OPINION OF ADVOCATE GENERAL TESAURO

delivered on 28 November 1995 *

1. By this action, the Kingdom of the Netherlands seeks the annulment of Council Decision 93/731/EC of 20 December 1993 on public access to Council documents, [1] Article 22 of Council Decision 93/662/EC of 6 December 1993 adopting the Council's Rules of Procedure [2] and act 93/730/EC, entitled 'Code of conduct, of 6 December 1993, concerning public access to Council and Commission documents' (hereinafter 'the Code of Conduct'), [3] adopted jointly by the two institutions, in so far as it has any legal effects.

In support of its claim, the Netherlands Government argues that the Council has committed an abuse of power in that it based the rules on citizens' means of access to documents in its possession on Article 151 of the EC Treaty, which authorizes it to adopt its Rules of Procedure. In the applicant's opinion, this question cannot be reduced to a mere question of the organization of the Council's internal operation.

2. For the sake of a better understanding of the parties' arguments, it is worth briefly calling to mind how it came about that the measures at issue were adopted.

Their origin is Declaration 17 on the right of access to information, annexed to the Final Act of the Inter-Governmental Conference which adopted the Treaty on European Union. [4] According to that declaration, 'The Conference considers that openness 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.'

With this in mind, the European Council meeting in Birmingham on 16 October 1992 called upon the Member States' Foreign Ministers to suggest ways of opening up the work of the Community's institutions, including the possibility of some open

* Original language: Italian.

1 — OJ 1993 L 340, p. 43.

2 — OJ 1993 L 304, p. 1.

3 — OJ 1993 L 340, p. 41.

4 — OJ 1992 C 191, p. 101.

Council discussion. [5] 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. This request was repeated by the Edinburgh European Council of 12 December 1992. [6]

3. In order to give effect to the Maastricht declaration and respond to the European Council's requests, the Commission put forward its proposals with regard to the policy of public access to documents and set forth the basic principles and an initial series of specific actions to be undertaken in order to make the Community's activities more open in two successive communications to the Council, the Parliament and the Economic and Social Committee of 5 May [7] and 2 June 1993. [8] The Commission suggested among other things that the fundamental principles on which the relevant rules should be based should be set out, at least as a first step, in an inter-institutional agreement.

The European Council meeting in Copenhagen on 22 June 1993 invited the Council and the Commission to continue their work based on the principle of citizens' having the fullest possible access to information, and set the aim of having all necessary measures in place by the end of 1993. [9]

4. On 6 December 1992, the Council and the Commission adopted a common measure, the aforementioned Code of Conduct, which sets out the agreement of those two institutions on the conditions and principles having to underlie the rules on access to documents in their possession, and entrusts each institution with the task of implementing the relevant principles by means of specific regulations.

On the same date, by Decision 93/662/EC, the Council amended its Rules of Procedure by making the changes necessitated by the entry into force of the Maastricht Treaty. Of particular relevance to these proceedings is Article 22, which provides 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'.

Next, on 20 December 1993, the Commission adopted Decision 93/731/EC pursuant to Article 151(3) of the EC Treaty and the derived legal basis of Article 22 of its new Rules of Procedure. That decision essentially reproduces, with a number of additions, the

5 — The Birmingham Declaration — A Community close to its citizens — is set out in Bull. EC 10-1992, p. 9, point 1.8.

6 — See Bull. EC 12-1992, p. 10, point 1.5.

7 — COM(93) 191 final, 'Public access to the institutions' documents', OJ 1993 C 156, p. 5.

8 — COM(93) 258 final, 'Openness in the Community', OJ 1993 C 166, p. 4.

9 — See Bull. EC 6-1993, p. 15, point 1.22.

provisions of the Code of Conduct. [10] Articles 2 and 3 lay down the procedure to be followed by persons wishing to have access to a document (form of application, institution competent to receive it) and the practical means of access (consultation on the spot or issue of a copy of the document requested). In accordance with the approach set out by the Commission in its communications, the applicant is not bound to specify his reasons for wishing to obtain particular information.

The principle of the general accessibility of documents laid down by Article 1 is subject to the exceptions provided for in Article 4(1) with a view to protecting the interests set forth therein, which are regarded as overriding the interest in the openness to the public of the Council's activity. More specifically, access should be refused where disclosure of a document could harm public security (including international relations, monetary stability and the due course of legal procedures and investigations), the protection of privacy and commercial and industrial secrecy, the protection of the Community's financial interests or the protection of confidentiality as requested by the natural or legal person who supplied information to the institution. In addition to those express exceptions, Article 4(2) affords a wider power to refuse access to a document 'in order to protect the confidentiality of the Council's proceedings'.

Lastly, Articles 5, 6 and 7 lay down rules on how the competent departments of the Council are to examine applications for documents and a special 'internal appeal' procedure to which the applicant may have recourse where the Council intends to refuse his application. If the intention is to refuse the application, the person concerned, who is to be informed of the reasons for refusal, has one month in which to make a 'confirmatory application' for reconsideration of the decision taken. A decision rejecting a confirmatory application must be duly reasoned and the person concerned must be informed at the same time about the possibility of referral to the Ombudsman pursuant to Article 138e of the EC Treaty or of seeking the annulment of the decision under Article 173 (Article 7(3)). [11]

5. Having thus described the nature and the scope of the contested measures, together with the background to their adoption, I

10 — I note that the Netherlands delegation voted against both the Code of Conduct and the two Council decisions, for the same reasons for which the Netherlands Government is now claiming that they should be annulled.

11 — For the sake of completeness, it is worth pointing out that under paragraphs 2 and 4 of Article 7, if the Council fails to reply to an application or a confirmatory application within a month of submission, this is to be deemed to constitute refusal.

would turn to consider the arguments put forward with a view to their annulment. I should explain straight away that the Netherlands' Government's criticisms are not concerned with the merits of the rules; it is not alleging that they are unsuited to guaranteeing openness of administrative action and hence the protection of legal interests capable of being asserted by individuals. The only matter in dispute is the legal basis. More precisely, the applicant considers that it is the wrong choice of legal basis and, as a result, of the procedure for the adoption of the measures in question which render them by that very fact unsuited to the purpose for which they were adopted.

The Netherlands Government observes that Decision 93/731/CE, which lays down the rules on public access to administrative action, essentially governs the relationship between the institutions and Community citizens to whom their measures are addressed or who, in any event, have an interest in the process by which they are drawn up and their actual operation. From that perspective, it vests in individuals the right to participate in the activity of the Council also at the preparatory and investigative stages, not merely at the final adoption stage; in addition, it secures judicial protection for that right. The fact that this is the purpose of the contested measure is clear in particular from the provisions of Article 1, which lays down the general principle of public access to Council documents, and from Article 7, which prescribes the procedure for examining applications for access and, at the same time, gives the person concerned the possibility of appealing in the event that his application is refused.

6. Consequently, in view of the decision's direct bearing on the personal legal situations of individuals, the Netherlands Government does not consider that the Council could validly base such rules on provisions such as Article 151 of the Treaty and Article 22 of its Rules of Procedure, whose function is essentially to make sure that the institution functions well and that its procedures are conducted properly. In this connection, it is not contested that, exceptionally, a private individual may base a claim on the infringement of a provision of the Rules of Procedure of an institution where it is intended (*inter alia*) to protect individuals and is therefore capable having effects on their legal situations. None the less, in the applicant's view it is a very different matter to confer on the Council the power to adopt provisions creating rights and obligations for individuals on the basis of a purely internal measure relating to the organization and conduct of its procedures. Such a power may be based only on the relevant provisions of the Treaty and exercised in the ways laid down which are appropriate to the objective pursued.

The Council is therefore charged with confusing the basic principle by virtue of which individuals must in any event be secured judicial protection *vis-à-vis* any act or activity affecting their legal sphere with the

different issue of the competence vested in an institution to adopt a particular measure.

In the final analysis, since openness of decision-making processes constitutes an innate feature of any democratic system and the right to information, including information in the hands of the public authorities, is a fundamental right of the individual, the Netherlands Government — associating itself with the European Parliament's observations on this subject in its statement in intervention — accordingly considers that determining the procedures, conditions and limits for public access to documents of the Community institutions cannot be left to the discretion of each institution, but must be a matter for the normal 'legislative' processes provided for in the Treaty and should be accompanied by the necessary guarantees as to the effectiveness of the relevant right. From this perspective, the amendments made to the working method and organization of the Council, that is, to its Rules of Procedure, in connection with the exercise of the right of access should have been only a (possible) consequence of the adoption of such general rules.

The same reasons are put forward for the annulment of Article 22 of the Rules of Procedure.

7. As for the Code of Conduct, the Netherlands Government considers that in fact it is not an act having legal effects, but is essentially a policy measure merely enshrining the agreement between the Council and the Commission on common guidelines for the policy of public access to documents. By that act, the two institutions simply undertook subsequently to implement the principles established thereby, each acting on its own account.

In the alternative, in the event that the Court should take a different view of that act, the applicant claims that it should be annulled for infringement of essential procedural requirements inasmuch as it does not refer to the legal basis pursuant to which it was adopted. In this connection, the Netherlands Government argues that it is certain that neither Article 151 nor Article 162 — as the Council contends — could be regarded as proper legal bases for the Code of Conduct, in view of the fact that it lays down rules which go well beyond the questions inherent in the internal organization of the Council or forms of collaboration between the Council and the Commission.

8. Lastly, the Netherlands Government argues that, by limiting the agreements on the publicity of administrative action to cooperation between two institutions, the Council is in breach of the institutional balance defined in Article 4 of the Treaty. In view of the importance and implications of the rules, they ought to have been drawn up with the cooperation of all the interested institutions, including, therefore, the Parliament.

9. In response to the Netherlands Government's arguments, the Council contends first that, in the absence of Treaty provisions on the publicity of decision-making processes, the various institutions should be empowered to set their own rules independently, as in fact each of them have been since the origins of the Community. That power has, in fact, never been challenged.

As far as it itself is concerned, the Council observes that its Rules of Procedure have always contained provisions relating to the publicity of its proceedings and documents, since this matter is closely connected with the detailed rules on the internal functioning of the institution, with the conduct of its procedures and, in the final analysis, with the actual effectiveness of the decision-making process. In this connection, it stresses that the nature and content of decisions may vary depending on the public access which is given to the proceedings accompanying their adoption and to the documents reflecting the progress of those proceedings. Until the amendment of 6 December 1993, the general rule laid down by the Rules of Procedure in this sphere was that documentation relating to the proceedings of the Council was secret unless the Council decided otherwise by a majority of its members. Those rules were changed in view of the policy of openness initiated following the signature of the Treaty on European Union, but that does not alter the fact that the subject-matter of the rules, in so far as they relate to the degree of public access having to characterize Council deliberations, still falls within the institution's power to organize itself.

Once it was decided that the rule of confidentiality was no longer to apply to all documents, it was essential to establish the principles for distinguishing between documents which could be brought to the knowledge of third parties and those which, in contrast, had to remain secret, together with the actual detailed rules on access. The basic criterion — the Council observes — was specially laid down by Article 22 of the new Rules of Procedure, which provides that public access is allowed only to documents 'disclosure of which is without serious or prejudicial consequences', and subsequently elaborated on by Decision 93/731/EC, which specified the conditions and limits of access, the procedures for applying for access and the resultant obligations on the institution. In the Council's contention, to accept the Netherlands Government's argument would have the paradoxical outcome of denying the Council competence to adopt any measure relating to public access to its work other than the one imposing secrecy, which had never been contested in the past.

10. The Council also denies that the effect of the rules at issue is to create a general right of access, which is mentioned neither by the Code of Conduct nor by Decision 93/731/EC. As far as the Code of Conduct is concerned, it merely lays down the principle that 'The public will have the widest possible access to documents'. Consequently, the aim of the measures was to lay down the procedures necessary in order to secure greater openness for the work of the Council and

not to confer rights on third parties, which constitutes, if anything, only an indirect consequence of the new rules.

Nor can it be argued that the Council lacked competence to adopt the contested decisions precisely because such rights arise. In that regard, the Council refers to what the Court held implicitly in the judgment in *Nakajima* [12] and more clearly in the recent judgment in *BASF*, [13] that is to say, that an individual can rely on the infringement of a provision set out in the Rules of Procedure of an institution if it is intended to protect individuals.

11. As for the alleged breach of the principle of institutional balance, the Council considers that it was under no obligation to associate the Parliament with the adoption of the contested acts inasmuch as each institution's independence in organizing its internal functioning cannot be contested. In that connection, the fact that the Code of Code was agreed between the Commission and the Council is due to the fact that their proceedings, unlike parliamentary proceedings, were formerly subject to secrecy. This was why it was appropriate to draw up common guidelines for their conduct when the Treaty attenuated the scope of the principle of secrecy.

12. Having described the positions adopted by the parties, I should first refute the objection of inadmissibility raised by the Council pursuant to the third paragraph of Article 37 of the Statute of the Court against the Parliament's intervention, at least in so far as the intervention is based on submissions different from those put forward by the Netherlands Government. In the Council's contention, the intervention is concerned essentially with the principle of the openness of legislative proceedings and the merits and implementing rules of the provisions relating to access and those matters are not the subject of the application.

It is observed first that the Council itself has pointed to the link between the rules on access and the manner in which its work is performed, in particular, to the potential effect of greater public access on its deliberations and hence also on its deliberations of a 'legislative' character; secondly, whilst it is true that the arguments put forward by the Parliament differ in part from those deployed by the applicant, there can be no doubt that the Parliament's statement in intervention is, in accordance with Article

12 — Case C-69/89 *Nakajima* v *Council* [1991] ECR I-2069, paragraphs 49 and 50.

13 — Case C-137/92 P *Commission* v *BASF and Others* [1994] ECR I-2555, paragraph 74 et seq.

37 of the Statute of the Court, 'limited to supporting the submissions of one of the parties'. Consequently, reference to the precedent of Case C-155/91 *Commission* v *Council* [14] is not relevant in my view: in that case, the Parliament's intervention was declared inadmissible only in so far as it made an *alternative* claim to those made by the applicant of which it had intervened in support. This is clearly not the case here.

13. Turning to the merits, I shall say straight away that, although I agree to a large extent with the general approach of the Netherlands Government with regard to citizens' right to information and access to documents held by the public authorities, I do not consider that the arguments put forward are capable of resulting in a declaration that the acts at issue in this case are invalid. I shall therefore endeavour to explain why I take this view, after setting out a number of necessary (brief) preliminary observations.

14. First, it is scarcely necessary to point out that openness of the public authorities' action is closely linked with the democratic nature of the institutions inasmuch as it tends to secure better knowledge on the part of citizens of the acts and measures — even in the phase when they are being drawn up — adopted by those who have 'government functions'. Only where there is appropriate publicity of the activities of the legislature, the executive and the public administration in general, is it possible for there to be effective, efficient supervision, *inter alia* at the level of public opinion, of the operations of the governing organization and also for genuinely participatory organizational models to evolve as regards relations between the administration and the administered.

It is clear from a comparative examination of the legislation of the Member States of the Community that publicity is inherent in any democratic system. All the national legal systems recognize that citizens have a broad right to be informed, although the rank of the legislative source conferring and governing that right varies, as do the limits to that right. In the first place, there is a general right to have access to documents of parliamentary institutions, in particular to those connected with the exercise of their primary function as legislators; indeed, it is normally provided that those institutions' documents must be published. Above all from the 1960s onwards, a right has been recognized to an increasing degree for citizens to have cognizance of papers held by the Government and the administration, with the very aim of taking a more open approach to reciprocal relations and to divest the administration of its

14 — Case C-155/91 *Commission* v *Council* (directive on waste) [1993] ECR I-939, paragraphs 22, 23 and 24. In that case, in addition to supporting the Commission's application for the annulment of a directive on the ground that it had been adopted on the wrong legal basis, the Parliament also claimed that an article of the directive was incompatible with the Treaty and sought its annulment as well, even though that issue had not been raised by the Commission.

more or less overtly authoritarian connotations. [15]

15. In this context, most Member States, as emerges from the note drawn up by the Court's documentation service, have adopted legislation, in some cases at constitutional level, [16] which generally confers on individuals a right of access to administrative documents. The purpose of such rules is, in the first place, to enable a person party to an administrative procedure to put across his point of view properly: for that reason, it supplements the principle *audi alteram partem*. Secondly, access to information in the possession of the public authorities aims at increasing citizens' participation in the decision-making process of the administration and hence is conferred irrespective of whether the person concerned can show a specific, legally protected interest in having such access. In other words, it is no longer true that everything is secret except what is expressly stated to be accessible, but precisely the converse.

The right of access is normally subject to expressly listed exceptions attributable to the need to protect particular general public interests or individuals' privacy. To a large degree, these are the same exceptions provided for by the Code of Conduct and Decision 93/731/EC: public security, international relations, proper conduct of criminal investigations, industrial secrecy, right to confidentiality, and so on.

What is important is to stress once again that such legislation involves the definitive abandonment of secrecy as the general principle informing action by public administrative authorities and the recognition that citizens' right to have access to information in the possession of the public authorities is an

15 — See the Commission's document, 'Public access to information', annexed to the communication of 5 May 1993 (COM(93) 191 final), cited in footnote 7; see also D. Curtin and H. Meijers, 'The principle of open government in Schengen and the European Union: democratic retrogression?', in *Common Market Law Review*, 1995, p. 391 et seq.

16 — This is the case in Belgium (Article 32 of the consolidated version of the Constitution, dated 17 February 1994; that article was introduced when the Constitution was revised in 1993, and entered into force on 1 January 1995), Spain (where the general right of access to papers held by the public authorities arises out of the principle of the publicity of acts of the legislature, executive and judiciary enshrined in the third paragraph of Article 9 and Articles 80, 105 and 120 of the Constitution), Finland (second paragraph of Article 10 of the Constitution of 17 July 1919, as amended this year; it entered into force on 1 August 1995 and connects the right of access to documents with freedom of expression), the Netherlands (Article 110 of the Constitution, in the version resulting from the revision carried out in 1983), Portugal (Article 268 of the Constitution, as amended in 1989) and Sweden (where the right of access to public papers is enshrined in the Law on press freedom of 1766, a statute of constitutional rank). As far as Austria is concerned, following the revision of the Constitution in 1987, Article 20 of the Constitution puts the public authorities under a duty to make information in their possession accessible. That provision does not create an individual right on the part of citizens, but merely places the ordinary legislature, at federal level and at the level of the individual Länder, under a duty to formulate such a right, which they did by means of a series of laws passed between 1987 and 1990. General rules on the right of access, laid down by ordinary legislation, also exist in Denmark (Laws Nos 571 and 572 of 19 December 1985), France (Laws Nos 78-17 of 6 January 1978, 78-573 of 17 July 1978 and 79-18 of 3 January 1979), Greece (Law No 1599/1986, which, however, makes the right subject to numerous conditions and exceptions) and Italy (Law No 241 of 7 August 1990, which confers a right of access only on persons having an interest therein in order to protect legally relevant situations).
Lastly, in the countries in which there are no rules governing the right of access generally, such a right is nevertheless provided for by numerous specific laws in relation to particular matters.

expression of the democratic principle and hence helps to determine the democratic nature of the State.

16. The fact that the existence of informed public opinion constitutes an essential part of any democratic system has also been recognized in various resolutions and recommendations adopted by the Parliamentary Assembly and the Committee of Ministers of the Council of Europe. Mention may be made in this connection, for example, of Recommendation No 854 (1979) of the Assembly of 1 February 1979, [17] which calls for public access to be guaranteed to administrative documents — subject to the inevitable exceptions — and, more specifically, for there to be a right to seek and receive information from government agencies and departments. Another document of undoubted importance is Recommendation No R (81) 19 of the Committee of Ministers of 25 November 1981, [18] in which, 'considering the importance for the public in a democratic society of adequate information on public issues', Member States are called upon to legislate for an automatic right of access to information held by the public authorities, without the person concerned having to specify the reasons for his request. Lastly, I would mention the 'Declaration on media in a democratic society', which was adopted at the Fourth European Ministerial Conference on Mass Media Policy, held in Prague in December 1994. In that declaration, the participants recommended that the Committee of Ministers of the Council of Europe 'consider the advisability of preparing a binding legal instrument or other measures embodying basic principles on the right of access of the public to information held by the public authorities'. It may be considered that the right of access to information is increasingly clearly a fundamental civil right.

In the Council of Europe documents which I have mentioned, a link is made between the right to access to documents in the possession of the public authorities and the right to freedom of expression and to receive and impart information enshrined in Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. That right, as the European Parliament rightly points out, constitutes a corollary of the freedom to seek, receive and disseminate information and ideas of every kind guaranteed by Article 19 of the International Covenant on Civil and Political Rights, signed at New York on 19 December 1966.

Consequently, we are witnessing, also on the level of the law of international conventions as in the legislation of the Member States, a progressive, increasingly broader affirmation of the individual's right of access to official information, either as a development of rights earlier recognized as being vested in

17 — Council of Europe, Parliamentary Assembly, Texts adopted, 30th Ordinary Session, Part 3, January-February 1979.

18 — Council of Europe, Collection of recommendations, resolutions and declarations of the Council of Ministers relating to human rights, 1949-1987, Strasbourg, 1989, p. 96.

the individual or as an independent right resulting from a change in how relations between the administration and the citizen or, in more general terms, between the governors and the governed are viewed.

17. So far there are no general rules in the Community legal order on public access to documents in the possession of the institutions. Only some specific rules, requiring publicity or secrecy for particular acts or information, are laid down by the Treaty or secondary legislation. For instance, there is Article 191(2) of the EC Treaty, which provides for the publication of Council and Commission regulations and of directives addressed to all the Member States and makes their entry into force conditional on such publication. Again, Article 156 of the EC Treaty and the corresponding provisions of the ECSC and EAEC Treaties [19] require the Commission annually to publish a general report on the activities of the Community. In contrast, Articles 24 to 27 of the EAEC Treaty lay down rules on the secrecy of information acquired by the Community institutions as a result of carrying out nuclear research programmes with a view to protecting Member States' defence interests. In order to protect, in particular, undertakings' commercial and industrial secrecy, the Commission and its officials and other servants are debarred from disclosing information obtained during the course of their duties by the second paragraph of Article 47 of the ECSC Treaty, Article 214 of the EC Treaty and Article 20 of Regulation No 17/62 on the application of the competition rules of the EC Treaty. [20]

18. Can it be said, as the Netherlands Government argues, that Decision 93/731/EC does in fact have the aim of laying down such general rules on public access to official documents or at least to those held by the Council, and therefore creates a possible personal right of individuals to obtain the information they seek?

I do not consider that this is the purpose to be attributed to the act in question. Both the form and content of the decision show that, in the final analysis, it sets out to formalize and make public the practice followed by the Council when it examines applications for access to documents, by making the changes necessary in order to make its work genuinely accessible to the public. In pursuance of the greater openness of Community action advocated by Declaration 17 annexed to the Union Treaty, it puts interested persons in a position to know precisely what

19 — Article 17 of the ECSC Treaty and Article 125 of the EAEC Treaty.

20 — Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles 85 and 86 of the EEC Treaty, OJ, English Special Edition 1959-1962, p. 87.

internal rules are applied in this regard by the competent departments of the Council.

19. The Council is therefore right when it states that the contested provisions constitute measures for the organization of its internal operation and do not, in themselves, create any individual right to information. Instead, the basis for such a right should be sought in the democratic principle, which constitutes one of the cornerstones of the Community edifice, as enshrined now in the Preamble to the Maastricht Treaty [21] and Article F of the Common Provisions. [22] In the light of the changes which have taken place in the legislation of the Member States, the right of access to official documents now constitutes part of that principle. It is the essential precondition for effective supervision by public opinion of the operations of the public authorities. Hence it is the democratic principle and the content which it has progressively assumed in the various national systems which requires access to documents no more to be allowed only to the addressee of a measure of the public authority: it is in those terms — that is to say, as a requirement connected with compliance with the principle *audi alteram partem* — that the right of access has been recognized and protected by the Community legal order, in particular in the context of the application of the competition rules. [23]

In addition, one cannot fail to stress that, at least as regards the exercise of the legislative function, publicity of parliamentary proceedings constitutes a principle common to the constitutional traditions of the Member States.

20. The question whether it is possible for interested parties to rely on a failure to comply with the provisions of Decision 93/731/EC takes on quite a different complexion once it is acknowledged that the act in question was adopted in the exercise of the power of self-regulation vested in every institution. The Court has already made it clear — and this is not contested by the Netherlands Government — that that possibility should be allowed whenever the internal provision is intended also to protect individuals. [24] This will be the case, in particular, where a particular measure intends to lay down the rules for the exercise of an activity

21 — See, in particular, the third and fifth recitals in the Preamble, in which the Contracting Parties confirm 'their attachment to the principles of liberty, democracy and respect for human rights and fundamental freedoms and of the rule of law' and express their desire to 'enhance further the democratic and efficient functioning of the institutions so as to enable them better to carry out, within a single institutional framework, the tasks entrusted to them'.

22 — Article F(1) provides that 'The Union shall respect the national identities of its Member States, whose systems of government are founded on the principles of democracy'.

23 — The extent and limits of the right of access to documents held by the Commission have been defined in abundant case-law of the Court: see, for example, Case 85/76 *Hoffmann-Laroche* [1979] ECR 461, in particular paragraphs 9 to 16, Joined Cases 209/78 to 215/78 and 218/78 *Van Landewyck* (FEDETAB) [1980] ECR 3125, in particular paragraphs 36 to 40), Case 322/81 *Michelin* [1983] ECR 3461, in particular paragraphs 5 to 10, and Case C-62/86 *AKZO* [1991] ECR I-3359, in particular paragraphs 15 to 24.

24 — See, in addition to *Nakajima* and *Commission* v *BASF*, cited in footnotes 12 and 13, Joined Cases 43/82 and 63/82 *VBVB and VBBB* [1984] ECR 19, paragraph 14, and Case C-200/89 *FUNOC* [1990] ECR I-3669, paragraph 14.

involving contact with third parties. More generally, there is settled case-law to the effect that whenever rules of conduct are laid down, the institutions may not subsequently depart from them, without giving reasons for doing so, without infringing the principle of equal treatment. [25]

On those bases, therefore, it is quite possible for interested parties to require the Council to comply with the rules which it has imposed upon itself for the purpose of examining applications for access to documents: the fact that those rules may be relied upon, however, does not mean in any way that they are the basis for the citizens' right of information. That right, as I have already mentioned, existed before the Council's new Rules of Procedure and Decision 93/731/EC were adopted. Accordingly, the contested acts are confined to organizing the operation of the institution in the light of that right; moreover, their scope could not have been otherwise, in that the very legal basis selected for their adoption shows that this, and no other, was the objective pursued.

21. The above also implies that, in assessing the legality of a decision refusing access to a given document, the Community judicature will, in any event, have to determine whether the rights conferred on citizens in this regard were effectively guaranteed. In other words, a Council decision, albeit adopted in full compliance with its self-imposed rules on public access, would have to be regarded as unlawful if it resulted in fact in a negation of the essential substance of the right of information.

I consider that this is the very significance of the judgment in *Carvel*, [26] in which the Court of First Instance was called upon to rule on this question for the first time. In that case, the Court of First Instance held that it was unlawful for the Council to refuse access to certain documents pursuant to Article 4(2) of Decision 93/731/EC, that is to say, by claiming that this was necessary in order to maintain the secrecy of its deliberations, in so far as it did not appear that the institution had genuinely balanced the interests at stake in the particular case. It follows, first, that public access was recognized as being the guiding principle for action by the Community institutions: only specific, clearly identified interests may cause the citizens' right of information to be sacrificed. Secondly, it was clear to the Court of First Instance that the content and limits of that right are not defined by Decision 93/731/EC: this is the only way in which the annulment of the Council's refusal of the application for access in that case, which refusal was moreover to be regarded as being in accordance with the provisions of Article 4(2), can be understood.

25 — See, for example, Case 148/73 *Louwage* [1974] ECR 81, paragraph 12, and Joined Cases 181/86 to 184/86 *Del Plato* [1987] ECR 4991, paragraph 10; this principle was also stressed by the Court of First Instance in Case T-63/89 *Latham* [1991] ECR II-19, paragraph 25.

26 — Case T-194/94 *Carvel* [1995] ECR II-2765.

22. In conclusion, I agree with the Netherlands Government as to the desirability or perhaps even the need to lay down by 'legislative' means general rules governing public access to documents held by all the Community institutions, which, while complying with citizens' right of information, precisely define the procedures and limits, possibly even in relation to the various functions performed by the institutions. This having been said, however, in the absence of such rules and subject, of course, to the supervision of the Community judicature over decisions in which access to documents is refused in individual cases, it cannot be denied that the institutions are authorized, pursuant to the power of self-regulation vested in each of them, to lay down rules independently in this sphere governing the aspects more directly concerned with the procedures and conditions for examining applications for access.

23. Lastly, as regards the Code of Conduct, it merely lays down the common principles and conditions on which the Commission and the Council intended to base themselves in laying down rules on access to documents; at the same time, it entrusted the two institutions with the task of implementing them by means of regulations of their own. It is therefore an agreement essentially of a policy nature, as the Netherlands Government itself argued in its main claim, and is not apt in any way to have legal effects.

Since, therefore, it has no legal effects and does not seek to produce any, the Code of Conduct — to use the formula employed by the Court — cannot be the subject of an action for annulment. [27]

24. A final word on costs. If the solution that I propose were adopted, the Kingdom of the Netherlands would normally have to be ordered to pay the costs. Article 69(2) of the Court's Rules of Procedure provides that, if they have been applied for in the unsuccessful party's pleadings, as they were here, 'the unsuccessful party shall be ordered to pay the costs'. In view, however, of the fundamental importance of the question raised in this case — namely, that of the democratic development of the Community — and of the fact that, even though I have rejected the specific criticisms underlying these proceedings, I cannot but agree with the general approach taken by the Netherlands Government with regard to the right of information, in particular as respects the need for general rules in this area, I propose that the Court exceptionally order the parties to bear their own costs. This will also give a signal to the Community institutions with regard to the urgency of the tasks which they are called on to carry out in this sphere.

27 — The nature of that act is fundamentally different from that of the 'code of conduct' considered in Case C-303/90 *France* v *Commission* [1991] ECR I-5315, in particular at paragraph 9, and from that of other acts which the Court held to be open to challenge, since, although they did not satisfy certain formal requirements, they appeared capable of having legal effects in view of their substantive content: see, for example, Case C-366/88 *France* v *Commission* (internal instructions) [1990] ECR I-3571, in particular at paragraph 8, and Case C-325/91 *France* v *Commission* (communication on aid) [1993] ECR I-3283, in particular at paragraph 9.

25. In the light of the foregoing observations, I therefore propose that the Court should:

— declare the application inadmissible in so far as it seeks the annulment of act 93/730/EC entitled 'Code of conduct concerning public access to Council and Commission documents';

— dismiss the remainder of the application;

— order each of the parties, including the interveners, to bear their own costs.