

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

19 July 1999 *

In Case T-188/97,

Rothmans International BV (formerly Rothmans Group Holdings BV), a company incorporated under Netherlands law, having its registered office in Amsterdam, represented by Scott Crosby, Solicitor, with an address for service in Luxembourg at the Chambers of Victor Elvinger, 31 Rue d'Eich,

applicant,

supported by

Kingdom of Sweden, represented initially by Erik Brattgård and subsequently by Anders Kruse, Adviser to the Ministry of Foreign Affairs, acting as Agents, with an address for service in Luxembourg at the Swedish Embassy, 2 Rue Heinrich Heine,

intervener,

* Language of the case: English.
ECR

Commission of the European Communities, represented initially by Ulrich Wölker and Carmel O'Reilly and subsequently by Ulrich Wölker and Xavier Lewis, of its Legal Service, acting as Agents, with an address for service in Luxembourg at the office of Carlos Gómez de la Cruz, also of its Legal Service, Wagner Centre, Kirchberg,

defendant,

APPLICATION for the annulment of a Commission decision refusing the applicant access to the minutes of the Customs Code Committee,

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

composed of: B. Vesterdorf, President, C.W. Bellamy, J. Pirrung, A.W.H. Meij and M. Vilaras, Judges,

Registrar: H. Jung,

having regard to the written procedure and further to the hearing on 19 January 1999,

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 (hereinafter ‘Declaration No 17’) in the following 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 Following Declaration No 17, the Commission published Communication 93/C 156/05 concerning public access to the institutions’ documents (OJ 1993

C 156, p. 5), which it sent to the Council, the Parliament and the Economic and Social Committee on 5 May 1993. On 2 June 1993 it submitted 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, the Council and the Commission approved on 6 December 1993 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 the documents held by those institutions.

4 The Commission, for its part, adopted this Code of Conduct by way of Decision 94/90/ECSC, EC, Euratom of 8 February 1994 on public access to Commission documents (OJ 1994 L 46, p. 58, hereinafter 'Decision 94/90').

5 The Code of Conduct, as adopted by the Commission, sets out the following general principle:

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

6 The Code of Conduct defines the term ‘document’ as meaning ‘any written text, whatever its medium, which contains existing data and is held by the Commission or the Council’.

7 Under the third paragraph of the section headed ‘Processing of initial applications’, the Code of Conduct provides as follows (hereinafter referred to as the ‘rule on authorship’):

‘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’.

8 The matters on which an institution may rely in order to justify rejection of an application for access to documents are set out as follows in a fourth section 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),

- 10 By letter of 23 January 1997 the applicant requested from the Commission access to a number of documents which included the minutes of the Customs Code Committee — Transit Section (hereinafter ‘the Committee’) from 4 April 1995 onwards.
- 11 By letter of 21 February 1997, the Director-General of the Directorate-General for Customs and Indirect Taxation (DG XXI) wrote to the applicant informing it that its application would be dealt with as quickly as possible but pointing out that, in view of the number and nature of the documents requested, it would probably be more than a month before the applicant would receive a reply.
- 12 By letter of 26 February 1997, the applicant requested the Director-General to confirm that the application for access had been granted within the meaning of Article 2(2) of Decision 94/90 and that the one-month period referred to was necessary only to enable the documents to be compiled.
- 13 Since no reply was forthcoming, the applicant, by letter of 14 March 1997, applied to the Secretary-General of the Commission for review of the intention to refuse access, as provided for in Article 2(2) of Decision 94/90.
- 14 The Secretariat-General replied on 24 April 1997 that the application would be dealt with as rapidly as possible but that it would probably be more than a month before the applicant would receive a reply.

- 15 By letter of 25 April 1997, the applicant stated that the failure by the Secretary-General to reply within one month following lodgement of the application for review constituted a decision rejecting its application.
- 16 In a letter of 30 April 1997 the Secretary-General forwarded a number of Commission documents but refused to hand over the minutes of the Committee on the ground that the Commission was not their author. The Secretary-General also referred to the Committee's internal regulation, which stated that its work was confidential.
- 17 On 6 May 1997 the applicant requested the Secretary-General to confirm that the documents forwarded constituted all the documents deemed accessible, to indicate who was the author of the Committee's minutes, and to forward to it the Committee's internal regulation.
- 18 The Secretariat-General confirmed, by letter of 15 May 1997, that it had sent to the applicant all documents which DG XXI had in its possession, with the exception of the Committee's minutes. It pointed out that, while the minutes are drawn up by the Commission in its secretarial capacity, they are adopted by the Committee, which is therefore their author. The Secretariat-General refused to hand over the Committee's internal regulation on the ground that the Commission was not the author of that document. Finally, it reiterated that, under that regulation, the Committee's proceedings are confidential.
- 19 By letters of 30 May 1997, the applicant requested access to the minutes in question from the customs authorities of each Member State. At the date on

which the present action was brought, seven replies had been received, two merely acknowledging receipt of the application and the other five declining access by reference, in the majority of cases, to the confidential nature of the work carried out by the Committee.

Procedure

- 20 The applicant brought the present action by application lodged at the Registry of the Court of First Instance on 24 June 1997.
- 21 By document lodged at the Court Registry on 25 November 1997, the Kingdom of Sweden applied for leave to intervene in support of the form of order sought by the applicant. By order of 12 December 1997 the President of the First Chamber of the Court of First Instance granted it leave to intervene.
- 22 By decision of 11 November 1998, the Court decided to assign the case to the First Chamber, Extended Composition.
- 23 Following the report of the Judge-Rapporteur, the Court (First Chamber, Extended Composition) decided to open the oral procedure without any preparatory inquiry. However, by way of measures of procedural organisation, the Court requested the defendant and the Council to reply in writing to a number of questions prior to the hearing. The defendant and the Council did so within the time allowed for the purpose.

- 24 By letter of 13 November 1998 in reply to the Court's written questions, the Commission thus confirmed to the Court that it had sent to the applicant on 20 November 1997 certain documents which it had, by an oversight, failed to forward to it. It stated that it was not holding any other pertinent documents.
- 25 The hearing took place on 19 January 1999. The parties presented oral argument and replied to the questions put by the Court.

Forms of order sought by the parties

- 26 The applicant claims that the Court should:
- annul the Commission decision of 15 May 1997, or in the alternative the Commission decision of 30 April 1997, refusing the applicant access to certain documents;

 - order the Commission to pay the costs.

27 The Commission contends that the Court should:

— dismiss the application;

— order the applicant to pay the costs.

28 The Kingdom of Sweden, as intervener, claims that the Court should annul the Commission decision of 15 May 1997.

The subject-matter of the dispute

29 Following the Commission's reply of 13 November 1998, the applicant confirmed, at the Court's request during the hearing, that the subject-matter of the dispute related exclusively to the minutes of the Committee.

30 In view of the fact that the applicant is seeking, primarily, the annulment of the decision of 15 May 1997 and, in the alternative, the annulment of the decision of 30 April 1997, it is necessary to determine which is the measure producing binding legal effects such as to affect the interests of the applicant by bringing about a distinct change in its legal position (see, for instance, Case T-154/94 *CSF and CSME v Commission* [1996] ECR II-1377, paragraph 37).

31 In that connection, it is clear from its content that the letter of 15 May 1997 is merely a confirmation of the decision of 30 April 1997 refusing to forward the minutes of the Committee. The letter also refers to the refusal to forward the internal regulation of the Committee, but that regulation does not feature among the documents in question. Finally, it also contains some additional explanations and information.

32 In light of the foregoing, the only act open to challenge for the purposes of Article 173 of the EC Treaty (now, after amendment, Article 230 EC) is the decision of 30 April 1997 (hereinafter 'the contested decision').

33 Next, the Court notes that neither the application nor the reply makes it possible to determine whether the applicant is raising a plea concerning the legality of the rule on authorship (see paragraph 7 above). It was established in this regard during the oral procedure that the applicant is not raising such a plea.

Substance

34 The applicant puts forward two pleas in law in support of its action. The first plea in law alleges infringement of Article 190 of the EC Treaty (now Article 253 EC) and the second infringement of Decision 94/90.

The first plea in law: infringement of Article 190 of the Treaty

35 The applicant submits that the contested decision is vitiated by defective reasoning such as to lead to its annulment.

- 36 The Court points out that, according to consistent case-law, the obligation to state reasons means that the reasoning of the Community authority which adopted the contested measure must be shown clearly and unequivocally so as to enable the persons concerned to ascertain the reasons for the measure in order to protect their rights and the Community judicature to exercise its power of review (see Case T-124/96 *Interporc v Commission* [1998] ECR II-231, paragraph 53).
- 37 In the present case, the Commission provided reasons for the contested decision by referring to the rule on authorship and by confirming that, by virtue of that rule, the applicant's request was inadmissible on the ground that the author of the documents sought was a third party. Such reasoning is sufficiently clear to enable the party concerned to understand why the Commission did not forward to it the documents at issue.
- 38 It follows that the first plea in law must be rejected.

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

Arguments of the parties

- 39 The applicant submits, primarily, that the Commission infringed the provisions of Decision 94/90 through its refusal, in reliance on the rule on authorship, to grant access to the minutes of the Committee.

- 40 It notes in this regard that the Commission draws up the minutes of the Committee. By virtue of this work, the Commission is, materially and intellectually, the author of those documents. The fact that the Committee approves those documents does not suffice to confer on it the status of author.
- 41 The applicant further submits that the rule on authorship is designed to protect third-party documents. It points out that the Chairman of the Committee is a Commission official. Similarly, it is a Commission representative who convenes the Committee, draws up its agenda, distributes documents to members and performs secretarial duties. Finally, all correspondence intended for the Committee must be addressed to the Commission and marked for the attention of the Committee Chairman.
- 42 The Commission denies that it refused the access to the Committee minutes requested by the applicant. It states that, in its letter of 30 April 1997, it confined itself to informing the applicant that the minutes of the Committee were not 'Commission documents'.
- 43 It argues in this regard that the reference to the rule on authorship has the effect of drawing a distinction between the person in possession of a document and the author of that document. It contends that Decision 94/90 is applicable only to those documents of which it is the author. That is a condition *sine qua non* for the admissibility of any request for access. In this case, the Commission merely pointed out that the request for access to the Committee minutes was inadmissible.
- 44 The Commission denies that it is the author of the minutes. It acknowledges that it provides the secretarial services for the Committee and, in that capacity, records

the content of the meetings in the minutes. However, the mere fact that it undertakes this technical work is not in itself sufficient to confer authorship on it, since that is determined by 'intellectual possession' of the text. The Committee approves the minutes and, as the applicant itself acknowledges, is solely responsible for its deliberations. The Commission cannot, therefore, be the author of those documents in the intellectual sense.

- 45 The Commission further rejects the applicant's argument that the Committee is merely an 'emanation' of the Commission. That argument, it submits, misconstrues the role, functions and place of 'comitology' committees within the Community's institutional framework.
- 46 According to the provisions of Council Decision 87/373/EEC of 13 July 1987 laying down the procedures for the exercise of implementing powers conferred on the Commission (OJ 1987 L 197, p. 33, hereinafter 'the "comitology" decision'), the committees established pursuant to that decision assist the Commission in the adoption of implementing measures under powers conferred by the Council. The Commission infers from the use of the verb 'assist' that these committees cannot be considered to constitute an integral part of the Commission.
- 47 The Customs Code Committee is composed of representatives of the Member States and was brought into being, not by the Commission, but by Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code (OJ 1992 L 302, p. 1). Consultation of this Committee is an essential procedural requirement, breach of which constitutes a procedural irregularity rendering the measures so adopted liable to annulment.

- 48 The Swedish Government points out that Decision 94/90 is a measure capable of conferring rights on third parties which the Commission is obliged to respect (Case T-105/95 *WWF UK v Commission* [1997] ECR II-313, paragraph 55).
- 49 The Swedish Government states that ‘comitology’ committees assist the Commission in the exercise of the powers which the Council has delegated to the Commission. From the organisational and administrative point of view, those committees must therefore be regarded as an integral part of the Commission.
- 50 The Swedish Government further points out that if ‘comitology’ committees were to be regarded as separate bodies, this would mean that the documents of such committees would fall outside the scope of the rules adopted in relation to public access to Council and Commission documents. An individual wishing to obtain access to the work of the committees would then be dependent on the committees’ exercise of their own discretion, without any possibility of judicial review. Such an interpretation would frustrate the principle of transparency and for that reason can scarcely have been the intention of the signatories of Declaration No 17 or of the authors of the declarations of the European Council in Birmingham and Edinburgh in 1992 (*EC Bulletin* 10-1992, p. 9, and *EC Bulletin* 12-1992, p. 7) and in Copenhagen in 1993 (*EC Bulletin* 6-1993, p. 16).
- 51 The Swedish Government considers that the minutes of the Committee were drawn up by the Commission within the scope of its activities. The Commission ought, for that reason, to have examined the substance of the request submitted by the applicant and determined whether the documents requested could be disclosed.
- 52 In an alternative submission, the applicant argues that, according to the terms of the letters of 30 April 1997 and 15 May 1997, the Commission infringed

Decision 94/90 and the Code of Conduct through its refusal to grant that access by invoking the provisions of the Committee's internal regulation dealing with the confidentiality of the Committee's proceedings, without examining the respective interests of the parties involved.

Findings of the Court

- 53 It should be borne in mind at the outset, first, that Declaration No 17 and the Code of Conduct lay down the general principle that the public should have the greatest possible access to documents held by the Commission and the Council and, second, that Decision 94/90 is a measure conferring on citizens the right of access to documents held by the Commission (*WWF UK v Commission*, cited above, paragraph 55).
- 54 Next, it is important to note that where a general principle is established and exceptions to that principle are laid down, those exceptions must be construed and applied strictly, so as not to frustrate the application of the general principle (*WWF UK v Commission*, cited above, paragraph 56, and *Interporc v Commission*, cited above, paragraph 49).
- 55 In this connection, the rule on authorship, howsoever described, lays down an exception to the general principle of transparency in Decision 94/90. It follows

that this rule must be construed and applied strictly, so as not to frustrate the application of the general principle of transparency.

- 56 It is in the light of these observations that the Court must appraise the argument that ‘comitology’ committees are entirely distinct from and independent of the Commission and that the documents in question are consequently not Commission documents.
- 57 ‘Comitology’ committees have their origin in Article 145 of the EC Treaty (now Article 202 EC), which provides that the Council may confer on the Commission, in the acts which the Council adopts, powers for the implementation of the rules which the Council lays down. These committees established pursuant to the ‘comitology’ decision are composed of representatives of the Member States and are presided over by a Commission representative.
- 58 According to the ‘comitology’ decision, the committees established under that decision, such as the Customs Code Committee, assist the Commission in performing the tasks conferred on it. Furthermore, under the terms of the Committee’s internal regulation, the Commission provides the secretarial services for the Committee, which means that it draws up the minutes which the Committee adopts. In addition, it appears that this Committee, in common with the other ‘comitology’ committees, does not have its own administration, budget, archives or premises, still less an address of its own.
- 59 In light of the above findings, the Committee cannot be regarded as being ‘another Community institution or body’ within the meaning of the Code of Conduct adopted by Decision 94/90. Since it is also not a natural or legal person,

a Member State or any other national or international body, such a committee does not belong to any of the categories of third-party authors listed in that Code.

60 At the Court's request, the Council confirmed that 'comitology' committees are not working groups set up for the purpose of supporting it in its activity, but are, on the contrary, established for the purpose of assisting the Commission in the exercise of the powers conferred on it. Moreover, the Council stated that it was only exceptionally that it held copies of the documents produced by those committees. The Council concluded that the minutes of a 'comitology' committee are not documents belonging to it and that it therefore does not have the power to grant access to those minutes. Finally, it pointed out that an application for access to the minutes of a 'comitology' committee should be made to the Commission, since it is the Commission that provides the chairman of and the secretarial services for such a committee.

61 Furthermore, refusal of access to the minutes of the numerous 'comitology' committees would amount to placing a considerable restriction on the right of access to documents, the importance of which was confirmed by the Court of Justice in its judgment in Case C-58/94 *Netherlands v Council* [1996] ECR I-2169, and by the Court of First Instance, most recently, in its judgment in Case T-174/95 *Svenska Journalistförbundet v Council* [1998] ECR II-2289. Such a restriction is not compatible with the very objective of the right of access to documents.

62 In those circumstances, it must be held that, for the purposes of the Community rules on access to documents, 'comitology' committees come under the Commission itself. It is therefore the Commission which is responsible for ruling on applications for access to documents of those committees, such as the minutes here in question.

63 The Commission was therefore not entitled, in this case, to refuse access to the minutes of the Committee by invoking the rule on authorship set out in the Code of Conduct adopted by Decision 94/90. It follows that it infringed that decision in adopting the contested decision.

64 It follows that the second plea in law must be upheld and that the contested decision must be annulled without its being necessary to examine the alternative submission put forward by the applicant.

Costs

65 Under Article 87(2) of the Rules of Procedure of the Court of First Instance, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has been unsuccessful, it must, in accordance with the form of order sought by the applicant, be ordered to pay the costs.

66 Under Article 87(4) of those Rules of Procedure, Member States and institutions which have intervened in the proceedings are to bear their own costs. The

Kingdom of Sweden, which has intervened in support of the form of order sought by the applicant, must for that reason bear its own costs.

On those grounds,

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

hereby:

1. **Annuls the Commission decision of 30 April 1997 refusing the applicant access to the minutes of the Customs Code Committee;**
2. **Orders the Commission to pay the costs of the applicant, in addition to its own costs;**

3. Orders the Kingdom of Sweden to bear its own costs.

Vesterdorf

Bellamy

Pirrung

Meij

Vilaras

Delivered in open court in Luxembourg on 19 July 1999.

H. Jung

Registrar

B. Vesterdorf

President