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

13 April 2005 *

In Case T-2/03,

Verein für Konsumenteninformation, established in Vienna (Austria), represented by A. Klauser, lawyer,

applicant,

v

Commission of the European Communities, represented by S. Rating and P. Aalto, acting as Agents, with an address for service in Luxembourg,

defendant,

* Language of the case: German.

supported by

Bank für Arbeit und Wirtschaft AG, established in Vienna, represented by H.-J. Niemeyer, lawyer, with an address for service in Luxembourg,

and by

Österreichische Volksbanken AG, established in Vienna,

and

Niederösterreichische Landesbank-Hypothekenbank AG, established in Sankt Pölten (Austria),

represented by R. Roniger, A. Ablasser and W. Hemetsberger, lawyers,

interveners,

APPLICATION for annulment of Commission Decision D (2002) 330472 of 18 December 2002 relating to a request for access to the administrative file in Case COMP/36.571/D-1, Austrian banks — 'Lombard Club',

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

composed of B. Vesterdorf, President, M. Jaeger, P. Mengozzi, M.E. Martins Ribeiro and I. Labucka, Judges,

Registrar: H. Jung,

having regard to the written procedure and further to the hearing on 28 September 2004,

gives the following

Judgment

Legal framework

1 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 governing the right of access to documents of those institutions, provided for in Article 255 EC. That regulation has been applicable since 3 December 2001.

2 Commission Decision 2001/937/EC, ECSC, Euratom of 5 December 2001 amending its rules of procedure (OJ 2001 L 345, p. 94) repealed Commission Decision 94/90/ECSC, EC, Euratom of 8 February 1994 on public access to Commission documents (OJ 1994 L 46, p. 58), which ensured that effect was given, as regards the Commission, to the code of conduct on public access to Council and Commission documents (OJ 1993 L 340, p. 41, 'the code of conduct').

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 lays down certain definitions as follows:

'For the purpose of this Regulation:

(a) "document" shall mean any content whatever its medium (written on paper or stored in electronic form or as a sound, visual or audiovisual recording) concerning a matter relating to the policies, activities and decisions falling within the institution's sphere of responsibility;

(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, relating to the exceptions to the abovementioned right of access, states:

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

...

(b) privacy and the integrity of the individual, in particular in accordance with Community legislation regarding the protection of personal data.

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

— commercial interests of a natural or legal person, including intellectual property,

— court proceedings and legal advice,

— the purpose of inspections, investigations and audits,

unless there is an overriding public interest in disclosure.

3. Access to a document, drawn up by an institution for internal use or received by an institution, which relates to a matter where the decision has not been taken by the institution, shall be refused if disclosure of the document would seriously undermine the institution's decision-making process, unless there is an overriding public interest in disclosure.

Access to a document containing opinions for internal use as part of deliberations and preliminary consultations within the institution concerned shall be refused even after the decision has been taken if disclosure of the document would seriously undermine the institution's decision-making process, 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.

...

6. If only parts of the requested document are covered by any of the exceptions, the remaining parts of the document shall be released.

...'

Background to the dispute

6 The Verein für Konsumenteninformation ('the VKI' or 'the applicant') is a consumer organisation constituted under Austrian law. In order to facilitate its task of safeguarding the interests of consumers, Austrian law confers on the VKI the right to bring proceedings before the Austrian civil courts in order to assert certain financial claims of consumers, which the latter have previously assigned to it.

7 By Decision 2004/138/EC of 11 June 2002 relating to a proceeding under Article 81 of the EC Treaty (in Case COMP/36.571/D-1: Austrian banks — 'Lombard Club') (OJ 2004 L 56, p. 1), the Commission found that eight Austrian banks had participated, over a number of years, in a cartel known as the 'Lombard Club' covering almost the whole of Austria ('the Lombard Club decision'). In the Commission's view, the banks referred to had, within that cartel, inter alia, fixed jointly the interest rates for certain investments and loans. The Commission therefore imposed fines totalling EUR 124.26 million on those banks, which included in particular the Bank für Arbeit und Wirtschaft AG ('BAWAG'), the Österreichische Volksbanken-AG ('ÖVAG') and the Niederösterreichische Landesbank-Hypothekenbank AG ('NÖ-Hypobank').

8 The VKI is currently conducting several sets of proceedings against BAWAG before the Austrian courts. In those proceedings, the VKI claims that, on account of an incorrect adjustment of the interest rates applicable to variable-interest loans granted by BAWAG, the latter charged its customers too much interest over a number of years.

9 By letter of 14 June 2002, the applicant requested authorisation from the Commission to consult the administrative file relating to the Lombard Club decision. In support of its request, the VKI stated inter alia that, in order to secure damages for the consumers on whose behalf it was acting, it had to be able to put forward specific claims regarding both the illegality of BAWAG's conduct under competition law and the effects of that conduct. To that end, consultation of the Lombard Club file would have been a significant, or even indispensable, help to it.

10 By letter of 3 July 2002, the Commission asked the VKI to clarify its request and, in particular, its legal basis. In reply to that letter, the VKI stated, by letter of 8 July 2002, that its request was based inter alia on Article 255(1) and (2) EC, on

Regulation No 1049/2001, on the provisions implementing that regulation and on Article 42 of the Charter of fundamental rights of the European Union proclaimed at Nice on 7 December 2000 (OJ 2000 C 364, p. 1, 'the Charter of fundamental rights'), as well as on Articles 5 EC and 10 EC.

11 On 24 July 2002, at a meeting with the Commission's staff, the representatives of the VKI raised the possibility that the applicant could give an undertaking in writing to use the information obtained solely for the purpose of asserting consumers' claims in the national proceedings against BAWAG.

12 By letter of 12 August 2002, the VKI supplemented its request by confirming that it was prepared to give the undertaking mentioned at the meeting on 24 July 2002.

13 By letter of 12 September 2002, the Commission, basing its decision on Regulation No 1049/2001, rejected the VKI's request in its entirety.

14 On 26 September 2002, the VKI made a confirmatory request as referred to in Article 7((2) of Regulation No 1049/2001, in which it stated, inter alia, while maintaining its request, that it was not interested primarily in the Commission's internal documents.

15 On 14 October 2002, the Commission acknowledged receipt of that confirmatory request and informed the applicant that, owing to the number of documents requested, the time-limit for replying which was applicable to the processing of its request was extended by 15 working days.

16 On 18 December 2002, the Commission adopted Decision D (2002) 330472 relating to a request for access to the administrative file in Case COMP/36.571/D-1, Austrian banks — 'Lombard Club' ('the contested decision'). The contested decision confirms the rejection of 12 September 2002.

17 In the contested decision, the Commission divided, in the first place, the documents in the Lombard Club file, except for the internal documents, into 11 separate categories. Excluding internal documents, that file contains more than 47 000 pages.

18 In the second place, the Commission detailed the reasons on which it based its view that each of the categories previously identified was covered by one or more of the exceptions provided for by Regulation No 1049/2001.

19 In the third place, the Commission took the view that, in cases where the application of certain exceptions would necessitate a balancing of the conflicting interests, the VKI had not referred to an overriding public interest in the access requested.

20 In the fourth place, the Commission listed the reasons why partial access was not possible in this case. In the Commission's view, a detailed examination of each document, which was necessary for any partial consultation, would have represented an excessive and disproportionate amount of work for it.

21 In the fifth place, the Commission took the view that no consultation of third parties in order to consider possible access to the documents of which they were the authors was necessary in this case since, pursuant to Article 4(4) of Regulation No 1049/2001, it was clear that those documents did not have to be disclosed.

22 The Commission concluded in the contested decision that the applicant's request for access had to be rejected in its entirety.

Procedure before the Court of First Instance

23 By application lodged at the Registry of the Court of First Instance on 7 January 2003, the VKI brought an action for annulment of the contested decision. By separate document lodged on the same day, it applied to have that action adjudicated on under an expedited procedure in accordance with Article 76a of the Rules of Procedure of the Court of First Instance.

24 By separate document lodged on 8 January 2003, the VKI applied for legal aid.

25 On 20 January 2003, the Commission lodged its observations on the application for an expedited procedure.

26 The First Chamber of the Court of First Instance, to which the case was assigned by decision of 20 January 2003, rejected the application for an expedited procedure by a decision of 28 January 2003, which was notified to the applicant on the following day.

27 On 18 February 2003, the Commission lodged its observations on the application for legal aid.

28 On 10 March 2003, the Commission lodged its defence.

29 The applicant's application for legal aid was rejected by order of the President of the Court of 14 March 2003.

30 By letter of 1 April 2003, the applicant waived its right to lodge a reply.

31 On 15 April 2003, BAWAG lodged an application to intervene in support of the form of order sought by the Commission. The Kingdom of Sweden and the Republic of Finland applied, on 16 and 25 April respectively, to intervene in support of the form of order sought by the VKI. Finally, on 29 April 2003, ÖVAG and NÖ-Hypobank jointly applied to intervene in support of the form of order sought by the Commission.

32 By order of the President of the First Chamber of the Court of First Instance of 1 August 2003, the Republic of Finland and the Kingdom of Sweden were granted leave to intervene in support of the form of order sought by the applicant. In the same order, BAWAG, on the one hand, and ÖVAG and NÖ-Hypobank, on the other, were granted leave to intervene in support of the form of order sought by the Commission.

33 Those applications having been made within the period prescribed in Article 115(1) of the Rules of Procedure, the interveners received, pursuant to Article 116(2) of the Rules of Procedure, a copy of every document served on the parties.

34 The Republic of Finland and the Kingdom of Sweden lodged, on 10 and 12 September 2003 respectively, applications to withdraw their interventions.

35 On 26 September 2003, BAWAG, on the one hand, and ÖVAG and NÖ-Hypobank, on the other, lodged their statements in intervention.

36 Since the VKI and the Commission did not lodge any observations on the applications to withdraw lodged by the Republic of Finland and the Kingdom of Sweden, the President of the First Chamber, by order of 6 November 2003, removed from the file of this case the interventions of those interveners and ordered the VKI and the Commission to bear their own costs in respect of those interventions.

37 On 14 November 2003, the applicant lodged its written observations on the statements in intervention, whereas those of the Commission were lodged on 11 November 2003.

38 Pursuant to Article 14 of the Rules of Procedure and acting on a proposal from the First Chamber, the Court decided, after the parties had been heard in accordance with Article 51 of those rules, to refer the case to a Chamber with an extended composition.

39 Upon hearing the Report of the Judge-Rapporteur, the Court (First Chamber, Extended Composition) decided to open the oral procedure and, as a measure of organisation of procedure provided for in Article 64 of the Rules of Procedure, put certain questions in writing to the Commission and the interveners.

40 On 6 July 2004, the Commission and the interveners replied in writing to the Court's questions.

41 The parties presented oral argument and their replies to the Court's questions at the hearing on 28 September 2004.

Forms of order sought by the parties

42 The applicant claims that the Court should:

— annul the contested decision;

— order the production of, and examine, the file in question with a view to determining whether the claims of the VKI are well founded;

— order the Commission to pay the costs.

43 The Commission contends that the Court should:

— dismiss the action;

— order the applicant to pay the costs.

44 BAWAG, in support of the Commission, submits that the Court should:

— dismiss the action;

— order the applicant to pay the costs, including those incurred by the intervener.

45 Finally, ÖVAG and NÖ-Hypobank, in support of the Commission, submit that the Court should:

— dismiss the action;

— order the applicant to pay the costs.

Law

The framework of the dispute and the admissibility of certain arguments put forward by the interveners

46 It is not disputed that the Commission adopted the contested decision under Regulation No 1049/2001.

47 The VKI's action is based, essentially, on six pleas. By its first plea, the VKI submits that it is incompatible with the right of access to documents and, in particular, with Regulation No 1049/2001 to refuse access to the whole of an administrative file without having first actually examined each of the documents contained in the file. In its second plea, the VKI claims that the Commission applied or interpreted incorrectly several of the exceptions provided for in Article 4(1) and (2) of Regulation No 1049/2001. In its third plea, the VKI argues that the Commission concluded unlawfully that the balance of the conflicting interests was not in favour of disclosure of the administrative file referred to by its request. In its fourth plea, the VKI maintains that the Commission should, at the very least, have granted it partial access to the file. By its fifth plea, the VKI claims that the failure to consult the banks which were the authors of certain documents constitutes an infringement of Article 4(4) of Regulation No 1049/2001. Finally, in its sixth plea, the applicant complains that the Commission infringed Article 255 EC, Article 42 of the Charter of fundamental rights and Articles 5 EC and 10 EC.

48 In their statements in intervention, BAWAG, on the one hand, and ÖVAG and NÖ-Hypobank, on the other, put forward a number of arguments ('the additional arguments') intended to show, in the first place, that Regulation No 1049/2001 applies only to documents produced during the Community legislative process, in the second place, that the right of access to documents concerning competition cases was, at the material time, governed only by Regulation No 17 of the Council of 6 February 1962, First Regulation implementing Articles [81] and [82] of the Treaty (OJ, English Special Edition 1959-1962, p. 87), in the third place, that an association with public-law status does not enjoy the right of access provided for by Regulation No 1049/2001, in the fourth place, that the VKI's request for access was unlawful under Regulation No 1049/2001, in the fifth place, that Regulation No 1049/2001 is contrary to Article 255 EC in that it allows access to documents originating from third parties and, in the sixth place, that that regulation can apply only to documents which came into the possession of the institutions after it became applicable, that is, from 3 December 2001.

49 The additional arguments thus seek to demonstrate, firstly, that Regulation No 1049/2001 was not applicable in this case, or, secondly, that it was applied incorrectly by the Commission, or, thirdly, that it constitutes an unlawful legal basis for the contested decision.

50 Consequently, if one or more of the additional arguments were to be accepted by the Court, that would permit a finding that the contested decision is unlawful. However, it should be pointed out that the interveners were granted leave to intervene in this case in support of the form of order sought by the Commission and that, moreover, the latter contends that the action for annulment should be dismissed.

51 When questioned in writing and at the hearing about the compatibility of the additional arguments with the form of order supported by the interveners, the latter replied in essence that, according to case-law, an intervener is entitled to advance arguments which differ from or even conflict with those of the party which he supports (Case 30/59 *De Gezamenlijke Steenkolenmijnen in Limburg* v *High Authority* [1961] ECR 1, 17 and 18, and Joined Cases T-228/99 and T-233/99 *Westdeutsche Landesbank Girozentrale* v *Commission* [2003] ECR II-435, paragraph 145).

52 However, under the fourth paragraph of Article 40 of the Statute of the Court of Justice, which applies to the Court of First Instance by virtue of Article 53 of that Statute, an application to intervene must be limited to supporting the form of order sought by one of the parties. In addition, under Article 116(3) of the Rules of Procedure, the intervener must accept the case as it finds it at the time of its intervention. Although those provisions do not preclude an intervener from using arguments different from those used by the party it is supporting, that is nevertheless on the condition that they do not alter the framework of the dispute and that the intervention is still intended to support the form of order sought by that party (see, to that effect, Case C-245/92 P *Chemie Linz* v *Commission* [1999] ECR I-4643, paragraph 32; Case C-248/99 P *France* v *Monsanto and Commission* [2002] ECR I-1, paragraph 56; and Case T-119/02 *Royal Philips Electronics* v *Commission* [2003] ECR II-1433, paragraphs 203 and 212).

53 In this case, since, on the one hand, assuming that they are well founded, the additional arguments would permit a finding that the contested decision is unlawful and since, on the other hand, the form of order sought by the Commission is the

dismissal of the action for annulment and is not supported by arguments seeking a declaration that the contested decision is unlawful, it is clear that consideration of the additional arguments would have the effect of altering the framework of the dispute as defined in the application and the defence (see, to that effect, Joined Cases T-447/93 to T-449/93 *AITEC and Others* v *Commission* [1995] ECR II-1971, paragraph 122, and Case T-243/94 *British Steel* v *Commission* [1997] ECR II-1887, paragraphs 72 and 73).

54 Moreover, the interveners' claim that the additional arguments support, in essence, the form of order sought by the Commission, namely, refusal of the access to documents requested by the applicant, must be rejected. Firstly, in this case, the Commission has certainly not contended that the requested access to the documents at issue should be refused regardless of the reasons for the contested decision, but only that the action for annulment should be dismissed. Secondly, it is not for the Court, when reviewing the lawfulness of a measure, to assume the role of the Commission and determine whether access to the contested documents is to be refused for reasons other than those mentioned in the contested decision.

55 The additional arguments must therefore be rejected as inadmissible.

The first plea, alleging failure to carry out a concrete examination of the documents referred to in the request for access, and the fourth plea, alleging infringement of the right to partial access

56 The first and fourth pleas put forward by the applicant must be examined first and together.

Arguments of the parties

— The first plea, alleging failure to carry out a concrete examination of the documents referred to in the request for access

57 In its first plea, the VKI claims that, in the contested decision, the Commission, contrary to Regulation No 1049/2001, exempted the whole of the Lombard Club file from the right of access without carrying out a concrete examination of each of the documents contained in that file. However, only actual circumstances applying to specific documents can justify an exception to the right of access to those documents.

58 In reply to the applicant's first plea, the Commission contends that, in this case, it is not necessary to determine whether it refused access to all the documents referred to in the request for access, but only whether it gave a proper statement of reasons for its refusal in respect of all those documents. However, the Commission certainly did not, in this case, exclude the whole of the Lombard Club file from the right of access but, on the contrary, explained why the reasons for refusal listed in Article 4 of Regulation No 1049/2002 precluded disclosure of the documents in that file.

59 The Commission adds that it is not contrary to Community law to refuse access to various categories of documents without examining each of the documents in those categories where, as in this case, the reasons for the Commission's refusal are stated in respect of each category. The Court has expressly held that the Commission is entitled to subdivide a file into categories, to which it may then refuse access altogether, provided that it mentions the reasons for its refusal (Case T-105/95 *WWF UK* v *Commission* [1997] ECR II-313, paragraph 64).

60 Finally, the Commission points out that examination of the various documents and parts of documents within those categories did not take place since the effort involved in such an operation would have been disproportionate.

— The fourth plea, alleging infringement of the right to partial access

61 The VKI submits that total refusal of access to the file would have been justified only if all the documents in it were covered by at least one of the exceptions in Article 4 of Regulation No 1049/2001. Since that condition was not satisfied in this case, the applicant should at least have been entitled to partial access. The Commission's 'commendable' concern to limit its workload cannot have the consequence of destroying the chances of compensation for the damage suffered by consumers as the result of a cartel.

62 The Commission challenges the validity of those arguments. It acknowledges that the case-law of the Court of Justice and the Court of First Instance recognises the existence of a right of partial access to documents. The Commission none the less points out that such access may be refused where it involves a disproportionate effort for the institution concerned.

63 The effort required for a file of more than 47 000 pages is bound to be disproportionate. That is at the very least the case where, on the one hand, the number of documents likely to be made available in each relevant category is very small and, on the other hand, those documents are manifestly of no use. Since the documents in the file are arranged in chronological order, any partial access would involve reviewing it in its entirety. Moreover, the task of drawing up a table of contents for the whole file would, having regard to the application of the exceptions in Article 4 of Regulation No 1049/2001, be just as disproportionate as partial access. The Commission concedes that the disproportionate nature of the effort

involved does not in itself constitute a reason for refusal. However, where it is clear from an analysis of strictly-defined categories of documents that access must be refused, no additional examination of each document within the relevant category is justified.

64 Both BAWAG and ÖVAG and NÖ-Hypobank essentially support the arguments of the Commission. They point out that where an applicant has expressly indicated its interest in its request for access, it is disproportionate to require the institution to which that request is made to grant partial access to documents which do not serve the purpose of the request.

Findings of the Court

65 It is common ground that the Commission did not carry out a concrete, individual examination of the documents comprising the Lombard Club file. At the hearing, the Commission confirmed that, in response to the applicant's confirmatory request, it had divided the Lombard Club file, excluding the internal documents, into 11 separate categories of documents, although without examining each of the documents. It is also clear from the contested decision that, after defining those categories, the Commission considered that 'one or more exceptions provided for in Article 4 of Regulation No 1049/2001 appl[ied] to each category of document, without there being any overriding public interest in disclosure'. The Commission then stated that, 'for reasons of proportionality, it [did] not appear either necessary or expedient to undertake an examination of the documents beyond the abovementioned categories'. The Commission further stated, 'as a subsidiary consideration', that publication of the Lombard Club decision was sufficient to 'safeguard' the interests of the applicant.

66 In the light of those considerations, it must therefore be determined whether the Commission was obliged, in principle, to carry out a concrete, individual examination of the documents referred to in the request for access, then, if so, to examine to what extent that obligation to examine could be qualified by certain exceptions based, inter alia, on the amount of work entailed by it.

— The obligation to carry out a concrete, individual examination

67 Article 2 of Regulation No 1049/2001 defines the principle of the right of access to documents of the institutions. Article 4 of Regulation No 1049/2001 sets out a number of exceptions to the right of access. Finally, Articles 6 to 8 of Regulation No 1049/2001 lay down certain procedures according to which a request for access must be processed.

68 The effect of those provisions is that the institution to which a request for access is made under Regulation No 1049/2001 is obliged to examine and reply to that request and, in particular, to determine whether any of the exceptions referred to in Article 4 of the regulation is applicable to the documents in question.

69 According to settled case-law, the examination required for the purpose of processing a request for access to documents must be specific in nature. On the one hand, the mere fact that a document concerns an interest protected by an exception cannot justify application of that exception (see, to that effect, Case T-20/99 *Denkavit Nederland* v *Commission* [2000] ECR II-3011, paragraph 45). Such application may, in principle, be justified only if the institution has previously assessed, firstly, whether access to the document would specifically and actually undermine the protected interest and, secondly, in the circumstances referred to in Article 4(2) and (3) of Regulation No 1049/2001, there is no overriding public interest in disclosure. On the other hand, the risk of a protected interest being undermined must be reasonably foreseeable and not purely hypothetical (see, to that effect, Case T-211/00 *Kuijer* v *Council* [2002] ECR II-485, paragraph 56, '*Kuijer II*'). Consequently, the examination which the institution must undertake in order to apply an exception must be carried out in a concrete manner and must be apparent from the reasons for the decision (see, to that effect, Case T-188/98 *Kuijer* v *Council* [2000] ECR II-1959, paragraph 38, '*Kuijer I*', and Case T-14/98 *Hautala* v *Council* [1999] ECR II-2489, paragraph 67).

70 That concrete examination must, moreover, be carried out in respect of each document referred to in the request for access. It is apparent from Regulation No 1049/2001 that all the exceptions mentioned in Article 4(1) to (3) are specified as being applicable to 'a document'.

71 The need for such a concrete, individual examination, as opposed to an abstract, general examination, is also confirmed by the case-law concerning the application of the code of conduct.

72 On the one hand, the code of conduct, the principles of which were in part reproduced in Article 4 of Regulation No 1049/2001, contained a first category of exceptions requiring the institution to refuse access to a document where disclosure 'could undermine' the interests protected by those exceptions. The Court has consistently held that the use of the conditional form 'could' means that before deciding on a request for access to documents the Commission must consider, 'for each document requested', whether, in the light of the information in its possession, disclosure is in fact likely to undermine one of the interests protected by the exceptions (Case T-124/96 *Interporc* v *Commission* [1998] ECR II-231, paragraph 52, and Case T-123/99 *JT's Corporation* v *Commission* [2000] ECR II-3269, paragraph 64). In view of the fact that the conditional form is maintained in Article 4(1) to (3) of Regulation No 1049/2001, the case-law developed in connection with the code of conduct is capable of being applied to Regulation No 1049/2001. It must therefore be held that an institution is obliged to assess in a concrete and individual manner whether exceptions to the right of access apply to each of the documents referred to in a request.

73 On the other hand, as the Commission rightly points out, the Court has in fact held, in essence, in its judgment in *WWF UK* v *Commission*, cited in paragraph 59 above (paragraph 64), that an institution is required to indicate, at the very least by reference to categories of documents, the reasons for which it considers that the documents detailed in the request received by it are related to a category of information covered by an exception. Nevertheless, regardless of whether the paragraph relied on by the Commission lays down only a rule that reasons must be

stated, a concrete, individual examination is in any event necessary where, even if it is clear that a request for access refers to documents covered by an exception, only such an examination can enable the institution to assess the possibility of granting the applicant partial access under Article 4(6) of Regulation No 1049/2001. In the context of applying the code of conduct, the Court has moreover already rejected as insufficient an assessment of documents by reference to categories rather than on the basis of the actual information contained in those documents, since the examination required of an institution must enable it to assess specifically whether an exception invoked actually applies to all the information contained in those documents (*JT's Corporation* v *Commission*, cited in paragraph 72 above, paragraph 46).

74 It must therefore be concluded that where an institution receives a request for access under Regulation No 1049/2001 it is required, in principle, to carry out a concrete, individual assessment of the content of the documents referred to in the request.

75 However, that approach, to be adopted in principle, does not mean that such an examination is required in all circumstances. Since the purpose of the concrete, individual examination which the institution must in principle undertake in response to a request for access made under Regulation No 1049/2001 is to enable the institution in question to assess, on the one hand, the extent to which an exception to the right of access is applicable and, on the other, the possibility of partial access, such an examination may not be necessary where, due to the particular circumstances of the individual case, it is obvious that access must be refused or, on the contrary, granted. Such could be case, inter alia, if certain documents were either, first, manifestly covered in their entirety by an exception to the right of access or, conversely, manifestly accessible in their entirety, or, finally, had already been the subject of a concrete, individual assessment by the Commission in similar circumstances.

76 In this case, it is common ground that the Commission based the contested decision on a general analysis by reference to categories of documents of the Lombard Club file. It is also established that the Commission did not carry out a concrete, individual examination of the documents referred to in the request for access in order to assess whether the exceptions relied on applied or whether partial access could be granted.

77 It must therefore be examined whether the applicant's request related to documents in respect of which, by reason of the circumstances of the case, it was not necessary to carry out such a concrete, individual examination.

78 In that regard, the Commission took the view, in the contested decision, that the documents referred to in the applicant's request were covered by four separate exceptions to the right of access.

79 The first of the exceptions relied on by the Commission concerns the protection of the purpose of inspections, referred to in the third indent of Article 4(2) of Regulation No 1049/2001. In the contested decision, the Commission justified the application of that exception on the basis, in essence, of two factors.

80 Firstly, according to the Commission, the Lombard Club decision is the subject-matter of a number of actions for annulment before the Court of First Instance which are still pending and on which the latter has therefore not yet ruled. Consequently, access by third parties to those documents could affect the new assessment it might be called upon to make if its decision were annulled and might lead the applicants to raise certain pleas in those actions.

81 Secondly, according to the Commission, a large number of the documents in the file were provided by the undertakings penalised in the Lombard Club decision, either on the basis of the Commission Notice on the non-imposition or reduction of fines in cartel cases (OJ 1996 C 207, p. 4), which was applicable at the material time, or in connection with requests for information or investigations under Articles 11 and 14 of Regulation No 17. Consequently, allowing third parties access to those documents would deter undertakings from cooperating with the Commission and would be detrimental to inspections and investigations in future cases. The same reasoning applies to documents drawn up by third parties.

82 The Court is of the view, however, that the Commission was not entitled to reach such a general conclusion applicable to the whole of the Lombard Club file without having first carried out a concrete, individual examination of the documents comprising it.

83 Firstly, it is not clear from the contested decision that the Commission specifically ascertained that each document referred to in the request was in fact included in one of the 11 categories identified. On the contrary, the reasons for the contested decision, which were confirmed by the Commission at the hearing, indicate that the manner in which the Commission carried out that division was, at least in part, abstract. The Commission seems to have acted more on the basis of what it imagined the content of the documents in the Lombard Club file to be than on the basis of an actual examination. That division into categories therefore remains approximate, both from the point of view of its exhaustiveness and from the point of view of its accuracy.

84 Secondly, the considerations set out by the Commission in the contested decision, as moreover in its defence, remain vague and general. In the absence of an individual examination, that is to say, document by document, they do not demonstrate with

sufficient certainty and detail that the Commission's argument, even if well founded in principle, applies to all the documents in the Lombard Club file. The fears expressed by the Commission remain mere assertions and are, consequently, utterly hypothetical.

85 There is nothing to show that all the documents referred to in the request are clearly covered by the exception relied on. In point 1 of the contested decision, the Commission itself notes that 'the exception provided for in the third indent of Article 4(2) applies in large part to certain documents, or even in full to all the categories'.

86 It is true that, in the table which it attached to its defence, the Commission stated that, in its view, the exception relied on applied to all the documents referred to in the file. However, as is clear from the considerations set out in the preceding paragraph, that table contradicts the reasons for the contested decision.

87 Finally, and in any event, it is not apparent from the reasons given for the contested decision that each of the documents comprising the Lombard Club file, taken individually, is covered in its entirety by the exception referred to in the third indent of Article 4(2) of Regulation No 1049/2001. It is not clear that disclosure of any information contained in them would undermine the purposes of the Commission's inspections and investigations.

88 The absence of any concrete, individual examination of the documents referred to by the applicant's request is therefore not justified in the case of the documents allegedly covered by the first exception relied on by the Commission.

89 The same finding must apply with regard to the documents covered, according to the contested decision, by the second, third and fourth exceptions. Those exceptions relate to the protection of commercial interests (first indent of Article 4(2) of Regulation No 1049/2001), the protection of court proceedings (second indent of Article 4(2)) and the protection of privacy and the integrity of the individual (Article 4(1)(b)). It is clear from points 2, 3, 10, 12 and 13 of the contested decision that, in the Commission's view, those exceptions concern only some of the documents referred to in the request. In particular, in point 13 of the contested decision, the Commission states that 'it is possible that a large proportion of the documents drawn up by the banks concerned or by third parties also contain information the disclosure of which could affect privacy and the integrity of the individual'.

90 It is therefore apparent from the contested decision that the exceptions relied on by the Commission do not necessarily apply to the whole of the Lombard Club file and that, even in the case of the documents to which they may apply, they may concern only certain passages in those documents.

91 Finally, the interveners rely on the exception in Article 4(3) of Regulation No 1049/2001. They maintain that the Lombard Club decision has been the subject-matter of several actions for annulment and that it is therefore not yet a decision 'taken' within the meaning of Article 4(3), which justifies a total refusal of access. However, since that exception was not relied on by the Commission in the contested decision, it is not for the Court to assume the role of that institution and determine whether that exception is actually applicable to the documents referred to by the request.

92 Consequently, the Commission was bound, in principle, to carry out a concrete, individual examination of each of the documents referred to in the request in order to determine whether any exceptions applied or whether partial access was possible.

93 Nevertheless, since, in this case, the Commission did not carry out such an examination, it must be determined whether it is permissible for an institution to justify a total refusal of access by reason of the very large amount of work which, according to that institution, is entailed by such an examination.

— Application of an exception related to the amount of work involved in carrying out a concrete, individual examination

94 Under Article 6(3) of Regulation No 1049/2001, 'in the event of a request relating to a very long document or to a very large number of documents, the institution concerned may confer with the applicant informally, with a view to finding a fair solution'.

95 In this case, it is apparent from the file that the applicant and the Commission met on 24 July 2002, but that that meeting and the contacts which followed it did not lead to a solution.

96 Regulation No 1049/2001 does not contain any provision expressly permitting the institution, in the absence of a fair solution reached together with the applicant, to limit the scope of the examination which it is normally required to carry out in response to a request for access.

97 In the introductory part of the contested decision, the Commission nevertheless, in essence, justifies the failure to carry out a concrete, individual examination of the documents in question by application of the principle of proportionality. The Commission states inter alia that 'for reasons of proportionality, it does not appear either necessary or expedient to undertake an examination of the documents beyond the [abovementioned] categories'. The Commission also relies on application of the principle of proportionality in points 10, 13 and 24 of the contested decision.

98 It must therefore be examined whether it is in fact permissible, on the basis of the principle of proportionality, to refrain from applying the principle of a concrete, individual examination of the documents referred to in a request for access under Regulation No 1049/2001.

99 According to consistent case-law, the principle of proportionality requires measures adopted by Community institutions not to exceed the limits of what is appropriate and necessary in order to attain the objectives pursued; when there is a choice between several appropriate measures recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued (Case C-157/96 *National Farmers' Union and Others* [1998] ECR I-2211, paragraph 60, and Case T-211/02 *Tideland Signal* v *Commission* [2002] ECR II-3781, paragraph 39). The principle of proportionality also requires that derogations remain within the limits of what is appropriate and necessary for achieving the aim in view (Case 222/84 *Johnston* [1986] ECR 1651, paragraph 38, and *Hautala* v *Council*, cited in paragraph 69 above, paragraph 85).

100 Consequently, the refusal by an institution to examine concretely and individually the documents covered by a request for access constitutes, in principle, a manifest breach of the principle of proportionality. A concrete, individual examination of the documents in question enables the institution to achieve the aim pursued by the exceptions referred to in Article 4(1) to (3) of Regulation No 1049/2001 and results, moreover, in identification of the only documents covered, in whole or in part, by those exceptions. It therefore constitutes, for the purposes of the applicant's right of access, a measure less onerous than a complete refusal to examine the documents.

101 It should however be borne in mind that it is possible for an applicant to make a request for access, under Regulation No 1049/2001, relating to a manifestly unreasonable number of documents, perhaps for trivial reasons, thus imposing a volume of work for processing of his request which could very substantially paralyse the proper working of the institution. It should also be noted that, where a request

relates to a very large number of documents, the institution's right to seek a 'fair solution' together with the applicant, pursuant to Article 6(3) of Regulation No 1049/2001, reflects the possibility of account being taken, albeit in a particularly limited way, of the need, where appropriate, to reconcile the interests of the applicant with those of good administration.

102 An institution must therefore retain the right, in particular cases where concrete, individual examination of the documents would entail an unreasonable amount of administrative work, to balance the interest in public access to the documents against the burden of work so caused, in order to safeguard, in those particular cases, the interests of good administration (see, by analogy, *Hautala* v *Council*, cited in paragraph 69 above, paragraph 86).

103 However, that possibility remains applicable only in exceptional cases.

104 Firstly, concrete, individual examination of the documents referred to in a request for access under Regulation No 1049/2001 is one of the elementary duties of an institution in response to such a request.

105 Secondly, public access to documents of the institutions is an approach to be adopted in principle, whereas the power to refuse access is the exception (see, by analogy with the principle laid down for application of the code of conduct, *Kuijer II*, paragraph 55).

106 Thirdly, exceptions to the principle of access to documents must be interpreted strictly (see, by analogy with the code of conduct, Case T-111/00 *British American Tobacco International (Investments)* v *Commission* [2001] ECR II-2997, paragraph

40). That case-law justifies a fortiori the need to construe particularly strictly any limitations placed on the diligence which must normally be displayed by an institution in deciding to apply an exception, since such limitations increase, from the time the request is received, the risk that the right of access may be compromised.

107 Fourthly, there are many circumstances in which for the Commission to have discretion not to carry out a concrete, individual examination when such an examination is necessary would run counter to the principle of good administration, which is one of the guarantees afforded by the Community legal order in administrative procedures and to which the duty of the competent institution to examine carefully and impartially all the relevant aspects in the individual case is linked (Case T-44/90 *La Cinq* v *Commission* [1992] ECR II-1, paragraph 86, and Joined Cases T-528/93, T-542/93, T-543/93 and T-546/93 *Métropole télévision and Others* v *Commission* [1996] ECR II-649, paragraph 93).

108 Fifthly, it is not, in principle, appropriate that account should be taken of the amount of work entailed by the exercise of the applicant's right of access and its interest in order to vary the scope of that right.

109 With regard to the applicant's interest, under Article 6(1) of Regulation No 1049/2001 he is not required to justify his request and therefore he does not normally have to demonstrate any interest.

110 As regards the amount of work entailed in processing a request for access, Regulation No 1049/2001 expressly envisages the possibility that a request for access may relate to a very large number of documents, since Articles 7(3) and 8(2) provide that the time-limits for processing initial requests and confirmatory requests may be extended in exceptional cases such as, for example, in the event of an application relating to a very long document or to a very large number of documents.

111 Sixthly, the amount of work entailed in considering a request for access depends not only on the number of documents referred to in the request and their volume, but also on their nature. Consequently, the need to undertake a concrete, individual examination of very numerous documents does not, on its own, provide any indication of the amount of work entailed in processing a request for access, since that amount of work also depends on the required depth of that examination.

112 Accordingly, it is only in exceptional cases and only where the administrative burden entailed by a concrete, individual examination of the documents proves to be particularly heavy, thereby exceeding the limits of what may reasonably be required, that a derogation from that obligation to examine the documents may be permissible (see, by analogy, *Kuijer II*, paragraph 57).

113 In addition, in so far as the right of access to documents held by the institutions constitutes an approach to be adopted in principle, it is with the institution relying on an exception related to the unreasonableness of the task entailed by the request that the burden of proof of the scale of that task rests.

114 Finally, where the institution has adduced proof of the unreasonableness of the administrative burden entailed by a concrete, individual examination of the documents referred to in the request, it is obliged to try to consult with the applicant in order, on the one hand, to ascertain or to ask him to specify his interest in obtaining the documents in question and, on the other, to consider specifically whether and how it may adopt a measure less onerous than a concrete, individual examination of the documents. Since the right of access to documents is the principle, the institution nevertheless remains obliged, against that background, to prefer the option which, whilst not itself constituting a task which exceeds the limits of what may reasonably be required, remains the most favourable to the applicant's right of access.

115 It follows that the institution may avoid carrying out a concrete, individual examination only after it has genuinely investigated all other conceivable options and explained in detail in its decision the reasons for which those various options also involve an unreasonable amount of work.

116 It must therefore be examined, in this case, whether the Commission was in a situation where concrete, individual examination of the documents referred to in the request for access imposed on it a burden exceeding the limits of what might reasonably be required, so that, taking into account the applicant's interest, it could specifically consider other options for processing the request, with a view, where appropriate, to adopting a measure less onerous in terms of its workload.

117 With regard, first, to whether a concrete, individual examination of each of the documents referred to in the request was unreasonable, it should be noted that the contested decision does not mention the precise number of documents in the Lombard Club file, but merely the number of pages which it contains. A mere reference to a number of pages is not sufficient, as such, for the purpose of assessing the amount of work entailed by a concrete, individual examination. Nevertheless, in the light, on the one hand, of the categories identified by the Commission in the contested decision and, on the other, of the nature of the file in question, it is clearly apparent from the papers in the case that the documents referred to are very numerous.

118 In addition, consultation of a file of more than 47 000 pages comprising many documents such as those belonging to the categories identified by the Commission is likely to be an extremely large task.

119 Firstly, it is clear that the documents in the Lombard Club file are filed in chronological order. In that regard, at the hearing, the Commission stated that, in

view of the date of the contested decision, the documents referred to in the applicant's request had not yet been recorded in the register provided for by Article 11 of Regulation No 1049/2001, the coverage of which, according to Article 8(1) of the Commission Decision of 5 December 2001 amending its rules of procedure, is to be extended gradually.

120 Secondly, in the light of the main categories identified by the Commission and of the reasons for the contested decision, it can be accepted that the documents referred to by the applicant's request contain a great deal of information which must be subjected to a concrete analysis in the light of the exceptions to the right of access and, in particular, information which could undermine the protection of the commercial interests of the banks involved in the Lombard Club file.

121 Thirdly, in the light of the main categories identified by the Commission, it can also be accepted that the Lombard Club file consists of a large number of documents originating from third parties. Consequently, the volume of work involved in examining concretely and individually the documents contained in that file could be increased by the need, where appropriate, to consult those third parties in accordance with Article 4(4) of Regulation No 1049/2001.

122 In this case, therefore, there are a number of factors which suggest that concrete, individual examination of all the documents in the Lombard Club file might represent a very large amount of work. Nevertheless, without there being any need to take a definitive view as to whether those factors demonstrate sufficiently in law that the amount of work involved exceeded the limits of what might reasonably be required of the Commission, it must be pointed out that the contested decision, which refuses altogether to grant the applicant any access, could in any event be lawful only if the Commission had previously explained specifically the reasons for which the alternatives to a concrete, individual examination of each of the documents referred to also represented an unreasonable amount of work.

123 In this case, the applicant informed the Commission, on 14 June 2002, that the purpose of its request was to enable it to produce certain evidence in proceedings brought against BAWAG before the Austrian courts.

124 It is also clear that, on 24 July 2002, at a meeting with the Commission's staff, the representatives of the VKI mentioned the possibility that the applicant could give an undertaking in writing to use the information obtained solely for the purpose of asserting consumers' claims.

125 In addition, in its confirmatory request of 26 September 2002, the applicant stated that it was not interested primarily in the Commission's internal documents, which prompted the latter to exclude those documents from the scope of its analysis in the contested decision.

126 Notwithstanding those considerations, it is not apparent from the reasons for the contested decision that the Commission considered specifically and exhaustively the various options available to it in order to take steps which would not impose an unreasonable amount of work on it but would, on the other hand, increase the chances that the applicant might receive, at least in respect of part of its request, access to the documents concerned.

127 Thus, in the contested decision, the Commission stated 'as a subsidiary consideration' that publication of the Lombard Club decision was sufficient to 'safeguard' the interests of the applicant.

128 In addition, in point 24 of the contested decision, the Commission refused, in the following terms, to grant partial access to the documents included in the Lombard Club file:

'We have undertaken in this case, for the purpose of deciding on your request, a categorisation of all the documents in the file and, in the case of some, a sub-categorisation. The alternative would be to examine each document, after consulting third parties where appropriate. In this specific instance, the file consists of more than 47 000 pages, not counting the internal documents. On the basis that an examination by reference to categories indicates that the documents in the file are — with the exception of a few documents already published — very largely subject to the exceptions provided for by the regulation, a separate examination of each document would impose on the Commission an inappropriate and disproportionate amount of work. That is particularly so because the other parts of the documents, or some of them, which could possibly be disclosed, would very probably serve neither the interests [of the] VKI in proving the unlawfulness of the conduct of the banks concerned in civil proceedings, nor other public interests.'

129 It is therefore clear that the Commission took into account the applicant's interest as a very subsidiary consideration in comparing the likely effects of two types of practice, namely, in the first place, an individual examination of the documents included in the Lombard Club file and, in the second place, an examination limited to the categories established among those same documents on the basis of their nature.

130 However, it is not apparent from the reasons for the contested decision that the Commission assessed, in a concrete, specific and detailed manner, on the one hand, the other conceivable options for limiting its workload and, on the other, the reasons which could allow it to avoid carrying out any examination rather than adopting, where appropriate, a measure less restrictive of the applicant's right of access. In particular, it is not apparent from the contested decision that, as regards the identification of documents contained in a file arranged in chronological order, the Commission specifically examined the option of asking the banks involved in the

Lombard Club file to provide it with the dates of the documents submitted by them, which might possibly have enabled it to find some of them more easily in its file. In addition, although the Commission stated in its defence that drawing up a table of contents would have been a disproportionate task, the examination of that option is not mentioned at all in the contested decision and therefore cannot be considered to have been specifically examined. Finally, it is likewise not apparent from the contested decision that the Commission evaluated the amount of work involved in identifying, then examining, individually and concretely, the few documents most likely to satisfy immediately and, where appropriate, partially in the first instance the applicant's interests.

131 The outright refusal by the Commission to grant the applicant access is therefore vitiated by an error of law. The first and fourth pleas must therefore be upheld. Consequently, without there being any need to rule on the other pleas put forward by the applicant, the contested decision must be annulled.

The request for production of documents

132 It is for the Community judicature to decide, in the light of the circumstances of the case and in accordance with the provisions of the Rules of Procedure on measures of inquiry, whether it is necessary for a document to be produced (Case C-196/99 P *Aristrain* v *Commission* [2003] ECR I-11049, paragraph 67).

133 Since the first and fourth pleas of the applicant must be upheld without there being any need to examine the documents in question, there is certainly no need in this case to order the production requested.

Costs

134 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. Since the Commission has been unsuccessful, it must be ordered to pay the costs borne by the VKI, in accordance with the form of order sought by the latter.

135 Under the third subparagraph of Article 87(4) of the Rules of Procedure, the Court may order an intervener to bear its own costs. In this case, the interveners are to bear their own costs.

On those grounds,

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

hereby:

1. **Annuls Decision D (2002) 330472 relating to a request for access to the administrative file in Case COMP/36.571/D-1, Austrian banks — 'Lombard Club';**

2. Orders the Commission to pay the costs;

3. Orders the interveners to bear their own costs.

Vesterdorf Jaeger Mengozzi

Martins Ribeiro Labucka

Delivered in open court in Luxembourg on 13 April 2005.

H. Jung B. Vesterdorf

Registrar President