JUDGMENT OF THE COURT OF FIRST INSTANCE (Fourth Chamber)
19 March 1998 *

In Case T-83/96,

Gerard van der Wal, residing in Kraainem, Belgium, represented initially by Caroline P. Bleeker and Laura Y. J. M. Parret, of the Hague Bar and the Brussels Bar respectively, and subsequently by Laura Y. J. M. Parret, with an address for service in Luxembourg at the Chambers of Aloyse May, 31 Grand-Rue,

applicant,

supported by

Kingdom of the Netherlands, represented by Marc Fierstra and Johannes S. van den Oosterkamp, Legal Advisers, acting as Agents, with an address for service in Luxembourg at the Embassy of the Netherlands, 5 Rue C. M. Spoo,

intervener,

v

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

defendant,

* Language of the case: Dutch.

APPLICATION for the annulment of the Commission's decision of 29 March 1996 refusing the applicant access to letters sent by the Directorate-General for Competition to national courts in the context of the notice on cooperation between national courts and the Commission in applying Articles 85 and 86 of the EEC Treaty,

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

composed of: K. Lenaerts, President, P. Lindh and J.D. Cooke, Judges,

Registrar: H. Jung,

having regard to the written procedure and further to the hearing on 25 September 1997,

gives the following

Judgment

Legal background

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

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

the administration. The Conference accordingly recommends that the Commission submit to the Council no later than 1993 a report on measures designed to improve public access to the information available to the institutions.'

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

3 In the context of those preliminary steps towards implementation of the principle of transparency, on 6 December 1993 the Council and the Commission approved a code of conduct concerning public access to Council and Commission documents (OJ 1993 L 340, p. 41, hereinafter 'the Code of Conduct'), which sought to establish the principles governing access to documents held by those institutions.

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

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

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

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

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

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

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

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

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

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

— the protection of the individual and of privacy,

— the protection of commercial and industrial secrecy,

— the protection of the Community's financial interests,

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

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

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

In the Notice, the Commission stated that:

'37. ... national courts may, within the limits of their national procedural law, ask the Commission and in particular its Directorate-General for Competition for the following information.

First, they may ask for information of a procedural nature to enable them to discover whether a certain case is pending before the Commission, whether a case has been the subject of a notification, whether the Commission has officially initiated a procedure or whether it has already taken a position through an official decision or through a comfort letter sent by its services. If necessary, national courts may also ask the Commission to give an opinion as to how much time is likely to be required for granting or refusing individual exemption for notified agreements or practices, so as to be able to determine the conditions for any decision to suspend proceedings or whether interim measures need to be adopted. The Commission, for its part, will endeavour to give priority to cases which are the subject of national proceedings suspended in this way, in particular when the outcome of a civil dispute depends on them.

38. Next, national courts may consult the Commission on points of law. Where the application of Article 85(1) and Article 86 causes them particular difficulties, national courts may consult the Commission on its customary practice in relation to the Community law at issue. As far as Articles 85 and 86 are concerned, these difficulties relate in particular to the conditions for applying these Articles as regards the effect on trade between Member States and as regards the extent to which the restriction of competition resulting from the practices specified in these provisions is appreciable. In its replies, the Commission does not consider the merits of the case. In addition, where they have doubts as to whether a contested agreement, decision or concerted practice is eligible for an individual exemption, they may ask the Commission to provide them with an interim opinion. If the Commission says that the case in question is unlikely to qualify for an exemption, national courts will be able to waive a stay of proceedings and rule on the validity of the agreement, decision or concerted practice.

39. The answers given by the Commission are not binding on the courts which have requested them. In its replies the Commission makes it clear that its view is

not definitive and that the right for the national court to refer to the Court of Justice, pursuant to Article 177, is not affected. Nevertheless, the Commission considers that it gives them useful guidance for resolving disputes.

40. Lastly, national courts can obtain information from the Commission regarding factual data: statistics, market studies and economic analyses. The Commission will endeavour to communicate these data ... or will indicate the source from which they can be obtained'.

Facts

10 The *XXIVth Report on Competition Policy* (1994) (hereinafter 'the XXIVth Report') stated that the Commission had received a number of questions from national courts pursuant to the procedure described in paragraph 9 above.

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

(1) The letter dated 2 August 1993 from the Director-General of the Directorate-General for Competition (DG IV) to the Oberlandesgericht (Higher Regional Court), Düsseldorf, concerning the compatibility of a distribution agreement

with Commission Regulation (EEC) No 1983/83 of 22 June 1983 on the application of Article 85(3) of the Treaty to categories of exclusive distribution agreements (OJ 1983 L 173, p. 1);

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

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

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

'... When the Commission replies to questions submitted to it by national courts before which an action has been brought for the purposes of resolving a dispute, the Commission intervenes as an "*amicus curiae*". It is expected to show a certain

reserve not only as regards acceptance of the manner in which the questions are submitted to it but also as regards the use which it makes of the replies to those questions.

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

...'

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

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

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

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

...'

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

Procedure and forms of order sought

17 In those circumstances, by application lodged at the Registry of the Court of First Instance on 29 May 1996, the applicant brought this action.

18 By documents lodged at the Registry of the Court of First Instance on 4 and 19 November 1996 respectively, the Netherlands Government and the Swedish Government sought leave to intervene in this case in support of the applicant.

19 By order of the President of the Fourth Chamber of the Court of First Instance of 9 December 1996, those two governments were granted leave to intervene in support of the applicant. Pursuant to its request dated 14 March 1997, the Swedish Government's application for leave to intervene was removed from the register by order of the President of the Fourth Chamber of 12 May 1997 and it was ordered to bear its own costs.

20 The written procedure ended on 24 April 1997.

21 The parties presented oral argument and replied to the Court's questions at the hearing on 25 September 1997.

22 The applicant, supported by the Kingdom of the Netherlands, claims that the Court should:

— annul the contested decision and

— order the Commission to pay the costs.

23 The Commission contends that the Court should:

— dismiss the application and

— order the applicant to pay the costs.

Law

24 The applicant raises two pleas in law in support of his action, alleging infringement of Decision 94/90 and infringement of Article 190 of the Treaty, respectively.

The first plea, alleging infringement of Decision 94/90

Arguments of the parties

25 The applicant submits, first, that the exception relating to 'court proceedings' provided for in the Code of Conduct applies only to proceedings to which the Commission is a party. The exception cannot therefore be relied on in this case.

26 If the Court were to consider that the exception relating to 'court proceedings' also applies to proceedings to which the Commission is not a party, the applicant submits, in the alternative, that disclosure of the documents in issue does not undermine the cooperation between the Commission and national courts or adversely affect the public interest. There is no basis for the Commission's assertion that disclosure of such documents would not be appreciated by the national court and, in any event, the feelings of the national court cannot take precedence over the primary rule of public access.

27 The Commission is wrong to claim that in certain circumstances it is required to refuse access to documents. In any event it has a duty to state the extent to which its legitimate interests and the interest in the proper conduct of legal proceedings require application of the exception to the rule of public access (Case C-54/90 *Weddel* v *Commission* [1992] ECR I-871).

28 The applicant considers that the information which might be provided by the Commission in the context of cooperation with national courts is not in any way confidential and points out that in this case the Commission has confirmed that none of the letters requested was of a confidential nature.

29 It would be contrary to the tradition of public access, of review of acts of the administration and of the conventional separation of powers if such communications from the administration to the judiciary were not accessible.

30 The Netherlands Government considers that the Commission has given a broad interpretation to the exceptions to the fundamental principle that the public will receive the widest possible access to documents held by the Commission. The effect of its interpretation of Decision 94/90 is to exclude a category of documents from public access with no consideration of whether the content of the documents justifies recourse to the exceptions. Letters sent by the Commission to a national court fall within the scope of the Code of Conduct and the Commission is incorrect in its view that it is for the national court alone to decide whether and under what conditions such letters may be disclosed to third parties.

31 The proper conduct of proceedings before the national court would not be impeded if information provided by the Commission to the court in the context of an action between individuals came to the attention of third parties. National courts would not be less disposed to request information from the Commission if the reply might be disclosed, and even if that proved to be the case it would not constitute sufficient grounds for holding disclosure to be incompatible with the public interest. The Netherlands Government acknowledges that disclosure of the documents could jeopardise the sound administration of justice to the extent that individuals who could have access to the information in those documents could thus avoid judicial proceedings, which would affect the efficient and uniform application of Community law.

32 The relationship between the Commission and national courts is governed by the principle of cooperation in good faith, pursuant to Article 5 of the Treaty. The Commission does not act as an expert in the context of the notice.

33 Finally, the Netherlands Government submits that the Commission has not carried out an individual assessment of each specific case.

34 In response to the applicant's first argument, the Commission points out that it starts from the assumption that the contested decision falls within the scope of Decision 94/90. It rejects the interpretation that the exception relating to 'court proceedings' applies only to proceedings to which the Commission is a party. The rule set out in the Code of Conduct is broad enough to include Commission letters drafted in the context of cooperation with national courts.

35 As regards the second argument concerning the protection of the public interest, it is not necessary to assess the interests at issue, since such an assessment is necessary only where the Commission refuses access to a document in order to protect the confidentiality of its proceedings (Case T-105/95 *WWF UK* v *Commission* [1997] ECR II-313, paragraph 59). It is nevertheless apparent from the two replies sent to the applicant that his request was examined on its own merits. In this case it is sufficient that there is a possibility that disclosure might undermine the protection of the public interest, in particular in the case of court proceedings, for the Commission to be obliged to refuse access to the document at issue.

36 Disclosure of the replies given by the Commission in the context of the Notice could indeed undermine the protection of the public interest (court proceedings), and not only in the situation evoked by the Netherlands Government. When a national court applies Articles 85(1) and 86 of the Treaty, it does so on the basis of its autonomous jurisdiction and in a manner determined in principle by national

procedural rules (Case C-60/92 *Otto* v *Postbank* [1993] ECR I-5683, paragraph 14, and Case C-234/89 *Delimitis* v *Bräu* [1991] ECR I-935, paragraph 53). It follows from those principles that if a national court submits a request to the Commission it is for that court alone to determine on the basis of its national procedural law whether and, if so, when and under what conditions the Commission's reply may be disclosed to third parties. That remains the case at least for as long as the litigation in question is pending.

37 The role of the Commission in the context of its cooperation with national courts differs fundamentally from the role of the Court of Justice in proceedings under Article 177 of the Treaty, to which the applicant referred in his confirmatory application. When it answers a question referred for a preliminary ruling the Court of Justice states the law and its judgment is binding on the national court. The Commission, by contrast, plays a secondary role *vis-à-vis* the national court, which is entirely free to decide whether or not to approach the Commission. The Commission's role can be compared to that of an expert commissioned by a court to provide information or an opinion. The Commission sends its answer to the national court to deal with as it sees fit.

38 The Commission adds that its reason for refusing access to the documents is quite separate from the question whether those documents contain business secrets or other confidential data which the Commission is not authorised to disclose in the context of a procedure initiated pursuant to Regulation No 17/62 of the Council of 6 February 1962, First Regulation implementing Articles 85 and 86 of the Treaty (OJ, English Special Edition 1959-1962, p. 87). It points out, however, that it is required to observe the rules of confidentiality as regards competition procedures pending before it. Within those limits, it seeks to be as open as possible.

39 The Commission also rejects the Netherlands Government's assertion that the principle that the public should have the widest possible access to documents held by the European institutions is a fundamental principle of Community law.

40 As regards the transparency of relations between the executive and the judiciary, it considers that the relationship between the Commission and national courts cannot simply be equated with the relationship between the executive and the judiciary in a traditional State.

Findings of the Court

41 Decision 94/90 is a measure granting citizens a right of access to documents held by the Commission (*WWF UK* v *Commission*, cited above, paragraph 55). It follows from the broad scheme of that decision that it applies generally to requests for access to documents and that any person may request access to any Commission document without needing to justify the request (see, in that respect, Communication 93/C 156/05, cited at paragraph 2 above). The exceptions to that right must be construed and applied strictly, in order not to defeat the application of the general principle laid down in the decision (*WWF UK* v *Commission*, cited above, paragraph 56).

42 Decision 94/90 established two categories of exception. According to the wording of the first category, drafted in mandatory terms, 'the institutions will refuse access to any document where disclosure could undermine ... [in particular] the protection of the public interest (... court proceedings)' (see paragraph 8 above). It follows that the Commission is obliged to refuse access to documents falling under that exception once the relevant circumstances are shown to exist (*WWF UK* v *Commission*, cited above, paragraph 58).

43 It follows from the use of the form 'could', in the present conditional, that in order to show that disclosure of documents relating to court proceedings could undermine the protection of the public interest, as required by the case-law (see paragraph 42 above), before deciding on an application for access to such documents, the Commission must consider in respect of each document requested whether, in

the light of the information available to it, disclosure is in fact likely to undermine one of the facets of public interest protected by the first category of exception. Where that is the case, the Commission must refuse access to the documents in issue (see paragraph 42 above).

44 It is thus necessary to consider whether, and if so, to what extent the Commission is entitled to rely on the exception based on the protection of the public interest in order to refuse to grant access to documents sent by it to a national court in response to a request from that court in the context of the cooperation based on the Notice, even though the Commission is not a party to the proceedings pending before the national court which gave rise to the request.

45 In that respect, it should be recalled that Article 6 of the European Convention on Human Rights (hereinafter the 'ECHR') assures the right of everyone to a fair trial. In order to guarantee that right, the case must be heard, *inter alia*, '... by an independent and impartial tribunal ...' (Article 6 of the ECHR).

46 It is settled case-law that fundamental rights form an integral part of the general principles of law whose observance the Community judicature ensures (see, in particular, Opinion 2/94 of the Court of Justice [1996] ECR I-1759, paragraph 33 and Joined Cases T-213/95 and T-18/96 *SCK* and *FNK* v *Commission* [1997] ECR II-1739, paragraph 53). For that purpose, the Court of Justice and the Court of First Instance draw inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international treaties for the protection of human rights on which the Member States have agreed or to which they have acceded. In that regard the ECHR has special significance (see, in particular, the judgment in Case 222/84 *Johnston* v *Chief Constable of the Royal Ulster Constabulary* [1986] ECR 1651, paragraph 18). Furthermore, as provided for in Article F(2) of the Treaty on European Union, which entered into force on 1 November 1993, 'the Union shall respect fundamental rights as guaranteed by the [ECHR], and as they result from the constitutional traditions common to the Member States, as general principles of Community law'.

47 The right of every person to a fair hearing by an independent tribunal means, *inter alia*, that both national and Community courts must be free to apply their own rules of procedure concerning the powers of the judge, the conduct of the proceedings in general and the confidentiality of the documents on the file in particular.

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

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

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

51 When, in the context of proceedings pending before it, a national court requests certain information from the Commission on the basis of the cooperation provided for by the Notice, the Commission's reply is expressly provided for the purposes

of the court proceedings in question. In such circumstances, the protection of the public interest must be regarded as requiring the Commission to refuse access to that information, and therefore to the documents containing it, because the decision concerning access to such information is a matter to be decided exclusively by the appropriate national court on the basis of its own national procedural law for as long as the court proceedings giving rise to its incorporation in a Commission document are pending.

52 In this case, the applicant requested the production of three letters, all concerning pending court proceedings. The applicant did not claim that those letters merely reproduced information which was otherwise accessible on the basis of Decision 94/90. In that respect, furthermore, it should be noted that the first letter related to the compatibility of a distribution agreement with Regulation No 1983/83, the second concerned the application of Regulation No 26/62 and the third concerned the interpretation of Regulation No 123/85 (see paragraph 11 above). Those letters thus concerned points of law raised in the context of specific pending proceedings.

53 In that respect, as the Commission has already pointed out, it is irrelevant whether the three documents in issue contained business secrets, since the Commission's refusal to disclose those replies was justified on the grounds set out above (see paragraphs 45 to 52 above).

54 The role played by the Commission in the context of the cooperation put in place by the Notice also differs from the role of the Court of Justice in proceedings under Article 177 of the Treaty. The latter establishes a special procedure between two court systems. The role of the Court of Justice in that procedure is to rule on the questions raised by national courts. The national court formulates the questions to be referred to the Court of Justice according to its own rules of procedure which will, where necessary, ensure the confidentiality of sensitive information. Similarly, the instructions to the Registrar of the Court of Justice provide that, where appropriate, names or confidential data may be omitted in publications

concerning the case. In contrast, the cooperation referred to in the Notice is not governed by any such rules of procedure. There is therefore no reason to apply the rules concerning the publication of judgments delivered in the context of proceedings under Article 177 to replies given by the Commission in the context of the Notice.

55 Finally, the applicant has not shown how the principle of the separation of powers and 'review of acts of the administration' would not be respected if the replies provided by the Commission to national courts in the context of the Notice were not made accessible to the public merely on request to the Commission. That argument must therefore be dismissed as unfounded.

56 For the reasons set out above, the first plea cannot be upheld.

The second plea, alleging infringement of Article 190 of the EC Treaty

Arguments of the parties

57 The applicant submits that the statement of reasons given by the Commission is insufficient.

58 The Netherlands Government submits that a statement of reasons must be commensurate to the nature of the measure involved. It considers that the statement of reasons is incomprehensible because different reasons were put forward by the Commission in the two letters. In the first the Commission referred to 'court

proceedings', whilst in the second it mentioned the 'proper administration of justice'. The recipient does not therefore have a clear view of the reasons which led the institution to decide in the way it finally did.

59 In the pleadings, the Commission again gives an essentially different justification for the contested decision, by referring to the nature of the cooperation between the Commission and national courts, in the context of which the Commission must be compared to an expert commissioned by the court to provide information. Quite apart from the fact that the comparison is erroneous, that argument completely obscures the grounds on which the Commission actually based its decision to refuse access to the requested documents.

60 The Netherlands Government also considers that the two letters fail to show why or in what way the supposed relationship of trust between the Commission and national courts could be jeopardised if the applicant were to be granted access to the documents. The Commission provided no justification for its view that the national court would not appreciate disclosure of the documents in issue. Furthermore, it is not at all clear from the statement of reasons how the possible need to protect that relationship of trust could have other consequences if the case at issue were no longer pending.

61 The Commission considers that the contested decision is based on sufficient grounds, which are set out not only in the contested decision itself but also in the letter dated 23 February 1996 from the Director-General of DG IV. Those two letters clearly indicate the reasons for which the application for access was refused. Furthermore, the Secretary-General of the Commission also replied to some of the arguments put forward by the applicant in his confirmatory application dated 29 February 1996.

62 In its observations on the Netherlands Government's statement in intervention, the Commission stresses that the grounds for the contested decision are to be

found not only in the letter dated 29 March 1996 but also in the letter dated 23 February 1996. There is no contradiction or material difference between the use of the expression 'court proceedings' in one letter and 'proper administration of justice' in the other. The relationship of trust referred to by the Commission is clearly the relationship resulting from the obligation of cooperation in good faith laid down in Article 5 of the Treaty.

Findings of the Court

63 It should first be noted that the duty to give reasons for a decision has a twofold purpose, namely, on the one hand, to permit interested parties to know the justification for the measure so as to enable them to protect their rights and, on the other, to enable the Community judicature to exercise its power to review the legality of the decision (see, in particular, Case C-350/88 *Delacre and Others* v *Commission* [1990] ECR I-395, paragraph 15, and *WWF UK* v *Commission*, cited above, paragraph 66). The question as to whether a statement of reasons satisfies those requirements must be assessed with reference not only to its wording but also to its context and the whole body of legal rules governing the matter in question (Case C-122/94 *Commission* v *Council* [1996] ECR I-881, paragraph 29).

64 The Code of Conduct provides that, where the initial application for access is rejected, the applicant is entitled to ask the institution to reconsider that rejection without being obliged to put forward arguments challenging the validity of the first decision. That procedure does not constitute an appeal against the refusal but an opportunity to obtain a second assessment by the institution of the application for access.

65 It follows that when a reply confirms the rejection of an application on the same grounds, it is appropriate to consider the sufficiency of the reasons given in the light of all the exchanges between the institution and the applicant, taking into account also the information available to the applicant concerning the nature and content of the requested documents.

66 In this case, it is clear from the applicant's letter dated 23 January 1996 and the paragraphs of the XXIVth Report referred to therein that the applicant knew from the outset that the Commission's letters constituted replies sent in the context of the Notice to three national courts and that each concerned a case pending before those courts. The subject-matter of those letters was also described in general terms.

67 In his response dated 23 February 1996 the Director-General of DG IV relied on the exception based on the protection of the public interest (court proceedings) and explained that the requested letters contained points of both law and fact which should be regarded as forming part of the national courts' files, particularly since the cases at issue were still pending.

68 The contested decision constitutes an express confirmation of that first refusal. Even though it refers to 'the protection of the public interest and, specifically, the proper administration of justice', the applicant could have been in no doubt that the Secretary-General's intention was to reject the application on the basis of the same exception to the Code. There is no conflict between the use of the expression 'court proceedings' in the first letter and 'proper administration of justice' in the second, since the exception at issue is intended to ensure respect for the proper administration of justice. It follows that the Commission gave essentially the same explanation in both letters.

69 Nor, contrary to what is claimed by the Netherlands Government, does the fact that the Commission referred to cooperation with national courts during the hearing constitute a new ground, as that cooperation was already mentioned in the first letter, which speaks of a 'relationship of trust' between the Commission and the national court authorities in the Member States, and was recalled in the second

letter, which refers to 'the necessary cooperation between the Commission and national courts' and to the risk that disclosure of the replies requested could undermine that cooperation.

70 Nor can the Commission be criticised for having referred to proceedings under Article 177 only in the second letter, as its comments constitute a response to the comparison which the applicant sought to draw in the confirmatory application between those proceedings and the procedure referred to in the Notice.

71 It follows from the foregoing that the Commission clearly indicated the grounds on which it had applied the exception based on the need to protect the public interest (court proceedings) in respect of the three replies requested, whilst taking account of the nature of the information contained therein. The applicant was thus in a position to know the reasons on which the contested decision was based and the Court was able to exercise its power to review the legality of that decision.

72 It follows that the second plea cannot be accepted and the action must therefore be dismissed in its entirety.

Costs

73 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs, if they have been asked for in the successful party's pleadings. Since the applicant has been unsuccessful and the Commission has asked for costs, he must be ordered to pay the costs. However, under Article 87(4) of the Rules of Procedure, the intervener must bear its own costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Fourth Chamber)

hereby:

1. Dismisses the application;

2. Orders the applicant to pay the costs incurred by the defendant;

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

Lenaerts Lindh Cooke

Delivered in open court in Luxembourg on 19 March 1998.

H. Jung P. Lindh

Registrar President