# JUDGMENT OF THE COURT OF FIRST INSTANCE
(Fourth Chamber, Extended Composition)
17 September 2003 *

In Case T-76/02,

**Mara Messina,** residing at Naples (Italy), represented by M. Calabrese, lawyer,

applicant,

v

**Commission of the European Communities,** represented by U. Wölker, V. Di Bucci and P. Aalto, acting as Agents, with an address for service in Luxembourg,

defendant,

APPLICATION for annulment of the Commission's decision refusing the applicant access to certain documents relating to the State aid scheme which was the subject of the Commission's Decision of 2 August 2000 (State Aid N 715/99 — Italy (SG 2000 D/10574)),

* Language of the case: Italian.

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

composed of: V. Tiili, President, J. Pirrung, P. Mengozzi, A.W.H. Meij and M. Vilaras, Judges,

Registrar: J. Palacio González, Principal Administrator,

having regard to the written procedure and further to the hearing on 3 April 2003,

gives the following

## Judgment

### Relevant Provisions

1 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.

...'

2 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) defines the principles, conditions and limits on grounds of public or private interest governing the right of access to European Parliament, Council and Commission documents provided for in Article 255 EC in such a way as to ensure the widest possible access to documents, establishes rules enabling the easiest possible exercise of that right, and seeks to promote good administrative practice on access to documents.

3 Article 2 of Regulation No 1049/2001 provides:

'1. Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, has a right of access to documents of the institutions, subject to the principles, conditions and limits defined in this regulation.

...

3. This regulation shall apply to all documents held by an institution, that is to say, documents drawn up or received by it and in its possession, in all areas of activity of the European Union.

...'

4 Article 3 of Regulation No 1049/2001 states:

'For the purpose of this regulation:

...

(b) "third party" shall mean any natural or legal person, or any entity outside the institution concerned, including the Member States, other Community or non-Community institutions and bodies and third countries.'

5 Article 4 of Regulation No 1049/2001, which sets out the exceptions to the abovementioned right of access, reads as follows:

'...

2. The institutions shall refuse access to a document where disclosure would undermine the protection of:

...

— court proceedings and legal advice,

— the purpose of inspections, investigations and audits,

unless there is an overriding public interest in disclosure.

...

4. As regards third-party documents, the institution shall consult the third party with a view to assessing whether an exception in paragraph 1 or 2 is applicable, unless it is clear that the document shall or shall not be disclosed.

5. A Member State may request the institution not to disclose a document originating from that Member State without its prior agreement.

...'

## Facts and procedure

6 The applicant is a lecturer in the law faculties of the Universities of Salerno and of Naples (Italy).

7 Since she had the task of preparing a study on the effects of State aid on undertakings in the less-favoured regions of the South of Italy, she applied, by letter of 4 December 2001, on the basis of Regulation No 1049/2001, for access to certain documents concerning a State aid scheme found, after preliminary examination, to be compatible with the common market by Commission Decision of 2 August 2000 (State Aid N 715/99 — Italy (SG 2000 D/10574)). Also, the applicant sought, more particularly, access to the correspondence exchanged between the Italian authorities and the Commission in the course of the investigation of that scheme, to the minutes of the meeting, which took place in Brussels on 16 May 2000, between those authorities and the services of that institution, and to the recommendation by which the Commission proposed, pursuant to Article 18 of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article [88] of the EC Treaty (OJ 1999 L 83, p. 1), some appropriate amendments to the aid scheme in question, if the said recommendation was not contained in one or other of the abovementioned documents.

8 By letter of 19 December 2001, the Commission rejected the applicant's application. In order to justify its refusal of access, the institution referred to the grounds of two judgments given by the Court of First Instance and, more specifically, to those contained in paragraphs 86 to 90 of the judgment in Case T-613/97 *Ufex and Others* v *Commission* [2000] ECR II-4055 and in paragraphs 67 and 68 of the judgment in Case T-191/99 *Petrie and Others* v *Commission* [2001] ECR II-3677. The Commission also invited the applicant to send her application to the Italian authorities whilst making clear that, for its part, it would have no objection to the disclosure of the letters which it had itself sent to those authorities.

9 By letter of 14 January 2002, the applicant made a confirmatory application to the Commission in accordance with Article 7(2) of Regulation No 1049/2001.

10 After having notified the applicant, by letter of 1 February 2002, of the extension by 15 days of the time-limit prescribed for processing her application, the Commission eventually gave no express reply to the confirmatory application, a position deemed to be a negative reply under Article 8(3) of Regulation No 1049/2001.

11 By application lodged at the Registry of the Court of First Instance on 18 March 2002, the applicant brought this action. By separate document dated that day, on the basis of Article 76a of the Rules of Procedure of the Court of First Instance, the applicant made an application for the expedited procedure, which was rejected by a decision of 11 April 2002.

12 In reply to a letter of 30 April 2002 from the Commission, asking to be informed whether they were in agreement or not with the applicant being sent the documents requested, the Italian authorities, by letter of 16 May 2002, stated that they agreed with her being refused access.

13 The written procedure was closed on 1 August 2002.

14 Pursuant to Article 14 of the Rules of Procedure, and on the proposal of the Fourth Chamber, the Court decided, after hearing the parties in accordance with Article 51 of those Rules, to refer the case to a Chamber sitting in extended composition.

15 Upon hearing the report of the Judge-Rapporteur, the Court (Fourth Chamber, Extended Composition) decided to open the oral procedure.

16 By letter of 3 March 2003, the applicant requested, among other things, the re-opening of the written procedure in order to be able to raise new pleas in law based on facts occurring after the closure of the said procedure as well as a longer time for oral argument.

17 In reply to that letter, it was decided, among other things, to reject the application for the re-opening of the written procedure and to invite the applicant to forward to the Court the documents relating to the alleged new facts and to set out briefly, in writing, the gist of the new pleas in law relied upon.

18 The applicant replied to that invitation on 24 March 2003 by submitting a note, dated 21 March 2003, in which she put forward four new pleas for annulment.

19 Meanwhile, by letter received at the Court Registry on 21 March 2003, the Commission stated that it had sent to the applicant, by letter of 20 March 2003, the documents which it had drawn up in the course of the examination of the aid scheme in question. That communication covered the letters sent to the Italian authorities dated 22 December 1999, 7 March and 29 May 2000, which were actually mentioned in the applicant's initial application for access and the final letter set out, in particular, the gist of the meeting of 16 May 2000 in Brussels mentioned in paragraph 7 above. According to the Commission, that transmission rendered the action devoid of purpose in relation to the abovementioned documents. On the other hand, the Commission stated that it had not been able to forward to the applicant the correspondence which it had been sent by the

Italian authorities in the course of the examination of the aid scheme in question because of their refusal of any disclosure, in their letter of 16 May 2002. Having regard to that development the Commission suggested that the applicant be asked whether she intended to proceed with her action or not.

20 By letter of 26 March 2003, the applicant requested that the hearing fixed for 3 April 2003 should take place as arranged. On 27 March 2003, the applicant asked to be sent the letter from the Italian authorities of 17 February 2003, replying to a question from the Commission concerning an application for access made by an Italian undertaking and stating their opposition to the communication of documents identical to those sought by her. That request was granted.

21 The parties presented oral argument and their replies to the Court's questions at the hearing on 3 April 2003.

## Forms of order sought by the parties

22 The applicant claims that the Court should:

— annul the decision of 19 December 2001 rejecting her initial application for access;

— annul the implied rejection of her confirmatory application;

— order the Commission to pay the costs.

23 The Commission claims that the Court should:

— dismiss the action;

— order the applicant to pay the costs.

## Law

*Subject-matter of the proceedings*

24 It is appropriate to state that, in the course of these proceedings, the Commission has communicated to the applicant the documents referred to in paragraph 19 above, which has changed the original facts of the dispute.

25 At the hearing on 3 April 2003, the applicant stated that her application for access was, as a result of that communication, satisfied in part, in relation to the documents originating from the Commission, and she consequently discontinued her claims for annulment of the refusal of access to those documents. She also abandoned the first three new pleas in law raised in her note of 21 March 2003

and based on infringement, respectively, of the principle of sound administration, of Article 4(4) of Regulation No 1049/2001 and of the principle of equal treatment. The Court of First Instance took formal note of such discontinuances in the record of the hearing.

26 On the other hand, the applicant maintained her claims for annulment of the Commission's decision refusing her access to the documents drawn up by the Italian authorities as well as the claims for annulment based on infringement of Article 2(1) and (3) in conjunction with Article 4(2) of Regulation No 1049/2001, as set out in her application, and on infringement of Article 4(5) of that regulation, as referred to in her note of 21 March 2003.

27 It is appropriate to consider, first, the plea based on infringement of Article 4(5) of Regulation No 1049/2001.

*The plea based on infringement of Article 4(5) of Regulation No 1049/2001*

Arguments of the parties

28 With regard to the new evidence on which this plea is based, the applicant claims that, having learnt that the Secretary-General of the Commission had authorised the communication to an Italian undertaking of documents relating to the examination of another State aid scheme, she repeated her application to the Secretary-General of the Commission. The latter's reply, by letter of 11 November 2002, combined with the Italian authorities' letter of 16 May 2002 included as Annex 2 to the rejoinder, constitutes a new statement of reasons for the contested refusal of access, which justifies the introduction of a new plea in law.

29 In that letter of 11 November 2002, the Secretary-General of the Commission again refused to communicate the documents sought, having regard to the existence of these proceedings and relying on the fact that the Italian authorities had objected to the disclosure of the documents which they had sent to the Commission in the course of the examination of the aid scheme in question.

30 With regard to the substance of the plea, the applicant draws attention, first of all, to the fact that the letter of 16 May 2002 from the Italian Ministry of Production Activities was signed by a Director-General and states, further, that she 'doubts that the signature of one of the (numerous) directors of one of the (numerous) ministries of a Member State is sufficient to bind that State' in the light of the exceptional nature of the power given to the State by Article 4(5) of Regulation No 1049/2001.

31 The applicant also argues that the author of the abovementioned letter confined himself to taking note of and approving the refusal of access by the Commission and did not expressly request the non-disclosure of the documents sought. That position does not preclude the possibility of a later decision by the Commission opposite to that forming the subject-matter of this action.

32 In those circumstances, by treating that letter as the exercise by the Italian State of the power conferred upon it by Article 4(5) of Regulation No 1049/2001 to request the non-disclosure of the documents sought and, therefore, by regarding it as an obstacle to disclosure, the Commission has committed a manifest error of assessment and infringed that article.

33 In its letter of 21 March 2003 and at the hearing, the Commission stated that it had not been able to forward the documents sought which originated from the Italian authorities because of the refusal expressed by those authorities in the letter of 16 May 2002, a refusal also contained in a letter of 17 February 2003

relating to the same documents, and that Article 4(5) of Regulation No 1049/2001 had been fully complied with in this case. The possibility afforded to the Member States by that article is explained by the continued existence of national rules on access to documents, which must not be able to be circumvented by means of the provisions of Regulation No 1049/2001. It also asserted that it is not for the Court to review the refusal of disclosure by a Member State either for formal reasons or on the merits and emphasised the fact that the Tribunale amministrativo regionale del Lazio (Regional Administrative Court of Lazio) had, in an order dated 25 July 2001, upheld the refusal by the Italian authorities of an application for access to the said documents made in April of that year by certain undertakings.

Findings of the Court

34 It is appropriate, first of all, to point out that under the first subparagraph of Article 48(2) of the Rules of Procedure, no new plea in law may be introduced in the course of proceedings unless it is based on matters of law or of fact which come to light in the course of the procedure.

35 In this case, it is common ground that it is in the rejoinder that the Commission stated that it had asked the Italian authorities, on 30 April 2002, about the applicant's application for access, so as to know whether they agreed or not with the documents sought being forwarded to her, and had then received the reply of those authorities expressing, in a letter dated 16 May 2002 (Annex 2 to the rejoinder), their approval of the refusal of access to the person concerned.

36 It must be held that those facts, which were revealed in the course of the procedure and which the applicant was not in a position to ascertain otherwise, are new facts which permit the introduction of the plea based on infringement of

Article 4(5) of Regulation No 1049/2001, it being noted that the defendant did not, at the hearing, dispute the admissibility of that plea.

37 Further, in the course of the procedure, the Commission sent the applicant its letters to the Italian authorities concerning the aid scheme in question and maintained its refusal to communicate the documents originating from those authorities, by relying, by way of additional reasons, on the objection to any disclosure expressed by those authorities in two letters dated 16 May 2002 and 17 February 2003.

38 It is important to point out that the right of access to documents of the institutions, provided for by Article 2 of Regulation No 1049/2001, covers all documents held by an institution, that is to say, documents drawn up or received by it and in its possession, under Article 2(3).

39 Accordingly, the institutions may be required, in appropriate cases, to communicate documents originating from third parties, including, in particular, the Member States, in accordance with the definition of 'third party' in Article 3(b) of Regulation No 1049/2001.

40 It follows, however, from Article 4(5) of Regulation No 1049/2001 that, among third parties, the Member States are subject to special treatment. That provision confers on the Member State the power to request the institution not to disclose documents originating from that State without its prior agreement.

41 It is appropriate to point out, at this stage, that the wording of Article 4(5) of Regulation No 1049/2001 transposes Declaration No 35 annexed to the final act

of Amsterdam, by which the Conference agreed that the principles and conditions set out in Article 255 EC will allow a Member State to request the Commission or the Council not to communicate to third parties a document originating from that State without its prior agreement. As the Commission correctly pointed out at the hearing, the power conferred on Member States by Article 4(5) of Regulation No 1049/2001 is explained by the fact that it is neither the object nor the effect of that regulation to amend national legislation on access to documents (recital 15 in the preamble to Regulation No 1049/2001).

42 In this case, it is common ground that the Commission, by letter of 30 April 2002, asked the Italian authorities whether they agreed or not that the correspondence exchanged with the institution should be forwarded to the applicant, whose name was expressly mentioned in the letter in question. In that regard, it is appropriate to note that the consultation of the Italian authorities was manifestly necessary, since the applicant's application for access covered documents sent to the institution prior to the date on which Regulation No 1049/2001 entered into force.

43 By letter of 16 May 2002, sent to the Commission under cover of a letter from the Permanent Representation of the Italian Republic to the European Union dated 17 May 2002 (Annex 2 to the rejoinder), G. Visconti, Director-General of the Italian Ministry of Production Activities, took note of the refusal of access already communicated to the applicant by the Commission in its letter of 19 December 2001 and agreed with the refusal.

44 The applicant claims that, by treating the letter of 16 May 2002 as the exercise by the Italian State of the power conferred on it by Article 4(5) of Regulation No 1049/2001 to request the non-disclosure of the documents requested and, therefore, by regarding it as a bar to disclosure, the Commission has made a manifest error of assessment and infringed that article.

45 In her note of 21 March 2003, the applicant communicated, in the first place, her 'doubts' as to the competence of the signatory of the letter dated 16 May 2002 to exercise the power conferred on the Italian Republic by Article 4(5) of Regulation No 1049/2001.

46 In that regard, according to the case-law of the Court of Justice, it is not for the Commission to rule on the division of competences by the institutional rules proper to each Member State (Case C-8/88 *Germany* v *Commission* [1990] ECR I-2321, paragraph 13).

47 In addition, in an action brought under Article 230 EC, the Community judicature has no jurisdiction to rule on the lawfulness of a measure adopted by a national authority (Case C-97/91 *Oleificio Borelli* v *Commission* [1992] ECR I-6313, paragraph 9, and Case T-22/97 *Kesko* v *Commission* [1999] ECR II-3775, paragraph 83).

48 In those circumstances, it was not for the Commission to determine the competence of the author of the letter of 16 May 2002, under Italian law, to raise an objection under Article 4(5) of Regulation No 1049/2001 to the disclosure of the documents requested by the applicant; it was required only to verify whether the letter in question was, prima facie, that of a Member State within the meaning of the above provision (*Kesko* v *Commission*, cited above, paragraph 84). In receiving a letter originating from the Italian Ministry of Production Activities, under cover of a letter from the Permanent Representation of the Italian Republic to the European Union expressly referring to the Commission's letter of 30 April 2002, the Commission was therefore justified in taking the view that it had, prima facie, received an objection from the Italian Republic to the communication of the documents requested by the applicant, in accordance with Article 4(5) of Regulation No 1049/2001.

49 In any event, after having expressed her complaint in terms of doubt in her note of 21 March 2003, the applicant, in reply to an express question by the Court at the hearing, said that she was unable to state which authority would in her view be competent, in Italy, to implement the power set out in Article 4(5) of Regulation No 1049/2001. Evidence to show the lack of competence of the author of the letter of 16 May 2002 has not therefore been produced.

50 The applicant relies, secondly, on the fact that the letter dated 16 May 2002 does not contain an express refusal to communicate the documents requested, which the implementation of Article 4(5) of Regulation No 1049/2001 would necessarily involve.

51 In that regard, first of all, it is clear from the wording of the abovementioned letter that it is the reply to the Commission's letter of 30 April 2002, telling of the action brought by the applicant in response to her being refused access and requesting the Italian authorities to take a view on disclosure of the documents requested by the applicant.

52 Secondly, the terms of that letter of 16 May 2002 are explained simply by the background against which it was written, namely the pre-existence of the Commission's refusal of access to the applicant, and, having regard to the substance of that letter, there is no ambiguity as to the negative nature of the Italian authorities' reply and, therefore, as to their objection, in accordance with Article 4(5) of Regulation No 1049/2001, to any disclosure of documents drawn up by them in the course of the examination of the aid scheme in question. Apart from their express approval of the Commission's refusal of access to the applicant, the Italian authorities there stated that they had already rejected two applications for access in respect of the same documents as those sought by the applicant, which had been made in April and December 2001 by certain Italian undertakings and the applicant's lawyer, in his own name.

53 In those circumstances, it is unnecessary to take into account the Italian authorities' letter of 17 February 2003 in response to a request from the Commission concerning an application for access by an Italian undertaking and expressing their objection to communication of the same documents as those requested by the applicant.

54 In the light of all the grounds set out above, it must be held that the Commission has not, in this case, made a manifest error of assessment or infringed Article 4(5) of Regulation No 1049/2001.

55 Finally, it is appropriate to note that the power conferred on Member States to request the non-disclosure of their documents to third parties without their prior agreement is one of the exceptions to the right of access to documents of the institutions which are laid down in Article 4 of Regulation No 1049/2001.

56 In the light of the Italian authorities' objection, such as it appears from the letter of 16 May 2002, to communication to the applicant of the documents drawn up in the course of the examination of the aid scheme in question, the rejection of the application for access, in so far as it concerns those documents, appears to be legally justified, it being noted that the applicant has, in this case, put in issue only the actual fact of the objection of those authorities to the disclosure of the above-mentioned documents.

57 In those circumstances, without it being necessary to rule upon the plea of infringement of Article 2(1) and (3) in conjunction with Article 4(2) of Regulation No 1049/2001, the action must be dismissed.

## Costs

58 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. However, under Article 87(3), 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.

59 In this case, as the Court has held above, the action must be dismissed in so far as it seeks annulment of the Commission's decision refusing access to the documents originating from the Italian Republic. Moreover, it should be recalled that the applicant discontinued her action in so far as it concerns annulment of the refusal of access to the documents drawn up by the Commission, which were forwarded to her on 20 March 2003.

60 The Court observes, however, that the Commission was late in consulting the Italian authorities and communicated to the applicant the documents it drew up in the course of the examination of the aid scheme in question only after the action was brought and more than 15 months after the lodging of the initial application for access.

61 Having regard to the Commission's conduct, the Court considers that, on the basis of Article 87(3) of the Rules of Procedure, the defendant institution must bear its own costs and pay half of the applicant's costs.

On those grounds,

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

hereby:

1. **Dismisses the action;**

2. **Orders the applicant to bear half her own costs. Orders the Commission to bear its own costs and to pay half of the applicant's costs.**

Tiili Pirrung Mengozzi

Meij Vilaras

Delivered in open court in Luxembourg on 17 September 2003.

H. Jung V. Tiili

Registrar President