JUDGMENT OF THE COURT OF FIRST INSTANCE (Fifth Chamber)

27 November 2007 *

In Joined Cases T-3/00 and T-337/04,

Athanasios Pitsiorlas, residing in Thessaloniki (Greece), represented by D. Papafilippou, lawyer,

applicant,

v

Council of the European Union, represented initially by M. Bauer, S. Kyriakopoulou and D. Zachariou, and subsequently by M. Bauer and D. Zachariou, acting as Agents,

and

European Central Bank (ECB), represented, in Case T-3/00, initially by C. Zilioli, C. Kroppenstedt and P. Vospernik, and subsequently by C. Zilioli, C. Kroppenstedt,

* Language of the case: Greek.

F. Athanasiou and S. Vuorensola, and finally by C. Zilioli, C. Kroppenstedt and F. Athanasiou and, in Case T-337/04, by C. Kroppenstedt, F. Athanasiou and P. Papapaschalis, acting as Agents,

defendants,

APPLICATION, first, for annulment of the decisions of the Council and the European Central Bank refusing the applicant access to documents relating to the Basle/Nyborg Agreement of September 1987 and, second, for damages,

THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES (Fifth Chamber),

composed of M. Vilaras, President, M.E. Martins Ribeiro and K. Jürimäe, Judges,

Registrar: C. Kantza, Administrator,

having regard to the written procedure and further to the hearing on 29 March 2007,

gives the following

Judgment

Relevant legal provisions

1 Articles 104 and 105 of the EEC Treaty were initially drafted as follows:

'*Article 104*

Each Member State shall pursue the economic policy needed to ensure the equilibrium of its overall balance of payments and to maintain confidence in its currency, while taking care to ensure a high level of employment and a stable level of prices.

Article 105

1. In order to facilitate attainment of the objectives set out in Article 104, Member States shall coordinate their economic policies. They shall for this purpose provide for cooperation between their appropriate administrative departments and between their central banks.

...

2. In order to promote coordination of the policies of Member States in the monetary field to the full extent needed for the functioning of the common market, a Monetary Committee with advisory status is hereby set up. It shall have the following tasks:

— to keep under review the monetary and financial situation of the Member States and of the Community and the general payments system of the Member States and to report regularly thereon to the Council and to the Commission;

— to deliver opinions at the request of the Council or of the Commission or on its own initiative, for submission to these institutions.

The Member States and the Commission shall each appoint two members of the Monetary Committee.'

2 Having regard to Article 105(2) cited above and Article 153 of the EEC Treaty (which became Article 153 of the EC Treaty, now Article 209 EC), pursuant to which the Council was to determine the rules governing the committees provided for in the EEC Treaty, the Council adopted by decision of 18 March 1958 the Rules governing the Monetary Committee (OJ, English Special Edition, Series I Chapter 1952-1958, p. 60).

3 On 8 May 1964, the Council adopted Decision 64/300/EEC on cooperation between the Central Banks of the Member States of the European Economic Community (OJ, English Special Edition, Series I Chapter 1963-1964, p. 141). Under Article 1 of the decision, for the purpose of promoting cooperation between the Central Banks of the Member States, a Committee of the Governors of the Central Banks of the Member States of the European Economic Community ('the Committee of Governors') was set up. Article 2 of the decision states, inter alia, that the Committee of Governors is to be composed of the Governors of the Central Banks of the Member States and that the Commission is, as a general rule, to be invited to send one of its members as a representative to the meetings of the Committee of Governors. Finally, under Article 3 of the decision, the tasks of the Committee of Governors are, inter alia, 'to hold consultations concerning the general principles and the broad lines of policy of the Central Banks, in particular as regards credit and the money and foreign exchange markets' and 'to exchange information at regular intervals about the most important measures that fall within the competence of the Central Banks, and to examine those measures'.

4 On 3 April 1973, the Council adopted Regulation (EEC) No 907/73 establishing a European Monetary Cooperation Fund (OJ 1973 L 89, p. 2). Under Article 2 of the regulation, the European Monetary Cooperation Fund (EMCF) is to promote, within the limits of its powers, 'the proper functioning of the progressive narrowing of the margins of fluctuation of the Community currencies against each other', 'interventions in Community currencies on the exchange markets' and 'settlements between Central Banks leading to a concerted policy on reserves'.

5 The first paragraph of Article 1 of the Statute of the EMCF, which is annexed to Regulation No 907/73, states that the EMCF is to be directed and managed by a Board of Governors and that the members of the Board of Governors are to be the members of the Committee of Governors.

6 In June 1988, the Council confirmed the objective of establishing, in stages, the economic and monetary union (EMU).

7 The tasks of the Committee of Governors were extended by Council Decision 90/142/EEC of 12 March 1990 amending Decision 64/300 (OJ 1990 L 78, p. 25). Under that decision, the Committee may express opinions to individual governments and the Council of Ministers 'on policies which might affect the internal and external monetary situation in the Community and, in particular, the functioning of the European Monetary System'.

8 The first stage in the establishment of the EMU officially began on 1 July 1990.

9 It is apparent from Article 109e of the EC Treaty (now, after amendment, Article 116 EC) that the second phase of the establishment of the EMU began on 1 January 1994.

10 Under the first subparagraph of Article 109f(1) of the EC Treaty (now, after amendment, Article 117 EC), '[a]t the start of the second stage, a European Monetary Institute (hereinafter referred to as "EMI") shall be established and take up its duties'. The fourth subparagraph of that provision, which has now been repealed, stated that '[t]he Committee of Governors shall be dissolved at the start of the second stage'.

11 Article 1.3 of the Protocol on the Statute of the European Monetary Institute (EMI), annexed to the EU Treaty, provides that '[p]ursuant to Article 109f of [the EC] Treaty, both the Committee of Governors and the [EMCF] shall be dissolved' and that all assets and liabilities of the EMCF are to pass automatically to the EMI. Pursuant to the first indent of Article 4.1 of the Protocol, the EMI is to 'strengthen cooperation between the national central banks' and the fifth indent of that provision states that the EMI is to 'take over the tasks of the EMCF'.

12 Under Article 123(1) EC, '[a]s soon as the Executive Board is appointed, the [European System of Central Banks] and the [European Central Bank] shall be established' and 'the full exercise of their powers shall start from the first day of the third stage'.

13 On 26 May 1998, the Heads of State or of Government of the Member States adopting the single currency took, by common accord, Decision 98/345/EC appointing the President, the Vice-President and the other members of the Executive Board of the European Central Bank (OJ 1998 L 154, p. 33). Pursuant to Article 123(1) EC, the effect of that decision was to set 1 June 1998 as the date for establishment of the European System of Central Banks (ESCB) and the European Central Bank (ECB).

14 It is thus in those circumstances that the ECB replaced the EMI on 1 June 1998 with a view to the entry into the third stage of the EMU, which began on 1 January 1999.

15 Article 114(2) EC states that '[a]t the start of the third stage an Economic and Financial Committee shall be set up' and that 'the Monetary Committee ... shall be dissolved'.

16 In accordance with Article 8 EC, the ESCB and the ECB act within the limits of the powers conferred upon them by the EC Treaty and the Statute of the ESCB and of the ECB ('the ESCB Statute') annexed thereto.

17 It is apparent from Article 105 EC that the basic tasks to be carried out through the ESCB are the definition and implementation of the monetary policy of the

Community, the conducting of foreign exchange operations, the holding and managing of the official foreign reserves of the Member States and the promotion of the smooth operation of payment systems, the primary objective being to maintain price stability. The ECB is to make regulations and take the decisions necessary for carrying out the tasks of the ESCB (Article 110 EC).

18 Paragraphs 1 and 3 of Article 107 EC state, respectively, that the ESCB 'shall be composed of the ECB and of the national central banks' and that it 'shall be governed by the decision-making bodies of the ECB which shall be the Governing Council and the Executive Board'.

19 Article 112 EC states:

'1. The Governing Council of the ECB shall comprise the members of the Executive Board of the ECB and the Governors of the national central banks.

2. (a) The Executive Board shall comprise the President, the Vice-President and four other members.

...'

20 Article 10.4 of the ESCB Statute provides that the meetings of the Governing Council are to be confidential and that that council may decide to make the outcome of its deliberations public.

21 Under Article 12.3 of the ESCB Statute, '[t]he Governing Council shall adopt Rules of Procedure which determine the internal organisation of the ECB and its decision-making bodies'. The ECB adopted its Rules of Procedure on 7 July 1998 (OJ 1998 L 338, p. 28), which were amended on 22 April 1999 (OJ 1999 L 125, p. 34) and on 7 October 1999 (OJ 1999 L 314, p. 32) ('the ECB Rules of Procedure').

22 Article 23 of the ECB Rules of Procedure, entitled 'Confidentiality of and access to ECB documents and archives', in the version resulting from the amendment of 22 April 1999 and applicable at the material time, states as follows:

'23.1 The proceedings of the decision-making bodies of the ECB and of any committee or group established by them shall be confidential unless the Governing Council authorises the President to make the outcome of their deliberations public.

23.2 All documents drawn up by the ECB shall be confidential unless the Governing Council decides otherwise. Access to ECB documentation and archives and to documents previously held in the archives of the EMI shall be governed by the Decision of the [ECB] of 3 November 1998 concerning public access to documentation and the archives of the [ECB] (ECB/1998/12).

23.3 Documents held in the archives of the [Committee of Governors], of the EMI and of the ECB shall be freely accessible after 30 years. In special cases the Governing Council may shorten this period.'

Background to the dispute

23 By letter of 6 April 1999, received at the General Secretariat of the Council on 9 April 1999, the applicant — who at that time was preparing a doctoral thesis in law at the University of Thessaloniki (Greece) — sought access, pursuant to Council Decision 93/731/EC of 20 December 1993 on public access to Council documents (OJ 1993 L 340, p. 43), as amended by Council Decision 96/705/EC, ECSC, Euratom of 6 December 1996 (OJ 1996 L 325, p. 19), to the Basle/Nyborg Agreement on the reinforcement of the European Monetary System (EMS) endorsed by the Council of Economic and Finance Ministers at their informal meeting at Nyborg (Denmark) on 12 September 1987.

24 In its letter of 11 May 1999, sent to the applicant on 15 May 1999, the General Secretariat of the Council responded in the following terms:

'The [General Secretariat] has given careful consideration to your request, but as it has not been possible to find the document, we believe that it is most probably an ECB document. Your request should therefore be addressed directly to that institution ...'

25 By letter of 8 June 1999, received at the General Secretariat of the Council on 10 June 1999, the applicant made a formal request pursuant to Article 7(1) of Decision 93/731.

26 By letter of 28 June 1999 addressed to the Public Relations department of the ECB, the applicant requested, pursuant to Decision 1999/284/EC of the ECB of

3 November 1998 concerning public access to documentation and the archives of the European Central Bank (OJ 1999 L 110, p. 30), access to the document concerning the Basle/Nyborg Agreement.

27 By letter of 5 July 1999, the General Secretariat of the Council informed the applicant that, because of the impossibility of taking a decision within the time-limit of one month, laid down in Article 7(3) of Decision 93/731, it had decided to extend this time-limit pursuant to Article 7(5) of that decision.

28 By letter of 6 July 1999, notified on 12 July 1999, the director of the Public Relations department of the ECB sent the applicant a press release from the Committee of Governors and the EMCF, dated 18 September 1987, describing measures agreed upon to strengthen the operating mechanisms of the EMS. That letter stated that the documents of the Committee of Governors were not covered by Decision 1999/284 but by Article 23.3 of the ECB Rules of Procedure which stated, in particular, that the documents of the Committee of Governors were to be freely accessible after 30 years.

29 By letter of 27 July 1999, the applicant wrote to the ECB to request a re-examination of his request on the basis of Article 23.3 of the ECB Rules of Procedure which authorises the Governing Council, in special cases, to shorten the 30-year period of confidentiality. The applicant added that the subject of his research could comfortably fall within the meaning of 'special cases', as referred to in that article.

30 By letter of 2 August 1999, notified to the applicant on 8 August 1999, the General Secretariat of the Council informed the applicant of the Council's decision of 30 July

1999 responding to the applicant's formal request based on Decision 93/731 ('the Council decision'). This decision was drafted in the following terms:

'Reply approved by the Council on 30 July 1999 to the formal request of Mr Pitsiorlas (1/99), which was submitted to the Council by letter of 8 June 1999, registered by the [General Secretariat] of the Council on 10 June 1999 in accordance with Article 7(1) of ... Decision 93/731/EC, for permission for access to the document:

Basle/Nyborg Agreement (September 1987).

Following a detailed search, we have established that the document referred to in your request is the "report" of the Committee of Governors on the reinforcement of the EMS, which was published by the Committee of Governors ... at Nyborg on 8 September 1987.

Since the rules on the administrative functioning of the EMS have never formed part of Community law, the Council has never been called upon to take a decision of this nature.

Since the document requested in this case was produced by the Governors of the Central Banks, we suggest you address your request directly to the Governors of the Central Banks or to the ECB ... pursuant to Article 2(2) of the decision.'

31 On 8 November 1999, the director of the Public Relations department of the ECB sent the applicant a letter, which he received on 13 November 1999, worded as follows:

'Thank you for your letter by which you applied for access to the "Basle/Nyborg [A]greement" of September 1987. Please accept our apologies for the delayed response which is due to the fact that your request arrived here during the summer break of the Governing Council meetings.

In line with your request, the Governing Council of the ECB considered your particular application for access to the archives of the Committee of Governors more closely. The Governing Council took into consideration that the "Basle/Nyborg [A]greement" was not a single document drawn up as a proper agreement among parties, but that the "[A]greement" only existed in the form of reports and minutes of meetings of both the Committee of Governors and of the Monetary Committee. The Governing Council further noted that a very elaborate press communiqué on this subject was released on 18 September 1987 which was also forwarded to you as an attachment to the letter of 6 July 1999. This press communiqué set out in great detail all points of the agreement reached among the Central Bank Governors. The resulting changes to the EMS Agreement of 13 March 1979 (referred to in the final paragraph of the press communiqué) were implemented by the Instrument of 10 November 1987, a copy of which has been attached to the present letter.

Taking into account these considerations, the Governing Council decided not to grant access to the archives of the Committee of Governors.

Since you dispose of all essential information on the "Basle/Nyborg [A]greement", I am confident that your research work will nevertheless develop fruitfully.'

Procedure and forms of order sought

32 By application lodged at the Registry of the Court of First Instance on 20 January 2000 (Case T-3/00), the applicant brought an action for annulment of the Council decision and of the letters of the ECB of 6 July and 8 November 1999.

33 By letter of 10 January 2000, the applicant sought a grant of legal aid. This application was dismissed by order of 8 May 2000 of the President of the First Chamber of the Court of First Instance.

34 By separate document, lodged at the Registry of the Court of First Instance on 11 April 2000, the Council raised a plea of inadmissibility under Article 114 of the Rules of Procedure of the Court of First Instance, on which the applicant submitted observations on 29 June 2000.

35 By order of the First Chamber of the Court of First Instance of 14 February 2001, the present action was dismissed as inadmissible in so far as it was brought against the Council decision, and the applicant was ordered to pay the costs.

36 By application lodged at the Registry of the Court of Justice on 7 May 2001, the applicant brought an appeal, under Article 49 of the Statute of the Court of Justice, against the order of 14 February 2001 (Case C-193/01 P).

37 By order of 17 April 2002, the President of the Fourth Chamber of the Court of First Instance decided to stay the proceedings pending the judgment of the Court of Justice.

38 In Case C-193/01 P *Pitsiorlas* v *Council and ECB* [2003] ECR I-4837 (*'Pitsiorlas'*), the Court set aside the order of the Court of First Instance in so far as it declared the action for annulment of the Council decision inadmissible; the Court also rejected the plea of inadmissibility raised by the Council in the present action and referred the case back to the Court of First Instance for it to adjudicate on the merits and reserved the costs.

39 The written procedure before the Court of First Instance was resumed at the stage which it had reached, in accordance with Article 119(2) of the Rules of Procedure.

40 By application lodged at the Registry of the Court of First Instance on 29 July 2004 (Case T-337/04), the applicant brought an action for damages against the Council and the ECB.

41 Following the change in the composition of the chambers of the Court of First Instance with effect from 13 September 2004, the Judge-Rapporteur has been assigned, in his capacity as President, to the Fifth Chamber. The present case has thus also been assigned to that chamber.

42 By order of the President of the Fifth Chamber of the Court of First Instance of 26 April 2005, Cases T-3/00 and T-337/04 were joined for the purposes of the oral procedure and the judgment, in accordance with Article 50 of the Rules of Procedure.

43 Upon hearing the report of the Judge-Rapporteur, the Court of First Instance (Fifth Chamber) decided to open the oral procedure in the two cases and, by way of measures of organisation of procedure, to invite the defendants to answer certain questions and to produce certain documents.

44 By letters received at the Registry on 15 and 16 March 2007, the ECB and the Council answered those questions and produced the documents requested.

45 By letters received at the Registry on 16 and 21 March 2007, the applicant lodged new documents in the file, concerning his tax situation, and observations on the wording of the Report for the Hearing.

46 The applicant was not present at the hearing on 29 March 2007 and only the defendants presented oral argument and answered the questions put to them by the Court.

A — *Forms of order sought in Case T-3/00*

47 In his application, the applicant claims that the Court should:

— declare the action admissible;

— annul the Council decision;

— annul the letters of the ECB of 6 July and 8 November 1999;

— order the measures of inquiry necessary to clarify the circumstances in which the decisions of the Council and the ECB were adopted;

— order the Council and the ECB to pay the costs.

48 In his reply, the applicant submits, in addition, that the Court should:

— take the measures of inquiry necessary to determine when, in what circumstances and in what legal context, which may be contractual, the ECB came into possession of the report of the Monetary Committee entitled 'The reinforcement of the EMS — Report of the President of the Monetary Committee at the informal meeting of Finance Ministers at Nyborg on 12 September 1987', which is held in the archives of the Committee of Governors;

— order the ECB to add to the file the minutes of the meeting of the Governing Council of 21 October 1999, or of any other date, in order to ascertain how the applicant's request was dealt with and the circumstances in which the ECB's letter of 8 November 1999 was adopted;

— request the ECB to provide statistical information relating to access to its documents for the period from 1 June 1998 to 31 May 2000;

— order the Council to pay the costs of the proceedings before both Courts (including in Case C-193/01 P).

49 The Council contends that the Court should:

— dismiss the action as unfounded;

— order the applicant to pay all the costs, including those incurred in Case C-193/01 P.

50 The ECB contends that the Court should:

— dismiss the action as inadmissible or, in the alternative, as unfounded;

— order the applicant to pay the costs.

B — *Forms of order sought in Case T-337/04*

51 The applicant claims that the Court should:

— order the defendants jointly and severally to pay to him (i) by way of compensation for the material damage the sum resulting from the calculation of the salary for an ECB post appropriate to his qualifications, for the period from

April 2001 until three months after the date of the judgment to be delivered by the Court of First Instance, provided that it is favourable, less his income as a lawyer over the corresponding period, and (ii) the sum of EUR 90 000 for non-material damage, together with legal interest calculated from the date on which the application was lodged;

— order the defendants to pay the costs of the proceedings, as well as 'extra-judicial costs'.

52 The Council contends that the Court should:

— dismiss the action as unfounded;

— order the applicant to pay the costs.

53 The ECB contends that the Court should:

— dismiss the application and all the claims set out therein as unfounded;

— order the applicant to pay all the costs.

The application for annulment

A — *Admissibility*

54 The ECB relies on a number of pleas of inadmissibility in respect of the action for annulment in so far as that action is directed against its letters of 6 July and 8 November 1999.

1. *The existence of challengeable acts*

55 The ECB contends, first, that the letter which it sent to the applicant on 6 July 1999 wholly lacks the features characteristic of a decision.

56 It should be noted, first of all, that under Article 35.1 of the ESCB Statute the acts or omissions of the ECB are open to review or interpretation by the Community judicature in the cases and under the conditions laid down in the EC Treaty, subject to the special rules laid down in respect of disputes between the ECB and its staff under Article 36.2 of the ESCB Statute. As the present action for annulment does not concern a dispute between the ECB and its staff, its admissibility must be considered in the light of the conditions laid down in Article 230 EC, to which Article 35.1 of the ESCB Statute refers (order in Case T-238/00 *IPSO and USE* v *ECB* [2002] ECR II-2237, paragraph 42).

57 The fourth paragraph of Article 230 EC provides that any natural or legal person may, under the conditions specified in the first three paragraphs of that article,

institute proceedings 'against a decision addressed to that person or against a decision which, although in the form of a regulation or a decision addressed to another person, is of direct and individual concern to the former'.

58 According to the case-law, the fact that a letter has been sent by a Community institution to a person in response to a prior request by that person is not sufficient for that letter to be regarded as a decision within the meaning of Article 230 EC, thereby opening the way for an action for annulment (see Case T-83/92 *Zunis Holding and Others* v *Commission* [1993] ECR II-1169, paragraph 30, and the case-law cited). Only a measure which produces binding legal effects such as to affect the interests of an applicant by bringing about a distinct change in his legal position is an act or decision which may be the subject of an action for annulment under Article 230 EC (Joined Cases C-68/94 and C-30/95 *France and Others* v *Commission* [1998] ECR I-1375, paragraph 62, and Joined Cases T-125/97 and T-127/97 *Coca-Cola* v *Commission* [2000] ECR II-1733, paragraph 77).

59 In the present case, it is not disputed, first, that after having received a request from the applicant for access to the Basle/Nyborg Agreement based on Decision 1999/284, the ECB informed the interested party, by letter of 6 July 1999, that the documents of the Committee of Governors were not covered by Decision 1999/284 but by Article 23.3 of the ECB Rules of Procedure, which states, in particular, that the documents of the Committee of Governors are to be freely accessible after 30 years.

60 It thus appears that, in its letter of 6 July 1999, the ECB merely pointed out the rules which were applicable to the applicant's request for disclosure of documents. The latter did, however, act in accordance with the ECB's instructions and made a new request for access based on Article 23.3 of the ECB Rules of Procedure.

61 As the applicant himself admits, the letter of 6 July 1999 is purely informative and does not constitute an act which may be the subject of an action under Article 230 EC. Consequently, the action must be dismissed as inadmissible in so far as it concerns the annulment of that letter.

62 The ECB states, second, that the letter of 8 November 1999, which is also covered by the form of order sought by the applicant, sought to inform the latter of the decision of the Governing Council of 21 October 1999 not to grant him access to the archives of the Committee of Governors.

63 The Court points out that the letter of 8 November 1999 is the only document which the applicant received in response to his request based on Article 23.3 of the ECB Rules of Procedure and that, although that letter states that 'the Governing Council decided' not to grant the applicant access to the archives of the Committee of Governors, it makes no reference whatsoever to a specific date of adoption for that decision, the date of 21 October 1999 having been supplied by the ECB in the defence.

64 In response to a request of the Court, the ECB produced various documents showing the existence of the alleged decision and, in particular, an extract from the minutes of the 29th meeting of the Governing Council of 21 October 1999.

65 It should therefore be noted that the decision of the Governing Council of 21 October 1999 refusing the applicant's request for access was formally embodied, in his regard, only in the document by which it was notified. Accordingly, it is necessary to interpret the form of order sought by the applicant as seeking the annulment of that decision, as brought to his knowledge on 8 November 1999.

66 It should also be noted that, after concluding that the action was inadmissible on the ground that the decision of the Governing Council of 21 October 1999 constituted an act of general application in respect of which the applicant did not have standing to bring an action, the ECB accepted, at the hearing, the individual nature of the measure at issue and withdrew the present plea of inadmissibility, formal note of which was taken in the minutes of the hearing.

67 Since the plea of inadmissibility alleging that the applicant lacks standing constitutes a ground involving a question of public policy which may, and even must, be raised of its own motion by the Community judicature (Case C-298/00 P *Italy* v *Commission* [2004] ECR I-4087, paragraph 35), the Court points out that, pursuant to Article 12.3 of the ESCB Statute, the Governing Council adopted, on 7 July 1998, Rules of Procedure seeking to ensure the internal functioning of the ECB in the interests of sound administration and containing an Article 23 entitled, in the version resulting from the amendment of the Rules of Procedure of 22 April 1999, 'Confidentiality of and access to ECB documents and archives'.

68 It is not disputed that that provision — which is framed in general terms, applies to objectively determined situations and entails legal effects for categories of persons regarded generally and in the abstract — is of general application.

69 It should be pointed out that the applicant has not sought the amendment or withdrawal of Article 23 of the ECB Rules of Procedure, nor has he been refused such a request: he has merely requested that that provision be applied and, more specifically, paragraph 3 thereof. In those circumstances, the case-law according to which the refusal by a Community institution to withdraw or amend an act may constitute an act whose legality may be reviewed under Article 230 EC only if the act which the Community institution refuses to withdraw or amend could itself have been contested under that provision (see *Zunis Holding and Others* v *Commission*, cited in paragraph 58 above, paragraph 31, and the case-law cited) is not applicable in the present case.

70 Contrary to the ECB's initial contentions, it cannot be considered that the only purpose of Article 23.3 of the ECB Rules of Procedure is to enable the Governing Council to reduce the period of confidentiality solely on the basis of the wording of the documents concerned and to adopt, in so doing, an act effective *erga omnes*.

71 It is, admittedly, conceivable that, on the basis of the aforementioned powers, the Governing Council may of its own initiative reduce the 30-year period of confidentiality for certain documents or for a category of documents, thereby allowing access to any interested party.

72 The fact none the less remains that Article 23.3 of the ECB Rules of Procedure also seeks to grant the public the right to request reduction of the period of confidentiality, it being recalled that there is nothing to prevent rules on the internal organisation of the work of an institution from having legal effects vis-à-vis third parties (Case C-58/94 *Netherlands* v *Council* [1996] ECR I-2169, paragraph 38). Under the second sentence of Article 23.3 of the ECB Rules of Procedure, which is designed to apply generally, anyone may thus apply for access to any of the documents held in the archives of the Committee of Governors, even before the expiry of a period of 30 years.

73 The general wording of Article 23.3 of the ECB Rules of Procedure supports the finding that the fact that an act adopted by the Governing Council on that basis may, in a particular case, be of a general nature does not rule out the possibility that that act may constitute an individual measure in another context, where a negative act is adopted following an application to the ECB by an individual, account taken of that individual's situation and the individual interests invoked, then notified directly to the interested party.

74 Clearly, the latter situation corresponds exactly with the facts of the present case as they result from the documents submitted to the Court.

75 It is not disputed that, by letter of 27 July 1999, the applicant applied to the ECB, on the basis of Article 23.3 of the ECB Rules of Procedure, for reduction of the period of confidentiality so that he could have sight of the documents relating to the Basle/Nyborg Agreement and that, to that end, he stressed the importance of those documents for his thesis.

76 That application was rejected on the ground, stated in the letter of 8 November 1999, that the applicant had already been sent two relevant documents and that, since he thus had all essential information on the Basle/Nyborg Agreement at his disposal, his research work could nevertheless develop fruitfully.

77 Finally, the applicant is the sole addressee of the decision of the Governing Council, which was brought to his knowledge by letter of 8 November 1999.

78 Accordingly, it must be found that the act adopted by the Governing Council on 21 October 1999, as notified by letter of 8 November 1999 ('the decision of the ECB'), constitutes an individual decision which the applicant has standing to challenge by means of an action for annulment.

2. *The assertion that the action for annulment is out of time*

79 The ECB contends that the first document lodged at the Court Registry by the applicant on 4 January 2000 contains both an application for a grant of legal aid and an application initiating proceedings under Article 230 EC and is signed by the applicant himself and not by another lawyer, which is contrary to Article 43(1) of the Rules of Procedure of the Court of First Instance and the third paragraph of Article 17 of the Statute of the Court of Justice, as interpreted by the latter (order in Case C-174/96 P *Lopes* v *Court of Justice* [1996] ECR I-6401). The second document, lodged on '7 February 2000', which is duly signed by a lawyer other than the applicant, cannot, in the view of the ECB, remedy the initial procedural error retroactively since the time-limit of two months within which the action had to be brought had expired on 13 January 2000.

80 It should be observed, in that regard, that the application initiating proceedings, entered in the register of the Court of First Instance on 20 January 2000, is signed by a lawyer appointed by the applicant and that it thus complies with the requirements of the third paragraph of Article 17 of the Statute of the Court of Justice and the first subparagraph of Article 43(1) of the Rules of Procedure of the Court of First Instance, the provisions applicable at the time.

81 In those circumstances, it remains to be examined whether the action was brought within the time-limit of two months laid down in Article 230 EC, with an extension on account of distance of 10 days, applicable to parties who have their habitual residence in Greece in accordance with a decision of the Court of Justice then in force, before the amendment of the Rules of Procedure of the Court of First Instance entered into force on 1 February 2001.

82 In the present case, the letter of the ECB of 8 November 1999 informing the applicant that his request had been rejected by the Governing Council was brought

to his knowledge on 13 November 1999. The time-limit for bringing an action thus expired on 23 January 2000, account being taken of the 10-day extension on account of distance, which the ECB omitted to mention in its arguments. Since the applicant brought his action on 20 January 2000 — not on 7 February 2000, as wrongly stated by the ECB in its defence — the plea of inadmissibility based on the allegation that the action was brought out of time is thus unfounded.

3. *The allegedly abusive nature of the action*

83 The ECB contends that the action is 'devoid of purpose' and abusive in so far as the ECB has, essentially, satisfied the applicant's request.

84 That line of argument cannot be upheld by the Court.

85 It must, first, be pointed out that, according to the ECB, the Basle/Nyborg Agreement is not a single document but is made up of a series of documents in the form of reports and minutes of meetings of the Committee of Governors and of the Monetary Committee. The ECB thus specified that the Basle/Nyborg Agreement consisted of the 'report of the Committee of Governors on the reinforcement of the EMS' and a report of the Monetary Committee entitled 'The reinforcement of the EMS — Report of the President of the Monetary Committee at the informal meeting of Finance Ministers at Nyborg on 12 September 1987'.

86 Next, it appears at the least paradoxical to maintain, as does the ECB, that the applicant received two documents — other than those referred to above — containing information which 'well represents the Basle/Nyborg Agreement in its entirety', while refusing the applicant access to that agreement on the ground, stated in its written pleadings, that its wording is confidential.

87 The ECB adds that the 'report of the Committee of Governors on the reinforcement of the EMS does not add any new and relevant information', thus making no mention of the report of the Monetary Committee referred to above.

88 It is sufficient, in reality, to note that the Governing Council refused to reduce the 30-year period of confidentiality and, by the same token, refused to grant access to the documents constituting the Basle/Nyborg Agreement sought by the applicant. Accordingly, it cannot be considered that the applicant's request was satisfied and that his action is therefore devoid of purpose.

89 In addition, a person who is refused access to a document or to part of a document has, by virtue of that very fact, established an interest in the annulment of the decision refusing access (Case T-174/95 *Svenska Journalistförbundet* v *Council* [1998] ECR II-2289, paragraph 67).

90 As regards, finally, the allegedly vexatious nature of the action brought by the applicant, that consideration does not have any relevance in the context of the examination of the admissibility of the action and belongs to the discussion on the costs.

4. *The alleged lack of competence of the ECB to grant access to the report of the Monetary Committee*

91 The ECB contends that it is not the correct addressee of the request for access to the report of the Monetary Committee in so far as it did not draft that report and it is not the guardian of the Monetary Committee's documents.

92 It is sufficient to note that that plea is wholly irrelevant in the context of the examination of the admissibility of the action. The ECB's arguments concerning the application, in the present case, of an authorship rule belong to the assessment of the substance.

93 Finally, it should be pointed out that the ECB confirmed at the hearing that it was in possession of the report of the Monetary Committee and that the decision of the Governing Council of 21 October 1999 refusing the applicant's request for access to the Basle/Nyborg Agreement, based on Article 23.3 of the ECB Rules of Procedure, concerned all of the documents constituting that agreement, including the report of the Monetary Committee. Formal note of this was taken in the minutes of the hearing.

94 It follows from the foregoing considerations that the plea of inadmissibility based on the allegation that the ECB lacked competence to grant access to the report of the Monetary Committee must be rejected.

B — *The substance*

1. *The application for annulment of the Council decision*

(a) Arguments of the parties

95 In support of its application, the applicant relies on three pleas in law, alleging infringement of (i) the principles of sound administration and protection of legitimate expectations; (ii) the duty to give reasons; and (iii) the 'fundamental principle of Community law concerning the access of citizens to documents', as well as Article 1 of Decision 93/731.

96 The applicant submits, first, that the principles of sound administration and the protection of legitimate expectations cannot mean that — or accommodate the possibility that — an institution such as the Council may hide the truth from citizens who make an application to it, or lie to or mislead them. In the present case, the applicant was the victim of the concerted and misleading conduct of the Council and the ECB. Thus, after claiming ignorance of the agreement at issue, the Council concealed the existence of the report of the Monetary Committee and referred the applicant to the ECB, which deliberately delayed in giving its response in order to make it impossible to bring an action against the Council decision because of the expiry of the time-limit laid down for those purposes.

97 According to the applicant, the infringement of those principles has been indirectly yet clearly recognised by the Court of Justice which, in *Pitsiorlas*, cited in paragraph 38 above, established that an excusable error had been brought about as a result of the Council's concealment of the report of the Monetary Committee which forms part of the Basle/Nyborg Agreement, and rejected the plea of inadmissibility raised by the Council. The applicant states that in spite of, and contrary to, the wording of that judgment, the Council still maintains that the information contained in its decision of 30 July 1999 is correct.

98 The applicant submits, second, that the misleading conduct on the part of the Council necessarily implies that its decision does not meet the requirements of Article 253 EC, or of Article 7(3) of Decision 93/731, and that it must be annulled on that basis (Case C-350/88 *Delacre and Others* v *Commission* [1990] ECR I-395, paragraph 15; Case T-85/94 *Branco* v *Commission* [1995] ECR II-45, paragraph 32; and *Svenska Journalistförbundet* v *Council*, cited in paragraph 89 above, paragraph 116).

99 The Council's contention, set out in its defence, that it applied the 'authorship rule' in its decision in order to refuse the applicant's request constitutes an interpretation of that decision ex post facto, given that that decision neither mentions Article 2(2) of Decision 93/731 nor contains the expression 'author of the document'. The applicant submits that that contention, which was indirectly but clearly rejected by the Court of Justice in *Pitsiorlas*, cited in paragraph 38 above, cannot constitute a

legitimate statement of reasons for the Council decision, since the Council did not give the applicant the opportunity to contest it in the administrative proceedings or the action (Case C-449/98 P *IECC* v *Commission* [2001] ECR I-3875, paragraph 87; Case T-252/97 *Dürbeck* v *Commission* [2000] ECR II-3031, paragraph 97; and Case T-204/99 *Mattila* v *Council and Commission* [2001] ECR II-2265, paragraph 92).

100 The applicant claims, third, that the Council's misleading conduct, to which he fell victim, also entails an infringement of the 'fundamental principle of Community law concerning the access of citizens to documents', and of Article 1 of Decision 93/731. Therefore, the arguments put forward in respect of the infringement of the principles of sound administration and the protection of legitimate expectations also apply to the third plea.

101 In his reply, the applicant submits that the arguments raised by the Council in its defence regarding the fact that the Monetary Committee is a third party are an expression of a refusal to apply Decision 93/731 and are unfounded, since the conditions for the application of Article 2(2) of that decision — concerning the authorship rule — are not met in the present case. Given its functions, the Monetary Committee cannot be classed as a third party in relation to the Council.

102 The applicant points out, finally, that, while claiming to apply the authorship rule in the present case, the Council avoided stating who was actually in possession of the report of the Monetary Committee, which is inconsistent with the principle of transparency relied upon by the Council.

103 The Council contends that the Court should reject the grounds for annulment relied upon by the applicant.

(b) Findings of the Court

Preliminary considerations

104 It is necessary, first of all, to make clear the subject-matter of the action for annulment brought by the applicant against the Council decision.

105 In its decision, the Council stated that the Basle/Nyborg Agreement consisted in the report of the Committee of Governors and that the applicant needed to address his request directly to the Governors of the Central Banks or to the ECB. It is not disputed that the Council did not mention the report of the Monetary Committee in that decision.

106 It is apparent from the letter of the ECB of 8 November 1999 that the Basle/Nyborg Agreement consists of a number of documents in the form of various reports and minutes of meetings of the Committee of Governors and of the Monetary Committee. In its defence, the ECB stated that the agreement in question consisted of a report of the Committee of Governors, entitled 'Report of the Committee of Governors on the reinforcement of the EMS', and a report of the Monetary Committee, entitled 'The reinforcement of the EMS — Report of the President of the Monetary Committee at the informal meeting of Finance Ministers at Nyborg on 12 September 1987'.

107 In his application, lodged after he had learned of the exact documentary content of the Basle/Nyborg Agreement, the applicant sought annulment of the Council's decision to 'deny him ... any access to the Basle/Nyborg Agreement', without any further information about the documents which constitute that agreement.

108 It is apparent from that wording that the applicant challenges the Council decision in that it refuses to provide him with the documents of either the Committee of Governors or the Monetary Committee, in so far as the Council's silence in respect of those documents amounts to a rejection decision.

109 It should be recalled in that regard that, in order to ensure the effective judicial protection of persons who, on requesting access, are confronted with answers from administrative bodies stating that they are not in possession of the documents requested or that those documents do not exist, the Court considers that those answers amount to refusals to grant access which affect the interests of the applicants for access and are therefore actionable (Case T-311/00 *British American Tobacco (Investments)* v *Commission* [2002] ECR II-2781, paragraphs 31 and 32).

110 Next, it should be pointed out that the examination of the three grounds for annulment relied upon by the applicant (as set out in paragraph 95 above) shows that they are based, to a large extent, on the same arguments, namely that the Council, in concertation with the ECB, is guilty of misleading conduct in relation to the applicant, first, by concealing the existence of the report of the Monetary Committee on the reinforcement of the EMS and, second, by delaying the decision refusing access in which reference is made to that report, which was adopted only after the expiry of the time-limits for bringing an action against the Council decision.

The Council's allegedly misleading conduct

111 It is apparent from the written pleadings lodged by the applicant that the Council's misleading conduct necessarily implies an infringement, first, of the principles of sound administration and the protection of legitimate expectations, second, of the duty to give reasons, and, third, of the right laid down in Decision 93/731 of access to documents. According to the applicant, the infringement of the principles of sound administration and the protection of legitimate expectations has been indirectly yet clearly acknowledged by the Court of Justice, which — in *Pitsiorlas*, cited in paragraph 38 above — established that an excusable error had been brought about as a result of the Council's concealment of the report of the Monetary Committee.

112 Those arguments cannot be upheld in so far as they are based on an incorrect premiss in that the wording of the documents submitted to the Court of First Instance does not support a finding that the Council concealed the nature or the accessibility of the documents which constitute the Basle/Nyborg Agreement.

113 The applicant's allegations of misleading or collusive conduct clearly originate from an abusive development of the approach adopted by the Court of Justice in *Pitsiorlas*, cited in paragraph 38 above.

114 In *Pitsiorlas*, the Court of Justice annulled an order of the Court of First Instance declaring inadmissible, because it was out of time, the action for annulment brought by the applicant against the Council decision on the ground that the Court of First Instance had misinterpreted the concept of excusable error by favouring a restrictive interpretation of that concept. The Court of Justice stated that, according to settled case-law, full knowledge of the finality of a decision and of the time-limit for bringing an action under Article 230 EC does not, in itself, prevent an individual

from pleading excusable error to justify his application being out of time since such an error may occur, in particular, where the conduct of the institution concerned has been, either alone or to a decisive extent, such as to give rise to pardonable confusion in the mind of a party acting in good faith and exercising all the diligence required of a normally well-informed person (*Pitsiorlas*, cited in paragraph 38 above, paragraph 24).

115 The Court of Justice pointed out that, in the light of the information provided by the Council, the applicant had no reason to challenge a 'decision preventing him from having access to a document the very existence of which was essentially denied' and that it was only on 13 November 1999, almost four weeks after the expiry of the time-limit for bringing an action against the Council decision, that the ECB informed the applicant that the Basle/Nyborg Agreement consists of reports and minutes prepared both by the Committee of Governors and the Monetary Committee (*Pitsiorlas*, cited in paragraph 38 above, paragraph 34).

116 Since the applicant brought his action against the Council decision on 20 January 2000, that is to say, within a reasonable time after he was apprised of that information provided by the ECB, the Court found that the delay in bringing the action must be regarded as excusable (*Pitsiorlas*, cited in paragraph 38 above, paragraph 35).

117 It cannot be inferred from the terms of *Pitsiorlas*, cited in paragraph 38 above, that the Court recognised that the Council had intentionally concealed the existence of the report of the Monetary Committee and that, consequently, the principles of sound administration and the protection of legitimate expectations had been infringed by that institution.

118 Admittedly, the Court held that the Council decision of 30 July 1999 sought to mislead the applicant, because it did not mention a document included in the Basle/

Nyborg Agreement whose existence was later revealed in the ECB's letter of 8 November 1999, and thus gave rise to a pardonable confusion in the mind of the applicant justifying his failure to challenge that decision within the time-limit prescribed.

119 Thus, although it was found that the delay in bringing the action against the Council decision had been brought about by the provision of information which later turned out to be partially inaccurate, the Court did not confirm, in that regard, that the Council had, as supposed, acted in bad faith, even though the applicant had argued in support of his appeal that the Council and the ECB had acted in collusion. The fact that the Council's reply was described as misleading does not necessarily mean that it purposely intended to mislead the applicant.

120 From this, the Court drew all the inferences material to the appeal before it, in finding that the delay in bringing the action had to be regarded as excusable, without in any way addressing the basis of the dispute, on which it was not in a position to give judgment (*Pitsiorlas*, cited in paragraph 38 above, paragraph 32). The fact that the concept of excusable error arises directly out of concern for respect of the principles of legal certainty and the protection of legitimate expectations does not mean that the Court found, in *Pitsiorlas*, that those principles were infringed by the Council when adopting its decision.

121 Quite apart from the interpretation of the wording in *Pitsiorlas*, cited in paragraph 38 above, the reality of the facts before the Court of First Instance is that they support the conclusion that the Council did not engage in misleading conduct.

122 It is apparent from the ECB's pleadings that it is indeed the ECB which is physically in possession of the report of the Monetary Committee, held in the archives of the Committee of Governors. Since the Council did not have the document at issue in its possession, it is conceivable and understandable that it could have overlooked its existence.

123 It follows that the applicant has not furnished evidence that the Council engaged in misleading conduct consisting in the concealment, in its decision, of its knowledge of the report and other documents of the Monetary Committee; also, that the Council's silence in respect of that committee's documents must, therefore, be interpreted as reflecting ignorance of their existence and thus the Council's genuine belief, at the time of adopting that decision, that there was no document, other than the report of the Committee of Governors, corresponding to the request for access.

124 Accordingly, the plea alleging infringement — as a result of allegedly misleading conduct on the part of the Council — of the principles of sound administration and the protection of legitimate interests, of the duty to give reasons and of the right laid down in Decision 93/731 of access to documents must be rejected.

125 However, the rejection of that plea does not resolve all of the problems raised by the three pleas in law on the basis of which annulment is sought, alleging infringement of the principles, the duty and the decision referred to above.

Infringement of the right laid down in Decision 93/731 of access to documents

126 It should be pointed out that the Council and the Commission approved, on 6 December 1993, a code of conduct seeking to lay down the principles governing access to the documents held by them. The code of conduct states, in particular, the following principle:

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

127 It also states:

'The Commission and the Council will severally take steps to implement these principles before 1 January 1994.'

128 In order to put that commitment into effect, the Council adopted Decision 93/731 on 20 December 1993.

129 Article 1 of Decision 93/731 provides as follows:

'1. The public shall have access to Council documents under the conditions laid down in this Decision.

2. "Council document" means any written text, whatever its medium, containing existing data and held by the Council, subject to Article 2(2).'

130 Article 2(2) of Decision 93/731 provides:

'Where the requested document was written by a natural or legal person, a Member State, another Community institution or body, or any other national or international body, the application must not be sent to the Council, but direct to the author.'

131 It is apparent from the wording of Article 1 of Decision 93/731 that the Council may accede to a request for access only if the documents envisaged in that request exist (Case T-123/99 *JT's Corporation* v *Commission* [2000] ECR II-3269, paragraph 58, and *British American Tobacco* (*Investments*) v *Commission*, cited in paragraph 109 above, paragraph 35), and only if they are held by the Council.

132 As regards, first, the documents of the Monetary Committee, the existence of which was not mentioned in the Council decision of 30 July 1999, their material existence became apparent as of the ECB's letter of 8 November 1999 and is not the subject of any discussion between the parties.

133 The issue of who is in possession of the documents is, however, disputed by the parties and must be resolved in order to deal with the plea alleging infringement of the applicant's right of access laid down in Decision 93/731. The conclusion that there was no misleading conduct on the part of the Council is not such as to resolve the problems relating to that plea.

134 The fact that the Council's silence in respect of the documents of the Monetary Committee must be interpreted as reflecting its ignorance of their existence does not necessarily mean that it did not hold those documents. It is conceivable that a less than thorough search by the Council services may have led to the Council to conclude, sincerely but wrongly, that the documents did not exist even though they were held in its archives. Such a situation could amount to an infringement of Decision 93/731.

135 As has already been stated, the Council maintains that it is not even in possession of the relevant documents of the Monetary Committee or the Committee of Governors.

136 That assertion is supported by the ECB's statements that the documents covered by the request for access, including the report of the Monetary Committee, are held in the archives of the Committee of Governors, governed by Article 23.3 of the ECB Rules of Procedure.

137 In response to those statements, the applicant states that 'one of the two institutions, the Council or the ECB, or even both of them, continues to conceal the truth'.

138 The applicant points out that the Council asserts that it applied the authorship rule but 'that [the Council] avoided ... stating who currently holds the report of the Monetary Committee'. The applicant adds that, in declaring that all the documents of that committee are to be regarded as Council documents in so far as that committee effectively prepared that institution's work, the Council 'recognises that it holds the report of the Monetary Committee'. Moreover, the applicant suggests that the two defendants may, during the summer of 1999, have 'negotiated and decided a common agreement to transfer to the ECB the report in question and other documents concerning the EMS, or all the documents of the Monetary Committee, in order to protect them by the time-limit of 30 years established in Article 23.3 of the ECB Rules of Procedure', and considers that it is necessary to find out how the report of the Monetary Committee was 'entrusted' to the ECB.

139 In order to resolve the present difficulty regarding proof of possession — or not — of the documents covered by the request for access, it is necessary to apply, by analogy, the case-law on arguments challenging the very existence of the documents applied for.

140 In that regard, it is apparent from the case-law that, in accordance with the presumption of legality attaching to Community acts, where the institution concerned asserts that a particular document to which access has been sought

does not exist, there is a presumption that indeed the document does not exist. That, however, is a simple presumption that the applicant may rebut in any way by relevant and consistent evidence (*JT's Corporation* v *Commission*, cited in paragraph 131 above, paragraph 58, and *British American Tobacco (Investments)* v *Commission*, cited in paragraph 109 above, paragraph 35).

141 The Council decision does not contain an express assertion that the Council was not in possession of documents of the Monetary Committee, the explanation for which lies in the particular nature of the present case and, specifically, in the fact that the Council identified only one document as corresponding to the request for access and thus reasoned its reply in respect of that document. The fact none the less remains that the Council decision is tacitly predicated on the assertion that there was no other document corresponding to the request for access and thus conveys — by implication, but unavoidably — the objective information that the Council was not in possession of such a document.

142 In the present case, it must be found that the applicant has not provided, in his written pleadings, relevant and consistent evidence capable of establishing that the Council was in possession of documents of the Monetary Committee.

143 It should be pointed out in that regard that:

— the bald assertion that the Council concealed the truth clearly has no probative value;

— the allegation that the Council states that it applied the authorship rule but 'that [the Council] avoided ... stating who currently holds the report of the Monetary Committee' is irrelevant, given that, in addition, the Council claims to have applied the authorship rule in respect of the report of the Committee of Governors;

— the inference drawn by the applicant, to the effect that the Council acknowledged that it was in possession of the report of the Monetary Committee (because the Council stated that all the documents of that committee are to be regarded as Council documents since that committee effectively prepared the Council's work), remains unexplained and inexplicable.

144 As regards the applicant's questioning of how the ECB found itself in possession of the report of the Monetary Committee, the ECB states that the report was included, by chance, among the documents of the Committee of Governors which were sent from Basle to Frankfurt when the EMI moved in October 1994. Since the report of the Monetary Committee was requested — as was the report of the Committee of Governors — by the finance ministers as part of the preparation for their meeting at Nyborg in September 1987, it is thus likely that the secretariat of the Committee of Governors received for information purposes a copy of the report of the Monetary Committee and that that copy was kept along with the other documents of the Committee of Governors.

145 It should be pointed out that the applicant does not provide any sound evidence on the basis of which the ECB's statements could be refuted.

146 Consequently, the Council cannot be accused of somehow infringing Decision 93/731, which lays down a right of access only to documents held by that institution.

147 It follows from that finding that the dispute between the parties as regards the position that the documents of the Monetary Committee properly belong with the Council is, in the light of the composition and powers of that committee, irrelevant.

148 As regards, second, the documents of the Committee of Governors, neither their material existence nor the fact that they were held by the ECB is in dispute between the parties.

149 Therefore, and for the same reason given in paragraph 146 above, the Council cannot be accused of infringing Decision 93/731 as regards access to the documents of the Committee of Governors.

Infringement of the duty to give reasons

150 It must be observed that, according to settled case-law, the statement of reasons required by Article 253 EC must be appropriate to the act at issue and must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted the measure in question in such a way as to enable the persons concerned to ascertain the reasons for the measure and to enable the competent Community Court to exercise its power of review. The requirements to be satisfied by the statement of reasons depend on the circumstances of each case, in particular the content of the measure in question, the nature of the reasons given and the interest which the addressees of the measure, or other parties to whom it is of direct and individual concern, may have in obtaining explanations. It is not necessary for the reasoning to go into all the relevant facts and points of law, since the question whether the statement of reasons meets the requirements of Article 253 EC must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question (Case C-41/00 P *Interporc* v *Commission* [2003] ECR I-2125, paragraph 55; Case T-188/97 *Rothmans* v *Commission* [1999] ECR II-2463, paragraph 36; Case T-188/98 *Kuijer* v *Council* [2000] ECR II-1959, paragraph 36; and *JT's Corporation* v *Commission*, cited in paragraph 131 above, paragraph 63).

151 In addition to the consequences attached to the Council's allegedly misleading conduct as regards the statement of reasons for the decision of 30 July 1999, a plea which has already been rejected in paragraph 124 above, the applicant alleges that the Council's contention that that decision is based on the 'authorship rule' constitutes an interpretation of that decision ex post facto and cannot be regarded as a legitimate statement of reasons for that decision.

152 It must be observed, however, that the wording of the Council decision, as brought to the applicant's knowledge by letter of 2 August 1999, is unambiguous and that it was clearly pointed out to the applicant in that decision that the document requested — namely, the report of the Committee of Governors concerning the reinforcement of the EMS which was 'published' at Nyborg on 8 September 1987 — was drawn up by the Governors of the Central Banks and that he needed to address his request directly to the Governors of the Central Banks or to the ECB.

153 Notwithstanding the misuse of the word 'published' and the failure to mention specifically the expression 'author of the document', it must be found that the statement of reasons for the Council decision of 30 July 1999 satisfies the requirements laid down in Article 253 EC and in Article 7(3) of Decision 93/731 in so far as it enables the applicant to ascertain the reasons for the refusal of his request for access, and the Court is fully able to exercise its power to review the legality of that decision.

154 The Court points out, for the sake of completeness, that the Council contends that, in spite of the failure to mention Article 2(2) of Decision 93/731 expressly in the refusal decision of 30 July 1999, it is apparent from the wording of that decision that it is based on the authorship rule laid down in that article.

155 It should nevertheless be pointed out that the Council decision, as notified to the applicant by letter of 2 August 1999, includes, first, a reference to the fact that the

formal request for access was registered by the General Secretariat in accordance with Article 7(1) of Decision 93/731, then, at the end of the document, the invitation made to the applicant to address his request to the Governors of the Central Banks or to the ECB, 'pursuant to Article 2(2) of the decision'.

156 It thus appears that reference was made in the Council decision to what can only be Article 2(2) of Decision 93/731, which lays down the authorship rule, pursuant to which the institution in possession of the document requested may refuse access and refer the person seeking access to the author of the document.

157 Since the Council was not in possession of the documents of the Committee of Governors, its decision of 30 July 1999 does not constitute, strictly speaking, an application of the authorship rule, as laid down in Article 2(2) of Decision 93/731. However, that finding is not such as to rebut the conclusion that the Council did not infringe the duty to give reasons.

158 Finally, it should be pointed out that the explanation for the reasons given in the Council decision lies in the particular nature of the present case and, specifically, in the fact that the Council identified a single document as corresponding to the request for access and thus reasoned its reply in respect of that document.

159 As has been stated, the Council decision includes the implied assertion that there were no other documents corresponding to the request for access, an assertion which, for reasons of effective judicial protection of the applicant, is regarded in legal terms as an actionable refusal of access.

160 The Council cannot, in those circumstances, be accused of not having given reasons for refusing access to documents which were not specifically identified, merely because it did not indicate expressly that, in its view, there were no documents corresponding to the request for access other than the report of the Committee of Governors.

161 It follows from the foregoing considerations that the plea alleging infringement of the duty to give reasons must be rejected.

Infringement of the principles of sound administration and protection of legitimate expectations

162 Although the way in which the Council handled the applicant's request for access cannot be classed as misleading conduct vis-à-vis the latter (see paragraph 123 above), it needs to be determined whether that manner of handling the request none the less gave rise to an infringement of the principles of sound administration and protection of legitimate expectations.

163 In that regard, the guarantees conferred by the Community legal order in administrative proceedings include, in particular, the principle of sound administration, by virtue of which the competent institution is under a duty to examine carefully and impartially all the relevant aspects of the individual case (see Case T-31/99 *ABB Asea Brown Boveri* v *Commission* [2002] ECR II-1881, paragraph 99, and the case-law cited).

164 In the present case, by its first letter of 11 May 1999, the Council replied to the applicant stating that it had not found the document sought, whereas, by its letter of 2 August 1999, it informed him that the requested agreement concerned a report 'published' at Nyborg on 8 September 1987 by the Committee of Governors, that it had never, itself, been called upon to make a decision in that regard and that it was necessary for him to address his request to the Governors of the Central Banks or to the ECB.

165 It should be pointed out that:

— the request made by the applicant was based on Decision 93/731, Article 1 of which states that '[t]he public shall have access to Council documents under the conditions laid down in this Decision' and that '"Council document" means any written text, whatever its medium, containing existing data and held by the Council';

— where, as in the present case, the Council is not in possession of the documents corresponding to the request for access, Decision 93/731 does not require it to search for and identify the relevant documents, their respective authors and who is in possession of them in order to be able to inform accordingly the person seeking access;

— in the present case, the Council none the less searched and managed to identify a document covered by the request for access, namely the report of the Committee of Governors, and helpfully referred the applicant to the ECB, the institution in possession of that document.

166 In that regard, it is apparent from the answer given by the Council to a written question of the Court that the Council sent the ECB the applicant's formal request

and requested it at the same time to send the document containing the agreement reached by the Committee of Governors on the technical reforms for the reinforcement of the EMS endorsed by the Finance Ministers of the Member States at their informal meeting at Nyborg on 12 September 1987. In response to its request, the Council received a press release of 18 September 1987 which mentions only the report of the Committee of Governors and makes no reference to the report of the Monetary Committee.

167 The Council also showed that it had carried out an internal search to make sure that no document containing the Basle/Nyborg Agreement had been sent to it following the informal meeting of the Finance Ministers of the Member States mentioned above.

168 In the light of the above considerations, the plea alleging infringement of the principle of sound administration must be rejected.

169 As regards the infringement of the principle of legitimate expectations, it should be pointed out that the right to rely on such a principle extends to any person in a situation in which it is apparent that the Community authorities have caused that person to entertain justified hopes (Case 265/85 *Van den Bergh en Jurgens and Van Dijk Food Products* v *Commission* [1987] ECR 1155, paragraph 44, and Case C-152/88 *Sofrimport* v *Commission* [1990] ECR I-2477, paragraph 26). Moreover, a person may not plead infringement of that principle unless he has been given precise assurances by the administration (Case T-290/97 *Mehibas Dordtselaan* v *Commission* [2000] ECR II-15, paragraph 59, and the case-law cited).

170 In the present case, it is sufficient to note that the applicant does not provide any information capable of establishing that the Council gave him precise assurances regarding disclosure of the documents constituting the Basle/Nyborg Agreement. It appears, in reality, that the applicant merely framed the plea at issue in abstract terms and did not explain how exactly that principle had allegedly been infringed.

171 It is thus necessary to reject the plea alleging infringement of the principle of the protection of legitimate expectations.

172 It follows from all the foregoing that the action brought by the applicant must be dismissed in so far as it concerns the annulment of the Council decision.

2. *The application for annulment of the decision of the ECB*

(a) The plea of illegality in respect of Article 1 of Decision 1999/284 and Article 23.3 of the ECB Rules of Procedure

173 Although he does not state so expressly in his written pleadings, it is apparent from those pleadings and, more particularly, from the examination of the pleas alleging infringement of the fundamental principle of transparency and of the right of access to documents, as well as a misuse of powers, that the applicant raises a plea of illegality in respect of Article 1 of Decision 1999/284 and Article 23.3 of the ECB Rules of Procedure, and this on two counts in respect of the latter provision.

174 Accordingly, the applicant alleges, first, that Article 23.3 of the ECB Rules of Procedure infringes Article 12.3 of the ESCB Statute and has no legal basis and, second, that Article 1 of Decision 1999/284 and Article 23.3 of the ECB Rules of Procedure, on which the decision of the ECB is based, are contrary to the fundamental principle of transparency and the right of access to documents, as recognised by the case-law and by Articles 1 EU and 6 EU, Article 110(2) EC and Article 255(1) EC.

The plea of illegality in respect of Article 1 of Decision 1999/284

175 As regards the plea of illegality in respect of Article 1 of Decision 1999/284, it should be pointed out that, after basing his first request for access to the Basle/Nyborg Agreement on Decision 1999/284, the applicant made a new request — as he was instructed to do by the ECB — based expressly on Article 23.3 of the ECB Rules of Procedure with a view to obtaining a reduction of the 30-year period of confidentiality. The fact that the applicant's letter of 27 July 1999 wrongly refers to a 'formal request' is irrelevant.

176 It is that second request which was refused by the Governing Council in the decision of the ECB, pursuant to Article 23.3 of the ECB Rules of Procedure, and not on the basis of Decision 1999/284.

177 Therefore, even supposing that the plea alleging the illegality of Article 1 of Decision 1999/284 for infringement of the principle of transparency and of the right of access to documents may be regarded as admissible, it must be rejected as ineffective. In fact, even supposing that plea were to be established, the illegality found would not be such as to call the lawfulness of the decision of the ECB into question.

The plea of illegality in respect of Article 23.3 of the ECB Rules of Procedure

— The admissibility of the plea of illegality in respect of Article 23.3 of the ECB Rules of Procedure

178 The ECB contends that the arguments raised by the applicant in his reply, concerning the ECB's powers to regulate access to the archives of the Committee of Governors and the lack of any legal basis for Article 23.3 of the ECB Rules of Procedure, constitute a new plea in law which, under Article 48(2) of the Rules of Procedure of the Court of First Instance, may not be introduced in the course of the proceedings.

179 It follows from Article 44(1)(c), read in conjunction with Article 48(2) of those Rules of Procedure, that the application initiating proceedings must contain, inter alia, a summary of the pleas in law relied on, and that new pleas in law may not be introduced in the course of the proceedings unless they are based on matters of law or of fact which have come to light in the course of the procedure. However, a submission which may be regarded as amplifying a submission made previously, whether directly or by implication, in the original application, and which is closely connected therewith, must be declared admissible (Case T-37/89 *Hanning* v *Parliament* [1990] ECR II-463, paragraph 38, and Case T-118/96 *Thai Bicycle* v *Council* [1998] ECR II-2991, paragraph 142).

180 It is common ground that, in his application, the applicant disputed the legality of Article 23.3 of the ECB Rules of Procedure. Accordingly, the applicant submitted that, although Decision 1999/284 referred to the archives of the ECB and of the EMI, it completely 'forg[ot]' the archives of the Committee of Governors, even though they were even older, which were governed by Article 23.3 of the ECB Rules

of Procedure. According to the applicant, that provision prohibits access to very wide-ranging categories of documents, reduces his right of access to the documents to nothing and infringes the fundamental principle of transparency, as recognised by Articles 1 EU and 6 EU, as well as by Article 110(2) EC and Article 255(1) EC and by the case-law.

181 In response to that plea alleging the illegality of Article 23.3 of its Rules of Procedure, the ECB asserts that the status and the specific nature of the documents held in the archives of the Committee of Governors explain and justify their exclusion from the scope of Decision 1999/284 and the adoption, in a perfectly lawful manner, of a specific legal framework, defined in Article 23 of those Rules of Procedure. In support of that assertion, the ECB contends that the archives of the Committee of Governors contain documents drafted, in some cases, by the Committee of Governors, the Committee of Deputies, the subcommittees and the groups of experts and, in other cases, by the Monetary Committee, all of which are third parties in relation to the ECB.

182 It is in those circumstances that the applicant submitted, in his reply, that, in regulating access to the archives of the Committee of Governors in its Rules of Procedure, the ECB had exceeded its powers, in breach of Article 12.3 of the ESCB Statute which does not empower the ECB to regulate 'the affairs of third parties'.

183 It thus appears that the plea alleging the illegality of Article 23.3 of the ECB Rules of Procedure, on the ground of an infringement of Article 12.3 of the ESCB Statute, constitutes an amplification of the plea alleging the illegality of that same provision on grounds of infringement of the principle of transparency and of the right of access to documents, which is stated implicitly in the application initiating proceedings and which is closely linked to that plea. It must therefore be regarded as admissible.

— The plea alleging the illegality of Article 23.3 of the ECB Rules of Procedure on grounds of infringement of Article 12.3 of the ESCB Statute

184 The context in which Article 23.3 of the ECB Rules of Procedure was adopted must first be noted.

185 The Final Act of the Treaty on European Union, signed at Maastricht on 7 February 1992, contains Declaration No 17, which states as follows:

'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.'

186 At the close of the European Council at Birmingham on 16 October 1992, the Heads of State or of Government issued a declaration entitled 'A Community close to its citizens', in which they stressed the need to make the Community more open. That commitment was reaffirmed at the European Council in Edinburgh on 12 December 1992.

187 On 5 May 1993, the Commission addressed to the Council, the Parliament and the Economic and Social Committee Communication 93/C 156/05 on public access to the institutions' documents. That communication contained the results of a comparative survey on public access to documents in the Member States and some non-member countries, and concluded that there was a case for developing further the access to documents at Community level.

188 On 2 June 1993, the Commission adopted Communication 93/C 166/04 on openness in the Community, setting out the basic principles governing access to documents.

189 At the European Council at Copenhagen on 22 June 1993, the Council and the Commission were called upon to 'continue their work based on the principle of citizens having the fullest possible access to information'.

190 On 6 December 1993, the Council and the Commission adopted a code of conduct aimed at establishing the principles to govern public access to documents held by them, whilst agreeing that they would both implement those principles before 1 January 1994 by means of specific reglementary provisions.

191 To ensure the implementation of that agreement, the Council adopted Decision 93/731 on 20 December 1993, and, on 8 February 1994, the Commission adopted Decision 94/90/ECSC, EC, Euratom on public access to Commission documents (OJ 1994 L 46, p. 58).

192 On 1 January 1994, the second stage of the EMU began, marked by the setting-up of the EMI and the dissolution of the Committee of Governors. On 3 June 1997, the EMI adopted Decision No 9/97 concerning public access to administrative documents (OJ 1998 L 90, p. 43), that is to say, concerning public access to any record, whatever its medium, which contains existing data and which relates to the actual organisation and functioning of the EMI.

193 The establishment of the ECB on 1 June 1998 brought an end to the tasks of the EMI, which was dissolved upon the establishment of the ECB in accordance with Article 123 EC.

194 It is in that context that, pursuant to Article 12.3 of the ESCB Statute, the ECB adopted its Rules of Procedure on 7 July 1998, the drafting of which was followed shortly after by the adoption of Decision 1999/284 on 3 November 1998.

195 In the light of the ECB's assertion, also contested by the applicant, that it is a third party in relation to the authors of the documents held in the archives of the Committee of Governors, which justifies a specific legal framework for access to those documents, as laid down in Article 23.3 of its Rules of Procedure, the applicant submits that the ECB exceeded its powers by regulating access to the archives of the Committee of Governors in its Rules of Procedure, in breach of Article 12.3 of the ESCB Statute which does not empower it to regulate 'the affairs of third parties'.

196 Article 12.3 of the ESCB Statute provides that '[t]he Governing Council shall adopt Rules of Procedure which determine the internal organisation of the ECB and its decision-making bodies'.

197 In *Netherlands* v *Council*, cited in paragraph 72 above, paragraph 37, the Court of Justice stated that, so long as the Community legislature has not adopted general rules on the right of public access to documents held by the Community institutions, the institutions must take measures as to the processing of such requests by virtue of their power of internal organisation, which authorises them to take appropriate measures in order to ensure their internal operation in conformity with the interests of sound administration.

198 In the present case, in so far as there was no general regulation, at the time the Rules of Procedure were adopted and when they were amended on 22 April 1999, of the right of public access to documents held by the Community institutions or bodies, the ECB was empowered to adopt, within the context of its Rules of Procedure, measures for dealing with requests for access to the documents then in its possession, whether established by the ECB or received by the ECB, and regardless of their origin or author.

199 The fact that the ECB defined specific rules, contained in its Rules of Procedure, governing access to the documents held in the archives of the Committee of Governors, by reason of the ECB's purported status as a third party in relation to the authors of those documents, cannot therefore have given rise to an infringement of Article 12.3 of the ESCB Statute. In other words, even supposing that the ECB may actually be regarded as a third party in relation to the authors of the documents held in the archives of the Committee of Governors, it would still have acted in accordance with Article 12.3 of the ESCB Statute by defining a specific legal framework in its Rules of Procedure governing access to those documents.

200 Moreover, it should be observed that, in Decision 93/731 and Decision 94/90, the Council and the Commission regulated access to the documents in their possession, including those established by other bodies, while providing none the less that requests for access to those documents had to be addressed directly to the authors of the documents, a provision which corresponds to the 'authorship rule'.

201 Accordingly, the plea alleging that Article 23.3 of the ECB Rules of Procedure was adopted in infringement of Article 12.3 of the ESCB Statute must be rejected.

202 For the sake of completeness, it should be pointed out that the ECB draws an untenable conclusion from its purported status as a third party in relation to the authors of the documents held in the archives of the Committee of Governors.

203 The ECB infers from that third-party status that it administers the documents of the Committee of Governors in the capacity of secretariat to the national central banks, which are the authors of those documents and to which the applicant should have addressed his request for access. That inference is not compatible with the wording of Article 23.3 of the ECB Rules of Procedure or of the decision adopted by the Governing Council in response to the applicant's request.

204 It is not disputed that the ECB defined, in Article 23.3 of its Rules of Procedure, a specific legal framework governing access to the documents held in the archives of the Committee of Governors, the implementation of which is entrusted to the Governing Council, no provision being made for the application of an authorship rule. This explains how it was that the Governing Council actually came to take a decision on the substance of the application made by the applicant for a reduction of the period of confidentiality, without referring him to the national central banks.

205 In any event, that line of argument put forward by the ECB, which is at odds with the rules applied and the decision adopted in that case, has no bearing on the outcome of the present case and is not such as to call into question the conclusion arrived at in paragraph 201 above.

— The plea alleging the illegality of Article 23.3 of the ECB Rules of Procedure on grounds of infringement of the right of access to documents and the fundamental principle of transparency

206 The applicant claims, first, that Article 23.3 of the ECB Rules of Procedure deprives the articles on which his right of access to the documents of the ECB is based — Articles 1 EU and 6 EU and Articles 110(2) EC and 255(1) EC — of any practical effect.

207 However, it is apparent from a mere reading of those provisions that the applicant's assertion is wholly unfounded.

208 By the Treaty of Amsterdam, which entered into force on 1 May 1999, the Member States incorporated into the EC Treaty a new article, concerning access to documents, namely Article 255 EC. Article 255 EC states as follows:

'1. Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, shall have a right of access to European Parliament, Council and Commission documents, subject to the principles and the conditions to be defined in accordance with paragraphs 2 and 3.

2. General principles and limits on grounds of public or private interest governing this right of access to documents shall be determined by the Council, acting in accordance with the procedure referred to in Article 251, within two years of the entry into force of the Treaty of Amsterdam.

3. Each institution referred to above shall elaborate in its own Rules of Procedure specific provisions regarding access to its documents.'

209 It is apparent from the very wording of Article 255 EC that it refers only to the right of access to documents of the European Parliament, of the Council and of the Commission. In addition, pursuant to the fourth subparagraph of Article 110(2) EC, only 'Articles 253, 254 and 256 shall apply to regulations and decisions adopted by the ECB'.

210 It appears that the applicant based his arguments relating to the right of access to the documents of the ECB on an erroneous version of the fourth subparagraph of Article 110(2) EC, according to which 'Articles 253 to 256 shall apply to regulations and decisions adopted by the ECB'.

211 That material error, which may have found its way into certain non-official consolidated versions of the EC Treaty, results, in all likelihood, from a misapplication of Article 12(2) of the Treaty of Amsterdam, according to which the cross-references to articles in the EC Treaty were to be adapted in accordance with the renumbering laid down in Article 12(1) of the Treaty of Amsterdam.

212 It is clear from the Treaty of Amsterdam that that Treaty did not amend Article 108a of the EC Treaty (now Article 110 EC) which was worded as follows: 'Articles 190 to 192 shall apply to regulations and decisions adopted by the ECB'. The Treaty of Amsterdam thus did not add to that list of articles the new Article 191a of the EC Treaty (now Article 255 EC) concerning the right of access to documents. In those circumstances, the cross-reference to Article 110 EC means, pursuant to Article 12(2) of the Treaty of Amsterdam, 'Articles 253, 254 and 256'.

213 It is not disputed that the material error referred to above was officially remedied with the agreement of all the signatory States and that since the *procès-verbal* of rectification to the Treaty of Amsterdam, signed in Rome on 16 March 1999, there is no longer any doubt that Article 255(1) EC does not apply to the ECB.

214 Accordingly, the applicant's arguments concerning the alleged direct effect of Article 255 EC are wholly irrelevant, given that the Court has clearly stated that that provision is not directly applicable in so far as it is not unconditional and its implementation is dependent on the adoption of subsequent measures (Case T-191/99 *Petrie and Others* v *Commission* [2001] ECR II-3677, paragraph 35).

215 In addition, even if Article 255 EC is read 'in the light of Articles 1 EU and 6 EU', as suggested by the applicant, no uncertainty arises as to the finding that Article 255 EC does not apply to the ECB.

216 It should be added that the second paragraph of Article 1 EU, according to which '[t]his Treaty marks a new stage in the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as openly as possible and as closely as possible to the citizen' lacks direct effect since that provision is not to be regarded as 'clear' within the meaning of the judgment in Case 26/62 *Van Gend en Loos* [1963] ECR 1 (*Petrie and Others* v *Commission*, cited in paragraph 214 above, paragraph 35).

217 As regards Article 6 EU, it should be pointed out that the Treaty of Maastricht inserted into the body of the Treaties the principle that the Union is bound to respect fundamental rights. Article 6 EU seeks to guarantee those rights 'as general principles of Community law'.

218 Second, the applicant submits specifically that Article 23.3 of the ECB Rules of Procedure runs directly counter to the case-law of the Court of Justice and the Court of First Instance, which has recognised the fundamental principle of transparency (*Rothmans* v *Commission*, paragraph 150 above, paragraph 55), the principle of the right to information and the right of access to documents as an inseparable part of the democratic principle (Case T-14/98 *Hautala* v *Council* [1999] ECR II-2489, paragraphs 82 and 87).

219 The ECB contests the existence in Community law of a fundamental legal principle which provides for a general right of access to its documents and to those of the Community institutions. Although arguments based on such a principle have been raised on numerous occasions before the Community judicature, none of the Community Courts has considered it appropriate to examine them.

220 In that regard, it should be pointed out that, in Case C-353/99 P *Council* v *Hautala* [2001] ECR I-9565, the Court of Justice stated that, in *Netherlands* v *Council*, cited in paragraph 72 above, it had stressed the importance of the right of public access to documents held by public authorities and noted that Declaration No 17 connects that right with the 'democratic nature of the institutions'. The Court went on to consider that the Court of First Instance had rightly held that Article 4(1) of Decision 93/731 had to be interpreted as meaning that the Council was obliged to examine whether it was appropriate to grant partial access to the information not covered by the exceptions and had rightly annulled the contested decision, 'without its being necessary to consider whether, as the Council and the Spanish Government submit[ted], the Court of First Instance was wrong in basing itself on the existence of a principle of the right to information' (*Council* v *Hautala*, paragraph 31).

221 In any event, even supposing that the right of access to the documents held by the Community public authorities, including the ECB, may be regarded as a fundamental right protected by the Community legal order as a general principle of law, the plea of illegality in respect of Article 23.3 of the ECB Rules of Procedure, based on the alleged infringement of such a principle, cannot be upheld.

222 It should be pointed out that fundamental rights cannot be understood as 'unfettered prerogatives' and that it is 'legitimate that these rights should, if necessary, be subject to certain limits justified by the overall objectives pursued by the Community, on condition that the substance of these rights is left untouched' (Case 4/73 *Nold* v *Commission* [1974] ECR 491, paragraph 14).

223 As regards the right of access to documents, reasons related to the protection of the public interest or a private interest may legitimately restrict that right.

224 It should thus be pointed out that the code of conduct mentions that access to a document cannot be granted in cases where its disclosure could adversely affect the protection of the public interest from the point of view of 'monetary stability'.

225 Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (OJ 2001 L 145. p. 43), applicable from 3 December 2001, whose purpose it is to give the fullest possible effect to the right of public access to documents and to lay down the general principles and limits on such access in accordance with Article 255(2) EC, defines a certain number of public and private interests which are safeguarded by means of a body of rules laying down exceptions to the right of access.

226 Article 4(1)(a) of Regulation No 1049/2001 states, in particular, that the institutions are to refuse access to a document where disclosure would undermine the protection of the public interest as regards 'the financial, monetary or economic policy of the Community or a Member State'.

227 In addition, the exceptions to access to documents, laid down in Article 4(1)(a) of Regulation No 1049/2001, are drafted in mandatory terms. It follows that the institutions are obliged to refuse access to documents falling under any one of those exceptions once the relevant circumstances are shown to exist (see, by analogy, Case T-105/95 *WWF UK* v *Commission* [1997] ECR II-313, paragraph 58, and Case T-20/99 *Denkavit Nederland* v *Commission* [2000] ECR II-3011, paragraph 39), and no weighing up of an 'overriding public interest' is provided for in that provision, in contrast with the exceptions referred to in Article 4(2) and (3) of Regulation No 1049/2001.

228 It is also necessary to point out that Article 10(4) of the ESCB Statute provides expressly that the meetings of the Governing Council are to be confidential; also,

that the effect of Article 110 EC, read in conjunction with Article 255 EC, is to exclude the ECB from the scope of the latter provision, thereby evidencing that, as regards access to documents, the ECB benefits from special treatment as compared with the European Parliament, the Council or the Commission.

229 Those specific provisions are related to the tasks conferred on the ECB by the EC Treaty, the authors of which clearly intended to ensure that the ECB is in a position to carry out those tasks in conditions of independence (see, to that effect, Case C-11/00 *Commission* v *ECB* [2003] ECR I-7147, paragraph 130).

230 It should be recalled that the ESCB is made up of the ECB and the national central banks and that it is run by the decision-making bodies of the ECB, which are the Governing Council and the Executive Board. In accordance with Article 105 EC, the basic tasks to be carried out by the ESCB are to define and implement the monetary policy of the Community, to conduct foreign exchange operations, to hold and manage the official foreign reserves of the Member States and to promote the smooth operation of payment systems, the primary objective being to maintain price stability. The ECB makes the regulations and takes the decisions necessary for carrying out the tasks entrusted to the ESCB (Article 110 EC).

231 It thus appears that protection of the public interest related to monetary policy in the Community constitutes a legitimate reason for restricting the right of access to documents held by the Community public authorities, viewed as a fundamental right.

232 In the present case, the applicant disputes the legality of Article 23.3 of the ECB Rules of Procedure which provides, in particular, for a 30-year period of

confidentiality for documents held in the archives of the Committee of Governors. As stated by the ECB in its written pleadings, those archives contain documents drafted, in some cases, by the Committee of Governors, the Committee of Deputies, the subcommittees and the groups of experts and, in other cases, by the Monetary Committee.

233 It is not disputed that the role both of the Committee of Governors and of the Monetary Committee was specifically related to monetary policy in the Community.

234 The Monetary Committee was created on the basis of the former Article 105(2) of the EEC Treaty which provided that, '[in] order to promote coordination of the policies of Member States in the monetary field to the full extent needed for the functioning of the common market, a Monetary Committee with advisory status is hereby set up'.

235 That committee, which is composed of members appointed by the Member States and the Commission, had the specific tasks of keeping under review the monetary and financial situation of the Member States and of the Community and the situation regarding the movement of capital and the freedom of payments, of reporting regularly thereon to the Council and to the Commission, and of delivering opinions for submission to those institutions.

236 On 8 May 1964, the Council adopted Decision 64/300 on cooperation between the Central Banks of the Member States of the European Economic Community, and set up the Committee of Governors composed of the Governors of the Central Banks of the Member States, the Commission being invited to send one of its members as a representative to the meetings of the Committee.

237 The Committee of Governors had, in particular, the tasks of holding 'consultations concerning the general principles and the broad lines of policy of the Central Banks, in particular as regards credit and the money and foreign exchange markets' and of 'exchang[ing] information about the most important measures that fall within the competence of the Central Banks, and [of] examin[ing] those measures'. The tasks of the Committee of Governors were broadened by Decision 90/142, in which it was provided that the Committee could express opinions to individual governments and the Council 'on policies which might affect the internal and external monetary situation in the Community and, in particular, the functioning of the [EMS]'.

238 It should be pointed out that Article 12.2 of the Rules of Procedure of the Committee of Governors stated that 'all documents drawn up by [that committee] are confidential, unless otherwise decided'.

239 The Monetary Committee and the Committee of Governors brought their activities to an end on 1 January 1999 and 1 January 1994, respectively, and were replaced by the Economic and Financial Committee and by the EMI. The documents produced by the former two bodies, possession of which was transferred to the ECB following the dissolution of the EMI, were grouped together, in view of their origin and their nature, in a specific category in the archives.

240 As is stated in the second recital in the preamble to Council Regulation (EEC, Euratom) No 354/83 of 1 February 1983 concerning the opening to the public of the historical archives of the European Economic Community and the European Atomic Energy Community (OJ 1983 L 43, p. 1), as amended by Council Regulation (EC, Euratom) No 1700/2003 of 22 September 2003 (OJ 2003 L 243, p. 1), 'it is standard practice, both in Member States and in international organisations, to make archives available to the public after a number of years has passed'.

241 In the present case, the applicant describes the 30-year period of confidentiality as excessive; he considers it imprecise in so far as the starting point is not expressly laid down in Article 23.3 of the ECB Rules of Procedure; and, in fine, he maintains that it 'reduces his right of access to nothing'.

242 However, it must be pointed out, first, that the 30-year period corresponds exactly to that laid down in Article 1 of Regulation No 354/83, the expiry of which enables, in principle, anyone who has so requested to gain access to the historical archives of the Community institutions.

243 In its rules on historical archives (adopted by the Bank's Management Committee on 7 October 2005) (OJ 2005 C 289, p. 12), the European Investment Bank also set a period of 30 years as the time-limit for opening its historical archives to the public.

244 In addition, Article 4(7) of Regulation No 1049/2001 states that the exceptions to the right of access as laid down in Article 4(1) to (3) apply for a maximum period of 30 years. However, the exceptions relating to the protection of privacy (Article 4(1)(b)) or of commercial interests (the first indent of Article 4(2)) and the specific provisions relating to sensitive documents (Article 9) may, if necessary, apply for longer.

245 Furthermore, although it is undoubtedly common ground that Article 23.3 of the ECB Rules of Procedure does not mention at what point that 30-year period begins, that mere omission cannot, of itself, render the provision contested by the applicant unlawful.

246 In the light of the specific nature of the archives at issue, which cover, inter alia, the activity of a body formed in 1964, which was not dissolved until 1 January 1994, as well as the constant practice referred to above, it must be considered that the 30-year period of confidentiality laid down in the ECB Rules of Procedure adopted in 1998 had, as its starting point — by necessary implication — the date on which the documents were produced. The date of production is also the date opted for in Regulation No 354/83 as the starting date for the 30-year period of confidentiality laid down therein.

247 Second, it is apparent from the second sentence of Article 23.3 of the ECB Rules of Procedure that the confidentiality rule is not absolute.

248 That provision is designed to grant the public the right to apply for a reduction of the period of confidentiality, given that 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 in paragraph 72 above, paragraph 38). Pursuant to the second sentence of Article 23.3 of the ECB Rules of Procedure, which is intended to be of general application, any person may thus request access to any of the documents held in the archives of the Committee of Governors even before the expiry of a 30-year period.

249 Contrary to the applicant's allegations concerning lack of judicial protection, the decision of the Governing Council rejecting the application for a reduction of the period of confidentiality is, as in the present case, subject to review by the courts in accordance with the right to effective judicial protection. It is for the court before which the dispute is brought to ascertain whether the Governing Council lawfully exercised the power conferred on it under the second sentence of Article 23.3 of the ECB Rules of Procedure.

250 It follows from all of the foregoing that the plea of illegality in respect of Article 23.3 of the ECB Rules of Procedure based on the alleged infringement 'of the applicant's right of access to the documents of the ECB and of the fundamental principle of transparency' must be rejected.

— The plea alleging the illegality of Article 23.3 of the ECB Rules of Procedure on grounds of misuse of powers

251 In support of his application for annulment, the applicant claims that the ECB misused its powers both objectively and subjectively.

252 As regards the objective misuse of powers, the applicant submits that the ECB, which enjoys a very high level of independence, adopted Article 23.3 of its Rules of Procedure in haste, without taking account of the case-law or of the constitutional obligation, resulting from the Treaty of Amsterdam signed on 2 October 1997, which required it to provide, in a specific rule, for a right of access to documents. According to the applicant, the ECB acted with the sole objective of 'suppressing a democratic right'.

253 That plea must be rejected in so far as it may be understood as an additional plea seeking to demonstrate the illegality of Article 23.3 of the ECB Rules of Procedure on the ground that the adoption of that provision is vitiated by a misuse of powers.

254 According to settled case-law, a measure may amount to a misuse of powers only if it appears, on the basis of objective, relevant and consistent factors, to have been taken with the exclusive purpose, or at any rate the main purpose, of achieving an

end other than that stated or evading a procedure specifically prescribed by the Treaty for dealing with the circumstances of the case (Joined Cases 140/82, 146/82, 221/82 and 226/82 *Walzstahl-Vereinigung and Thyssen* [1984] ECR 951, paragraph 27; Case 69/83 *Lux* v *Court of Auditors* [1984] ECR 2447, paragraph 30; Case C-331/88 *Fedesa and Others* [1990] ECR I-4023, paragraph 24; and Case T-143/89 *Ferriere Nord* v *Commission* [1995] ECR II-917, paragraph 68).

255 In the present case, it is sufficient to note that the applicant's reasoning is based on a false premiss, in that the provisions of the Treaty of Amsterdam, from which Article 255 EC derives, do not provide for a right of public access to ECB documents. Furthermore, the case-law referred to by the applicant concerning access to documents does not concern the ECB.

256 The mere assertion that the ECB acted with the aim of 'suppressing a democratic right' amounts to pure intellectual speculation, not to concrete and objective evidence of a misuse of powers.

257 It follows from the foregoing that the plea of illegality raised by the applicant in respect of Article 23.3 of the ECB Rules of Procedure must be rejected.

(b) The infringement of the duty to give reasons

258 The applicant submits that the decision of the ECB, in response to his application for reduction of the period of confidentiality so as to gain access to the Basle/Nyborg Agreement, wholly lacks a statement of reasons and infringes Article 253 EC, which the ECB expressly disputes.

259 In its written pleadings, the ECB contended initially that, given the general scope of the decision of the Governing Council, which was not addressed to the applicant, it was not necessary to include in the letter of 8 November 1999, informing the applicant of that decision, 'any additional, individual and specific reasoning'. However, at the hearing, the ECB clearly admitted the individual nature of its decision and subsequently withdrew a plea of inadmissibility based on the general scope of that decision.

260 The ECB considers that, in any case, the letter of 8 November 1999 states a certain number of grounds which clearly show that the Governing Council, which enjoys a very wide discretion in its field of competence, weighed up the applicant's interests as against the protection of the public interest, in particular, as against the risks for monetary stability. Since the Governing Council's essential objective has thus been revealed, it would be excessive to require more precise reasoning, which would have meant disclosing the content of the documents.

261 It should be noted that, according to settled case-law, the statement of reasons required by Article 253 EC must be appropriate to the act at issue and must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted the measure in question in such a way as to enable the persons concerned to ascertain the reasons for the measure and to enable the competent Community Court to exercise its power of review. It is not necessary for the reasoning to go into all the relevant facts and points of law, since the question whether the statement of reasons meets the requirements of Article 253 EC must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question (see *Interporc* v *Commission*, cited in paragraph 150 above, paragraph 55, and the case-law cited).

262 In the present case, the applicant applied, by letter of 27 July 1999, to the ECB for a reduction of the 30-year period of confidentiality, based on Article 23.3 of the ECB

Rules of Procedure, in order to gain access to the documents relating to the Basle/Nyborg Agreement, arguing to that end the importance of those documents for his doctoral thesis.

263 In the light of the nature of the application submitted by the applicant, it is necessary to apply, by analogy, the case-law according to which the institution to which the application for access to documents is made must make clear in the grounds stated for its decision that it has carried out an assessment of the documents to which access is sought (*Kuijer* v *Council*, cited in paragraph 150 above, paragraph 38, and *JT's Corporation* v *Commission*, cited in paragraph 131 above, paragraphs 64 and 65).

264 In response to a request of the Court of First Instance, the ECB produced various documents attesting to the existence of the decision of the Governing Council of 21 October 1999 and, in particular, an extract from the minutes of the 29th meeting of that council, in which reference is merely made to the presentation by the president of the application for access, of the documentary content of the Basle/Nyborg Agreement and of the decision of the Council approving its president's proposal that access to the archives of the Committee of Governors should not be granted.

265 In the letter of 8 November 1999, it is stated that the Governing Council, first, took into consideration the fact 'that the "Basle/Nyborg [A]greement" was not a single document drawn up as a proper agreement among parties, but that the "[A]greement" only existed in the form of reports and minutes of meetings of both the Committee of Governors and of the Monetary Committee' and, second, observed that a press release setting out 'in great detail all points of the agreement reached among the Central Bank Governors' had already been forwarded to the applicant. It is also stated that another document, namely the copy of the instrument of 10 November 1987 implementing the changes to the EMS Agreement of 13 March 1979, was attached to the letter concerned.

266 It is stated in the letter of 8 November 1999 that, '[t]aking into account these considerations, the Governing Council decided not to grant access to the archives of the Committee of Governors'. The director of the Public Relations department of the ECB then concludes that letter by stating that he is confident that the applicant's research work will develop fruitfully since the latter has all essential information on the Basle/Nyborg Agreement at his disposal.

267 Although it is clear from the letter of 8 November 1999 that the Governing Council did actually specify the documentary content of the Basle/Nyborg Agreement, it cannot be inferred from that letter that the Council decision indicates that that institution carried out a concrete assessment of the documents covered by the request for access. The mere fact that the nature of the documents sought was specified cannot be assimilated to an assessment of the information contained in those documents. The decision of the Governing Council of 21 October 1999, as brought to the applicant's knowledge on 8 November 1999, in no way refers to an assessment on the basis of the wording of the documents sought.

268 In any event, even if it were to be accepted that the grounds for that decision show that a concrete examination of the documents sought had been undertaken, it should be pointed out that the applicant was not really put in a position to be able to understand the reasons why he was refused access and that the Court is not in a position to exercise its powers of review.

269 The inescapable conclusion is that, in its decision refusing to reduce the period of confidentiality and thus refusing access to the documents sought, the Governing Council does not base its position on any specific need or reason to protect those documents Nor, a fortiori, does it provide any explanation, however brief, justifying its refusal to disclose the content of the documents, so that it is possible to understand, and to verify, the need for their protection.

270 It appears that that decision is founded exclusively on the assessment made by the Governing Council of the applicant's specific need to get hold of the documents requested, regard being had to the information sent to the applicant in respect of the Basle/Nyborg Agreement, which was considered to be sufficient in his case.

271 Contrary to the ECB's contention, it is not clear from its decision that the applicant's interests had been weighed against the public interest constituted by monetary stability.

272 It is only in its defence that the ECB stated, for the first time, that the Governing Council had considered that the documents requested — which had primarily been intended as guidance for the political discussions at the informal meeting of the finance ministers at Nyborg — contained controversial deliberations and information which had not yet been made available to the public, since those political deliberations had to be kept confidential so as to retain 'room' for reflection. It is in the rejoinder that, in response to the plea alleging infringement of the duty to give reasons, the ECB contended that the grounds for the decision clearly show that the Governing Council had 'indeed weighed up the applicant's interests in relation to the protection of the public interest and in particular in relation to the risks for monetary stability'.

273 In addition, it should be recalled that, whilst the context in which a decision is adopted may make the requirements to be satisfied by the institution as regards the statement of reasons lighter, it may, conversely, also make them more stringent in certain circumstances (*Kuijer* v *Council*, cited in paragraph 150 above, paragraph 45). Thus, in the present case, it is necessary to examine whether the duty to give reasons was respected, in the light of all the correspondence exchanged between the institution and the applicant.

274 In response to his first request for access to the Basle/Nyborg Agreement, the ECB informed the applicant that the documents of the Committee of Governors did not fall within the scope of Decision 1999/284 but within that of Article 23.3 of its Rules of Procedure which states, in particular, that those documents are to be freely accessible only after a period of 30 years. Consequently, the ECB did not send the applicant any document filed in the archives of the Committee of Governors.

275 On 27 July 1999, the applicant wrote to the ECB asking for a re-examination of his request on the basis of Article 23.3 of the ECB Rules of Procedure, which authorises the Governing Council, in special cases, to reduce the 30-year period of confidentiality. In support of his request, the applicant argued expressly that the Basle/Nyborg Agreement took place long ago and that the EMS is of purely historical interest.

276 Accordingly, the obligation to give reasons meant that the ECB should have responded to that second request for access — on a different legal basis, of course, but to the same effect — by stating the reasons why the arguments put forward by the applicant were not such as to enable the ECB to go back on its initial position that the documents at issue were confidential.

277 As it is, in the decision of the ECB, the Governing Council did not give any reason capable of refuting the applicant's arguments. Once again, it was not until after the action for annulment had been brought that the ECB contended, first, that the opinions expressed and the strategies analysed in the documents constituting the Basle/Nyborg Agreement were still valid and could have repercussions on the current exchange rate mechanism, even if it concerned only the central banks of two Member States, and second, that, 'in order to avoid any confusion of the markets', there were legitimate reasons for not making those documents public.

278 It should be pointed out that the reasons for a decision have to appear in the actual body of the decision and that, if that decision contains a statement of reasons of some kind, as in the present case, that reasoning cannot be developed and explained for the first time ex post facto before the Community Court, save in exceptional circumstances which are not present in this case given that there is no urgency and in the light of the unique character of the act which had to be adopted by the ECB (see, to that effect, Case T-61/89 *Dansk Pelsdyravlerforening* v *Commission* [1992] ECR II-1931, paragraph 131, and Joined Cases T-374/94, T-375/94, T-384/94 and T-388/94 *European Night Services and Others* v *Commission* [1998] ECR II-3141, paragraph 95).

279 It is apparent from the foregoing findings that the decision of the ECB must be annulled as not satisfying the obligation to give reasons, as laid down in Article 253 EC, without there being any need to examine the other pleas raised by the applicant, alleging, respectively, misuse of powers, infringement of the principle of sound administration and error of assessment on the part of the ECB.

280 Finally, it is necessary at this juncture to point out that, after bringing an action for annulment (Case T-3/00), the applicant brought an action for damages (Case T-337/04) from which it is apparent that the allegedly unlawful conduct of the Council and the ECB consists precisely in the adoption of the decisions in respect of which the applicant seeks annulment in Case T-3/00.

281 In the context of his action for damages and in order to show the unlawful conduct of the defendants, the applicant developed arguments partially identical to those formulated for the purpose of obtaining annulment of the acts at issue. It is not disputed that the applicant raised a new plea of illegality in respect of the contested decisions refusing access — alleging infringement of the principle of legal certainty — and new arguments in support of the pleas of illegality already raised in the annulment proceedings in response to certain contentions made by the defendants in the course of those proceedings.

282 Those arguments must be rejected as inadmissible in so far as they can be understood as additional support for the claim in Case T-3/00 that the decisions of the Council and the ECB should be annulled.

283 It should be noted, in that regard, that the action to establish liability is an independent form of action, with a particular purpose to fulfil within the system of legal remedies and subject to conditions of use dictated by its specific purpose. Whereas actions for annulment and for failure to act seek a declaration that a legally binding measure is unlawful or that such a measure has not been taken, an action to establish liability seeks compensation for damage resulting from a measure or from unlawful conduct, attributable to a Community institution or body (see Case C-234/02 P *Ombudsman* v *Lamberts* [2004] ECR I-2803, paragraph 59, and the case-law cited).

284 In the present case, the principle of independent legal remedies precludes a collective assessment of all the pleas of illegality raised in the context of the action for annulment and the action for damages, in view of the different consequences flowing from decisions upholding such actions. The success of an action for annulment results in the disappearance of the act impugned from the Community legal order, whereas the success of an action for damages enables the damage caused thereby to be made good, but does not result in the automatic extinction of the act impugned.

285 The joining of Cases T-3/00 and T-337/04 for the purposes of the oral procedure and the judgment is not capable of rebutting that conclusion, given that the order for joinder does not affect the independence and autonomy of the cases which it covers, since they may always subsequently be disjoined (Joined Cases C-280/99 P to

C-282/99 P *Moccia Irme and Others* v *Commission* [2001] ECR I-4717, paragraph 66, and Case T-209/01 *Honeywell* v *Commission* [2005] ECR II-5527, paragraph 71).

C — *The applications for measures of inquiry or of organisation of procedure*

286 In the context of his action for annulment, the applicant requested the Court to carry out measures of inquiry to clarify the circumstances in which the contested decisions were adopted and, more specifically, to determine in what circumstances the ECB came into possession of the report of the Monetary Committee, and to order the ECB to add to the documents before the Court the minutes of the meeting of the Governing Council of 21 October 1999.

287 In the light of (i) the information provided by the ECB relating to the circumstances in which the report of the Monetary Committee came to be in its possession, as described in paragraph 144 above, (ii) the provision by the ECB of various documents and, in particular, of an extract from the minutes of the 29th meeting of the Governing Council of 21 October 1999 and (iii) the explanations and documents provided by the Council concerning the circumstances in which the decision of 30 July 1999 was adopted, the applicant's requests as referred to in the preceding paragraph must be regarded as having being satisfied and have therefore become redundant.

288 As regards the applicant's request for a measure of organisation of procedure, whereby the ECB would have had to provide statistical information relating to access to its documents during the period from 1 June 1998 to 31 May 2000, it must be rejected as having no bearing on the outcome of the dispute.

The application for damages

A — *Preliminary considerations*

289 It should be pointed out that the applicant clearly seeks to establish the non-contractual liability of the Community, within the meaning of the second paragraph of Article 288 EC, for unlawful conduct on the part of its organs.

290 It is settled case-law that such liability depends on fulfilment of a set of conditions, namely: the unlawfulness of the conduct alleged against the institutions, the fact of damage and the existence of a causal link between that conduct and the damage complained of (Case 26/81 *Oleifici Mediterranei* v *EEC* [1982] ECR 3057, paragraph 16; Case T-175/94 *International Procurement Services* v *Commission* [1996] ECR II-729, paragraph 44; Case T-336/94 *Efisol* v *Commission* [1996] ECR II-1343, paragraph 30; and Case T-267/94 *Oleifici Italiani* v *Commission* [1997] ECR II-1239, paragraph 20).

291 As regards the first of those conditions, the case-law requires there to be a sufficiently serious breach of a rule of law intended to confer rights on individuals (Case C-352/98 P *Bergaderm and Goupil* v *Commission* [2000] ECR I-5291, paragraph 42). As regards the requirement that the breach must be sufficiently serious, the decisive test for determining whether that requirement is met is whether the Community institution concerned has manifestly and gravely disregarded the limits on its discretion. Where that institution has only a considerably reduced or even no discretion, the mere infringement of Community law may be sufficient to establish the existence of a sufficiently serious breach (Case C-312/00 P *Commission* v *Camar and Tico* [2002] ECR I-11355, paragraph 54, and Joined Cases T-198/95,

T-171/96, T-230/97, T-174/98 and T-225/99 *Comafrica and Dole Fresh Fruit Europe* v *Commission* [2001] ECR II-1975, paragraph 134).

292 As regards the condition concerning the causal link, the Community may be held responsible only for damage which is a sufficiently direct consequence of the misconduct of the institution concerned (Joined Cases 64/76, 113/76, 167/78, 239/78, 27/79, 28/79 and 45/79 *Dumortier Frères and Others* v *Council* [1979] ECR 3091, paragraph 21, and Case T-333/01 *Meyer* v *Commission* [2003] ECR II-117, paragraph 32). By contrast, it is not the responsibility of the Community to compensate for every harmful consequence, even a remote one, of the conduct of its organs (see, to that effect, *Dumortier Frères and Others* v *Council*, paragraph 21).

293 As regards the damage suffered, it must be pointed out that that damage must be actual and certain (Joined Cases 256/80, 257/80, 265/80, 267/80 and 5/81 *Birra Wührer and Others* v *Council and Commission* [1982] ECR 85, paragraph 9, and Case T-99/98 *Hameico Stuttgart and Others* v *Council and Commission* [2003] ECR II-2195, paragraph 67), and quantifiable (Case T-108/94 *Candiotte* v *Council* [1996] ECR II-87, paragraph 54). By contrast, purely hypothetical and indeterminate damage does not give rise to compensation (see, to that effect, *Oleifici Italiani* v *Commission*, cited in paragraph 290 above, paragraph 73).

294 It is for the applicant to produce to the Court the evidence to establish the existence and the extent of the damage suffered (Case 26/74 *Roquette Frères* v *Commission* [1976] ECR 677, paragraphs 22 to 24; Case T-575/93 *Koelman* v *Commission* [1996] ECR II-1, paragraph 97; and Case T-184/95 *Dorsch Consult* v *Council and Commission* [1998] ECR II-667, paragraph 60).

295 Finally, where one of the conditions is not satisfied the application must be dismissed in its entirety without it being necessary to examine the other preconditions (Case C-146/91 *KYDEP* v *Council and Commission* [1994] ECR I-4199, paragraphs 19 and 81, and Case T-170/00 *Förde-Reederei* v *Council and Commission* [2002] ECR II-515, paragraph 37).

B — *The damage suffered and the causal link*

1. *Arguments of the parties*

296 As regards the condition relating to the existence of damage, the applicant states, first, that the refusal of the two Community 'institutions' to grant him access to the document requested had disrupted his timetable for writing his thesis and was still preventing him — three years and four months after the expiry of the deadline set for handing in his thesis (31 March 2001) — from finishing it and submitting it to the Thessaloniki Faculty of Law. It is a logical result of that situation that the applicant has suffered material damage in the form of loss of revenue which he would have received by reasonably and appropriately using the doctorate which he would have obtained, in this case by securing a legal position within an international institution or body such as the ECB or the International Monetary Fund (IMF).

297 The applicant points out that the procedural principle that it is for the person claiming the existence of damage to furnish evidence thereof is not without limits. The Court of First Instance should take into account, first, the specific nature of the case, second, the nature of the damage suffered and the principle of procedural equality as regards the burden of proof and, third, the case-law of the Court of Justice.

298 Thus, according to the applicant, this is the first case in the field of extra-contractual responsibility concerning access to documents and the case-law referred to by the ECB is in no way relevant in such a context. Only the case-law concerning the Staff Regulations is capable of providing useful criteria for assessment.

299 The content of the application does not leave any room for doubt about the fact that the damage complained of is loss of potential earnings (*lucrum cessans*) and not actual loss incurred (*damnum emergens*), those being two distinct concepts, as the Court has consistently held (*Oleifici Italiani* v *Commission*, cited in paragraph 290 above, paragraph 72, and Case T-149/96 *Coldiretti and Others* v *Council and Commission* [1998] ECR II-3841, paragraph 48).

300 The evidentiary requirements in respect of loss of potential earnings are less stringent than those in respect of actual loss, in so far as it is necessary to examine the existence of damage and the assessment of that damage in the light of the normal course of events and real probabilities, not theoretical ones. The applicant maintains, in that regard, that he has produced all the documentation necessary to establish the actual existence of the damage complained of.

301 He claims that the damage which he has suffered must be calculated on the basis of the earnings of a lawyer holding a doctorate and employed by the ECB as of 1 April 2001, the date on which the applicant was due to submit his doctoral thesis, up until three months after the date of delivery of the judgment of the Court of First Instance in the present case, after deduction of the income which the applicant has earned over that period from practising law in Greece. The applicant requests the Court to call on the ECB to produce the relevant information relating to the remuneration of its staff so that a precise calculation of the damage suffered can be made.

302 That assessment of the damage suffered would be based on the probable course of events. It is not a situation chosen at random but a situation which could in all

likelihood have occurred in the light of the job applications actually made by the applicant to the ECB. The applicant alleges that the information submitted goes beyond what is required by the case-law relating to proof of loss of potential earnings (Case T-231/99 *Joynson* v *Commission* [2002] ECR II-2085, paragraphs 102, 114, 124, 134, 137 and 173).

303 The applicant claims, second, that the delay of approximately three and a half years in finishing his thesis caused him very serious non-material damage consisting in:

— a significant prolongation of his anxieties concerning the completion of his thesis;

— the delay to his career and financial advancement;

— the impossibility of applying for job opportunities in Greece and, in particular, abroad, for which a doctorate was necessary;

— the postponement of a career in an academic environment which requires a doctorate, the resulting uncertainty and the worsening of his situation, in view also of his age;

— the need to update his thesis repeatedly as a result of constant developments in the EMU and the resulting loss of time and fatigue;

— the psychological pressure suffered to this day concerning the completion of his thesis, the negative and ironic comments made about him and which continue to be made, and the obligation to have to give an explanation every time he is asked when his thesis will be completed;

— the loss of time and energy brought about by the proceedings before the Court of First Instance and the Court of Justice;

— the psychological strain caused by the length of the proceedings, the outcome of which is fundamental for his future.

304 The applicant claims that, in those circumstances, he should be awarded the sum of EUR 90 000 by way of compensation for the non-material damage which he has suffered.

305 As regards the requirement relating to the causal link, the applicant asserts that the material and non-material damage which he has suffered are the direct consequence of the unlawful refusal to grant him access to the document concerned, which constitutes the core element of his study, in so far as it is a unique historical and legal source and is indispensable for establishing 'the existence and functioning of soft law in the financial and monetary sector covered by the EMU and the activities of the G7/8'.

306 He submits that the refusal to grant access has had a catastrophically negative effect on his timetable for drafting his thesis, since it has made it impossible for him to meet the deadline for its submission — set as 31 December 2000, then as 31 March 2001 — a negative effect which persists to this day.

307 The applicant states that, for three years — from the beginning of 1997 to the end of 1999 — he spent all his time drafting his thesis and that, since the summer of 1999, when his research was at an advanced stage, the only thing that has interfered with his drafting timetable and prevented him from completing his thesis has been the contested decisions refusing access.

308 He also invokes the case-law of the Court of Justice and the Court of First Instance on the causal link and, more specifically, the judgment in Case T-45/01 *Sanders and Others* v *Commission* [2004] ECR II-3315, in which the Court of First Instance 'distinguished the theoretical uncertainty of the genuine uncertainty and recognised the difficulties of proof' by placing the burden of proof on the Commission.

309 As regards the question whether he was able, on expiry of the deadline, to submit his thesis without taking the Basle/Nyborg Agreement into account, or even whether he ought to have done so, the applicant asserts that that question is primarily linked to his independence, his research freedom and his internal autonomy in his scientific choices, and the evaluation of the needs of his thesis, which need to be recognised.

310 He refers, in that regard, to *Mattila* v *Council and Commission*, cited in paragraph 99 above, in which the Court considered that the applicant for access, and he alone, was the judge of the documents which he needed since the administrative institution did not have any power to intervene in the assessment of what is necessary or useful for the applicant.

311 The applicant submits that, in so far as he considered at the time of his request for access — and still considers — that the Basle/Nyborg Agreement is relevant for his thesis, he could not and did not have to ignore that agreement and submit a very mediocre piece of work to the Faculty of Law on 31 December 2000. Moreover,

there is no alternative way for the applicant to establish the legal means by which the macroeconomic indices of the G7 were integrated into the EMS in 1987, how they worked afterwards until the creation of the EMU in 1991-92 and, ultimately, what the position is today as regards those indices.

312 He states, finally, that the considerations relating to his independence and his internal scientific autonomy meet the ECB's contentions as to his alleged contribution to the occurrence of the damage.

313 The Council and the ECB contend that the requirements for extra-contractual liability in relation to the existence of damage which is certain, and of a direct causal link between that damage and the unlawful conduct alleged, are lacking in the present case.

2. *Findings of the Court*

314 The applicant claims that the material and non-material damage spring directly from the refusal by the Council and the ECB to grant access to the documents constituting the Basle/Nyborg Agreement.

315 First, as regards the material damage, categorised as loss of opportunity or loss of potential earnings, that damage consists, in the applicant's view, in the loss of the income that he would have earned through reasonable and appropriate use of the doctorate which he would already have obtained, in his case through securing a legal position with an international institution or body such as the ECB or the IMF.

316 It is, however, apparent from the applicant's written submissions that the alleged loss of opportunity and potential earnings are themselves the consequence of an initial event, namely the failure to complete the thesis before the submission date and the subsequent failure to qualify for a doctorate in law.

317 That initial event cannot be considered to be the direct cause of the alleged loss of opportunity or loss of potential earnings, in so far as the applicant does not establish that possession of a doctorate was a necessary precondition for obtaining a position with one of the bodies to which he refers.

318 Nor does the failure to complete and submit the thesis before the deadline of 31 March 2001 appear to be the direct consequence of the contested decisions refusing access, which were brought to the applicant's knowledge in August and November 1999 whereas, by his own admission, his research was already at an advanced stage in the summer of 1999. That situation can be considered only as having been brought about by the applicant himself, who — besides challenging the refusals — should have been vigilant as to the progress of his thesis so that he could submit and defend it within the period allowed for that purpose, albeit in the belief that his research was incomplete.

319 Moreover, it should be recalled that, if loss of opportunity is capable of constituting reparable damage (Case T-47/93 *C* v *Commission* [1994] ECR-SC I-A-233 and II-743, paragraph 54), that damage must none the less be actual and certain if compensation is to be possible.

320 As it is, the applicant has not established that the opportunity of which he was deprived, namely of gaining a position within the ECB or another body and of benefiting from the related financial advantages, was actual and certain in the sense that he would otherwise have had every chance of obtaining such a position, or at

least a serious chance of doing so (see, to that effect, Case T-10/02 *Girardot* v *Commission* [2006] ECR-SC I-A-2-129 and II-A-2-609, paragraphs 96 to 98, and the case-law cited). In that regard, the job applications sent by the applicant to the ECB in 1999 do not support the finding that he was in the middle of a recruitment process which was due to be finalised after he had obtained his doctorate. The applicant's arguments as to his chances of obtaining a position with the ECB or another body on successful completion of his doctoral thesis are, in actual fact, purely speculative.

321 Second, it should be pointed out that the applicant himself states, in paragraph 35 of his application, that it was 'the delay' of approximately three and a half years in completing his thesis which caused him very serious non-material damage.

322 For the reasons set out in paragraph 318 above, it must be concluded that there is no direct causal link between the contested decisions refusing access and the non-material damage claimed.

323 It should, however, be noted that one of the aspects of the alleged non-material damage suffered by the applicant, as defined in paragraph 303 above, is the loss of time and energy and the psychological 'strain' brought about by the bringing and following of the legal proceedings relating to the contested decisions refusing access, and by the drawn-out nature of those proceedings.

324 In so far as the loss of time and energy alleged by the applicant, and the psychological strain — which are different from his claims concerning the uncertainty, anxiety and frustration brought about by the failure to complete his thesis before the submission date and the subsequent failure to obtain his doctorate in law — may be regarded as the direct consequence of the contested decisions refusing access, they cannot be regarded as characterising non-material damage for which compensation is possible.

325 As regards the psychological strain purportedly suffered by the applicant, it must be noted that the applicant merely claims this to be so, and does not provide any documentary evidence attesting to genuine psychological distress. As regards the alleged loss of time and energy, such inconvenience is an unavoidable part of the bringing and following of legal proceedings, and cannot be assimilated to non-material damage in respect of which compensation is possible. On that point, it is important to note that, in accordance with Article 19 of the Statute of the Court of Justice, the applicant was represented, both in the current proceedings and in those before the Court of Justice in the case which gave rise to the judgment in *Pitsiorlas*, cited in paragraph 38 above, by a lawyer whose very role it is to assist the litigant, inter alia, by drafting the pleadings and following the progress of the proceedings in the name of, and on behalf of, his client.

326 It is clear from the foregoing considerations that the conditions which must be met in order for extra-contractual liability to be incurred, concerning the existence of actual and certain damage and a direct causal link between that damage and the allegedly unlawful conduct of the defendants, are not in fact met and that the action for damages brought by the applicant must therefore be dismissed, there being no need to examine the condition concerning the unlawfulness of the conduct of the Council and the ECB.

Costs

327 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 pleadings of the successful party. Article 87(3) provides that, where each party succeeds on some and fails on other heads, or where the circumstances are exceptional, the Court may order that the costs be shared or that each party bear its own costs.

328 In the present case, the applicant's claims have been upheld in so far as they concern the annulment of the decision of the ECB and that the Council has wrongly sought to plead that the action seeking the annulment of its decision of 30 July 1999 was inadmissible. On the other hand, the applicant's claim for annulment of that decision and his claim for damages against the Council and the ECB have been dismissed.

329 The Court considers that, in the specific circumstances of the present case, it is fair to order the Council, the ECB and the applicant each to bear their own costs as incurred in Joined Cases T-3/00 and T-337/04. The Council must also bear its own costs, together with those of the applicant, as incurred in Case C-193/01 P.

330 Lastly, it should be observed that the ECB has not provided any information justifying the application in the present case of Article 87(3) of the Rules of Procedure and an order for the applicant to pay to the ECB costs considered to be unreasonable or vexatious.

On those grounds,

THE COURT OF FIRST INSTANCE (Fifth Chamber)

hereby:

1. Annuls the decision of the Governing Council of 21 October 1999, as brought to the knowledge of Mr Athanasios Pitsiorlas by letter of the European Central Bank (ECB) of 8 November 1999;

2. **Dismisses the action for annulment as to the remainder;**

3. **Dismisses the action for damages;**

4. **Orders the Council, the ECB and the applicant each to bear their own costs as incurred in Joined Cases T-3/00 and T-337/04. The Council shall bear the costs that it incurred in Case C-193/01 P, together with those incurred in that case by the applicant.**

Vilaras Martins Ribeiro Jürimäe

Delivered in open court in Luxembourg on 27 November 2007.

E. Coulon M. Vilaras

Registrar President

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