

JUDGMENT OF THE COURT OF FIRST INSTANCE (First Chamber)
25 June 2002 *

In Case T-311/00,

British American Tobacco (Investments) Ltd, established in London (United Kingdom), represented by S. Crosby, Solicitor,

applicant,

v

Commission of the European Communities, represented by U. Wölker, X. Lewis and M. Shotter, acting as Agents, with an address for service in Luxembourg,

defendant,

APPLICATION for annulment of the Commission's decision of 7 September 2000 refusing to grant access to certain documents concerning preparatory work relating to the proposal for a directive of the European Parliament and of the Council (COM(1999) 594 final), presented by the Commission on 7 January

* Language of the case: English.

2000, on the approximation of the laws, regulations and administrative provisions of the Member States concerning the manufacture, presentation and sale of tobacco products (OJ 2000 C 150 E, p. 43),

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

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

Registrar: D. Christensen, Administrator,

having regard to the written procedure and further to the hearing on 20 June 2001, 25 October 2001 and 5 March 2002,

gives the following

Judgment

- 1 The applicant, British American Tobacco (Investments) Ltd, is a company established in the United Kingdom belonging to the British American Tobacco group, whose principal activity is the manufacture, distribution and sale of tobacco products.

- 2 On 7 January 2000 the Commission presented a proposal for a directive of the European Parliament and of the Council (COM(1999) 594 final) on the approximation of the laws, regulations and administrative provisions of the Member States concerning the manufacture, presentation and sale of tobacco products (OJ 2000 C 150 E, p. 43; hereinafter ‘the proposal for a directive’).
- 3 By letter of 6 June 2000 addressed to the Commission, the applicant applied, on behalf of the British American Tobacco group and on the basis of Commission Decision 94/90/ECSC, EC, Euratom of 8 February 1994 on public access to Commission documents (OJ 1994 L 46, p. 58), for access, first, to all of the international scientific research considered by the Commission and to the records of the Commission’s review thereof on which it based its proposal for a directive and, secondly, to the minutes of the meetings of the cancer experts committees (namely, the High-level Cancer Experts Committee and the Advisory Committee for Cancer Prevention, hereinafter together referred to as ‘the cancer experts committee’), assessing that research.
- 4 By letter of 12 July 2000, the Director General of the Health and Consumer Protection Directorate-General sent the applicant the recommendations concerning tobacco of the cancer experts committee adopted in Helsinki on 2 October 1996 (hereinafter ‘the 1996 recommendations’), which were annexed to the Commission’s communication to the Council and to the European Parliament of 18 December 1996 on the present and proposed Community role in combating tobacco consumption, together with a list of scientific publications consulted by the Commission’s staff in the course of preparing the proposal for a directive.
- 5 The Director General also stressed that the 1996 recommendations had already been the subject of extensive preparatory discussions held under the auspices of the High-level Cancer Experts Committee, without the presence of Commission

staff, but that, apart from the recommendations themselves, no official minutes had been adopted. Consequently, for further information concerning the scientific work on which the recommendations were based, the applicant was invited to contact the expert designated by the chairman of the High-level Cancer Experts Committee to prepare the file.

- 6 By letter of 26 July 2000, received at the Secretariat-General of the Commission on 28 July 2000, the applicant made a confirmatory application, within the meaning of Decision 94/90, arguing that the Director General's reply amounted to a refusal to grant access to the documents sought.

- 7 By letter of 30 August 2000, the applicant pointed out to the Secretariat-General of the Commission that the time for replying to the confirmatory application had expired the previous day and that, failing an express decision by 7 September 2000, it would bring an action for annulment before the Court of First Instance.

- 8 By letter of 7 September 2000, the Secretary General of the Commission replied that, as regards, first of all, the international scientific research to which the applicant referred and the records of the Commission's review thereof, the research in question had been analysed by the scientific experts who had prepared the 1996 recommendations on the basis of which the Commission had then drafted the proposal for a directive. Nevertheless, he emphasised that 'the totality of' the documents relating to that work had neither been sent to, nor analysed by either the cancer experts committee or the Commission's services. Secondly, as regards the application for access to the minutes of the meetings of the cancer experts committee relating to the assessment of the international scientific research, the Secretary General stated that none of the minutes dealt with that subject. In conclusion, the Secretary General once again invited the applicant to contact the expert who had prepared the file relating to the 1996 recommendations if it wished to obtain further details on the scientific research carried out.

- 9 By application lodged at the Registry of the Court of First Instance on 28 September 2000, the applicant brought the present action.
- 10 On hearing the report of the Judge-Rapporteur, the Court of First Instance (First Chamber) decided to open the oral procedure.
- 11 The parties presented oral argument and answered questions put by the Court at the hearing on 20 June 2001. At that hearing the Court of First Instance decided to summon witnesses in order to ascertain whether, for the purposes of drawing up the 1996 recommendations, documents relating to the international scientific research were first sent to the High-level Cancer Experts Committee and/or to the working group established for that purpose and whether the meetings of that committee concerning the drawing up of the 1996 recommendations were minuted. Consequently, it suspended the oral procedure.
- 12 By order of 13 July 2001, pursuant to Article 68 of its Rules of Procedure, the Court of First Instance ordered of its own motion that four witnesses be summoned and that the funds necessary for hearing the witnesses be advanced by the Court's cashier.
- 13 On 24 October 2001, the day before the date fixed for hearing the witnesses, the Court received a letter from one of the witnesses summoned, Professor Veronesi, who, prevented for professional reasons from appearing before the Court, provided a written answer to the questions which the Court had framed in its order of 13 July 2001. Professor Veronesi stated, amongst other things, that the meetings of the High-level Cancer Experts Committee had been minuted.

- 14 That same day, the Commission sent the applicant copies of the minutes of the 22nd and 23rd meetings of the cancer experts committee which had taken place on 23 November 1995 in Luxembourg and on 23 and 24 May 1996 in Milan respectively, together with the minutes of the committee's meeting in Dublin on 7 and 8 November 1996.
- 15 In its letter accompanying those documents, the Commission informed the applicant that it would be sending it two further documents as soon as it had obtained the agreement of the authors.
- 16 In those circumstances, at the hearing of 25 October 2001, the Court of First Instance held that there was no longer any need for the witnesses to be heard and set a period of three weeks within which any new documents were to be sent to the applicant and within which the applicants were to inform the Court of their views as to the future conduct of the case. Consequently, the oral procedure was once again suspended.
- 17 On 14 November and 5 December 2001 the Commission sent the applicant further documents, namely:
- the final report of the Finnish Ministry for Social Affairs and Health concerning the 'consensus' conference on tobacco smoking, which was held, under the auspices of the cancer experts committee, in Helsinki on 2 October 1996 and a study entitled 'Cancer, cigarette smoking and premature death in Europe' prepared by Professor Boyle for the committee and the conference (sent on 14 November 2001);

- a piece of bibliographic research prepared in July 1996 by ‘Health Promotion Wales’ pursuant to a contract concluded with the Commission.
- 18 By letter of 10 December 2001, the applicant sent the Court its observations following its receipt of those documents. It asked the Court to give final judgment in the dispute and to order the Commission to bear all of the costs, including those relating to the hearing of 25 October 2001.
- 19 The Commission’s observations on that letter, dated 21 January 2001, reached the Registry of the Court of First Instance the following day.
- 20 On hearing the report of the Judge-Rapporteur, the Court of First Instance (First Chamber) decided to resume the oral procedure and, by way of measures of organisation of procedure, called upon the Commission to answer a written question. The Commission complied with that request within the period allowed.
- 21 By letter of 5 February 2002, the applicant applied for measures of organisation of procedure the object of which was to question the Commission about the existence of an internal written assessment of the international scientific research. The Commission opposed that application by letter of 19 February 2002.
- 22 Immediately before the hearing on 5 March 2002 the Commission produced a new document to the applicant and to the Court. The parties presented oral argument and answered the questions put to them by the Court at that hearing.

- 23 By facsimile letter dated 6 June 2002, the applicant applied for measures of organisation of procedure the object of which was to have the Court take account of certain new facts.

Forms of order sought

- 24 The applicant claims that the Court should:

- annul the decision of 7 September 2000;
- order the Commission to pay the costs.

- 25 The Commission contends that the Court should:

- dismiss the action as inadmissible;
- in the alternative, dismiss the action as unfounded;
- order the applicant to pay the costs.

- 26 Those claims were partially amended during the course of the proceedings in order to reflect the change in the original facts of the dispute resulting from the Commission's sending several documents to the applicant (see paragraph 34 below).

Admissibility

Arguments of the parties

- 27 The Commission maintains that the action is inadmissible because the Secretary General's letter of 7 September 2000, against which it is directed, does not affect the applicant's legal position and thus does not constitute an actionable measure.
- 28 In this connection, the Commission argues that, by the letter of 12 July 2000 from the Director General of the Health and Consumer Protection Directorate-General, it had already granted access to the documents in its possession that fell within the scope of the code of conduct. The subsequent letter of 7 September 2000 from the Secretary General did not, therefore, contain any refusal to grant access to documents falling within the scope of the code of conduct, as adopted by Decision 94/90.
- 29 The applicant counters that, by its letter of 7 September 2000, the Commission refused to communicate documents under its control or in its possession. Consequently, this was a decision affecting its legal position against which an action for annulment is admissible.

Findings of the Court

- 30 The Court has consistently held that only a measure whose legal effects are binding on the applicant and are capable of affecting his interests is an act or decision which may be the subject of an action for annulment under Article 230 EC (see, *inter alia*, Case C-147/96 *Netherlands v Commission* [2000] ECR I-4723, paragraph 25, and the case-law cited).
- 31 In the present case, the Secretary General's letter of 7 September 2000 indicating, in essence, that the documents requested were not in the Commission's possession or did not exist, amounted to a refusal to grant access and thus affects the applicant's interests.
- 32 The argument that the Commission did not refuse access to 'documents falling within the scope of the code of conduct', as adopted by Decision 94/90, cannot alter that conclusion. Irrespective of whether or not the Commission was required to grant access to the documents, it nevertheless remains the case that a negative decision was taken and that that decision is actionable.
- 33 The present action must therefore be regarded as admissible.

Substance

- 34 During the course of the proceedings in this case, the Commission has, on a number of occasions, sent the applicant various documents, thereby altering the

original circumstances of the dispute. The Court considers it necessary to examine the import of those new documents in terms of the three categories of documents covered by the request for access of 6 June 2000.

Minutes of the meetings of the cancer experts committee assessing the international scientific research

- 35 Decision 94/90 is a measure conferring on citizens a right of access to documents held by the Commission. Clearly, however, the Commission cannot accede to a request for access to documents which do not exist, and it is clear from case-law that, in accordance with the presumption of legality attaching to Community acts, where the institution concerned asserts that a particular document to which access has been sought does not exist, there is a presumption that it does not. That, however, is a simple presumption that the applicant may rebut in any way by relevant and consistent evidence (see, to that effect, Case T-123/99 *JT's Corporation v Commission* [2000] ECR II-3269, paragraph 58).
- 36 In the present case, the Commission sent the applicant on 24 October 2001 copies of the minutes of the 22nd and 23rd meetings of the cancer experts committee which had taken place on 23 November 1995 in Luxembourg and on 23 and 24 May 1996 in Milan respectively, together with the minutes of that committee's meeting in Dublin on 7 and 8 November 1996.
- 37 In its observations dated 10 December 2001, the applicant points out that the minutes of the meetings of the cancer experts committee sent by the Commission on 24 October 2001 contain no assessment of the international scientific research. It also stated that, provided the Commission could confirm that it was

now in possession of all the minutes of that committee, it would acknowledge that its action was unfounded to the extent that it related to that category of document.

38 In its observations of 21 January 2002, the Commission confirmed that the applicant was now in possession of all of the sets of minutes of the relevant meetings of the cancer experts committee and asserted that that aspect of the action was unfounded.

39 The Court notes that the applicant has produced no relevant or, *a fortiori*, consistent evidence within the meaning of the judgment in *JT's Corporation v Commission*, cited above, to throw doubt upon the Commission's assertion that neither it nor the cancer experts committee is in possession of sets of minutes of committee meetings assessing the international scientific research, at which the request for access was directed.

40 That being so, the Court finds that the applicant is in possession of all of the sets of minutes of the relevant meetings of the cancer experts committee and that those minutes contain no assessment of the international scientific research, as contemplated by the request for access. The action must, therefore, be dismissed as unfounded in so far as it relates to this category of documents.

Documents relating to the international scientific research considered by the Commission

41 The Court notes that the Commission sent the applicant a list of scientific publications consulted by its services, a study entitled 'Cancer, cigarette smoking

and premature death in Europe' prepared by Professor Boyle for the cancer experts committee in anticipation of the Helsinki conference and a piece of bibliographic research prepared in July 1996 by 'Health Promotion Wales' pursuant to a contract concluded with the Commission, a copy of which had been sent directly to Mr J. Ryan, Head of Unit within the Health and Consumer Protection Directorate-General of the Commission.

- 42 In its observations dated 10 December 2001, the applicant indicated, in essence, that, provided the Commission could confirm that it was in possession of no other documents which might belong to the category referred to above, its action had become devoid of purpose to the extent that it related to that category of documents.
- 43 In response to a written question put by the Court, the Commission stated that, other than those already sent to the applicant, there were no documents in its possession or in the possession of the cancer experts committee belonging to the category of documents relating to the international scientific research on the basis of which the Commission prepared its proposal for a directive.
- 44 At the hearing on 5 March 2002, the applicant confirmed that there was no longer any difficulty concerning this category of documents.
- 45 Consequently, the Court finds that the action has become devoid of purpose in so far as the category of documents under consideration is concerned and that there is no need for it to give judgment on this point.

Reports prepared by the Commission evaluating the international scientific research and providing a basis for its proposal for a directive

- 46 At the hearing on 5 March 2002, the Commission stated that the document which it had produced to the applicant immediately before the hearing had been prepared by a consultant working for the institution and sent to it before it had prepared its proposal for a directive and was the only document that might correspond to the applicant's request. The Commission also confirmed that the document was to be regarded as its own.
- 47 The applicant argues that the document in question does not amount to or contain any assessment by the Commission of the international scientific research, as sought in its request for access, although it acknowledges that it is unable to provide further proof in support of its assertion that such internal assessment exists.
- 48 The Court finds that the document in question, which was prepared for the Commission and is in the Commission's possession, does contain an assessment of the international scientific research to which it refers in numerous footnotes. That assessment relates, *inter alia*, to questions concerning the maximum tar and nicotine content of cigarettes and the use of expressions such as 'light' and 'mild' to describe certain cigarettes and the impact of those terms on tobacco consumption.
- 49 That being so, and in the absence of relevant and consistent evidence indicating the existence of other documents containing a written assessment by the Commission of the international scientific research (see, to that effect *JT's*

Corporation v Commission, cited above, paragraph 58), the Court finds that the applicant's request for access has been satisfied on this point. The action must, therefore, be regarded as being devoid of purpose in so far as it relates to this last category of documents.

The applications for measures of organisation of procedure

- 50 The Court finds that there is no need to grant the application for measures of organisation of procedure made by letter of 5 February 2002, which, as matters now stand, is of no interest in the resolution of the dispute (see, by analogy, Case T-138/98 *ACAV and Others v Council* [2000] ECR II-341, paragraph 72).
- 51 By its application of 6 June 2002, the applicant asked the Court to consider certain new facts which came to light following a request for access to documents which it sent to the Commission on 22 April 2002 and the Commission's letter of reply of 6 June 2002.
- 52 In the circumstances, the applicant's request must be treated as a request to the Court to reopen the oral procedure so that it might take into account the alleged new facts.
- 53 According to case-law, the Court of First Instance is required to accede to such a request only if the party concerned wishes to place before it facts which may have a decisive influence on the outcome of the case and which it was unable to put forward before the close of the oral procedure (Case C-200/92 P *ICI v Commission* [1999] ECR I-4399, paragraphs 60 and 61).

- 54 The new facts which the applicant puts forward are two alleged contradictions between assertions made by the Commission's representative at the hearing on 5 March 2002 and the Commission's reply to its request for access to documents of 22 April 2002. The alleged contradictions concern the date on which the document produced by the Commission immediately before the hearing was prepared and the addressee of that document.
- 55 According to the applicant, the document in question was not, as the Commission's representative claimed, prepared after 1998 but was in fact sent by its author to the Commission in the autumn of that year; nor was it sent to the office of the Commissioner for Health and Consumer Protection, but merely to certain Commission officials.
- 56 The applicant deduces from that that the Commission was ignorant of the document until the hearing on 5 March 2002, that it does not belong to the category of documents referred to in its original application for access of 6 June 2000 under the hearing of internal records of the Commission's review of the international scientific research on tobacco smoking on which it based its proposal for a directive COM(1999) 594 final and that it cannot be recognised as such by the Court of First Instance in its judgment.
- 57 None of those facts are capable of having a decisive influence on the outcome of the case, within the meaning of the case-law cited.
- 58 The contradiction concerning the date of the document's preparation and the circumstances of its communication to the Commission is irrelevant inasmuch as, regardless of its actual date, be it autumn 1998 or after 1998, the document pre-dates the proposal for a directive of 7 January 2000, which is the only relevant date in so far as concerns the question of how to describe the document and the purpose of the application for access to documents, as summarised in paragraph 3 of the present judgment, which is the only application the Court is called upon to decide in these proceedings.

- 59 The alleged contradiction concerning the addressee of the document is also entirely irrelevant, in that there is no doubt that the document in question, which was prepared for the Commission, was sent to it and constituted a document in its possession.
- 60 The conclusions drawn by the applicant and mentioned in paragraph 56 of the present judgment reveal no new fact as such and are a matter for the Court's discretion; the Court alone may decide on the precise description of the document in question.
- 61 Consequently, the applicant's request of 6 June 2002 for the oral procedure to be re-opened must be rejected.

Costs

- 62 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. However, under Article 87(3), the Court may order a party, even if successful, to pay costs which it considers that party to have unreasonably or vexatiously caused the opposite party to incur. Furthermore, Article 87(6) provides that, where a case does not proceed to judgment, the costs are in the discretion of the Court of First Instance.
- 63 As the Court has held, whilst the action has become devoid of purpose in so far as it relates to documents connected with the international scientific research considered by the Commission and any written evaluation by the Commission of that research, it must be dismissed as unfounded in so far as it concerns the

category of documents constituted by the minutes of the meetings of the cancer experts committee that contain an assessment of the international scientific research.

- 64 In its observations of 21 January 2002, the Commission expressly stated that the minutes of the meetings of the cancer experts committee sent to the applicant on 24 October 2001 ought to have been sent immediately they were requested. It recognises that, in order to bring its action, the applicant has had to incur costs which ought not to have been necessary. That amounts to an admission by the Commission that its conduct contributed to the dispute and caused the applicant to incur costs unnecessarily.
- 65 The Court also observes that it was only after it ordered the summoning of witnesses and after one of those witnesses proffered written evidence that the Commission was able to find and send to the applicant, on the day before the hearing fixed for hearing the witnesses, the relevant sets of minutes of the cancer experts committee. In addition, almost 21 months after the initial request for access and after having repeatedly denied its existence, the Commission also found a document which it produced to the applicant only minutes before the hearing on 5 March 2002.
- 66 Because of its particularly regrettable conduct in this matter, the Commission must be ordered to bear not only its own costs but also the costs incurred by the applicant, save for those relating to its request for the oral procedure to be re-opened, which was an inappropriate request.
- 67 In the circumstances, the Commission must also reimburse to the Court of First Instance the sums advanced by its cashier in connection with calling the witnesses summoned by the Court of its own motion.

On those grounds,

THE COURT OF FIRST INSTANCE (First Chamber),

hereby:

1. Dismisses the action in so far as it relates to the category of documents constituted by the minutes of the meetings of the cancer experts committee assessing the international scientific research;
2. Finds that there is no need to proceed to judgment on the remainder of the case;
3. Orders the Commission in addition to bearing its own costs, to pay those of the applicant, save for costs relating to the request for the oral procedure to be re-opened. The Commission is also ordered to pay the costs connected with the summoning of witnesses.

Vesterdorf

Vilaras

Forwood

Delivered in open court in Luxembourg on 25 June 2002.

H. Jung

B. Vesterdorf

Registrar

President

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