JUDGMENT OF THE COURT OF FIRST INSTANCE (First Chamber)
13 September 2000 *

In Case T-20/99,

Denkavit Nederland BV, established at Voorthuizen (Netherlands), represented by E.A. Buys, of the Arnhem Bar,

applicant,

v

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

defendant,

* Language of the case: Dutch.

APPLICATION for annulment of the Commission decision of 17 November 1998 refusing to grant the applicant access to a report concerning measures taken to combat swine fever in the Netherlands,

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

composed of: B. Vesterdorf, President, M. Vilaras and N. Forwood, Judges,

Registrar: H. Jung,

having regard to the written procedure and further to the hearing on 14 April 2000.

gives the following

Judgment

Legal background

1 On 6 December 1993 the Commission and the Council approved a common code of conduct concerning public access to Council and Commission documents (OJ 1993 L 340, p. 41; hereinafter 'the code of conduct').

2 On 8 February 1994, in order to ensure the implementation of the code, the Commission 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 measure.

3 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.'

4 Under the heading 'Exceptions', the code lists the circumstances in which an institution may properly refuse a request for access to documents. It provides as follows:

'The institutions will refuse access to any document whose 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.'

Facts

5 In the context of completion of the internal market and in order to ensure the protection of human and animal health, the Community adopted a body of measures, including Council Decision 90/424/EEC of 26 June 1990 on expenditure in the veterinary field (OJ 1990 L 224, p. 19), amended by Council Decision 94/370/EC of 21 June 1994 (OJ 1994 L 168, p. 31), which lays down *inter alia* the detailed rules governing the financial contribution of the Community to programmes for the eradication of certain animal diseases.

6 Under Article 3(2) of Decision 90/424, the Member State concerned is to obtain a financial contribution from the Community for the eradication of animal diseases on condition that the measures applied immediately comprise at least the isolation of the holding from the time of suspicion and that, following official confirmation of the disease, certain measures — defined in that provision — are adopted.

7 Article 9 of Decision 90/424 provides:

'1. The Commission shall carry out, with the cooperation of the national competent authorities, on-the-spot checks to ensure, from a veterinary point of view, that the measures adopted have been applied.

2. Member States shall take all necessary steps to facilitate these checks, and shall, in particular, ensure that the experts have access to all information and documents necessary for assessing whether the measures have been carried out.'

8 In 1997 cases of swine fever were reported in various production regions located in the Netherlands. Shortly thereafter, several hundred centres of infection were recorded.

9 On 3 March 1997 the Commission adopted Regulation (EC) No 413/97 adopting exceptional support measures for the market in pigmeat in the Netherlands (OJ 1997 L 62, p. 26), authorising the Netherlands authorities to grant aid and pledging that 70% of the expenditure incurred would be financed by the Community budget.

10 Following one of the checks carried out by the Commission, in August 1997, the findings and proposals made by the inspection team were set out in a document entitled 'Report on Inspection Visit — the fight against classical swine fever in the

Netherlands in 1997 — Verification of Expenditure within the framework of Checks of Technical and Financial Implementation' (hereinafter 'the Report').

11 On the basis of Decision 90/424 — specifically, pursuant to Article 3 thereof — the Commission adopted on 15 December 1997 Decision 98/25/EC on Community financial aid towards the eradication of classical swine fever in the Netherlands (OJ 1998 L 8, p. 28).

12 Pursuant to Decision 98/25, the Netherlands was granted an initial advance of ECU 31.3 million to be used to compensate the owners of the first 195 holdings affected by the disease in question, subject to production of documentary evidence. In accordance with the fifth recital in the preamble to the Decision, that 'initial advance [was to] be paid, irrespective of the final decision concerning the overall contribution and any reductions therein'. The seventh recital contemplated further financial assistance for other owners of contaminated animals, subject to verification, to be carried out by the Commission, that the Community veterinary rules had been complied with and provided that the conditions for Community financial assistance were satisfied.

13 By letter of 7 August 1998, the applicant applied to the Commission for access to the Report.

14 On receiving no response, the applicant submitted, by letter of 5 October 1998 addressed to the Secretary-General of the Commission, a request for review, pursuant to Article 2(2) of Decision 94/90.

15 By letter of 17 November 1998 (hereinafter 'the contested decision'), the Secretary-General of the Commission refused the applicant's request in the following terms:

'1. The disclosure of the above report could undermine the protection of the public interest (in particular, inspections and investigations).

The Commission's inspection task on the classical swine fever in the Netherlands is not finished and contacts are ongoing between the Commission and the Member State concerned. This work has to be carried out in a climate of mutual confidence. Furthermore, the report you have applied for refers to alleged infringements of the Community rules. These allegations need to be brought to light, and disclosure of the report may undermine legal action that may need to be undertaken.

2. Moreover, the disclosure could harm the protection of commercial secrecy, as the report contains detailed data on individual named holdings.'

16 Subsequent to its adoption of the contested decision, the Commission adopted Decision 1999/18/EC of 22 December 1998 on additional Community financial aid towards the eradication of classical swine fever in the Netherlands (OJ 1999 L 6, p. 18), granting the Netherlands additional Community financial aid. Under Article 1 of that Decision, this aid was granted 'without prejudice to the final decision concerning the overall financial contribution and any reductions necessary'.

17 The third and fourth recitals in the preamble to that Decision emphasised that 'the Commission [was] still checking whether all the Community veterinary rules [had been] complied with and whether all the conditions for obtaining Community financial aid [had been] met' and that 'the Dutch authorities [were] also conducting additional checks of the declarations they [had] made to the Commission to see whether the conditions laid down in Decision 90/424/EEC [had been] met, in particular in the light of the Commission's remarks at [that] stage'.

Procedure

18 Those are the circumstances in which, by application lodged at the Registry of the Court of First Instance on 21 January 1999, the applicant brought the present proceedings.

19 Upon hearing the report of the Judge-Rapporteur, the Court of First Instance (First Chamber) decided to open the oral procedure without first ordering measures of inquiry.

20 At the hearing on 14 April 2000, the parties presented oral argument and replied to questions addressed to them by the Court.

Forms of order sought

21 The applicant claims that the Court should:

— annul the contested decision;

— order the Commission to pay the costs.

22 The Commission contends that the Court should:

— dismiss the action as unfounded;

— order the applicant to pay the costs.

Substance

The first and second pleas: infringement of Decision 94/90 and of Article 190 of the EC Treaty (now Article 253 EC)

Arguments of the parties

— The public interest exception (inspections and investigations)

23 The applicant maintains that the Commission infringed Decision 94/90 by applying the exception based on protection of the public interest.

24 According to the applicant, the first reason relied upon by the Commission in the contested decision — the need to preserve a relationship based on mutual trust with the Netherlands during the inspection period — has no basis in fact. By the time the contested decision was adopted, the investigation had already been closed and there was therefore no longer any need for consultation with the Netherlands. As early as November 1998, the Commission's spokesman had indicated that a decision had been taken to apply a 25% reduction to the Community financial assistance initially granted, by way of penalty.

25 No weight is to be attached to the fact that the administrative process for adopting a decision on the final amount of the financial assistance to be granted to the Netherlands was never brought to completion. It is not in dispute that this decision remains pending; the crucial point, however, is that the inspection on which the Report was based has been definitively closed.

26 As regards the second reason given for applying the public interest exception, that is to say, the risk that possible court proceedings might be prejudiced, the applicant maintains that this, too, lacks foundation in so far as the Member State concerned already had a copy of the Report and the fact that there were differences of opinion between that State and the Commission was public knowledge. Moreover, the Netherlands authorities founded their refusal of the applicant's request for access to the Report on instructions received from the Commission.

27 Furthermore, it is clear from Case T-105/95 *WWF UK* v *Commission* [1997] ECR II-313, paragraph 64, that the Commission cannot confine itself to invoking the possible initiation of an infringement procedure as justification for refusing access to all the documents identified in a request made by a citizen. That possibility cannot be relied on in a case which concerns only the monitoring of Community expenditure. In the present case, all that the Netherlands had to fear from that exercise was that certain expenditure would be disallowed under the procedure for clearance of the accounts submitted by the Member States for payment by the European Agricultural Guidance and Guarantee Fund (EAGGF).

28 Lastly, according to the applicant, it is incorrect to maintain that it is also to be inferred from the reference in the contested decision to 'alleged infringements' that infringements could have been committed by individuals. The decision concerns individuals only in so far as it purports to protect their business secrets.

29 The Commission makes the preliminary point that each of the mandatory exceptions relied on constitutes in itself a sufficient ground for refusing access to the Report. Consequently, the action can succeed only if it is held that in both cases the Commission was wrong in invoking the exception in question.

30 The Commission maintains that it had to apply the public interest exception in the present case since the document to which access was requested was directly linked to an inspection exercise. It states, in particular, that the purpose of that exercise was to verify that the Netherlands authorities had correctly applied health measures partly financed by the Community budget or for which Community financial assistance had been requested. Consequently, protection of the public interest entailed a duty to ensure the smooth conduct of the procedure leading to the adoption of a decision as to whether the expenditure would be allowed or disallowed under the Community budget, or even a decision to initiate an infringement procedure.

31 In that respect, it is clear from the case-law that the Member States are entitled to expect the Commission to protect the confidentiality of documents relating to inspection exercises which may give rise to an infringement procedure, even where a period of time has elapsed since the closure of the investigation (*WWF UK* v *Commission*, cited above, paragraphs 63 and 64). The same is true where the inspection at issue is not primarily designed to determine whether or not there has been a failure to fulfil obligations with a view to intiating the procedure under Article 169 of the EC Treaty (now Article 226 EC), but rather to determine whether certain expenditure may be allowed under the Community budget. There is a close link between an infringement procedure and the monitoring of expenditure by the Commission, since the latter exercise may be carried out both throught the initiation of a procedure under Article 169 of the Treaty and also in the context of the clearance of the EAGGF accounts. The principle laid down in

WWF UK v *Commission*, cited above, applies *a fortiori* in the present case, where the decision-making process in relation to the possible consequences of the inspection had not yet been completed when the contested decision was adopted.

32 Lastly, the Commission contends that, although the reference in the contested decision to 'alleged infringements' of Community law primarily concerns infringements attributable to the Netherlands, it also covers infringements involving individuals. The Report contains information relating to individuals and observations regarding the measures taken in different holdings. Accordingly, its disclosure might prejudice the adoption of measures by the Netherlands authorities as well as the conduct of national administrative procedures.

— The commercial secrecy exception

33 On this point, the applicant maintains, first, that the contested decision is inadequately reasoned. The decision simply states that the Report contains detailed data on individual named holdings where pigs are raised, whereas it should have specified the nature of that information.

34 In any event, the contested decision infringes the provisions of Decision 94/90. The term 'commercial secrecy' covers information concerning an undertaking's business activities. Information of that kind could not appear in the Report. Since the purpose of the inspection was to monitor the effectiveness of measures taken by the Netherlands authorities in order to combat swine fever, the only information regarding undertakings in that sector would concern the manner in which they had reacted to those measures.

35 Even supposing that the Report contained information which could be classified as commercial secrets, that would not justify refusing access to it in its entirety. All that would be necessary would be to render illegible the names of holdings referred to in the Report. The risk that the undertakings concerned could be identified would be non-existent given the number of pig farms — estimated at 10 000 — in the Netherlands.

36 The applicant concedes that the Commission was not required to consider whether the applicant could be, or had to be, allowed access to a version of the Report in which certain passages had been rendered illegible since it had also invoked another exception, based on the public interest. However, if the Court of First Instance were to find that the Commission had erred in doing so and that the Report did contain commercial secrets, it ought also to determine whether the applicant was entitled to partial access.

37 The Commission contends that the decision sets out sufficiently clearly the reasons for which the information contained in the Report could not be disclosed. That information comprised data concerning named holdings. Given the purpose of the Report, it is clear that the information at issue related to the number of animals slaughtered, the compensation paid and the failure to comply with certain obligations. That being so, the application, by way of a subsidiary ground, of the commercial secrecy exception is justified.

38 As for the argument that the Commission should have provided the applicant with a non-confidential version of the Report, the Commission replies that, in the circumstances of the case, there was no need to determine whether partial access could be granted since other considerations precluded disclosure of any part of the document.

Findings of the Court

39 The first point to note is that the code of conduct adopted by Decision 94/90 sets out two categories of exception to the right of access to Commission documents. The first category, framed in compulsory terms, comprises the 'mandatory exceptions' which are intended to protect the interests of third parties or of the general public. The second, framed in discretionary terms, concerns the internal deliberations of the institution, in which case solely the interests of the institution are at stake (*WWF UK* v *Commission*, cited above, paragraph 60).

40 On this point, it is important to note that just as the Commission is entitled to invoke jointly an exception from each category in order to refuse access to the documents in its possession (*WWF UK* v *Commission*, cited above, paragraph 61; as regards the Council, see Case T-174/95 *Svenska Journalistförbundet* v *Council* [1998] ECR II-2289, paragraph 114), so may it also jointly invoke more than one exception from the first category. The possibility cannot be ruled out that the disclosure of certain documents may be harmful both to the public interest and to the individual interests of third parties.

41 In the present case, the contested decision refusing the applicant access to a report on a Commission inspection is based on the joint application of two mandatory exceptions relating respectively to protection of the public interest and to protection of commercial secrecy.

42 Since the applicant had requested access to a single document, it must be determined whether or not the Commission was entitled to invoke either of those exceptions in justification of its refusal. Under Decision 94/90, each of those exceptions constitutes in itself sufficient ground for refusal.

43 As regards the first exception relied upon — protection of the public interest — it should be observed that, among the cases coming under that exception, the code of conduct expressly contemplates the case of documents concerning 'inspections and investigations'.

44 Clearly, the document requested in the present case related to one of those activities. It is common ground that it was an inspection report drawn up by Commission officials following checks carried out in the Netherlands pursuant to Article 9 of Decision 90/424, to make certain that the measures prescribed in that decision to eradicate classical swine fever were being implemented.

45 However, the fact that the document at issue concerns an inspection cannot in itself justify application of the exception invoked. According to established case-law, any exception to the right of access to Commission documents covered by Decision 94/90 must be interpreted and applied strictly (Joined Cases C-174/98 P and C-189/98 P *Netherlands and Van der Wal* v *Commission* [2000] ECR I-1, paragraph 27).

46 Accordingly, it is for the Court of First Instance to determine whether, in the present case, the Commission erred in its assessment that disclosure of the Report could undermine the protection of the public interest.

47 In that regard, it should be noted that the procedure under which the inspection exercise took place had not yet been completed by the time the contested decision was adopted on 17 November 1998. The Commission had by then adopted only one decision on the Community financial assistance to be granted to the Netherlands, a decision which authorised an initial advance to that country, without prejudice to the final amount to be granted or to any reductions which might be made on the basis of the outcome of the checks that had yet to be carried out (see paragraph 12 above).

48 Accordingly, although the particular inspection which gave rise to the report to which access is sought had been completed, the fact remains that on 17 November 1998 the Commission was carrying out 'inspections and investigations' in order to make certain that the Community veterinary rules were being complied with and that the conditions governing the grant of financial assistance were satisfied. This is confirmed by Decision 1999/18 granting the Netherlands a second provisional advance, which, although it post-dates the contested decision, makes it clear that the Commission was still carrying out checks (see paragraph 17 above).

49 It follows that the Commission could properly form the view that the inspection work that had to be carried out in the Netherlands required that the report to which access is sought be withheld so as to preserve the climate of mutual trust essential to the smooth conduct of that procedure.

50 The application must therefore be dismissed, there being no need to determine whether the refusal of access to the Report is also justified under the other mandatory exception invoked, relating to the protection of commercial secrecy.

Costs

51 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. Since the Commission has applied for costs and the applicant has been unsuccessful, the applicant must be ordered to pay the costs.

On those grounds,

THE COURT OF FIRST INSTANCE (First Chamber)

hereby:

1. **Dismisses the application;**

2. **Orders the applicant to bear its own costs, and pay the costs incurred by the defendant.**

Vesterdorf Vilaras Forwood

Delivered in open court in Luxembourg on 13 September 2000.

H. Jung
Registrar

B. Vesterdorf
President