JUDGMENT OF THE COURT

11 January 2000 *

In Joined Cases C-174/98 P and C-189/98 P,

Kingdom of the Netherlands, represented by M.A. Fierstra and C. Wissels, Deputy Legal Advisers in the Ministry of Foreign Affairs, acting as Agents, with an address for service in Luxembourg at the Netherlands Embassy, 5 Rue C.M. Spoo,

appellant in Case C-174/98 P and
intervener at first instance,

and

Gerard van der Wal, residing in Crainhem, Belgium, represented by L.Y.J.M. Parret, with an address for service in Luxembourg at the Chambers of A. May, 31 Grand-Rue,

appellant in Case C-189/98 P and
applicant at first instance,

APPEAL against the judgment of the Court of First Instance of the European Communities (Fourth Chamber) of 19 March 1998 in Case T-83/96 *Van der Wal* v *Commission* [1998] ECR II-545, seeking to have that judgment set aside,

* Language of the case: Dutch.

the other party to the proceedings being:

Commission of the European Communities, represented by W. Wils and U. Wölker, of its Legal Service, acting as Agents, with an address for service in Luxembourg at the office of C. Gómez de la Cruz, of the same service, Wagner Centre, Kirchberg,

defendant at first instance,

THE COURT,

composed of: G.C. Rodríguez Iglesias, President, J.C. Moitinho de Almeida (Rapporteur), D.A.O. Edward and L. Sevón (Presidents of Chambers), P.J.G. Kapteyn, C. Gulmann, G. Hirsch, H. Ragnemalm and M. Wathelet, Judges,

Advocate General: G. Cosmas,
Registrar: H. von Holstein, Deputy Registrar,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 11 May 1999,

after hearing the Opinion of the Advocate General at the sitting on 6 July 1999,

gives the following

Judgment

1 By applications lodged at the Court Registry on 11 and 19 May 1998 respectively, the Kingdom of the Netherlands (Case C-174/98 P) and Mr Van der Wal (Case C-189/98 P) lodged an appeal under Article 49 of the EC Statute of the Court of Justice against the judgment of the Court of First Instance of 19 March 1998 in Case T-83/96 *Van der Wal* v *Commission* [1998] ECR II-545 ('the contested judgment') rejecting the application for the annulment of the Commission decision of 29 March 1996, refusing access to certain documents ('the contested decision').

The action before the Court of First Instance

2 So far as the legal background is concerned, this was described by the Court of First Instance as follows:

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

"The Conference considers that transparency of the decision-making process strengthens the democratic nature of the institutions and the public's confidence in the administration. The Conference accordingly recommends

that the Commission submit to the Council no later than 1993 a report on measures designed to improve public access to the information available to the institutions."

2 In response to that Declaration, the Commission published Communication 93/C 156/05 which it sent to the Council, the Parliament and the Economic and Social Committee on 5 May 1993, concerning public access to the institutions' documents (OJ 1993 C 156, p. 5). On 2 June 1993 it adopted Communication 93/C 166/04 on openness in the Community (OJ 1993 C 166, p. 4).

3 In the context of those preliminary steps towards implementation of the principle of transparency, 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, hereinafter "the Code of Conduct"), which sought to establish the principles governing access to documents held by those institutions.

4 Accordingly, in implementation of that agreement the Commission adopted, on 8 February 1994, on the basis of Article 162 of the EC Treaty, Decision 94/90/ECSC, EC, Euratom on public access to Commission documents (OJ 1994 L 46, p. 58, hereinafter "Decision 94/90"), under Article 1 of which the Code of Conduct was formally adopted. The text of that Code is set out in an Annex to Decision 94/90.

5 The Code of Conduct as thus adopted by the Commission sets out a general principle in these terms:

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

6 For those purposes the term "document" is defined in the Code of Conduct as meaning "any written text, whatever its medium, which contains existing data and is held by the Commission or the Council".

7 After briefly setting out the rules governing the lodging and processing of requests for documents, the Code of Conduct describes the procedure to be followed, where it is proposed to reject a request, in these terms:

"Where the relevant departments of the institution concerned intend to advise the institution to reject an application, they will inform the applicant thereof and tell him that he has one month to make a confirmatory application to the institution for that position to be reconsidered, failing which he will be deemed to have withdrawn his original application.

If a confirmatory application is submitted, and if the institution concerned decides to refuse to release the document, that decision, which must be made within a month of submission of the confirmatory application, will be notified in writing to the applicant as soon as possible. The grounds of the decision must be given, and the decision must indicate the means of redress that are available, i.e. judicial proceedings and complaints to the ombudsman under the conditions specified in, respectively, Articles 173 and 138[E] of the Treaty establishing the European Community."

8 The Code of Conduct describes the factors which may be invoked by an institution to ground the rejection of a request for access to documents in these terms:

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

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

— the protection of the individual and of privacy,

— the protection of commercial and industrial secrecy,

— the protection of the Community's financial interests,

— the protection of confidentiality as requested by the natural or legal persons that supplied the information or as required by the legislation of the Member State that supplied the information.

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

9 In 1993 the Commission adopted Notice 93/C 39/05 on cooperation between national courts and the Commission in applying Articles 85 and 86 of the EC Treaty (OJ 1993 C 39, p. 6; hereinafter "the Notice")...'

3 As regards the facts, the contested judgment states:

'10 The *XXIVth Report on Competition Policy* (1994) (hereinafter "the XXIVth Report") stated that the Commission had received a number of questions from national courts...

11 By letter dated 23 January 1996 the applicant, in his capacity as a lawyer and member of a firm which deals with cases raising questions of competition at Community level, requested copies of some of the Commission's replies to those questions, namely:

(1) The letter dated 2 August 1993 from the Director-General of the Directorate-General for Competition (DG IV) to the Oberlandesgericht (Higher Regional Court), Düsseldorf, concerning the compatibility of a distribution agreement with Commission Regulation (EEC) No 1983/83 of 22 June 1983 on the application of Article 85(3) of the Treaty to categories of exclusive distribution agreements (OJ 1983 L 173, p. 1);

(2) The letter dated 13 September 1994 from Commissioner van Miert to the Tribunal d'Instance (District Court), St Brieuc, concerning the interpretation of Council Regulation (EEC) No 26 of 4 April 1962 applying certain rules of competition to production of and trade in agricultural products (OJ, English Special Edition 1959-1962, p. 129); and

(3) The letter sent by the Commission in early 1995 to the Cour d'Appel (Court of Appeal), Paris, which had asked it for an opinion on contractual provisions concerning sales targets for motor vehicle agents in the light of Article 85(1) of the Treaty and Commission Regulation (EEC) No 123/85 of 12 December 1984 on the application of Article 85(3) of the Treaty to certain categories of motor vehicle distribution and servicing agreements (OJ 1985 L 15, p. 16).

12 By letter dated 23 February 1996 the Director-General of DG IV refused the applicant's request on the ground that disclosure of the requested letters would be detrimental to "the protection of the public interest (court proceedings)". He explained that:

"... When the Commission replies to questions submitted to it by national courts before which an action has been brought for the purposes of resolving a dispute, the Commission intervenes as an '*amicus curiae*'. It is expected to show a certain reserve not only as regards acceptance of the manner in which the questions are submitted to it but also as regards the use which it makes of the replies to those questions.

I consider that, once the replies have been sent, they form an integral part of the proceedings and are in the hands of the court which raised the question. The points of both law and fact contained in the replies must... be regarded, in the context of the pending proceedings, as part of the national court's file. The Commission has sent the replies to that national court and the decision whether to publish that information and/or make it available to third parties is a matter primarily for the national court to which the reply is sent.

..."

13 The Director-General also referred to the need to maintain a relationship of trust between the Community executive and the national court authorities in the Member States. Such considerations, which are valid in all cases, must apply even more forcibly in cases such as the present, where no final judgment has yet been given in respect of the matters dealt with in the questions submitted to the Commission.

14 By letter dated 29 February 1996 the applicant sent a confirmatory application to the Secretariat-General of the Commission stating, *inter alia*, that he did not see how the conduct of the national proceedings could be undermined if information of a non-confidential nature provided by the Commission to the national court in the context of application of Community competition law came to the attention of third parties.

15 By letter dated 29 March 1996 (hereinafter "the contested decision") the Secretary-General of the Commission confirmed DG IV's decision "on the ground that disclosure of the replies could undermine the protection of the public interest and, more specifically, the sound administration of justice". He continued as follows:

"... there is a risk that disclosure of the replies requested, which comprise legal analyses, could undermine the relationship and the necessary cooperation between the Commission and national courts. A court which has submitted a question to the Commission would obviously not appreciate the reply being disclosed, particularly where the question is relevant to a pending case.

...”

16 The Secretary-General added that the procedure in the present case differed considerably from that under Article 177 of the Treaty to which the applicant had referred in his confirmatory application.’

4 It is in those circumstances that, on 29 May 1996, Mr Van der Wal brought an action for the annulment of the contested decision, which refused him access to the letters referred to above.

5 By order of 9 December 1996, the Court of First Instance granted the Netherlands Government leave to intervene in support of the form of order sought by Mr Van der Wal.

The appeal

6 By the contested judgment the Court of First Instance dismissed the action. The Netherlands Government and Mr Van der Wal have each lodged an appeal, based, respectively, on the following pleas in law:

— infringement of Decision 94/90 and the combined provisions of Articles 33 and 44 of the EC Statute of the Court of Justice;

— infringement of Decision 94/90, the European Convention for the Protection of Human Rights and Fundamental Freedoms ('the ECHR'), the duty to state reasons and the principle of equality between the parties and of the rights of the defence.

The plea alleging infringement of Decision 94/90

The judgment of the Court of First Instance

7 In concluding that the Commission had correctly relied on the protection of the public interest as a ground for refusing access to the documents in question, the Court of First Instance based its reasoning on Article 6 of the ECHR. In that respect, it stated at paragraph 47 of the contested judgment that 'The right of every person to a fair hearing by an independent tribunal means, *inter alia*, that both national and Community courts must be free to apply their own rules of procedure concerning the powers of the judge, the conduct of the proceedings in general and the confidentiality of the documents on the file in particular.' It added:

'48 The exception to the general principle of access to Commission documents based on the protection of the public interest when the documents at issue are connected with court proceedings, enshrined in Decision 94/90, is designed to ensure respect for that fundamental right. The scope of that exception is therefore not restricted solely to the protection of the interests of the parties in the context of specific court proceedings, but encompasses the procedural autonomy of national and Community courts (see paragraph 47 above).

49 Its scope therefore entitles the Commission to rely on that exception even when it is not itself party to the court proceedings which, in the particular case, justify the protection of the public interest.

50 In that respect, a distinction must be drawn between documents drafted by the Commission for the sole purposes of a particular court case, such as the letters in the present case, and other documents which exist independently of such proceedings. Application of the exception based on the protection of the public interest can be justified only in respect of the first category of documents, because the decision whether or not to grant access to such documents is a matter for the appropriate national court alone, in accordance with the essential rationale of the exception based on the protection of the public interest in the context of court proceedings (see paragraph 48 above).

51 When, in the context of proceedings pending before it, a national court requests certain information from the Commission on the basis of the cooperation provided for by the Notice, the Commission's reply is expressly provided for the purposes of the court proceedings in question. In such circumstances, the protection of the public interest must be regarded as requiring the Commission to refuse access to that information, and therefore to the documents containing it, because the decision concerning access to such information is a matter to be decided exclusively by the appropriate national court on the basis of its own national procedural law for as long as the court proceedings giving rise to its incorporation in a Commission document are pending.

52 In this case, the applicant requested the production of three letters, all concerning pending court proceedings. The applicant did not claim that those letters merely reproduced information which was otherwise accessible on the basis of Decision 94/90. In that respect, furthermore, it should be noted that the first letter related to the compatibility of a distribution agreement with Regulation No 1983/83, the second concerned the application of Regulation No 26/62 and the third concerned the interpretation of Regulation

No 123/85 (see paragraph 11 above). Those letters thus concerned points of law raised in the context of specific pending proceedings.'

Arguments of the parties

8 The appellants argue essentially that the public-interest exception does not allow a whole category of documents to be excluded from the scope of Decision 94/90. They maintain that that exception requires the Commission to verify in respect of each document whether, having regard to the information it contains, its disclosure is in fact capable of harming the public interest. In their submission, the interpretation by the Court of First Instance of Decision 94/90 is a wide interpretation which has no legal basis and undermines the uniform application of Community law.

9 As regards the principle of procedural autonomy which the contested judgment derives from Article 6 of the ECHR, the appellants maintain that the Court of First Instance has not explained how the independence of national courts could be called into question if the Commission were obliged to verify on a case-by-case basis whether the disclosure of a document was capable of harming the public interest. They state in that respect that the contested judgment does not contain any explanation concerning the limitation of the principle of procedural autonomy to documents drafted by the Commission for the purposes of particular court proceedings for as long as those proceedings are pending.

10 The Commission argues that the principle of procedural autonomy relied on by the Court of First Instance in interpreting Decision 94/90 must be understood in the light of the case-law of the Court of Justice according to which cooperation between the Commission and the national courts in applying Articles 85(1) and 86 of the EC Treaty (now Articles 81(1) and 82 EC) takes place within the limits of the applicable national law on procedure (Case C-234/89 *Delimitis* v *Henninger Bräu* [1991] ECR I-935, paragraph 53). Within the framework of

that cooperation, the Commission's role is secondary; it is for the national court to decide, first, whether it is necessary to consult the Commission, secondly, what questions to put to it, and, finally, what action should be taken in response to the answers obtained. According to the Commission, it follows that it is solely for the national court to determine, on the basis of its procedural law, whether, at what time, and under what conditions, the Commission's reply may be disclosed to third parties.

11 The Commission adds that the reference in the contested judgment to the ECHR constitutes only one factor in support of the principle of procedural autonomy according to which both national and Community courts must be free to apply their own rules of procedure concerning the powers of the judge, the conduct of the proceedings in general and the confidentiality of the documents on the file in particular. If paragraphs 45 and 46 of the contested judgment were removed, the judgment would remain substantively unchanged. The limitation placed on that principle by the Court of First Instance, to the effect that it applies only to documents drafted by the Commission for the purposes of particular proceedings for as long as those proceedings are pending, represents an incidental opinion, which, moreover, is not formulated as categorically as the appellants claim.

12 In the Commission's submission, therefore, it is in the light of the above that Decision 94/90 must be interpreted. The exception based on protection of the public interest (court proceedings) covers all cases in which the disclosure of the documents in question is a matter for the national courts pursuant to their own rules of procedure.

13 As regards the argument that the Court of First Instance's interpretation of Decision 94/90 undermines the uniform application of Community law, the Commission maintains that the application of that decision is always identical and that it is the application of different national rules which may lead to access to documents being granted in some Member States and not in others.

Findings of the Court

14 Having deduced from Article 6 of the ECHR that the right of every person to a fair hearing by an independent tribunal means, *inter alia*, that both national and Community courts must be free to apply their own rules of procedure concerning the powers of the judge, the conduct of the proceedings in general and the confidentiality of the documents on the file in particular, the Court of First Instance held, in paragraph 48, that '[T]he exception to the general principle of access to Commission documents based on the protection of the public interest when the documents at issue are connected with court proceedings, enshrined in Decision 94/90, is designed to ensure respect for that fundamental right'.

15 However, according to the contested judgment, the principle of procedural autonomy thus deduced from Article 6 of the ECHR does not concern all the documents in the proceedings. It applies only to documents written by the Commission for the sole purposes of a particular court case, thus excluding other documents which exist independently of such proceedings (paragraph 50), and only while the matter is pending (paragraph 51).

16 As regards documents covered by the principle of procedural autonomy thus conceived, the contested judgment holds that it is for national courts alone to rule on requests for access to those documents on the basis of their national procedural law (paragraph 51).

17 It is true that the general principle of Community law under which every person has a right to a fair trial, inspired by Article 6 of the ECHR (see, *inter alia*, Case C-185/95 P *Baustahlgewebe* v *Commission* [1998] ECR I-8417, paragraphs 20 and 21), comprises the right to a tribunal that is independent of the executive power in particular (on that point, see in particular the judgment of the European Court of Human Rights of 18 June 1971 in the case of *De Wilde, Ooms and Versyp* v *Belgium*, Series A, No 12, paragraph 78). However, it is not possible to deduce from that right, as the Court of First Instance did in paragraphs 47 to 51

of the contested judgment, that the court hearing a dispute is necessarily the only body empowered to grant access to the documents in the proceedings in question. Nor can such a general principle be deduced from the constitutional traditions common to the Member States.

18 The power to grant such access also cannot be deduced from Article 6 of the ECHR, even limited to documents drafted with a view to the court proceedings in question.

19 Moreover, the risks that the independence of the court might be undermined are sufficiently taken into account by Decision 94/90 and by the protection afforded by the courts at Community level with respect to measures of the Commission granting access to documents which it holds.

20 In order to determine under what conditions, in the context of its cooperation with national courts with a view to the application by them of Articles 85 and 86 of the Treaty, the Commission must refuse access to documents which it holds, on the ground that the protection of the public interest, within the meaning of Decision 94/90, may be undermined, it is necessary to consider the manner in which such cooperation works in practice.

21 As the Notice shows, those courts may need information of a procedural nature 'to enable them to discover whether a certain case is pending before the Commission, whether a case has been the subject of a notification, whether the Commission has officially initiated a procedure or whether it has already taken a position through an official decision or through a comfort letter sent by its services. If necessary, national courts may also ask the Commission to give an opinion as to how much time is likely to be required for granting or refusing individual exemption for notified agreements or practices, so as to be able to determine the conditions for any decision to suspend proceedings or whether interim measures need to be adopted' (paragraph 37 of the Notice).

22 According to paragraph 38 of the Notice, national courts may also consult the Commission on points of law where the application of Articles 85 and 86 causes them particular difficulties. Such difficulties relate in particular to the conditions for applying those articles as regards the effect on trade between Member States and as regards the question whether the restriction of competition resulting from the practices specified in these provisions is appreciable. In addition, where national courts have doubts as to whether an agreement, decision or concerted practice in issue before them is eligible for an individual exemption, they may ask the Commission to provide them with an interim opinion.

23 Lastly, it follows from paragraph 40 of the Notice that national courts can obtain information from the Commission regarding factual data: statistics, market studies and economic analyses.

24 It follows from the above that documents supplied by the Commission to national courts are often documents which it already possessed or which, although drafted with a view to particular proceedings, merely refer to the earlier documents, or in which the Commission merely expresses an opinion of a general nature, independent of the data relating to the case pending before the national court. In relation to those documents, the Commission must assess in each individual case whether they fall within the exceptions listed in the code of conduct adopted by Decision 94/90.

25 Documents supplied by the Commission may also contain legal or economic analyses, drafted on the basis of data supplied by the national court. In those cases, the Commission acts as a legal or economic adviser to the national court and documents drafted in the exercise of that function must be subject to national procedural rules in the same way as any other expert report, in particular as regards disclosure.

26 In those cases, national law may preclude the disclosure of those documents and compliance with that law may be regarded as a public interest worthy of protection under the exceptions provided for by Decision 94/90.

27 That is, however, not enough to exonerate the Commission entirely from its obligation to disclose those documents. In so far as they are held by the Commission, such documents fall within the scope of Decision 94/90, which provides for the widest public access possible. Any exception to that right of access must therefore be interpreted and applied strictly.

28 Consequently, the Commission does not discharge its duty merely by refusing any request for access to the documents in question. Compliance with national procedural rules is sufficiently safeguarded if the Commission ensures that disclosure of the documents does not constitute an infringement of national law. In the event of doubt, it must consult the national court and refuse access only if that court objects to disclosure of the documents.

29 Moreover, that procedure makes it unnecessary for the applicant to make a request first to the competent national court and subsequently to the Commission if that court considers that national procedural law does not preclude disclosure of the documents requested, but considers that the application of Community rules may lead to a different solution. The procedure is therefore also consistent with the requirements of good administration.

30 It follows that, by interpreting Decision 94/90 as meaning that the exception based on protection of the public interest in the context of court proceedings

obliges the Commission to refuse access to documents which it drafted solely for the purposes of such proceedings, the Court of First Instance erred in law, with the result that the plea alleging infringement of that decision is well founded.

31 Under Article 54 of the EC Statute of the Court of Justice, where the appeal is well founded, the Court of Justice is to set aside the decision of the Court of First Instance. It may then itself give final judgment in the matter, where the state of the proceedings so permits. That is so in this case.

The action brought before the Court of First Instance for annulment of the contested decision

32 It follows from paragraphs 14 to 29 of this judgment that, where the Commission has received a request for access to documents which it has supplied to a national court in the context of its cooperation with national courts in applying Articles 85 and 86 of the Treaty, it must verify whether those documents constitute legal or economic analyses as defined in paragraph 25 of this judgment. If the documents in question are of that kind, the Commission must ensure that their disclosure is not contrary to national law. In case of doubt, it must consult the national court and refuse access only if that court objects to disclosure.

33 Thus, in refusing access to the documents requested without verifying whether they constituted legal or economic analyses drafted on the basis of data supplied by the national court, and, if that were so, without ensuring that their disclosure was not contrary to national law, the Commission infringed Decision 94/90, with the result that the contested decision must be annulled.

Costs

34 Under the first paragraph of Article 122 of the Rules of Procedure, where the appeal is well founded and the Court itself gives final judgment in the case, the Court is to make a decision as to costs. Under Article 69(2) of the Rules of Procedure, applicable to appeals by virtue of Article 118, the unsuccessful party is to be ordered to pay the costs, if they have been applied for in the successful party's pleadings. Under Article 69(4) of the Rules of Procedure, Member States and institutions which intervene in the proceedings are to bear their own costs. Since the Commission has been unsuccessful, it must be ordered to pay, in addition to its own costs, all the costs incurred in the proceedings before the Court of First Instance and the Court of Justice by the appellants and by Mr Van der Wal as intervener in Case C-174/98 P. The Kingdom of the Netherlands is ordered to bear its own costs, as intervener in Case T-83/96 relating to the proceedings before the Court of First Instance and as intervener in Case C-189/98 P relating to these proceedings.

On those grounds,

THE COURT

hereby:

1. **Sets aside the judgment of the Court of First Instance of the European Communities of 19 March 1998 in Case T-83/96 *Van der Wal* v *Commission*;**

2. Annuls the Commission's decision of 29 March 1996 refusing access to certain documents;

3. Orders the Commission of the European Communities to pay the costs relating to both sets of proceedings;

4. Orders the Kingdom of the Netherlands to bear its own costs, as intervener in Case T-83/96, in the proceedings before the Court of First Instance and, as intervener in Case C-189/98 P, in these proceedings.

Rodríguez Iglesias Moitinho de Almeida

Edward Sevón Kapteyn Gulmann

Hirsch Ragnemalm Wathelet

Delivered in open court in Luxembourg on 11 January 2000.

R. Grass

Registrar

G.C. Rodríguez Iglesias

President