JUDGMENT OF THE COURT OF FIRST INSTANCE
(Third Chamber, Extended Composition)
6 February 1998 *

In Case T-124/96,

Interporc Im- und Export GmbH, a company incorporated under German Law, established in Hamburg, Germany, represented by Georg M. Berrisch, Rechtsanwalt, Hamburg, with an address for service in Luxembourg at the Chambers of Guy Harles, 8-10 Rue Mathias Hardt,

applicant,

v

Commission of the European Communities, represented by Ulrich Wölker, of its Legal Service, acting as Agent, with an address for service in Luxembourg at the office of Carlos Gómez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

defendant,

APPLICATION for annulment of the Commission's decision of 29 May 1996 confirming its refusal to grant the applicant access to certain of its documents,

* Language of the case: German.

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

composed of: B. Vesterdorf, President, C. P. Briët, P. Lindh, A. Potocki and J. D. Cooke, Judges,

Registrar: A. Mair, Administrator,

having regard to the written procedure and further to the hearing on 21 October 1997,

gives the following

Judgment

Legal framework

1 In the Final Act of the Treaty on European Union signed at Maastricht on 7 February 1992 the Member States incorporated a Declaration (No 17) on the right of access to information, in these terms:

'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.'

2 In response to the Maastricht Declaration, the Commission undertook a comparative survey on the rules governing public access to information in the Member States and in some non-member countries. The results of its survey were summarised in Communication 93/C 156/05 to the Council, the Parliament and the Economic and Social Committee on public access to the institutions' documents (OJ 1993 C 156, p. 5, hereinafter 'the 1993 communication'). In that communication it concluded that there was a case for developing further the access to documents at Community level.

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

4 On 6 December 1993, the Council and the Commission drafted and jointly adopted a Code of Conduct concerning public access to Council and Commission documents ('the Code of Conduct') and undertook each to take the necessary steps to implement the principles set out in the Code of Conduct before 1 January 1994.

5 In implementation of that agreement the Commission adopted, on 8 February 1994, on the basis of Article 162 of the EC Treaty, Decision 94/90/ECSC, EC, Euratom on public access to Commission documents (OJ 1994 L 46, p. 58). Article 1 of that decision formally adopted the Code of Conduct, the text of which is annexed to the decision.

6 The Code of Conduct sets out the following general principle:

'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 Commission or the Council.'

7 The factors which may be relied upon by an institution as grounds for rejecting a request for access to documents are listed in the Code of Conduct in the following terms:

'The institutions will refuse access to any document where 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 persons that supplied the information or as required by the legislation of the Member State that supplied the information.

They may also refuse access in order to protect the institution's interest in the confidentiality of its proceedings.'

8 On 4 March 1994, the Commission adopted a communication on improved access to documents (OJ 1994 C 67, p. 5, hereinafter 'the 1994 communication'), giving details of the criteria for implementation of Decision 94/90. That communication states that 'anyone may ... ask for access to any unpublished Commission document, including preparatory documents and other explanatory material'. Furthermore, the Commission 'guarantees that applications for access to documents will be treated fairly and within a reasonable period'. In that regard, the communication specifies: 'Applicants for Commission documents will receive an answer within one month'. With regard to the exceptions provided for in the Code of Conduct, the communication states that the Commission 'may take the view that access to a document should be refused because its disclosure could undermine public and private interests and the good functioning of the institution. ...' On that point, the communication stresses: 'There is nothing automatic about the exemptions, and each request for access to a document will be considered on its own merits.'

Factual background to the case

9 Each year, the Community opens a so-called 'Hilton' quota. Under that quota, certain quantities of high-quality beef ('Hilton Beef') from Argentina may be imported into the Community free of any levies. In order to qualify for that exemption, a certificate of authenticity from the Argentine authorities is required.

10 The Commission was informed that certificates of authenticity had been found to have been falsified and, in collaboration with the customs authorities of the Member States, initiated inquiries into the matter in late 1992 and early 1993. When the customs authorities came to the conclusion that falsified certificates of authenticity had been presented to them, they took action for post-clearance recovery of the import duty.

11 After those falsifications had been discovered, the German authorities sought post-clearance recovery of import duty from the applicant, which requested remission of that duty, claiming that it had presented the certificates of authenticity in good faith and that certain deficiencies in the control procedure were attributable to the competent Argentine authorities and to the Commission.

12 By decision of 26 January 1996, addressed to the Federal Republic of Germany, the Commission considered that the applicant's request for remission of the import duty was not justified.

13 By letter of 23 February 1996 to the Secretary-General of the Commission and to the Directors-General of Directorates-General ('DG') I, VI and XXI, the applicant's lawyer requested access to certain documents relating to control procedures for imports of Hilton Beef and to the inquiries which gave rise to the German authorities' decisions to effect post-clearance recovery of import duty. The request concerned 10 categories of document: (1) the declarations of the Member States of quantities of Hilton Beef imported from Argentina between 1985 and 1992, (2) the declarations of the Argentine authorities of quantities of Hilton Beef exported to the Community in the same period, (3) the Commission's internal records drawn up on the basis of those declarations, (4) the documents relating to the opening of the 'Hilton' quota, (5) the documents relating to the designation of the bodies responsible for issuing certificates of authenticity, (6) the documents relating to the agreement concluded between the Community and Argentina concerning a reduction in the quota following discovery of the falsifications, (7) any reports of inquiries into the Commission's control procedures as regards the 'Hilton' quota in 1991 and 1992, (8) the documents relating to inquiries into any irregularities in imports between 1985 and 1988, (9) the views of DG VI and DG XXI on decisions taken in other similar cases and (10) the minutes of the meetings of the group of experts from the Member States on 2 and 4 December 1995.

14 By letter of 22 March 1996, the Director-General of DG VI refused the request for access as regards the correspondence with the Argentine authorities and the records of the discussions prior to the granting and opening of the 'Hilton' quotas and as regards the correspondence with the Argentine authorities following the discovery of the falsified certificates of authenticity. That refusal was based on the exception for protection of the public interest (international relations). As regards the remaining documents, the Director-General also refused access to those emanating from the Member States or the Argentine authorities, on the ground that the applicant should address its request directly to the various authors of those documents.

15 By letter of 25 March 1996, the Director-General of DG XXI refused the request for access to the report of the internal inquiry into the falsifications drawn up by the Commission, basing that refusal on the exception for protection of the public interest (inspections and investigations) and the exception for protection of the individual and of privacy. As regards the positions taken by DG VI and DG XXI concerning other requests for remission of import duty and the minutes of the meetings of the committee of experts from the Member States, the Director-General of DG XXI refused access to the documents on the basis of the exception for protection of the institution's interest in the confidentiality of its proceedings. As regards the remaining documents, he refused access to those emanating from the Member States, on the ground that the applicant should address its request directly to the various authors of those documents.

16 By letter of 27 March 1996, the applicant's lawyer submitted a confirmatory application within the meaning of the Code of Conduct to the Secretary-General of the Commission. In that letter, he challenged the justification for the grounds on which the Directors-General of DG VI and DG XXI refused access to the documents.

17 By application lodged at the Registry of the Court of First Instance on 12 April 1996, the applicant and two other German firms brought an action for annulment of the Commission's decision of 26 January 1996 (Case T-50/96 *Primex and Others* v *Commission*).

18 By letter of 29 May 1996, the Secretary-General of the Commission rejected the confirmatory application. That letter ('the contested decision') was couched in the following terms:

'Following an examination of your request, I regret to have to inform you that I confirm the decision of DG VI and DG XXI for the following reasons.

The documents requested all concern a Commission decision of 26 January 1996 (doc. COM (C)96 180 final) which has since become the subject-matter of an application for annulment brought by your representative (Case T-50/96).

Consequently, and without prejudice to other exceptions which might justify refusing access to the documents requested, the exception for protection of the public interest (court proceedings) is applicable. The Code of Conduct cannot oblige the Commission, as a party to a pending action, to provide the other party with documents relating to the dispute.'

19 By letter lodged at the Court Registry on 25 June 1996 in the context of Case T-50/96, the applicant requested the Court to order production of the documents requested as a measure of organisation of the procedure.

Procedure and forms of order sought

20 By application lodged at the Registry of the Court of First Instance on 9 August 1996, the applicant brought the present action. The case was allocated to a Chamber of three judges. After hearing the parties, the Court, by decision of 2 July 1997, assigned the case to the Third Chamber, Extended Composition, composed of five judges.

21 Upon hearing the report of the Judge-Rapporteur, the Court of First Instance (Third Chamber, Extended Composition) decided to open the oral procedure without any preparatory measures of inquiry.

22 At the hearing in open court on 21 October 1997 the parties presented oral argument and replied to the Court's oral questions.

23 The applicant claims that the Court should:

— annul the contested decision;

— declare that the Commission is not entitled to refuse access to the documents specified in the letter of 23 February 1996 from the applicant's lawyer to the Secretary-General of the Commission; and

— order the Commission to pay the costs.

24 The Commission contends that the Court should:

— dismiss the application for directions to be issued as inadmissible;

— dismiss the remainder of the application as unfounded; and

— order the applicant to pay the costs.

The first head of claim, seeking annulment of the contested decision

25 In support of its application, the applicant puts forward three pleas in law. The first alleges infringement of the Code of Conduct and of Decision 94/90. The second alleges infringement of Article 190 of the Treaty. The third plea, which was put forward at the hearing, alleges infringement of the right to a fair hearing in that the Secretary-General relied, in the contested decision, on a new ground for refusing access which had not previously been put forward.

26 In the circumstances of this case, it is appropriate to examine the first two pleas together.

The first and second pleas taken together, alleging infringement of the Code of Conduct and of Decision 94/90 and infringement of Article 190 of the Treaty

Arguments of the parties

— Infringement of Decision 94/90 and the Code of Conduct

27 The applicant notes, first of all, that the Commission refused its request for access to the documents on the sole ground that the exception for protection of the public interest (court proceedings) was applicable. By so doing, however, the Commission infringed the provisions relating to the exceptions to the right of access to documents laid down in the Code of Conduct and thus in Decision 94/90.

28 It points out that Decision 94/90 and the Code of Conduct are binding on the Commission. Those measures place a legal obligation on the Commission to give the public the widest possible access to documents held by it (Case T-105/95 *WWF UK* v *Commission* [1997] ECR II-313, paragraph 55, and Case T-194/94 *Carvel and Guardian Newspapers* v *Council* [1995] ECR II-2765, which concerns the equivalent decision adopted by the Council — Council Decision 93/731/EC of 20 December 1993 on public access to Council documents (OJ 1993 L 340, p. 43)).

29 The exceptions to the right of access to documents should be interpreted strictly in order not to frustrate the specific aim of the Code of Conduct, which is to give the public 'the widest possible access to documents'.

30 The applicant submits that the Commission is not entitled to apply the exceptions in a general way. In order to determine whether disclosure of a document is precluded by one of the exceptions, the Commission should first weigh the interests which the exception in question is intended to protect against the overall aim of the Code of Conduct and then establish for each document the 'imperative reasons' justifying application of the exception (Case C-2/88 Imm. *Zwartveld and Others* [1990] ECR I-4405, paragraphs 11 and 12).

31 The Commission is wrong to consider, relying on the exception for protection of the public interest (court proceedings), that it is empowered to refuse access to any document relating to a decision which is the subject of an action for annulment. Such a position by the Commission would tend to interfere with the judicial process.

32 Having refused access to the documents requested on the ground that they might be used against the Commission as the defendant in court proceedings, the contested decision could have the consequence that a number of Commission decisions might escape judicial review. As a public administration acting in the general interest, the Commission should not be entitled to withhold texts which it adopts from such review by keeping them secret.

33 The exception in question should be interpreted in accordance with point 2.2 of the 1993 communication, which lists the interests supposed to be protected by that exception in the laws of the Member States. In fact, it covers only information likely to damage the investigation of criminal offences and the prosecution of offenders.

34 Finally, the Commission's position in the present case is contradicted by its observations submitted in the *Primex* case, referred to above, on the request for measures of organisation of the procedure seeking production of those same documents. In that case, the Commission considered that the documents were not relevant to the proceedings.

35 Whilst accepting that it is important from a political point of view for the public to have access to documents held by the Community institutions, the Commission questions whether the principle of access to documents, as set out in the declarations on transparency, is important from a legal point of view. As regards the legal value of Decision 94/90, it stresses that that decision was adopted under the framework of its power of internal organisation, which authorises it to take appropriate measures in order to ensure its internal operation in conformity with the interests of good administration (Case C-58/94 *Netherlands* v *Council* [1996] ECR I-2169, paragraph 37).

36 The Commission submits, first, that the exception for protection of the public interest (court proceedings) authorises it, in the context of Decision 94/90, not to make available to the public — and to the applicant — all documents relating to pending proceedings. For that exception to be applicable, it considers it is enough that the documents requested concern the pending proceedings and relate to their subject-matter, as is the case here.

37 Any other interpretation would be likely seriously to jeopardise the right to a fair hearing and thus the public interest. Even if its rights as a defendant might well not be harmed by the disclosure of each and every document, the Commission considers that it would not be able to prepare an adequate defence if, as the applicant claims, it had to prove the importance of each document for the legal proceedings. It denies that it has to put forward 'imperative reasons' in order to be able to refuse a request for access to documents.

38 The 1993 communication does not lead to any different interpretation. The exception in the Code of Conduct is wider in scope than the equivalent exceptions under national law, since the Code of Conduct does not specify the restrictive particular of 'judicial secrecy' added in the description of the equivalent exceptions under national law.

39 Secondly, the Commission submits that the question whether the applicant may have access to the documents requested must be settled on the basis of the Rules of Procedure of the Court of First Instance concerning measures of organisation of the procedure and not on that of the Code of Conduct. That code is not, and is not intended to be, the appropriate text for deciding the question raised here.

40 Since measures of organisation of the procedure have been requested by the applicants in *Primex*, referred to above, it is for the Court to decide to what extent it can grant that request on the basis of its Rules of Procedure. The question whether the documents requested by the applicant are really relevant to the action brought against the decision of 26 January 1996 (see paragraph 12 above) can only be decided in the context of that action.

— Infringement of Article 190 of the Treaty

41 The applicant submits that the statement of reasons in the contested decision does not meet the requirements of Article 190 of the Treaty.

42 In the first place, the wording of the contested decision does not reveal whether the special features of the case in issue were analysed. Secondly, the Commission did not specify the reasons for which it considers that the exception for protection of the public interest (court proceedings) is applicable.

43 In particular, the Commission failed, in breach of its obligations, to state for each document the 'imperative reasons' for which disclosure would jeopardise protection of the public interest.

44 Finally, the applicant submits that the Commission may not rely in this case on other exceptions provided for in the Code of Conduct because the contested decision contains an inadequate statement of reasons in that regard.

45 The Commission denies that it has infringed Article 190 of the Treaty. The statement of reasons clearly summarises the essential point. As regards the applicant's regret that the decision does not analyse the 'special features' of the case, the Commission considers that it is not obliged to prove, for each and every document, that disclosure could damage the public interest.

Findings of the Court

46 Decision 94/90 is a measure conferring on citizens a right of access to documents held by the Commission (*WWF UK*, cited above, paragraph 55).

47 The fact that Article 162 of the Treaty was taken as the legal basis for that decision does not affect that finding. Even if Decision 94/90 was adopted under the Commission's powers of internal organisation, there is nothing to prevent rules on the internal organisation of the work of an institution having legal effects *vis-à-vis* third parties (*Netherlands* v *Council*, cited above, paragraph 38).

48 From its overall scheme, it is clear that Decision 94/90 is intended to apply generally to requests for access to documents. By virtue of that decision, any person may request access to any unpublished Commission document, and is not required to give a reason for the request (see the 1993 and 1994 communications).

49 In accordance with the Code of Conduct, however, the right of access to documents is subject to certain exceptions. Those exceptions must be interpreted strictly, in order not to frustrate the application of the general principle of giving the public 'the widest possible access to documents held by the Commission' (*WWF UK*, cited above, paragraph 56).

50 As was held at paragraph 57 of the *WWF UK* judgment, the Code of Conduct contains two categories of exception (see paragraph 7 above).

51 As regards the first category, to which the exception relied upon in the present case belongs, it provides: 'The institutions will refuse access to any document where disclosure could undermine ... the protection of the public interest (public security, international relations, monetary stability, court proceedings, inspections and investigations)'.

52 The use of the form 'could' means that before deciding on a request for access to documents the Commission must consider, for each document requested, whether in the light of the information in its possession disclosure is in fact likely to undermine one of the interests protected under the first category of exceptions. If so, the Commission is bound to refuse access to the document in question, that being a case in which the Code of Conduct provides that the institutions 'will refuse' access.

53 Such a decision on the part of the institution must state the reasons on which it is based, in accordance with Article 190 of the Treaty. It has consistently been held that the reasoning required by that provision must show clearly and unequivocally the reasoning of the Community authority which adopted the contested measure so as to enable the persons concerned to ascertain the reasons for the measure in order to protect their rights, and the Court to exercise its power of review (Case C-278/95 P *Siemens* v *Commission* [1997] ECR I-2507, paragraph 17; *WWF UK*, cited above, paragraph 66).

54 The statement of the reasons for a decision refusing access to documents must therefore contain — at least for each category of documents concerned — the specific reasons for which the Commission considers that disclosure of the documents requested is precluded by one of the exceptions provided for in the first category of exceptions (*WWF UK*, paragraphs 64 and 74), in order to enable the person to whom the decision is addressed to satisfy himself that the Commission did in fact consider the documents in the manner described in paragraph 52 above and to assess whether the grounds for refusal are justified.

55 In the present case, however, the contested decision contains only the conclusion that the exception for protection of the public interest (court proceedings) is applicable (see paragraph 18 above). It provides no explanation, even for categories of documents, from which it might be ascertained whether all the documents requested, some of which are several years old, do indeed fall within the scope of the exception relied upon because they bear a relation to the decision whose annulment is sought in the *Primex* case, referred to above.

56 The statement of reasons in the contested decision is therefore inadequate.

57 It follows that the contested decision must be annulled, without there being any need to rule on the plea alleging infringement of the right to a fair hearing.

The second head of claim, seeking a declaration that the Commission is not entitled to refuse access to the documents specified in the applicant's letter of 23 February 1996 to the Secretary-General of the Commission

58 In support of this head of claim, the applicant submits that under the Code of Conduct it is for the Secretary-General, when dealing with a confirmatory application, to review the initial rejection of the request for access to the documents in question. He must therefore take a final decision as to the grounds on which he intends to base final rejection of the request.

59 In the applicant's view, therefore, it would deprive the procedure laid down in Decision 94/90 of any practical effect if, following a judgment annulling the decision, the Commission were allowed in a subsequent administrative procedure to rely on different grounds to justify rejection of a request for access to the documents. If that were so, the applicant would be obliged to bring the matter before the Court again, a requirement which it considers unacceptable.

60 In order to avoid further court proceedings, the applicant therefore requests the Court to find that the Commission has no grounds for refusing access to the various documents referred to in its letter of 23 February 1996 (see paragraph 13 above), since it has exhausted its right to refuse access to those documents by relying on other grounds.

61 This head of claim, which seeks the issue of directions to the Commission, is inadmissible, since the Community judicature, when exercising the jurisdiction to annul acts conferred on it by Article 173 of the Treaty, is not entitled to issue directions to the Community institutions (see, for example, Case 15/85 *Consorzio Cooperative d'Abruzzo* v *Commission* [1987] ECR 1005, paragraph 18, and Case T-346/94 *France-Aviation* v *Commission* [1995] ECR II-2841, paragraph 42).

Costs

62 Under Article 87(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 applicant has applied for costs and the Commission has essentially been unsuccessful, the Commission must be ordered to pay the costs.

On those grounds,

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

hereby:

1. Annuls the Commission's decision of 29 May 1996 refusing the applicant access to certain documents held by the Commission;

2. Dismisses the application as inadmissible in so far as it seeks the issue of directions to the Commission;

3. Orders the Commission to pay the costs.

Vesterdorf Briët Lindh

Potocki Cooke

Delivered in open court in Luxembourg on 6 February 1998.

H. Jung B. Vesterdorf

Registrar President