council's letters of 28 February and 17 May 1994 (see paragraphs 15 to 18 and 22 above) and to the declaration made by the Danish and Netherlands Governments following the Council meeting of 16 and 17 May 1994 (see paragraph 56 above).

71 In the fifth paragraph of its letter of 28 February 1994, the Council refused access to documents relating to the Justice Council of 29 and 30 November 1993 on the ground that they 'directly refer to the deliberations of the Council and cannot, under its Rules of Procedure, be disclosed'.

72 In its letter of 17 May 1994, the Council confirmed its refusal to grant the applicants access to the documents requested on the ground that they 'refer directly to the deliberations of the Council and its preparatory instances. If it did allow access, the Council would fail to protect the confidentiality of its proceedings. The documents in question contain confidential information relating to the position taken by the members of the Council during its deliberations' (see the full text of the letter of 17 May 1994 in paragraph 22 above).

73 Those two letters show that the Council, when responding to the applicants' requests, did not comply with the obligation of balancing the interests involved, laid down by Article 4(2) of Decision 93/731. The terms of those letters indicate that the Council considered both that it was obliged to refuse access to the documents in question merely because they referred to its deliberations and that disclosure of the documents requested by the applicants would involve a breach of its Rules of Procedure, in particular of Article 5. The Council's incorrect interpretation of the relevant provisions is illustrated, moreover, by the phrases used in the letter of 28 February 1994 — 'I am unable to send you these documents, since they ... cannot ... be disclosed' — and in that of 17 May 1994 — '... access to these documents cannot be allowed ...' — which indicate that the Council considered that it did not have the option of disclosing the documents requested.

74 The Court's conclusions in that regard are reinforced by the declaration made by the Danish and Netherlands Governments following the Council meeting of 16 and 17 May 1994 at which the decision to refuse the applicants access to the documents requested was taken. According to that declaration, no comparative analysis took place within the Council of, on the one hand, the interests of the citizens seeking information and on the other hand the interest of the Council in preserving the secrecy of its deliberations (see paragraph 56 above).

75 Furthermore, in answer to a question put by the Court at the hearing, the Danish Government explained that the discussions which took place within the Working Party and Coreper did not comprise any specific assessment of the interests involved but concerned exclusively procedural matters, whether the requests could be automatically refused and whether a subjective approach could be adopted.

76 The Council has claimed that the declaration made by the Danish and Netherlands Governments following the Council meeting of 16 and 17 May 1994 is merely evidence of the existence of a minority view. The Court cannot accept that analysis. The view expressed is indeed that of a minority, but the declaration contains details

of the manner in which the adoption of the contested decisions was discussed. Those details are unrelated to any question of a minority or a majority; they do cast light, however, on the issue of fact which the Court must decide.

77 When those details were put to the Council, it did not adduce any concrete evidence capable of refuting them and establishing that it did assess the specific competing interests. It merely provided certain information concerning the course of the procedure leading up to the rejection decisions in issue and maintained that the applicants' requests had been discussed by the various Council bodies.

78 In the light of the foregoing, it must be found that, as regards the requests for access to the documents relating to the Justice and Agriculture Councils, the Council failed to exercise its discretion in compliance with the relevant provisions as interpreted by the Court (see paragraph 65 above).

79 The third plea in law must therefore be upheld.

80 The contested decisions must therefore be annulled, without there being any need to examine the other pleas advanced by the applicants or to rule either on the applicants' request for the Council to be ordered to produce to the Court the full tape recordings or verbatim transcripts of all meetings of the Council and its subsidiary bodies at which their case was discussed or on the request of the applicants and the Danish Government for the Council to be ordered to produce to the Court the report of the Legal Service of 5 May 1994.

Costs

81 Under Article 87(2) of the Rules of Procedure of the Court of First Instance, 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 Council has been, in substance, unsuccessful and the applicants have applied for costs, the defendant must be ordered to pay the costs. Under Article 87(4) of those Rules, Member States and institutions which intervened in the proceedings are to bear their own costs. The Kingdom of Denmark, the Kingdom of the Netherlands and the European Parliament, which have intervened in support of the applicants, must therefore bear their own costs.

On those grounds,

THE COURT OF FIRST INSTANCE
(Second Chamber, Extended Composition)

hereby:

1. **Annuls the implied decision of the Council refusing the applicants access to the preparatory reports, the minutes, attendance and voting records of the Justice Council of 29 and 30 November 1993 and the decision contained in the letter of the Council of 17 May 1994 refusing access to the minutes of the Agriculture Council of 24 and 25 January 1994;**

2. **Dismisses the remainder of the application;**

3. **Orders the Council to pay the costs;**

4. Orders the Kingdom of Denmark, the Kingdom of the Netherlands and the European Parliament to bear their own costs.

Vesterdorf Barrington Saggio

Kirschner Kalogeropoulos

Delivered in open court in Luxembourg on 19 October 1995.

H. Jung B. Vesterdorf

Registrar President