JUDGMENT OF THE COURT OF FIRST INSTANCE
(Fourth Chamber, Extended Composition)

11 December 2001 *

In Case T-191/99,

David Petrie, Victoria Jane Primhak and **David Verzoni,** residing respectively in Verona, Naples and Bologna (Italy),

Associazione lettori di lingua straniera in Italia, incorporating Committee for the Defence of Foreign Lecturers (ALLSI/CDFL), established in Verona,

represented by L. Picotti and C. Medernach, lawyers, with an address for service in Luxembourg,

applicants,

* Language of the case: Italian.

Commission of the European Communities, represented by P. Stancanelli and U. Wölker, acting as Agents, with an address for service in Luxembourg,

defendant,

APPLICATION for the annulment of the Commission decision of 20 July 1999 refusing access to documents relating to Infringement Procedure No 96/2208 brought under Article 226 EC against the Italian Republic and concerning the situation of foreign-language lecturers employed in Italian universities,

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

composed of: P. Mengozzi, President, R. García-Valdecasas, V. Tiili, R.M. Moura Ramos and J.D. Cooke, Judges,

Registrar: J. Palacio González, Administrator,

having regard to the written procedure and further to the hearing on 14 March 2001,

gives the following

Judgment

Legal framework

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

'The Conference considers that transparency of the decision-making process strengthens the democratic nature of the institutions and the public's confidence in the administration. The Conference accordingly recommends that the Commission submit to the Council no later than 1993 a report on measures designed to improve public access to the information available to the institutions.'

2 On 6 December 1993, the Council and the Commission approved a Code of Conduct concerning public access to Council and Commission Documents (OJ 1993 L 340, p. 41) ('the Code of Conduct'), designed to establish the principles governing access to the documents held by them.

3 With a view to guaranteeing implementation of that Code, the Commission, on 8 February 1994, adopted Decision 94/90/ECSC, EC, Euratom on public access to Commission documents (OJ 1994 L 46, p. 58), Article 1 of which formally adopts the Code of Conduct, the text of which is set out in the annex to that decision.

4 The Code of Conduct lays down the following general principle:

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

5 The term 'document' is defined as 'any written text, whatever its medium, which contains existing data and is held by the Commission or the Council'.

6 Under the third paragraph of the section headed 'Processing of initial applications', the Code of Conduct provides as follows (the 'authorship rule'):

'Where the document held by an institution was written by a natural or legal person, a Member State, another Community institution or body [or] any other national or international body, the application must be sent direct to the author.'

7 The matters which an institution may invoke in order to justify refusal of an application for access to documents are set out as follows under the heading of the Code of Conduct entitled 'Exceptions':

'The institutions will refuse access to any document where disclosure could undermine:

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

...

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

8 On 4 March 1994 the Commission adopted a communication on improved access to documents (OJ 1994 C 67, p. 5), setting out details of the criteria for implementation of Decision 94/90. That communication states that 'anyone may... ask for access to any unpublished Commission document, including preparatory documents and other explanatory material'. In regard to the exceptions provided for under the Code of Conduct, the communication states: 'the Commission may take the view that access to a document should be refused because its disclosure could undermine public and private interests and the good functioning of the institution'. It further states in this regard: 'There is nothing automatic about the exemptions, and each request for access to a document will be considered on its own merits.'

9 Under the Treaty of Amsterdam, which entered into force on 1 May 1999, the Member States incorporated a new article on access to documents in the EC Treaty. Article 255 EC provides:

'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.'

10 In addition, Article 1, second paragraph, EU provides:

'This 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.'

11 On 30 May 2001 the European Parliament and the Council, pursuant to Article 255(2) EC, adopted Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission documents (OJ 2001 L 145, p. 43).

Facts of the dispute

12 The applicants, who are natural persons, held posts as lecturer of foreign mother tongue at a number of Italian universities. This post was discontinued and replaced, in 1995, by that of 'assistant and mother tongue language expert'. In the present proceedings, Mr Petrie is acting on his own behalf and as the legal representative of the Associazione lettori di lingua straniera in Italia, incorporating Committee for the Defence of Foreign Lecturers (ALLSI/CDFL), a union organisation set up to represent and protect the category of lecturers in question.

13 In its judgments in Case 33/88 *Allué and Coonan* [1989] ECR 1591 and in Joined Cases C-259/91, C-331/91 and C-332/91 *Allué and Others* [1993] ECR I-4309, the Court of Justice ruled that the continued and systematic use by Italian universities of fixed-term contracts to meet ongoing needs in language teaching was incompatible with Community law where such a limit did not in principle exist in regard to other areas of teaching. Notwithstanding those judgments and the subsequent reform of foreign-language teaching in Italian universities, the applicants take the view that discrimination against former lecturers of foreign mother tongue still persists.

14 Following a number of complaints, the Commission opened infringement proceedings under Article 226 EC against the Italian Republic. It sent a letter of formal notice, dated 23 December 1996, to the Italian Government. Subsequently, by reasoned opinion of 16 May 1997, the Commission requested that Government to set out its views on the complaints raised. Following receipt

of the Italian Government's response, the Commission recast the heads of complaint by way of a supplementary letter of formal notice of 9 July 1998. On 28 January 1999 the Commission issued a supplementary reasoned opinion. As a result of that procedure, the Commission brought the matter before the Court of Justice in June 1999.

15 As they considered that the situation presented to the Commission did not reflect the true state of affairs, the applicants, with a view to examining the content of the documents in the Commission's possession relating to Infringement Procedure No 96/2208, requested, by letter of 1 April 1999 addressed to the Commission's Directorate-General 'Employment, Industrial Relations and Social Affairs', access to the following documents:

(a) telex No 1923/I.2/93 of 2 November 1993 from the Ministero dell'Università e della Ricerca Scientifica e Tecnologica (Italian Ministry responsible for Universities and for Scientific and Technological Research) ('the MURST') to the rectors of Italian universities concerning the suspension of all relations or activity with lecturers following the judgment in *Allué and Others*, cited above;

(b) letter of formal notice of 23 December 1996 opening Infringement Procedure No 96/2208 and the documents attached thereto;

(c) letter of reply from the MURST to the Commission of 7 March 1997 (reference 562) and, if relevant, the attached documents;

(d) reasoned opinion of the Commission of 16 May 1997 concerning Infringement Procedure No 96/2208 and related annexes;

(e) all of the documents relating to the activity of the MURST, the Conference of Rectors, the Department of Community Policies and of the Ministry of Foreign Affairs, in order to obtain the other material requested by the Commission in its reasoned opinion of 16 May 1997, which include, for example, requests for information, counter-arguments or documents sent to the Italian universities or other bodies or administrative authorities and the replies received from these, together with a summary list;

(f) memorandum of July 1997 and/or 7 August or 21 August 1997 from the MURST to the Commission (through the intermediary of the Office of the Italian Permanent Representative) and the attached documents with the results of the previous investigation;

(g) memorandum of 12 September 1997 from the Department of Community Policies to the Commission and related documents;

(h) *communiqué* of 19 and 20 December 1997 from Ambassador Cavalchini to the MURST;

(i) the Commission's supplementary letter of formal notice of 9 July 1998;

(l) memorandum of 7 August 1998 from the MURST to the Italian universities and the list of the Italian universities to which that memorandum was addressed;

(m) memoranda No 2599 of 10 August 1998 and No 3830 of 16 November 1998 from the MURST to the Commission;

(n) counter-arguments and documents sent by the Italian universities in reply to the MURST's memorandum of 7 August 1998, and the list thereof;

(o) memorandum of 10 December 1997 from the MURST to the Office of the Italian Permanent Representative to the European Union;

(p) ministerial circulars interpreting Article 4 of Italian Law No 236/95, in particular that of 7 August 1998 from the MURST to the rectors of the Italian universities bearing the signature of Under-Secretary Luciano Guerzoni;

(q) the Commission's supplementary reasoned opinion of 28 January 1999;

(r) any other document or measure not included in the above list and relating to the investigations and requests for information from the MURST concerning the Italian universities with regard to the situation of lecturers and/or language assistants following the judgment in *Allué and Others* and the entry into force of Italian Law No 236/95, and in any event relating to the Italian State's defence in the abovementioned infringement procedure, including the reply, if any, to the reasoned opinion referred to under (q).

16 By letter of 3 May 1999 the Commission refused access to the aforementioned documents. The applicants thereupon confirmed their request for access by letter of 3 June 1999.

17 After briefly extending, by letter of 2 July 1999, the period for replying to that request, the Secretary-General of the Commission, by decision of 20 July 1999, rejected the confirmative request (hereinafter 'the decision' or 'the contested decision'). The decision is drafted in the following terms:

'... I would first like to confirm that the documents mentioned in your letter under references (a), (c), (e), (f), (g), (h), (l), (m), (n) and (p) are not Commission documents, having been provided by the Italian authorities. I therefore suggest that you contact directly those authorities in order to obtain copies of those documents. Even though the general principle in the Code of Conduct concerning public access to Commission and Council documents provides that "the public will have the widest possible access to documents held by the Commission and the Council", the fifth paragraph of that Code states that "where the document held by an institution was written by a natural or legal person, a Member State, another Community institution or body [or] any other national or international body, the application must be sent direct to the author".

Concerning the documents mentioned in your letter under references (b), (d), (i) and (q), which are Commission documents, I regret to inform you that, after detailed consideration of your request, I am obliged to confirm the refusal by Mr [Larsson] in so far as disclosure of those documents might adversely affect the protection of the public interest and in particular the conduct of investigations liable to result in the opening of the procedure under Article 226 EC (formerly Article 169 of the EC Treaty). The Code of Conduct expressly provides for this exception.

It is vital that the Commission should be able to conduct investigations into issues in which it has a direct interest as guardian of the Treaties, while at the same time respecting the intrinsic nature of such proceedings. Infringement investigations call for genuine cooperation and an atmosphere of mutual trust between the Commission and the Member State concerned so as to enable those two parties to open discussions with a view to a rapid resolution of the dispute.

This attitude is consistent with the judgment of the Court of First Instance in Case T-105/95 *WWF UK* v *Commission* [1997] ECR II-313, paragraph 63 of which states that: "In this regard, the Court considers that the confidentiality which the Member States are entitled to expect of the Commission in such circumstances warrants, under the heading of protection of the public interest, a refusal of access to documents relating to investigations which may lead to an infringement procedure, even where a period of time has elapsed since the closure of the investigation."

Furthermore, disclosure of those documents, which concern proceedings that are pending (Infringement Procedure No 96/2208 against Italy), could have an adverse effect on another public interest referred to in the Code of Conduct, namely the proper conduct of court proceedings. Such disclosure would be liable to affect the interests of the parties involved and could adversely impact on the specific rules governing submission of documents in connection with those proceedings...'

Procedure and forms of order sought by the parties

18 By application lodged at the Court Registry on 25 August 1999, the applicants brought the present action.

19 The parties presented oral argument and replied to the questions put by the Court at the hearing on 14 March 2001.

20 The applicants claim that the Court should:

— annul the Commission's decision contained in the letters of 3 May 1999 and 20 July 1999 in so far as it refuses access to the documents held by the Commission concerning Infringement Procedure No 96/2208 brought under Article 226 EC against the Italian Republic;

— declare that the applicants have a right of access to those documents and order the Commission to allow such access;

— order the Commission to pay the costs.

21 The defendant claims that the Court should:

— primarily, declare the action inadmissible in its entirety on grounds of absence of *locus standi*;

— in the alternative, dismiss as unfounded the application for annulment of the contested decision;

— declare inadmissible the application for recognition of the applicants' right of access to the documents in question and the application for an order requiring the Commission to allow such access;

— order the applicants to bear the costs.

22 At the hearing, the applicants withdrew their application for annulment in so far as it relates to the decision contained in the Commission's letter of 3 May 1999. They also withdrew their application for a declaration that they have a right of access to those documents and for an order requiring the Commission to grant such access.

23 The applicants also sought leave at the hearing to place on the case file the decision of 13 September 2000 taken by the European Ombudsman, Mr Söderman, in relation to their complaint No 161/99/IJH. The Court decided to place that document on the file after hearing the defendant, which did not raise any objection although maintaining that the document was irrelevant to the resolution of the dispute.

Admissibility

24 The defendant submits that the applicants would appear already to have possession of certain of the documents to which they were refused access and that in any event they are aware of the contents of the documents requested. The contested decision does not therefore substantially affect the applicants' interests because it does not significantly alter their legal position. The applicants consequently lack *locus standi*.

25 The Commission's contention cannot be accepted.

26 As has been pointed out frequently in the case-law, it follows from the overall scheme of Decision 94/90 that it is intended to apply generally to requests for access to documents and that, pursuant to that decision, any person may request access to any unpublished Commission document and is not required to give a reason for the request. It follows that any person 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-124/96 *Interporc* v *Commission* [1998] ECR II-231, paragraph 48, ('*Interporc I*'), and Case T-174/95 *Svenska Journalistförbundet* v *Council* [1998] ECR II-2289, paragraphs 65 to 67).

27 The action is accordingly admissible.

Substance

28 The applicants invoke three pleas in law in support of their action. The first plea is based on infringement of Article 255(1) EC and of Article 1, second paragraph, EU. The second plea is based on breach of Decision 94/90. The third plea relates to infringement of Article 253 EC.

The first plea in law: infringement of Article 255(1) EC and of Article 1, second paragraph, EU

Arguments of the parties

29 The applicants note at the outset that Article 1, second paragraph, EU and Article 255(1) EC reinforce the principle of transparency, which, through the

exercise of the rights to information which it allows, constitutes an essential democratic basis for achieving European integration through greater confidence of citizens in the Community institutions and a greater closeness of those institutions to citizens.

30 The applicants argue in this connection that no express limit on the exercise of those rights is provided for in any specific legal measure, with the exception of the Council's power to fix such a limit, under the procedure set out in Article 251 EC (see Article 255(2) EC), during the two years following the entry into force of the Treaty of Amsterdam and the provision under which each institution elaborates in its own Rules of Procedure specific provisions regarding access to its documents (see Article 255(3) EC).

31 The applicants stress that the Treaty of Amsterdam is now in force and that the principles which it sets out cannot be deprived of their substance by the argument that, in the absence of measures of application, they are not directly applicable. The provision on the right of access, a right which is also set out in Article 1 EU, must be understood as a provision containing a substantive legal rule and requiring immediate application. Consequently, in order to be regarded as being legal *vis-à-vis* the higher norms of primary law, the existing Community provisions must be construed in a manner consistent with those norms, even if the latter are subsequent to those provisions. The Commission, they contend, is therefore required to interpret Decision 94/90 in a manner consistent with the principles set out in Article 255 EC by giving preference to a restrictive interpretation of the provisions that limit the right of access.

32 The defendant argues that, even after the entry into force of the Treaty of Amsterdam, the right of access is a right which may be subject to limitations. It points out that Article 255(2) EC refers expressly to the limits which the legislature may impose on grounds of public or private interest. The Commission contends that Article 255 EC does not have direct effect inasmuch as it does not involve a precise and unconditional obligation. The applicants, it suggests, appear to be aware of this when they state that what is important is that the Commission should interpret Decision 94/90 in the light of the principle laid down in

Article 255 EC. It points out that, in its application of Decision 94/90, it has complied with the principle laid down in Article 255 EC, even before that provision entered into force.

33 The defendant goes on to stress that the right of access is not directly applicable since the European Parliament and the Council still have to adopt provisions relating to general principles and limits on that right. In this regard, the Treaty lays down a period of two years from the entry into force of the Treaty of Amsterdam, which period was to expire on 1 May 2001. Pending the adoption of a measure, the right of access to documents of the institutions may be exercised only within the framework of the existing rules. The referential legal framework, therefore, is constituted by Decision 94/90.

Findings of the Court

34 Contrary to the applicants' contention, Article 1, second paragraph, EU and Article 255 EC are not directly applicable. In this regard, as is clear from the judgment in Case 26/62 *Van Gend en Loos* [1963] ECR 1, the criteria for deciding whether a Treaty provision is directly applicable are that the rule should be clear and unconditional, in the sense that its implementation must not be subject to any substantive condition, and that its implementation must not depend on the adoption of subsequent measures which either the Community institutions or the Member States may take in the exercise of a discretionary power of assessment.

35 In this case, Article 1, second paragraph, EU is not clear in the sense required by the case-law cited. It is likewise obvious that Article 255 EC is, by virtue of paragraphs 2 and 3 thereof, not unconditional and that its implementation is dependent on the adoption of subsequent measures. The determination of general principles and limits which, on grounds of public or private interest, govern exercise of the right of access to documents is a matter entrusted to the Council in the exercise of its legislative discretion.

36 It follows that the entry into force of Article 1, second paragraph, EU and Article 255 EC did not automatically render inoperative the provisions contained in Decision 94/90.

37 The applicants' argument that Decision 94/90 must be construed in accordance with the principles set out in Article 255 EC cannot be accepted. Because Article 255 EC does not lay down an unconditional obligation, the Commission could not, in advance of a determination by the Community legislature of the principles and limits to govern application of the article, deduce from it criteria for interpreting the provisions of Decision 94/90 that limit the right of access to documents.

38 It follows that the applicants' plea alleging failure to comply with Article 255(1) EC and Article 1, second paragraph, EU must be rejected as being unfounded.

The second plea in law: breach of Decision 94/90

The documents originating with the Italian authorities

— Arguments of the parties

39 The applicants note that Decision 94/90 refers to 'documents held by the Commission' and that the term 'document' is defined in the Code of Conduct as

'any written text, whatever its medium, which contains existing data and is held by the Commission or the Council'. Access to documents thus relates not only to documents originating with Community bodies or drawn up by them but also to all documents which they hold.

40 They argue that Decision 94/90 amounts to nothing more than a measure of self-regulation which the Commission has imposed on itself, in the absence of *ad hoc* norms, in order to guarantee transparency of the acts of that institution. The rules contained in that decision must not be given a restrictive interpretation confined to a pre-determined category of documents. Were they to be given such an interpretation, the two main purposes served by document access, namely improved transparency of decisions and reinforcement of public confidence in Community administration, would not be achieved.

41 The applicants point out that the authorship rule constitutes a considerable restriction on the principle of transparency, since it excludes entirely from the right of access documents drawn up by third parties but held and used by the Commission solely by virtue of its functions. Referring to the judgment of the Court of Justice in Joined Cases C-174/98 P and C-189/98 P *Netherlands and Van der Wal* v *Commission* [2000] ECR I-1, the applicants submit that the Court of Justice has confirmed the need to interpret strictly those provisions of Decision 94/90 that limit the right of access. They add that the restrictive interpretation of the authorship rule obliges the Commission to check the content of the documents requested and the national rules on disclosure in order to determine whether those documents may or may not be disclosed under national law.

42 The applicants further point out that, in their decisions, Community bodies use not only their own documents but also documents originating with other bodies or persons. For that reason, the transparency of the decision-making process and public confidence in Community administration can be guaranteed only if all

documents forming the basis of the decisions taken by those Community bodies are brought to the knowledge of the persons concerned.

43 Finally, the applicants take the view that the institution must always balance the complainants' interest in the transparency of the decision-making process and the interest of the authors of the documents sought. They point out in this connection that their request for access was rejected by the Italian authorities and express the opinion that document access must be guaranteed independently at Community level, irrespective of any dispute which the persons concerned may have with their Member State.

44 The defendant argues that the distinction which the applicants criticise is based on an express provision of Decision 94/90, under which documents drafted by a person external to the Commission are not subject to the system provided for by that decision and any request for such documents must be made to their author.

45 With regard to the applicants' claims seeking to challenge the legality of the authorship rule, the Commission takes the view that these assertions are inadmissible since the provision in issue is one of general scope which is not of direct and individual concern to the applicants. The Commission further contends that the authorship rule constitutes a limitation of the general principle of transparency expressly recognised by the case-law. It stresses that neither the wording nor the systematic reading of Article 255 EC reveals that that provision also concerns documents held by the Commission but drafted by third parties. Consequently, the authorship rule does not oblige the Commission to guarantee a balance between the conflicting interests involved.

46 The Commission adds that the restrictive interpretation of this rule is limited to those cases in which doubt exists as to the identity of the author of the document in question.

— Findings of the Court

47 In the light of the judgment of the Court of Justice in Case C-58/94 *Netherlands* v *Council* [1996] ECR I-2169, paragraph 37, the Court has ruled that the authorship rule may be applied so long as there is no higher rule of law which prohibits the Commission, in Decision 94/90, excluding from the scope of the Code of Conduct documents of which it is not the author (Case T-123/99 *JT's Corporation* v *Commission* [2000] ECR II-3269, paragraph 53).

48 So far as Article 255 EC is concerned, that article does not oblige the Community legislature to permit, without any limitation, public access to the documents held by the institutions. On the contrary, that article expressly provides that the legislature must determine the principles and limits governing exercise of the right of access to those documents.

49 This conclusion is not vitiated by the fact that, as the applicants correctly point out, the Community institutions, when adopting decisions, make use of documents originating with third parties, given that the transparency of the decision-making process and the confidence of citizens in Community administration can be assured by adequate reasoning of those decisions. The restrictions on access to documents originating with third parties and held by the institutions have no bearing on the duty imposed on those institutions under Article 253 EC to provide adequate reasoning for their decisions. Adequate reasoning means that, basing itself on a document originating with a third party, the institution must explain the content of that document in that decision and justify that document's choice as a basis for that decision.

50 Consequently, as it is common ground that the documents requested were drawn up by the Italian authorities, the Court holds that the Commission did not err in law in taking the view that it was not under an obligation to grant access to those documents.

The documents drawn up by the Commission

51 The documents at issue here are letters of formal notice and reasoned opinions drawn up within the context of proceedings instituted against the Italian Republic under Article 226 EC.

— Arguments of the parties

52 The applicants point out that an unduly strict interpretation of the exception based on protection of the public interest risks rendering nugatory the principal objectives of Community policy on document access.

53 They note that the initial pre-litigation phase in infringement proceedings is an investigation phase which has an appreciable bearing on any litigation phase which might follow. This is so because, in the first place, following the hearing of the State involved, the Commission may discontinue proceedings by taking the view that the infringement of Community obligations has not been established and, second, because, in order to be able to guarantee the right to a fair hearing, the action brought by the Commission before the Court of Justice may not relate to heads of complaint that were not raised during the initial phase.

54 The procedure designed to establish the facts must consequently respect the *audi alteram partem* principle, this being understood as the possibility for all parties directly concerned or adversely affected by the alleged breaches of Community law to intervene during those proceedings. The applicants state that infringement proceedings are always verification procedures designed to impose a public sanction on a State in respect of facts which, in the particular case, are not secret and are of direct concern to them.

55 From this the applicants conclude that the documents relating to the Article 226 EC infringement proceedings cannot all be covered by the exception based on protection of the public interest and that, in any event, they cannot be covered by that exception indiscriminately or without specific reasons being provided for each document.

56 The applicants note that the defendant's proposed interpretation of the exception based on protection of the public interest rests on an absolute presumption of genuine cooperation and confidentiality in the relations between a Member State and the Commission. The presumption of genuine cooperation on the part of the Italian Republic is patently contradicted by the findings in favour of partial discontinuation made by Italian courts in the context of criminal proceedings brought as a result of a complaint made by one of the applicants and in which those courts appear to have formed the view that the MURST and its senior officials had been responsible for the false declarations which the Italian State sent to the Commission.

57 The applicants take the view that the presumption of genuine cooperation and confidentiality may at most relate to the measures preparatory to the Commission's decision whether or not to open infringement proceedings. Referring to the Commission's press release of 16 December 1997, the applicants contend that this presumption cannot be relied on if the request for the documents is made in cases in which the decision to open infringement proceedings has already been adopted and made public. The publicity, they argue, will have removed any need for confidentiality.

58 The defendant points out that protection of the public interest is included among the first category of exceptions and is for that reason binding in nature. That being so, the Commission is not under any obligation to balance the various interests in issue before refusing access.

59 Citing the Court's judgment in Case T-105/95 *WWF UK* v *Commission* [1997] ECR II-313 ('*WWF*'), which established that documents relating to an investiga-

tion into a possible breach of Community law by a Member State capable of resulting in the bringing of infringement proceedings under Article 226 EC come within the exception based on protection of the public interest, in order not to affect adversely the proper conduct of the infringement proceedings, in particular its purpose, which is to allow the Member State to comply voluntarily with the Treaty requirements or to justify its position, the Commission argues that the four documents which it drew up are documents relating to an investigation which could lead to proceedings for failure to fulfil obligations. The documents in question are letters of formal notice and reasoned opinions which essentially give an account of the result of the investigations and inspections carried out by the Commission and the contacts between it and the Italian Republic. For that reason, the corresponding requirement of confidentiality applies to those documents. Given that the four documents in question relate to an investigation phase which might result in proceedings for failure to fulfil obligations, and thus come within one of the cases contemplated by the exception based on protection of the public interest, the Commission claims that it was entitled to refuse the applicants access to those documents in the contested decision.

60 The Commission states that the exception based on protection of the public interest is also relevant for a separate reason. It points out that the documents in question were drafted for purposes of court proceedings, an action having been brought in June 1999 against the Italian Republic in connection with Infringement Procedure No 96/2208. Those documents therefore come within the definition of 'pleadings or other documents lodged' which constitute a category of documents covered by the exception based on protection of the public interest.

61 The Commission also challenges the applicants' argument that persons who lodge complaints with it regarding alleged infringements of Community law by Member States ought to be entitled to take part in the proceedings for failure to fulfil obligations.

62 With regard to the argument that the exception based on protection of the public interest should no longer be applied where the Member State has acted in bad faith in infringement proceedings, the Commission submits that there is no

justification for this presumed limit in the purpose served by that exception and that the relevant case-law does not recognise it either. The obligation of confidentiality is imposed on the Commission and operates in favour of the State concerned, irrespective of how that State has conducted itself during the infringement proceedings. The Commission argues that, contrary to what the applicants contend, it has not been established that the conduct of the Italian Republic in Infringement Procedure No 96/2208 was motivated by bad faith and marked by impropriety. Regarding the issue of the publicity given to its intention to bring infringement proceedings before the Court of Justice, the Commission states that, in the press release, the positions taken by the parties were not revealed in detail and there was therefore no breach in relation to the openness of the dialogue with the State in question. The fact that dialogue continued even after publication of the press release, it argues, provides evidence in this regard.

63 The Commission adds that even the bringing of an action does not remove the requirement of confidentiality. It takes the view that the need to guarantee confidentiality even after an investigation has been terminated applies *a fortiori* in the case where an action has been brought. It argues that the reason providing justification for the requirement of confidentiality, namely the possibility for the Member State concerned to comply with the requirements of Community law or, where relevant, to justify its position in order to avoid a finding that it has failed to meet its obligations, remains valid throughout the entire court proceedings.

— Findings of the Court

64 Decision 94/90 is a measure conferring on citizens a right of access to documents held by the Commission (see, in particular, *WWF*, cited in paragraph 59 above, paragraph 55, and *Interporc I*, cited in paragraph 26 above, paragraph 46). Its objective is to give effect to the principle of the widest possible access for citizens to information with a view to strengthening the democratic character of the institutions and the trust of the public in the administration (*Svenska Journalistförbundet* v *Council*, cited in paragraph 26 above, paragraph 66).

65 However, two categories of exceptions to the general principle that citizens are to have access to Commission documents are set out in the Code of Conduct adopted by the Commission in its Decision 94/90. The first category, which includes the exception relied on by the Commission in the present case, is worded in mandatory terms and provides that 'the institutions will refuse access to any document where disclosure could undermine [*inter alia*] the protection of the public interest (public security, international relations, monetary stability, court proceedings, inspections and investigations)'.

66 The exceptions to document access fall to be interpreted and applied restrictively so as not to frustrate application of the general principle of giving the public 'the widest possible access to documents held by the Commission' (Case T-309/97 *Bavarian Lager* v *Commission* [1999] ECR II-3217, paragraph 39 and the case-law there cited).

67 In the contested decision, the Commission states that disclosure of the letters of formal notice and the reasoned opinions 'might adversely affect the protection of the public interest and in particular the conduct of investigations liable to result in the opening of the procedure under Article 226 EC (ex Article 169 of the EC Treaty)'. In this connection, it refers expressly to the fact that 'infringement investigations call for genuine cooperation and an atmosphere of mutual trust between the Commission and the Member State concerned so as to enable those two parties to open discussions with a view to a rapid resolution of the dispute.' The Commission adds that 'disclosure of those documents, which concern proceedings that are pending..., could have an adverse effect on another public interest referred to in the Code of Conduct, namely the proper conduct of court proceedings. Such disclosure would be liable to affect the interests of the parties involved and could adversely impact on the specific rules governing submission of documents in connection with those proceedings'.

68 In the present case, the documents requested are letters of formal notice and reasoned opinions drawn up in connection with investigations and inspections carried out by the Commission. As the Court pointed out in paragraph 63 of its judgment in *WWF* (cited above in paragraph 59), the Member States are entitled

to expect the Commission to guarantee confidentiality during investigations which might lead to an infringement procedure. This requirement of confidentiality remains even after the matter has been brought before the Court of Justice, on the ground that it cannot be ruled out that the discussions between the Commission and the Member State in question regarding the latter's voluntary compliance with the Treaty requirements may continue during the court proceedings and up to the delivery of the judgment of the Court of Justice. The preservation of that objective, namely an amicable resolution of the dispute between the Commission and the Member State concerned before the Court of Justice has delivered judgment, justifies refusal of access to the letters of formal notice and reasoned opinions drawn up in connection with the Article 226 EC proceedings on the ground of protection of the public interest relating to inspections, investigations and court proceedings, which comes within the first category of exceptions in Decision 94/90.

69 The Commission was thus justified in refusing to disclose the documents in question on the ground that such disclosure might adversely affect the public interest.

70 So far as concerns the applicants' argument that proceedings under Article 226 EC seeking to establish the facts relating to the infringements of Community law complained of must respect the *audi alteram partem* principle, it must be noted that individuals are not party to proceedings concerning failure to fulfil obligations and for that reason cannot invoke rights to a fair hearing involving application of the *audi alteram partem* principle.

71 With regard to the applicants' assertion that any infringement by a Member State of its obligation of genuine cooperation in the course of infringement proceedings removes the requirement of confidentiality, it must first of all be noted that the applicants have not established that the Member State in question has acted in bad faith. Further, as the Commission has stressed in its written pleadings, it is the Commission which bears the obligation of confidentiality and that obligation cannot be affected by the alleged conduct of a Member State.

72 It follows from all of the foregoing that the second plea in law must also be rejected.

The third plea in law: infringement of Article 253 EC

Arguments of the parties

73 The applicants take the view that the summary grounds set out by the Commission as general justification for its refusal to grant access to the documents in question lack any legal basis and reflect the fact that infringement proceedings are conducted under conditions of absolute secrecy. The applicants point out in this regard that, according to settled case-law, the reasons given for refusing access must be sufficient and must involve a balance between the conflicting interests.

74 In the present case, the grounds given for the contested decision amount to mere general and abstract mentions of the applicable provisions, without any reference to actual and specific circumstances and without any distinction being drawn between the documents according to the category of exception within which they might fall. Further, before refusing access to the documents drafted by the Italian State, the Commission ought to have checked in order to ascertain whether those documents could or could not have been disclosed under national legislation.

75 The Commission states that, for compliance with Article 253 EC, it is sufficient that the decision refusing access to documents should contain specific grounds for refusal by document category. It adds that the grounds based on application of the authorship rule, used as justification for refusing to grant access to the documents drawn up by the Italian authorities, which are regarded as belonging

to one single and identical category, are clear, detailed and quite specific. As for the documents which it itself drafted, the Commission submits that the decision sets out in a clear and appropriate manner the reasons why those documents come under the exception based on protection of the public interest. Common grounds, it argues, are adequate in view of the fact that the documents have the same characteristics and thus belong to one single identical category.

Findings of the Court

76 So far as the documents drawn up by the Italian authorities are concerned, these were the subject of individual examination and there was an identical reason, in the case of each of them, for prohibiting their disclosure. It is thus logical that the contested decision should contain a statement of reasons for refusal of access that is common to all of those documents.

77 The Commission has given reasons for the contested decision by referring to the authorship rule and stating that, under that rule, the applicants' request had no basis because the documents sought had been written by a third party. Such a statement of reasons is sufficiently clear to enable interested parties to understand why the Commission did not forward to them the documents in question and to enable the Court to exercise its power to review the legality of the contested decision (*JT's Corporation* v *Commission*, cited above in paragraph 47, at paragraph 67).

78 So far as the documents drafted by the Commission are concerned, it follows from the use of the verb 'could', in the present conditional, that in order to demonstrate that the disclosure of particular documents 'could' undermine protection of the public interest, the Commission is obliged to consider in respect of each requested document whether, in the light of the information available to it, disclosure is in fact likely to undermine one of the facets of public interest protected by the first category of exceptions (*Svenska Journalistförbundet* v *Council*, cited in paragraph 26 above, paragraph 112 and the case-law there cited).

79 As the Court pointed out in its judgment in *WWF* (cited in paragraph 59 above, at paragraph 64), the Commission is not entitled to confine itself to invoking the possible opening of an infringement procedure as justification, under the heading of protecting the public interest, for refusing access to the entirety of the documents identified in a request made by a citizen. The Court took the view that the Commission is required to indicate, at the very least by reference to categories of documents, the reasons why it considers that the documents detailed in the request which it received are related to the possible opening of an infringement procedure, by indicating to which subject-matter the documents relate and particularly whether they involve inspections or investigations relating to a possible procedure for infringement of Community law.

80 In the present case, the unavoidable conclusion is that the Commission did carry out such an examination. As is clear from paragraph 67 above, the Commission indicated in the contested decision the reasons why it formed the view that disclosure of the letters of formal notice and the reasoned opinions would have an adverse effect on the public interest.

81 In the light of the foregoing, the third plea in law must also be rejected, and the action must therefore be dismissed in its entirety.

Costs

82 Under Article 87(2) of the Rules of Procedure, the unsuccessful party must be ordered to pay the costs if they have been applied for by the successful party. Since the applicants have been unsuccessful, they must be ordered to pay their own costs together with those of the defendant, in accordance with the form of order sought by the latter.

On those grounds,

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

hereby:

1. **Dismisses the action;**

2. **Orders the applicants to pay the defendant's costs in addition to their own costs.**

Mengozzi García-Valdecasas Tiili

Moura Ramos Cooke

Delivered in open court in Luxembourg on 11 December 2001.

H. Jung P. Mengozzi

Registrar President