

JUDGMENT OF THE COURT OF FIRST INSTANCE (First Chamber)

10 October 2001 *

In Case T-111/00,

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

applicant,

v

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

defendant,

* Language of the case: English.

APPLICATION for annulment of the Commission's decision partially refusing an application for access to certain minutes of the Committee on Excise Duties,

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

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

Registrar: H. Jung,

having regard to the written procedure and further to the hearing on 7 March 2001,

gives the following

Judgment

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

2 In order to implement the code of conduct, the Commission adopted, on 8 February 1994, Decision 94/90/ECSC, EC, Euratom on public access to Commission documents (OJ 1994 L 46, p. 58). Article 1 of Decision 94/90 formally adopts the code of conduct, the text of which is annexed to the decision.

3 The code of conduct lays down the following general principle:

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

4 The circumstances in which an institution may refuse an application for access to documents are set out in the code of conduct, under the heading ‘Exceptions’, in the following terms:

‘The institutions will refuse access to any document whose disclosure could undermine:

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

— the protection of the individual and of privacy,

- the protection of commercial and industrial secrecy,

- the protection of the Community's financial interests,

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

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

- 5 Article 24 of Council Directive 92/12/EEC of 25 February 1992 on the general arrangements for products subject to excise duty and on the holding, movement and monitoring of such products (OJ 1992 L 76, p. 1), as amended by Article 1(11) of Council Directive 94/74/EC of 22 December 1994 (OJ 1994 L 365, p. 46) provides:

'1. The Commission shall be assisted by a Committee on Excise Duties, hereinafter referred to as the "Committee". The Committee shall be composed of the representatives of the Member States and chaired by a Commission representative.

The Committee shall draw up its rules of procedure.

2. The measures necessary for the application of Articles 5, 7, 15b, 18, 19 and 23 shall be adopted in accordance with the procedures laid down in paragraphs 3 and 4.

3. The Commission representative shall submit to the [Committee] a draft of the measures to be adopted. The Committee shall deliver its opinion on the draft within a time-limit which the Chairman may lay down according to the urgency of the matter. The Committee shall take its decision by the majority laid down in Article 148(2) of the Treaty. The Chairman shall not vote.

4. (a) The Commission shall adopt the intended measures where they are in accordance with the Committee's opinion.

(b) Where the intended measures are not in accordance with the opinion of the Committee, or in the absence of any opinion, the Commission shall forthwith submit to the Council a proposal relating to the measures to be taken. The Council shall act on a qualified majority.

If, on the expiry of three months from the date on which the matter was referred to it, the Council has not adopted any measures, the Commission shall adopt the proposed measures, save where the Council has decided against the said measures on a simple majority.

5. In addition to the measures referred to in paragraph 2, the Committee shall examine the matters referred to it by its chairman, either on his own initiative or at the request of the representative of a Member State, concerning the application of Community provisions on excise duties.'

Facts

- 6 The applicant, British American Tobacco International (Investments) Ltd, is a company established in the United Kingdom belonging to the British American Tobacco group which, at the relevant time, exported expanded tobacco from the United Kingdom to various Member States of the Community.

- 7 In 1998 the applicant became aware, through the intervention of the United Kingdom authorities, of extracts of the minutes of a meeting held by the Committee on Excise Duties on 7 and 8 October 1997. It was apparent from those extracts that, at the instigation of one of the Member States, a majority of delegations had expressed their wish that expanded tobacco be treated in the same way as 'smoking tobacco', as defined in Article 5(1) of Council Directive 95/59/EC of 27 November 1995 on taxes other than turnover taxes which affect the consumption of manufactured tobacco (OJ 1995 L 291, p. 40), and thus as a product subject to excise duty for the purposes of Directive 92/12. Subsequently, the applicant was informed by the same authorities that an opinion to that effect had been adopted by the Committee on Excise Duties, that the delegation of the Italian Republic had expressed reservations and that Italy's tax authorities were encountering difficulties in applying the decision. The applicant therefore asked the Commission for the tax treatment of expanded tobacco to be reconsidered by the committee and that the decision be reversed.

- 8 By letter of 16 November 1999 the Commission confirmed that an agreement had been reached at a meeting of the committee on 29 and 30 April 1998 pursuant to which expanded tobacco had to be treated as smoking tobacco and, consequently, as a product subject to excise duty. Its movement between the Member States was thus conditional upon completion of the formalities set out in Article 18(1) of Directive 92/12. The Commission also indicated that, in accordance with the applicant's request, it had again raised the question of the

tax treatment of expanded tobacco at a meeting of the committee on 28 and 29 October 1999. The members of the committee had, however, refused to reopen the debate and had instead confirmed their position.

- 9 By letter of 6 January 2000 the applicant applied to the Commission under Decision 94/90 for access to the minutes of the meetings of the Committee on Excise Duties of 29 and 30 April 1998 and 28 and 29 October 1999 in so far as they concerned the tax treatment of expanded tobacco.

- 10 By letter of 17 January 2000 the Commission's 'Taxation and Excise Union' Directorate-General informed the applicant that its request had been refused on the ground that disclosure of the documents in question could undermine the protection of confidentiality as requested by the legal persons that had supplied the information.

- 11 The applicant made a confirmatory application by letter of 4 February 2000 to the Secretary General of the Commission, in accordance with Article 2(2) of Decision 94/90.

- 12 By letter of 8 March 2000 the Secretary General of the Commission informed the applicant of his decision to refuse access to the minutes in question on the ground that their disclosure could undermine the protection of confidentiality as requested by the legal person that had supplied the information, and in order to protect the institutions's interest in the confidentiality of its proceedings.

Procedure and form of order sought by the parties

- 13 By application lodged at the Registry of the Court of First Instance on 2 May 2000, the applicant brought the present action.

- 14 Upon hearing the report of the Judge-Rapporteur, the Court of First Instance (First Chamber) decided to open the oral procedure.

- 15 By order of 19 February 2001 pursuant to Article 66(1) of its Rules of Procedure, the Court of First Instance ordered the Commission, by way of measures of inquiry, to produce the minutes of the meetings of the Committee on Excise Duties to which access had been denied, so that it could consider their contents.

- 16 On 1 March 2001 the Commission lodged at the Registry of the Court of First Instance the two sets of minutes of the Committee on Excise Duties relating to the committee's meetings of 29 and 30 April 1998 and of 28 and 29 October 1999. In accordance with the third subparagraph of Article 67(3) of the Rules of Procedure, those documents were not communicated to the applicant.

- 17 The parties presented oral argument at the hearing on 7 March 2001 and replied to questions put to them by the Court.

18 The applicant claims that the Court should:

- annul the decision denying access to the documents;

- order the Commission to pay the costs.

19 The Commission contends that the Court should:

- dismiss the action as unfounded;

- order the applicant to pay the costs.

The ambit of the dispute

20 At the hearing the Commission informed the Court and the applicant of its decision to grant the applicant access to a non-confidential version of the minutes in question in which the identities of the delegations expressing the positions recorded in the minutes would be masked. The Court took formal notice thereof.

- 21 On being invited to respond to the replacement of the initial decision denying access by that latter decision, the applicant made a consequential amendment of the form of order sought and its pleas in law.
- 22 According to settled case-law, heads of claim directed against a decision which is replaced during the course of proceedings may be regarded as being directed against the replacement decision because the latter decision constitutes a new factor which entitles the applicant to amend its heads of claim and pleas in law (Case 14/81 *Alpha Steel v Commission* [1982] ECR 749, paragraph 8, Case 103/85 *Stahlwerke Peine-Salzgitter v Commission* [1988] ECR 4131, paragraph 11, Case T-23/96 *De Persio v Commission* [1998] ECR-SC 1-A-483 and II-1413, paragraph 32). It would, in fact, not be in the interests of the administration of justice and would be contrary to the requirement of procedural economy to oblige the applicant, in such an eventuality, to make a fresh application to the Court (*Alpha Steel v Commission*, paragraph 8).
- 23 In the present case the applicant seeks annulment of the Commission's decision in that it refuses to disclose the names of the Member States referred to in the minutes at issue.
- 24 Consequently, the parties agree, and formal notice has been taken of the fact, that the only question remaining is whether the Commission was entitled to grant only partial access to the documents in question, withholding the identities of the delegations that had expressed their positions in the meetings to which the minutes relate. Formal notice is also taken of the applicant's withdrawal of all other pleas and arguments put forward in its application challenging the initial decision refusing access.

- 25 The Commission also stated at the hearing that its refusal to disclose the names of the Member States referred to in the minutes was based solely on the non-mandatory exception relating to the protection of an institution's interest in the confidentiality of its proceedings. The Court is therefore required to rule solely on the application for annulment of that decision to refuse to disclose the names of the Member States and on the plea in law put forward in support of that application, being infringement of Decision 94/90.

Substance

Arguments of the parties

- 26 The applicant maintains that the Commission's decision not to disclose the names of the Member States referred to in the minutes to which it sought unrestricted access is contrary to Decision 94/90 in that it is founded upon incorrect application of the non-mandatory exception relating to the protection of the Commission's interest in the confidentiality of its proceedings. The necessary prior balancing of the interests at stake ought, according to the applicant, to have resulted in its interests prevailing over those of the Commission.
- 27 The applicant submits that it clearly has an interest in ascertaining the identities of the various delegations referred to in the minutes. It argues that, despite harmonisation of excise duties within the Community, there remain significant differences in the treatment of expanded tobacco by the various customs authorities of the Member States, and this causes the applicant difficulty. Given

that the applicant is responsible for managing the tax aspects of the British American Tobacco group's commercial operations, it is important that it know precisely what position is adopted by each of the Member States concerned so that it may effectively conduct bilateral negotiations with them.

- 28 The applicant submits that the Commission's alleged interest is based upon the false premiss that keeping the identities of the national delegations confidential is indispensable if frank discussions are to take place between the Member States. According to the applicant the contrary is true. It is the non-confidentiality of the positions adopted by the members of a committee that ensures honest debate, as is confirmed by the transparency of the discussions which take place within other institutional bodies, such as parliamentary bodies. Furthermore, it should be clear from case-law (Case T-194/94 *Carvel and Guardian Newspapers v Council* [1995] ECR II-2765) that it is legitimate to ask institutions to disclose the positions adopted by national delegations during the course of proceedings.
- 29 As regards the argument put forward by the Commission that the applicant at no point made known its interest in the identities of the delegations referred to in the minutes, the applicant replies that it wished to ascertain the positions adopted by the Member States, that is to say, not only the content of their discussions but also the identities of the delegations which expressed a position. That information formed an integral part of the documents to which it sought access. There was therefore no need for it to state additional reasons in support of its request in that regard. In any event, unless the burden of proof were to be reversed, it falls to the Commission to justify its position in the event that it refuses to grant access to a document, and not for the applicant to give reasons for its request.
- 30 The Commission takes the view that its decision to grant partial access to the minutes, without disclosing the identities of the various delegations referred to in them, does reflect a proper balancing of the interests at stake.

- 31 It maintains that sufficient account has been taken of the applicant's interest in the present case. It was clear from the application that the applicant's aim in requesting access to the documents was simply to find out what was said in the committee regarding the treatment of expanded tobacco. The Commission emphasises that it is indispensable that it be informed of the interests of the applicant when it comes to balancing the various interests at stake, yet at no time did the applicant indicate that it also wished to know the identities of the delegations expressing the various positions. Furthermore, according to the Commission, the applicant itself emphasised, during the written procedure, that partial access to the documents in question might be a satisfactory solution.
- 32 The Commission also argues that, thanks to its own activities, the applicant in any event knows which are the Member States whose customs authorities are imposing special requirements. It therefore already has the information it is requesting.
- 33 The Commission submits that its own interests require that the identities of the various delegations attending the committee meetings be kept confidential. Since it presides over the Committee on Excise Duties, it has an interest in ensuring that discussions between Member States remain full, frank and honest. It emphasises that, in meetings such as those for which the minutes at issue were produced, the committee does not have a comitology function. It is merely a forum for debate between the Member States, in accordance with Article 24(5) of Directive 92/12. Consequently, disclosing the identities of the delegations would be all the more likely to undermine the smooth running of the debate.
- 34 In response to the questions put by the Court of First Instance, the Commission stated at the hearing that, more generally, its basic principle is that the identities of national delegations referred to in committee meetings are not disclosed, albeit

that it stated that the interests at stake must be balanced on a case by case basis with account being taken of the content of the document in question.

Findings of the Court

- 35 It should be observed at the outset that the code of conduct adopted by the Commission by Decision 94/90 sets out two categories of exception to the public's right of access to Commission documents. The first category, framed in compulsory terms, comprises the 'mandatory exceptions' which are intended to protect the interests of third parties or of the general public. The second, framed in non-mandatory terms, concerns the internal deliberations of the institution, in which case solely the interests of the institution are at stake (Case T-105/95 *WWF UK v Commission* [1997] ECR II-313, paragraph 60).
- 36 In the present case, as the Commission stated at the hearing, the contested decision, by which it partially rejected the applicant's request for access to the minutes of the meetings of the Committee on Excise Duties, was based solely on the non-mandatory exception whereby it may refuse access to its documents 'in order to protect the interest of the institution in the confidentiality of its proceedings'.
- 37 It must be emphasised that the deliberations of the Committee on Excise Duties, and the documents of that committee, are to be regarded as being the deliberations and documents of the Commission. The main task of the committee, which was constituted in pursuance of a Community act, is to assist the Commission, which presides over it and provides its secretariat. The

Commission thus draws up the minutes which the committee adopts. In addition, it appears that this committee does not have its own administration, budget, archives or premises, still less an address of its own. Consequently, the committee is not a natural or legal person, nor a Member State or any other national or international body, and cannot be regarded as another ‘Community institution or body’ within the meaning of the code of conduct (see, to that effect, Case T-188/97 *Rothmans v Commission* [1999] ECR II-2463, paragraphs 58 and 59).

- 38 Given that the Committee on Excise Duties is thus to be regarded as part of the Commission, the Commission is entitled to rely upon the exception relating to the protection of the confidentiality of its deliberations where the documents to which access has been requested concern the deliberations of that committee.
- 39 Nevertheless, the fact that the documents at issue relate to deliberations of the Committee on Excise Duties cannot by itself justify application of the exception invoked.
- 40 According to case-law, any exception to the right of access to documents covered by Decision 94/90 must be interpreted and applied strictly (Joined Cases C-174/98 P and C-189/98 P *Netherlands and Van der Wal v Commission* [2000] ECR I-1, paragraph 27, and Case T-20/99 *Denkavit Nederland v Commission* [2000] ECR II-3011, paragraph 45). The Commission nevertheless enjoys a margin of discretion in applying the non-mandatory exception, albeit that in the exercise of that discretion it must strike a genuine balance between the interest of the citizen in obtaining access to its documents and its own interest in protecting the confidentiality of its deliberations (*WWF UK v Commission*, paragraph 59; see also, in relation to the Council, *Carvel and Guardian Newspapers v Council*, cited above, paragraph 65, and Case T-174/95 *Svenska Journalistförbundet v Council* [1998] ECR II-2289, paragraph 113).

- 41 Thus, in its review of a decision's legality, the Court must, without substituting its own assessment for that of the Commission, ascertain whether the Commission has indeed struck a balance between the interests at stake without overstepping the boundaries of its power of assessment. It is to that end that the Court ordered production of the documents at issue.
- 42 As regards, first of all, the assessment of the applicant's interest, it should be borne in mind that, under Decision 94/90, any person may request access to any unpublished Commission document, without being required to give a reason for the request (*Svenska Journalistförbundet v Council*, paragraph 65). One consequence of that situation is that, where it has no information on the particular reasons underlying a request for access, the institution concerned cannot be criticised, when it comes to balance the various interests at stake for the purpose of application of the non-mandatory exception, for assessing the applicant's interest by reference to the interest that any citizen might have who asks for access to the institution's documents, and without taking into account particular interests of which, by definition, it is unaware.
- 43 However, in the circumstances of the present case, the Commission cannot contend that it was unaware of the applicant's intentions in submitting its request for access to the minutes in question. As is clear from the documents before the Court (see paragraphs 7 and 8 of the present judgment), that request was preceded by steps which the applicant took in order to put its case opposing the decision taken by certain Member States to treat expanded tobacco as 'smoking tobacco' within the meaning of Article 5(1) of Directive 95/59 and, consequently, to make it subject to the regime provided for in Directive 92/12 concerning products subject to excise duty. The aim of the applicant's request, in view of the implications that such treatment would have for it from both a tax and administrative point of view, was thus to ascertain what positions were adopted on that question within the committee.

- 44 Against that background, the Commission clearly could not have been unaware of the applicant's interest in being able to ascertain not only the substance of the discussions but also the identities of the delegations voicing the opinions expressed.
- 45 Next, it must be observed that that interest could not be regarded as irrelevant to the balancing of the interests at stake.
- 46 In this connection, it should be observed that the documents to which access was sought concerned the implementation in the Member States of provisions which had been the subject of harmonisation at the Community level. Directive 92/12 in fact seeks to lay down a number of rules on the holding, movement and monitoring of products subject to excise duty, in particular so as to ensure that chargeability of excise duties is identical in all the Member States (Case C-296/95 *EMU Tabac and Others* [1998] ECR I-1605, paragraph 22). In so far as concerns tobacco products in particular, the chargeability and structure of excise duty on any given product depends, amongst other things, on its inclusion in one of the categories laid down in Directive 95/59 (Case C-319/96 *Brinkmann* [1998] ECR I-5255).
- 47 It is not in dispute that differences in the treatment of expanded tobacco by the Member States have been noted. Some have classified it as smoking tobacco within the meaning of Article 5(1) of Directive 95/59, with the intention of making it subject to excise duties and making the document provided for in Article 18(1) of Directive 92/12 a requirement for exportation to their territory. Furthermore, it appears from extracts of the minutes of the meeting of the Committee on Excise Duties of 7 and 8 October 1997 (see paragraph 7 of the present judgment) already communicated to the applicant that, according to the

Commission, this was 'a typical instance of differing views within the Community affecting trade by multinational firms'. Despite the positions then expressed by the various national delegations within the committee at the meetings to which the minutes at issue relate, the Commission does not dispute that there are still significant differences in the treatment by the Member States of exports of expanded tobacco to their respective territories.

- 48 That being so, the possibility of ascertaining the identities of the delegations which formally expressed a position on the matter must be regarded as of manifest importance to the applicant and its business, in particular, so that the applicant can argue its case before the tax and customs authorities of the Member States concerned.
- 49 That conclusion is in no way called into question by the argument that the applicant had, in any event, identified which Member States' customs authorities impose special requirements. Even assuming it had, the fact that the applicant is aware of the individual practices of the authorities of certain Member States does not diminish its interest in acquainting itself with the positions formally expressed by them in meetings of the Committee on Excise Duties. Furthermore, that argument, by implying that the positions expressed by the Member States within the committee correspond to widely-known practices on the part of their customs authorities, merely calls into question the confidential nature of the positions expressed and not the applicant's interest in ascertaining them.
- 50 As regards the argument that the applicant admitted, during the written procedure, that partial access to the minutes might be a satisfactory solution, that too must be rejected. Suffice it to observe that, in its application, the applicant merely pointed out that the Commission had failed to consider the possibility of granting partial access to the minutes. It nevertheless sought annulment of the decision refusing access in its entirety.

- 51 Secondly, it must be established whether the Commission could, without exceeding the limits on its power of assessment, have found that its interest in the confidentiality of its proceedings prevailed over the applicant's interest, and thus refuse to disclose the identities of the delegations referred to in the minutes. In this connection the Commission argues that disclosing that information could compromise the effectiveness of the discussions between the Member States, that is to say, render them less full, frank and honest, and thus undermine the smooth running of the committee's deliberations.
- 52 However, as is clear from case-law, the code of conduct adopted by the Commission in Decision 94/90 cannot justify an institution's refusal, as a matter of principle, to grant access to documents pertaining to its deliberations on the basis that they contain information relating to positions taken by representatives of the Member States, since that would fail to comply with the obligation to balance the interests involved (see, in relation to the Council, *Carvel and Guardian Newspapers v Council*, cited above, paragraphs 72 and 73). The Commission's submission that disclosing the identities of the delegations would necessarily undermine the smooth running of the committee's proceedings is, by itself, insufficient to override the applicant's basic right of access under Decision 94/90.
- 53 Furthermore, as the Commission accepted at the hearing (see paragraph 34 of the present judgment), the interests at stake must be balanced on a case by case basis with account being taken of the content of the document in question.
- 54 In the present case, it is clear, first of all, from the content of the minutes of the meeting of the committee of 29 and 30 April 1998 that the delegation of one of the Member States was won over to the point of view of the majority in spite of the fact that it regarded expanded tobacco as unsmokable. It follows that all 15 delegations were thus in favour of the accompanying document referred to in Article 18(1) of Directive 92/12 being compulsory for movement of the product within the Community.

- 55 Furthermore, as regards the minutes of the meeting of the committee of 28 and 29 October 1999, reference is made in that document to the applicant's request for the committee to reconsider its position and to the refusal of three delegations to reopen the debate on the matter, as well as to the fact that the other delegations expressed no opinion.
- 56 It must therefore be observed that the minutes relate to discussions which had been terminated by the time the applicant made its request (see, *a contrario*, in a case concerning documents relating to ongoing inspections, *Denkavit Nederland v Commission*, cited above, paragraph 48). Consequently, disclosure of the identities of the delegations referred to in those documents could no longer inhibit the Member States from effectively expressing their respective positions regarding the tax treatment of expanded tobacco.
- 57 Thus, if there is a proper balancing of the interests at stake, a reason of that nature cannot, in the present case, cause the interest in protecting the confidentiality of proceedings to prevail over the applicant's interest.
- 58 It follows from the foregoing that, in the particular circumstances of this case, the contested decision is vitiated by a manifest error of assessment and must therefore be annulled.

Costs

- 59 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. Since the Commission has been unsuccessful, it must, in accordance with the form of order sought by the applicant, be ordered to pay the costs.

On those grounds,

THE COURT OF FIRST INSTANCE (First Chamber)

hereby:

1. **Annuls the Commission's decision partially to reject an application for access to certain minutes of the Committee on Excise Duties.**
2. **Orders the Commission to pay the costs.**

Vesterdorf

Vilaras

Forwood

Delivered in open court in Luxembourg on 10 October 2001.

H. Jung

Registrar

B. Vesterdorf

President