

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

7 December 1999 *

In Case T-92/98,

Interporc Im- und Export GmbH, a company incorporated under German law, established in Hamburg, Germany, represented by Georg M. Berrisch, Rechtsanwalt, Brussels and Hamburg,

applicant,

v

Commission of the European Communities, represented by Ulrich Wölker, of its Legal Service, acting as Agent, 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: German.

APPLICATION for annulment of the decision of the Commission of 23 April 1998 refusing the applicant access to certain documents,

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

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

Registrar: H. Jung,

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

gives the following

Judgment

Legal framework

- 1 In the wake, *inter alia*, of the Final Act of the Treaty on European Union signed at Maastricht on 7 February 1992 which contains a Declaration (No 17) on the right of access to information, and of several European Council meetings at which the commitment to a more open Community was reaffirmed (see, in that

connection, Case T-105/95 *WWF UK v Commission* [1997] ECR II-313, paragraphs 1 to 3), the Commission and the Council, on 6 December 1993, adopted a Code of Conduct concerning public access to Council and Commission documents (OJ 1993 L 340, p. 41, hereinafter ‘the Code of Conduct’) to establish the principles governing access to the documents they hold. The Code of Conduct provides:

‘The Commission and the Council will severally take steps to implement these principles before 1 January 1994.’

- 2 In implementation of that undertaking, on 8 February 1994, on the basis of Article 162 of the EC Treaty (now Article 218 EC), the Commission adopted Decision 94/90/ECSC, EC, Euratom on public access to Commission documents (OJ 1994 L 46, p. 58). Article 1 of that decision formally adopted the Code of Conduct, the text of which is annexed to the decision (hereinafter ‘Decision 94/90’).
- 3 The Code of Conduct sets out the following general principle:

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

‘Document’ means any written text, whatever its medium, which contains existing data and is held by the Commission or the Council.’

- 4 The factors which may be relied upon by an institution as grounds for rejecting a request for access to documents are listed in the Code of Conduct in the following 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.'

- 5 The Code of Conduct also states, under the heading 'Processing of initial applications':

'Where the document held by an institution was written by a natural or legal person, a Member State, another Community institution or body or any other national or international body, the application must be sent direct to the author.'

- 6 On 4 March 1994, the Commission adopted a communication on improved access to documents (OJ 1994 C 67, p. 5, hereinafter 'the 1994 communication'), giving details of the criteria for implementation of Decision 94/90. That communication states that 'anyone may ... ask for access to any unpublished Commission document, including preparatory documents and other explanatory material'. With regard to the exceptions provided for in the Code of Conduct, the communication states that the Commission 'may take the view that access to a document should be refused because its disclosure could undermine public and private interests and the good functioning of the institution' On that point, the communication stresses: 'There is nothing automatic about the exemptions, and each request for access to a document will be considered on its own merits.' As regards the processing of confirmatory applications, the 1994 communication states:

'If an applicant is told that access is to be refused, and is not satisfied with the explanation, he or she can ask the Commission's Secretary-General to review the matter and either confirm or overturn the refusal.'

Factual background to the case

7 Imports of beef and veal into the Community are subject, as a rule, to customs duty and an additional levy. Under the General Agreement on Tariffs and Trade (GATT), each year the Community opens a so-called 'Hilton' quota. Under that quota, certain quantities of high-quality beef ('Hilton Beef') from Argentina may be imported into the Community free of any levies and subject only to duty in accordance with the applicable common customs tariff. In order to qualify for that exemption, a certificate of authenticity from the Argentine authorities is required.

8 The Commission was informed that certificates of authenticity had been found to have been falsified and, in collaboration with the customs authorities of the Member States, initiated inquiries into the matter in late 1992 and early 1993. When the customs authorities came to the conclusion that falsified certificates of authenticity had been presented to them, they took action for post-clearance recovery of the import duty.

9 After those falsifications had been discovered, the German authorities sought post-clearance recovery of import duty from the applicant, which requested remission of that duty, claiming that it had presented the certificates of

authenticity in good faith and that certain deficiencies in the control procedure were attributable to the competent Argentine authorities and to the Commission.

- 10 By decision of 26 January 1996, addressed to the Federal Republic of Germany, the Commission declared that the applicant's request for remission of the import duty was not justified.
- 11 By letter of 23 February 1996 to the Secretary-General of the Commission and to the Directors-General of Directorates-General ('DG') I, VI and XXI, the applicant's lawyer requested access to certain documents relating to control procedures for imports of Hilton Beef and to the inquiries which gave rise to the German authorities' decisions to effect post-clearance recovery of import duty. The request concerned 10 categories of document: (1) the declarations of the Member States of quantities of Hilton Beef imported from Argentina between 1985 and 1992, (2) the declarations of the Argentine authorities of quantities of Hilton Beef exported to the Community in the same period, (3) the Commission's internal records drawn up on the basis of those declarations, (4) the documents relating to the opening of the 'Hilton' quota, (5) the documents relating to the designation of the bodies responsible for issuing certificates of authenticity, (6) the documents relating to the agreement concluded between the Community and Argentina concerning a reduction in the quota following discovery of the falsifications, (7) any reports of inquiries into the Commission's control procedures as regards the 'Hilton' quota in 1991 and 1992, (8) the documents relating to inquiries into any irregularities in imports between 1985 and 1988, (9) the views of DG VI and DG XXI on decisions taken in other similar cases and (10) the minutes of the meetings of the group of experts from the Member States on 2 October and 4 December 1995.
- 12 By letter of 22 March 1996, the Director-General of DG VI refused the request for access both as regards the correspondence with the Argentine authorities and

the records of the discussions prior to the granting and opening of the 'Hilton' quotas and as regards the correspondence with the Argentine authorities following the discovery of the falsified certificates of authenticity. That refusal was based on the exception for protection of the public interest (international relations). As regards the remaining documents, the Director-General also refused access to those emanating from the Member States or the Argentine authorities, on the ground that the applicant should address its request directly to the various authors of those documents.

- 13 By letter of 25 March 1996, the Director-General of DG XXI refused the request for access to the report of the internal inquiry into the falsifications which had been drawn up by the Commission, basing that refusal on the exception for protection of the public interest (inspections and investigations) and the exception for protection of the individual and of privacy. As regards the positions taken by DG VI and DG XXI concerning other requests for remission of import duty and the minutes of the meetings of the committee of experts from the Member States, the Director-General of DG XXI refused access to the documents on the basis of the exception for protection of the institution's interest in the confidentiality of its proceedings. As regards the remaining documents, he refused access to those emanating from the Member States, on the ground that the applicant should address its request directly to the various authors of those documents.
- 14 By letter of 27 March 1996, the applicant's lawyer submitted a confirmatory application within the meaning of the Code of Conduct to the Secretary-General of the Commission. In that letter, he challenged the justification for the grounds on which the Directors-General of DG VI and DG XXI refused access to the documents.
- 15 By application lodged at the Registry of the Court of First Instance on 12 April 1996, the applicant and two other German firms brought an action for annulment of the Commission's decision of 26 January 1996 (Case T-50/96 *Primex and Others v Commission*).

- 16 By letter of 29 May 1996, the Secretary-General of the Commission rejected the confirmatory application in the following terms:

‘Following an examination of your request, I regret to have to inform you that I confirm the decision of DG VI and DG XXI for the following reasons.

The documents requested all concern a Commission decision of 26 January 1996 (doc. COM (C)96 180 final) which has since become the subject-matter of an application for annulment brought by your representative (Case T-50/96).

Consequently, and without prejudice to other exceptions which might justify refusing access to the documents requested, the exception for protection of the public interest (court proceedings) is applicable. The Code of Conduct cannot oblige the Commission, as a party to a pending action, to provide the other party with documents relating to the dispute.’

- 17 By letter lodged at the Court Registry on 25 June 1996 in the course of proceedings in Case T-50/96, the applicant requested the Court to order production of the documents requested as a measure of organisation of the procedure.
- 18 By application lodged at the Registry of the Court of First Instance on 9 August 1996, the applicant brought an action for annulment of the Commission’s decision of 29 May 1996 confirming its refusal to allow the applicant access to certain of its documents. By its judgment in Case T-124/96 *Interporc v*

Commission [1998] ECR II-231 (hereinafter '*Interpor I*'), the Court of First Instance held that the statement of reasons in the decision of 29 May 1996 was inadequate and annulled that decision.

19 Moreover, in the course of proceedings in Case T-50/96, in response to the request of the Court of First Instance of 15 December 1997, the Commission produced certain documents some of which were the same as those requested by the applicant in the course of proceedings in *Interporc I*. In the present case the applicant has confirmed that the confirmatory application has ceased to have any purpose in so far as it relates to the documents the Commission produced at the request of the Court of First Instance in Case T-50/96.

20 In implementation of the judgment in *Interporc I*, the Commission sent to the applicant's lawyer a further decision dated 23 April 1998 concerning the applicant's confirmatory application of 27 March 1996 and containing an identical conclusion to that in the annulled decision of 29 May 1996 but stating different reasons (hereinafter 'the contested decision'). The contested decision reads as follows:

'The documents you have requested may be placed in the following categories:

1. Documents emanating from the Member States and the Argentine authorities

— the declarations of the Member States of quantities of "Hilton" Beef imported from Argentina between 1985 and 1992;

- the declarations of the Argentine authorities of quantities of “Hilton” Beef exported to the Community in the same period;

- the documents of the Argentine authorities relating to the designation of the bodies responsible for issuing certificates of authenticity;

- the documents of the Argentine authorities relating to the opening of the “Hilton” quota;

- the positions taken by the Member States in similar cases.

2. Documents emanating from the Commission

- the internal records of DG VI drawn up on the basis of the declarations of the Member States and third countries;

- the documents of the Commission relating to the designation of the bodies responsible for issuing certificates of authenticity;

- the documents relating to the agreement on the opening of the “Hilton” quota, the views of DG VI, views of other departments, communications sent to the Argentine authorities;

- the documents relating to the agreement concluded between the Community and Argentina concerning a reduction in the quota following discovery of the falsifications, internal views of DG VI, views of other departments (DG I, DG XXI), notes from the offices of the Commissioners responsible, notes sent to those offices, communications sent to the Commission delegation to Argentina, correspondence sent to the Argentine Ambassador to the European Union;

- the Commission's report into the control procedures as regards the "Hilton" quota;

- the views of DG VI and DG XXI on decisions taken in other similar cases;

- the minutes of the meetings of the group of experts from the Member States held on 2 October and 4 December 1995.

As regards the documents emanating from the Member States and the Argentine authorities, I would advise you to request a copy directly from those Member States and from the authorities concerned. Whilst the Code of Conduct provides that "the public will have the widest possible access to documents held by the Commission and the Council", the fifth paragraph provides that "where the document held by an institution was written by a natural or legal person, a Member State, another Community institution or body or any other national or international body, the application must be sent direct to the author". The

Commission can therefore in no circumstances be accused of an abuse of rights; it is merely applying its decision of 8 February 1994 governing the implementation of the Code of Conduct.

All the other documents concern pending legal proceedings (Case T-50/96) and fall within the exception based on the protection of the public interest, and, in particular, of the proper conduct of court proceedings, expressly provided for by the Code of Conduct. To disclose them on the basis of provisions relating to public access to Commission documents is likely to be damaging to the interests of the parties in those proceedings, and in particular to the rights of the defence, and would be contrary to the special provisions governing the disclosure of documents in court proceedings.²¹

- ²¹ By judgment of 17 September 1998 in Case T-50/96 *Primex Produkte Import-Export and Others v Commission* [1998] ECR II-3773, the Court of First Instance annulled the decision of 26 January 1996. The Commission appealed against that judgment (Case C-417/98 P).

Procedure and forms of order sought

- ²² The application initiating the proceedings in the present case was lodged at the Court Registry on 9 June 1998. The case was initially allocated to a Chamber made up of three Judges. Having heard the parties, the Court of First Instance, by decision of 20 April 1999, decided to refer the case to a Chamber of five Judges.

23 Upon hearing the report of the Judge-Rapporteur the Court of First Instance (First Chamber, Extended Composition) decided to open the oral procedure without any preparatory inquiry.

24 The parties presented oral argument and replied to the oral questions of the Court at the hearing in open court on 19 May 1999.

25 The applicant claims that the Court should:

— annul the contested decision;

— in the alternative, annul the decision in so far as the applicant has not already, in the course of proceedings in Case T-50/96, obtained the documents to which it requests access;

— in any event, order the Commission to pay the costs.

26 The Commission contends that the Court should:

— dismiss the application as unfounded;

— order the applicant to pay the costs.

Substance

- 27 In its submissions the applicant makes a distinction between the documents drawn up by the Commission on the one hand and those drawn up by the Member States or the Argentine authorities on the other.

The documents emanating from the Commission

- 28 The applicant relies on three pleas in law alleging that the Commission infringed, first, the Code of Conduct and Decision 94/90, second, Article 176 of the EC Treaty (now Article 233 EC) in conjunction with the judgment in *Interporc I* and, third, Article 190 of the EC Treaty (now Article 253 EC).

The plea alleging infringement of the Code of Conduct and Decision 94/90

— Arguments of the parties

- 29 The applicant submits, as a preliminary point, that the exception based on the protection of the public interest, in so far as it concerns court proceedings, covers only the documents drawn up by the Commission for the purposes of court proceedings and not the documents existing independently of such proceedings,

as the Court of First Instance held in Case T-83/96 *Van der Wal v Commission* [1998] ECR II-545, paragraph 50, delivered more than a month before the contested decision was adopted.

- 30 In the present case it is clear that none of the documents to which the applicant has requested access was drawn up by the Commission for the purposes of specific court proceedings. Consequently, the exception relating to the protection of the public interest as raised by the Commission cannot apply.
- 31 In the alternative, the applicant submits that the Commission does not specify what procedural rights would be jeopardised by the disclosure of the documents requested and in what way.
- 32 The Commission contends that the contested decision is in conformity with the judgment in *Van der Wal* and that, moreover, it followed that judgment when deciding how to proceed. It follows from *Van der Wal* that the Commission may rely on the exception based on the protection of the public interest (court proceedings), even where it is not a party to any such proceedings.
- 33 Moreover, it is clear from the use of the expression 'in that respect' at paragraph 50 of the judgment in *Van der Wal* that it is only where the Commission is not itself a party to proceedings that it is necessary to make a distinction between the documents drawn up solely for the purposes of specific court proceedings and those which exist independently of such proceedings and to limit the application of the exception based on the protection of the public interest to the first category of documents.

- 34 In situations other than those described in *Van der Wal* it is justifiable to accord different treatment to documents which were not drafted for the purposes of court proceedings but which are none the less ‘connected’ with such proceedings.
- 35 If the Commission were obliged to grant its opponent access to documents concerning the subject-matter of the litigation in the course of proceedings, the rights of the defence would be undermined, the need to safeguard which is a fundamental principle of the Community legal order (Case 347/87 *Orkem v Commission* [1989] ECR 3283, paragraph 32).
- 36 At the hearing the Commission made clear, however, that the exception at issue is applicable only during the course of the proceedings it is intended to protect.
- 37 Finally, the Commission contends that the question whether the applicant or any other person may have access to the documents requested can only be appraised in the light of the provisions of the Rules of Procedure of the Community courts, applicable as a *lex specialis*, and not on the basis of the Code of Conduct governing the right of access of the general public.

— Findings of the Court

- 38 It should be observed that, in accordance with the Code of Conduct, the right of access to documents is subject to two categories of exception, the first mandatory and the second optional. Those exceptions must be interpreted strictly, in order not to frustrate the application of the general principle of giving the public ‘the

widest possible access to documents held by the Commission' (*Interporc I*, paragraph 49, and Case T-174/95 *Svenska Journalistförbundet v Council* [1998] ECR II-2289, paragraph 110).

- 39 Before going on to interpret the exception at issue, the Court would point out that Decision 94/90 was adopted with the objective of making the Community more open, the transparency of the decision-making process being a means of strengthening the democratic nature of the institutions and the public's confidence in the administration (Declaration No 17). Similarly, the transparency called for by European Councils, in order to allow the public 'the widest possible access to documents' as stated in the Code of Conduct, is essential in order to enable citizens to carry out genuine and efficient monitoring of the exercise of the powers vested in the Community institutions, and thereby increase confidence in the administration.
- 40 In the light of those considerations and in view of the requirement to interpret the exception strictly, the expression 'court proceedings' must be interpreted as meaning that the protection of the public interest precludes the disclosure of the content of documents drawn up by the Commission solely for the purposes of specific court proceedings.
- 41 The words 'documents drawn up by the Commission solely for the purposes of specific court proceedings' must be understood to mean not only the pleadings or other documents lodged, internal documents concerning the investigation of the case before the court, but also correspondence concerning the case between the Directorate-General concerned and the Legal Service or a lawyers' office. The purpose of this definition of the scope of the exception is to ensure both the protection of work done within the Commission and confidentiality and the safeguarding of professional privilege for lawyers.

- 42 However, the exception based on the protection of public interest (court proceedings) contained in the Code of Conduct cannot enable the Commission to escape from its obligation to disclose documents which were drawn up in connection with a purely administrative matter. That principle must be respected even if the disclosure of such documents in proceedings before the Community judicature might be prejudicial to the Commission. The fact that court proceedings for annulment were initiated against the decision taken following the administrative procedure is immaterial in that regard.
- 43 The interpretation proposed by the Commission runs counter to one of the essential objectives of Decision 94/90, namely to give citizens the opportunity to monitor more effectively the lawfulness of the exercise of public powers.
- 44 As regards the Commission's arguments concerning the scope of Decision 94/90, it should be pointed out that it is clear from the general structure of that decision that it applies generally to requests for access to documents emanating from the public. Whilst in Case T-50/96, *Interporc*, in its capacity as applicant, was able to rely on the provisions of the Rules of Procedure which relate to measures of organisation of the procedure or the rights of the defence in order to obtain some of the documents it had requested in its initial application of 23 February 1996, it none the less retains the option of requesting access to the same documents pursuant to Decision 94/90. Moreover, in its 1994 communication, the Commission stated that, following the adoption of the Code of Conduct by Decision 94/90, 'anyone may now ask for access to any unpublished Commission document, including preparatory documents and other explanatory material'.
- 45 Support for that finding is to be found in the preamble to the Code of Conduct, according to which 'the said principles [that is to say, the right to have access to documents] are without prejudice to the relevant provisions on access to files directly concerning persons with a specific interest in them'. That statement

merely affirms that any provisions governing the right of access to information the Commission might adopt would not affect the application of specific provisions concerning access to files. Furthermore, it does not preclude reliance on the Code of Conduct by persons who are also covered by other provisions.

- 46 Next, the fact that the applicant obtained access to some of the documents mentioned in its initial application of 23 February 1996 in the course of proceedings in Case T-50/96 cannot deprive it of its right under Decision 94/90 to seek disclosure of those documents which were not produced to it.
- 47 That curtailment of the scope of Decision 94/90 for which the Commission contends could only result from the decision itself. However the decision contains no provision to that effect.
- 48 It follows that the Commission has misapplied the exception based on the protection of the public interest (court proceedings) and that the Code of Conduct can be relied on by the applicant in support of its request for access to documents in the present case.
- 49 Accordingly the contested decision must be annulled in so far as it refuses to authorise access to documents emanating from the Commission without there being any need to consider the other pleas raised by the applicant in that connection.

The documents emanating from the Member States or the Argentine authorities

- 50 The applicant relies on three pleas alleging, first, the unlawfulness of the contested decision in so far as it is based on the authorship rule, second, infringement of Decision 94/90 and the Code of Conduct and, third, infringement of Article 190 of the Treaty.

The plea alleging the unlawfulness of the contested decision in so far as it is based on the authorship rule

— Arguments of the parties

- 51 The applicant submits that, under Article 2(2) of Decision 94/90, it was for the Secretary-General, following the confirmatory application of 27 March 1996, to undertake a full review of the application for access and to ascertain in the light of that review whether the reasons given by the Directors-General of DGs VI and XXI to justify their refusal were well founded or not.
- 52 As the Secretary-General did not express a view on the argument based on the authorship rule in his decision of 29 May 1996, in the applicant's submission he is no longer entitled to rely on it. Accordingly, the contested decision should be annulled in so far as it too is based on that argument.

53 The Commission contends that a full review of the documents requested must be undertaken when a confirmatory application is considered. None the less the Secretary-General is entitled to base his decision on a single decisive ground. The contested decision could, therefore, be based on reasons which were not considered in the decision of 29 May 1996, annulled by the judgment in *Interporc I*.

— Findings of the Court

54 First of all, the various stages of the administrative procedure should be recapitulated. By letter of 23 February 1996 the applicant requested access to certain documents relating to the control procedure for imports of 'Hilton Beef', including the documents at issue. By letters of 22 and 25 March 1996, the Directors-General of DG VI and XXI rejected the applications for access, citing the exception based on the protection of the public interest (international relations), the authorship rule, the exception based on the protection of the public interest (inspections and investigations) and that based on the protection of the individual and of privacy. By letter of 27 March 1996 to the Secretary-General of the Commission, the applicant's legal representative contested those refusals and submitted a confirmatory application. By letter of 29 May 1996, the Secretary-General rejected the confirmatory application, citing the exception based on the protection of the public interest (court proceedings). By its judgment in *Interporc I*, the Court of First Instance held that the decision of 29 May 1996 was inadequately reasoned and annulled it. In implementation of the judgment in *Interporc I*, the Secretary-General again rejected the confirmatory application citing not only the exception based on the protection of the public interest (court proceedings) but also the authorship rule.

55 It follows from the judgment in *Interporc I*, first, that the Secretary-General was required, under Article 176 of the Treaty, to take a further decision in implementation of that judgment and, second, that the decision of 29 May 1996 is deemed to have never existed.

56 Accordingly, it cannot be inferred from Article 2(2) of Decision 94/90 and the 1994 communication that the Secretary-General could not rely on grounds other than those on which he took a position in his initial decision. He was therefore entitled to undertake a full review of the applications for access and base the contested decision on the authorship rule.

57 It follows that this plea must be dismissed.

The plea alleging infringement of Decision 94/90 and the Code of Conduct

— Arguments of the parties

58 The applicant submits that it is clear from the Code of Conduct, and in particular from the definition of the term 'document', that access must be granted to all documents held by the Commission, regardless of authorship. On that point it also cites Declaration No 17, which speaks of 'information available to the institutions'.

59 It submits that the authorship rule, according to which documents of which the Commission is not the author are excluded from the scope of the Code of

Conduct, is not lawful. A procedural rule cannot restrict the scope of that code by excluding certain documents. That rule is therefore invalid as it breaches the underlying principle of the code adopted by Decision 94/90.

- 60 In any event, the reasons stated for the contested decision on the basis of that rule are contrary to the underlying principle of the Code of Conduct. Those reasons also constitute an abuse of rights in that they serve to exclude the documents concerned from the scope of the code.
- 61 In the alternative, the applicant submits that the rule must be interpreted strictly, so that it remains compatible with the principle of the widest possible access to documents.
- 62 The Commission contends that, in the Code of Conduct, the principle of the 'widest possible access to documents' is qualified by the authorship rule, which thus restricts the scope of the code. Moreover, the Code of Conduct only makes reference to Declaration No 17 in vague terms and that declaration, essentially, merely recommends that the Commission submit a report. However, at the hearing the Commission stated that the authorship rule does not bar it from granting access to the documents concerned but simply means that their disclosure is not mandatory. The Commission also disputed that there is a rule of law of a higher order on which the applicant might be able to rely in order to plead that the authorship rule is void.
- 63 Moreover, the applicant has in no way demonstrated that there has been an abuse of its rights.

- 64 Finally, the Commission contends, in the alternative, that the question of a wide or strict interpretation of the authorship rule does not arise in the present case. The Commission maintains that the applicant is simply attempting to have that rule disappplied.

— Findings of the Court

- 65 On a preliminary point, as to the question whether the authorship rule is to be disappplied, it should be observed that the Court of Justice, in its judgment in Case C-58/94 *Netherlands v Council* [1996] ECR I-2169, paragraph 37, concerning public access to documents, held as follows:

‘So long as the Community legislature has not adopted general rules on the right of public access to documents held by the Community institutions, the institutions must take measures as to the processing of such requests by virtue of their power of internal organisation, which authorises them to take appropriate measures in order to ensure their internal operation in conformity with the interests of good administration.’

- 66 In the light of that judgment, it must be held that, so long as there is no rule of law of a higher order according to which the Commission was not empowered, in Decision 94/90, to exclude from the scope of the Code of Conduct documents of

which it was not the author, the authorship rule can be applied. The fact that Decision 94/90 makes reference to declarations of general policy such as Declaration No 17 and the conclusions of several European Councils, does not alter that finding, as such declarations do not have the force of a rule of law of a higher order.

- 67 As regards the interpretation of the authorship rule, it should be borne in mind, first, that Declaration No 17 and the Code of Conduct lay down the general principle that the public should have the greatest possible access to documents held by the Commission and the Council and, second, that Decision 94/90 is a measure conferring on citizens the right of access to documents held by the Commission (*WWF UK v Commission*, cited above, paragraph 55).
- 68 Next, it is important to note that where a general principle is established and exceptions to that principle are laid down, those exceptions must be construed and applied strictly, so as not to frustrate the application of the general principle (*WWF UK v Commission*, cited above, paragraph 56, and *Interporc I*, cited above, paragraph 49).
- 69 It must be held, in that regard, that the authorship rule, however it may be characterised, lays down an exception to the general principle of transparency in Decision 94/90. It follows that this rule must be construed and applied strictly, so as not to frustrate the application of the general principle of transparency (Case T-188/97 *Rothmans International v Commission* [1999] ECR II-2463, paragraphs 53 to 55).
- 70 At the hearing, the Commission acknowledged that the application of the authorship rule might give rise to difficulty where there is some doubt as to the

authorship of a document. It is in precisely such cases that it is important to construe and apply the authorship rule strictly.

- 71 In the light of the foregoing observations, the Court must determine whether the authorship rule is applicable to the five types of documents emanating from the Member States or the Argentine authorities mentioned in the contested decision.
- 72 The five types of document in question comprise, first, the declarations of the Member States of quantities of Hilton Beef imported from Argentina between 1985 and 1992, second, the declarations of the Argentine authorities of quantities of Hilton Beef exported to the Community in the same period, third, the documents of the Argentine authorities relating to the designation of the bodies responsible for issuing certificates of authenticity, fourth, the documents of the Argentine authorities relating to the opening of the 'Hilton' quota and, fifth, the positions taken by the Member States in similar cases.
- 73 It is clear, on examination of the five types of documents, that their authors are either the Member States or the Argentine authorities.
- 74 It follows that the Commission has applied the authorship rule correctly in taking the view that it was not required to grant access to those documents. It cannot, therefore, have committed an abuse of rights. Accordingly, the applicant's plea alleging infringement of Decision 94/90 and the Code of Conduct must be dismissed as unfounded.

The plea alleging infringement of Article 190 of the Treaty

— Arguments of the parties

- 75 The applicant submits, as regards the documents emanating from the Member States or the Argentine authorities, that, in the contested decision, the Commission should have explained why the authorship rule justified the refusal of access to the documents. The Commission therefore infringed Article 190 of the Treaty.
- 76 The Commission contends that the statement in the contested decision that it is not the author of the documents constitutes an adequate statement of the reasons for application of the authorship rule.

— Findings of the Court

- 77 According to consistent case-law, the obligation to state reasons, laid down in Article 190 of the Treaty, means that the reasoning of the Community authority which adopted the contested measure must be shown clearly and unequivocally so as to enable the persons concerned to ascertain the reasons for the measure in order to protect their rights and the Community judicature to exercise its power of review (*WWF v Commission*, cited above, paragraph 66).

78 In the present case, in the contested decision the Commission referred to the authorship rule and informed the applicant that it should request a copy of the documents in question from the Member States concerned or the Argentine authorities. Such a statement of reasons shows clearly the reasoning of the Commission. The applicant was thus in a position to know the justification for the contested measure and the Court of First Instance is in a position to exercise its power to review the legality of that decision. Accordingly, the applicant is not justified in maintaining that a more specific statement of reasons was required (see *Rothmans International v Commission*, cited above, paragraph 37).

79 It follows that this plea must be dismissed. Accordingly, the contested decision should not be annulled in so far as it relates to the documents emanating from the Member States or the Argentine authorities.

Costs

80 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 that the costs be shared or that the parties bear their own costs if each party succeeds on some and fails on other heads. As both of the parties have been partially unsuccessful, they must be ordered to bear their own costs.

On those grounds,

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

hereby:

1. **Annuls the decision of the Commission of 23 April 1998 in so far as it refuses access to documents emanating from the Commission;**
2. **Dismisses the remainder of the application;**
3. **Orders the parties to bear their own costs.**

Vesterdorf

Bellamy

Pirrung

Meij

Vilaras

Delivered in open court in Luxembourg on 7 December 1999.

H. Jung

Registrar

B. Vesterdorf

President

II - 3553