

JUDGMENT OF THE COURT OF FIRST INSTANCE (Fourth Chamber)

12 October 2000 *

In Case T-123/99,

JT's Corporation Ltd, established in Bromley (United Kingdom), represented by M. Cornwell-Kelly, Solicitor, with an address for service in Luxembourg at the Chambers of Wilson Associates, 3 Boulevard Royal,

applicant,

v

Commission of the European Communities, represented by U. Wölker and X. Lewis, of its Legal Service, acting as Agents, with an address for service in Luxembourg at the office of C. Gómez de la Cruz, also of its Legal Service, Wagner Centre, Kirchberg,

defendant,

APPLICATION for the annulment of the Commission's decision of 11 March 1999 refusing the applicant access to certain documents,

* Language of the case: English.
ÉCR

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

composed of: V. Tiili, President, R.M. Moura Ramos and P. Mengozzi, Judges,
Registrar: B. Pastor, Principal Administrator,

having regard to the written procedure and further to the hearing on 29 March 2000,

gives the following

Judgment

Legal background

1 In the Final Act of the Treaty on European Union, the Member States incorporated a Declaration (No 17) on the right of access to information ('Declaration No 17'), worded as follows:

'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 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; 'the Code of Conduct'), designed to establish the principles governing access to the documents held by them.

- 3 The Commission adopted that Code of Conduct by Decision 94/90/ECSC, EC, Euratom of 8 February 1994 on public access to Commission documents (OJ 1994 L 46, p. 58).

- 4 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'.

- 5 Under the third paragraph of the section headed 'Processing of initial applications', the Code of Conduct provides as follows (hereinafter referred to as the 'authorship rule'):

'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 The matters on which an institution may rely in order to justify rejection of an application for access to documents are set out as follows under the heading of the Code of Conduct entitled 'Exceptions':

'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),

...

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

- 7 On 4 March 1994, Commission Communication 94/C 67/03 on improved access to documents, which explains the conditions for implementation of Decision 94/90, was published (OJ 1994 C 67, p. 5). According to that communication, 'anyone may... ask for access to any unpublished Commission document, including preparatory documents and other explanatory material'. As 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...'. It is also stated that 'there is nothing automatic about the exemptions, and each request for access to a document will be considered on its own merits'.

- 8 Council Regulation (EEC) No 1468/81 of 19 May 1981 on mutual assistance between the administrative authorities of the Member States and cooperation between the latter and the Commission to ensure the correct application of the law on customs or agricultural matters (OJ 1981 L 144, p. 1), as amended by Council Regulation (EEC) No 945/87 of 30 March 1987 (OJ 1987 L 90, p. 3), provides in Article 15b:

‘... For the purposes of attaining the objectives of this Regulation the Commission may, under the conditions laid down in Article 15a, carry out Community administrative and investigative missions in third countries in coordination and close cooperation with the competent authorities of the Member States.

...’

- 9 Article 15c of the same regulation provides:

‘The findings established and the information obtained in the context of the Community missions referred to in Article 15b, particularly in the form of documents passed on by the competent authorities of the third countries concerned, shall be dealt with in accordance with Article 19.

Original documents obtained or certified copies thereof shall be delivered by the Commission to the competent authorities of the Member States, at the said authorities’ request, for use in connection with judicial proceedings or proceedings instituted for failure to comply with the law on customs or agricultural matters.’

10 Article 19 of Regulation No 1468/81 is worded as follows:

'1. Any information communicated in whatever form pursuant to this Regulation shall be of a confidential nature. It shall be covered by the obligation of professional secrecy and shall enjoy the protection extended to like information under both the national law of the Member State which received it and the corresponding provisions applying to the Community authorities.

The information referred to in the first subparagraph may not in particular be sent to persons other than those in the Member States or within the Community institutions whose duties require that they have access to it. Nor may it be used for purposes other than those provided for in this Regulation, unless the authority supplying it has expressly agreed and in so far as the provisions in force in the Member State where the authority which received it is situated do not preclude such communication or use.

2. Paragraph 1 shall not impede the use, in any legal actions or proceedings subsequently instituted in respect of non-compliance with the law on customs or agricultural matters, of information obtained pursuant to this Regulation.

The competent authority of the Member State which supplied this information shall be informed forthwith of such utilisation.'

11 Regulation No 1468/81 was repealed and replaced with effect from 13 March 1998 by Council Regulation (EEC) No 515/97 of 13 March 1997 on mutual assistance between the administrative authorities of the Member States and

cooperation between the latter and the Commission to ensure the correct application of the law on customs and agricultural matters (OJ 1997 L 82, p. 1).

Background to the dispute

- 12 The applicant is an importer of textiles coming mainly from Bangladesh. During 1997 and 1998, it received several post-clearance demands for customs duty totalling UKL 661 133.89. Those demands were in respect of certain imports of goods under Chapter 61 of the Common Customs Tariff, carried out in 1994, 1995 and 1996.

- 13 The imports concerned had initially been exempted from import duties, on presentation of certificates of origin under the generalised system of preferences (hereinafter 'GSP Forms A'), certifying that the origin of the goods was Bangladesh. Those GSP Forms A were subsequently declared void by the Bangladesh Government.

- 14 The applicant has challenged the post-clearance demands for customs duty before a United Kingdom court. Presuming that certain documents in the Commission's possession might help to clarify the reasons for the annulment of the GSP Forms A, the applicant asked the Commission in a letter of 20 November 1998 for access to certain documents, namely:
 - the mission reports of the European Union from 1993 to 1996 concerning Bangladesh, together with the annexes thereto ('Category 1' of the requested documents);

- the replies of the Government of Bangladesh ('Category 2');

- the Commission's decisions with regard to the mission reports ('Category 3');

- the correspondence between the Commission and the Government of Bangladesh concerning the annulment of the GSP Forms A ('Category 4');

- the reports or summaries compiled or received by the Commission regarding the operation and conduct of the GSP scheme for textile products imported from Bangladesh between 1991 and 1996 ('Category 5').

15 By letter of 15 December 1998, the Commission refused access to those documents. The applicant then confirmed its application by letter of 7 January 1999. By letter of 18 February 1999, the Commission informed the applicant that it would deal with the confirmatory application as soon as possible and would take a decision subsequently. Finally, by letter of 11 March 1999 (hereinafter 'the decision' or 'the contested decision'), the Commission rejected the confirmatory application in the following terms:

'... Concerning the first category and part of the fourth category of documents (the mission reports and annexes, and the correspondence of the Commission with the Government of Bangladesh regarding the cancellation of the GSP Forms A): these reports are covered by the exception regarding the protection of the public interest, since they concern the Commission's inspection and investigation tasks. This exception to the rule of access is expressly provided for in the Code of Conduct concerning public access to Commission and Council documents, adopted by the Commission on 8 February 1994. It is indeed essential for the Commission to be able to conduct such investigations, the aim of which is to

investigate the authenticity and regularity of certificates while respecting the confidential nature of such proceedings. In addition, sincere cooperation and a climate of mutual confidence between the Commission, the Member States concerned — which participated in the mission — and the Government of Bangladesh are required in order to ensure compliance with customs legislation.

Moreover, the Commission did carry out the enquiry in Bangladesh under Regulation No 1468/81... Indeed, Article 15b of that amended regulation allows the Commission to conduct Community administrative and investigative cooperation missions in third countries in coordination and close cooperation with the competent authorities of the Member States. The findings and information obtained in the course of these Community missions are to be handled in accordance with Article 19 of the regulation, which lays down strict confidentiality conditions on the use and exchange of information within the provisions on mutual assistance. In accordance with that article, both the Commission and the Member States' authorities are prohibited from transmitting information obtained in the context of the enquiries to anyone other than those in the Member States' administrations or within the Community institutions whose functions require them to know or to use it.

Concerning the second category and part of the fourth category of documents (responses of the Government of Bangladesh to the report on its agencies, and correspondence from the Government of Bangladesh to the Commission regarding the cancellation of GSP Forms A), the abovementioned Code of Conduct specifies 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”. Therefore, as these letters are not Commission documents, I suggest you contact directly the authorities which produced them.

Concerning the third category of documents (Commission decisions with respect to the mission reports), I can advise you that, as there have been no “Commission

Decisions” with respect to any of the mission reports which you have specified, such documents do not exist.

Concerning the fifth category of documents (reports or summaries compiled or received by the Commission with regard to the operation and conduct of the GSP scheme relating to textile goods from Bangladesh between 1991 and 1996), your request covers such a large number of documents that it is completely impractical to undertake an exercise which would encompass many of the archives of other Directorates-General, as well as the UCLAF's for this period (the volume of correspondence on this subject, together with reports and annexes would exceed several thousand documents). I would thus suggest [that] you [make] your request on this point [more specific]....’

Procedure and forms of order sought by the parties

- 16 By application lodged at the Registry of the Court of First Instance on 21 May 1999, the applicant brought the present action.
- 17 The written procedure closed on 15 October 1999.
- 18 Upon hearing the report of the Judge-Rapporteur, the Court of First Instance (Fourth Chamber) decided to open the oral procedure and, by way of measures of organisation of procedure, asked the parties to reply to written questions and to produce certain documents. The parties complied with those requests.

19 The parties presented oral argument and replied to the oral questions of the Court of First Instance at the hearing in open court on 29 March 2000.

20 The applicant claims that the Court should:

- annul the contested decision;

- order the Commission to pay the costs.

21 The Commission contends that the Court should:

- dismiss the action as inadmissible or, in the alternative, as unfounded as regards the alleged refusal to authorise access to documents in ‘Category 5’;

- dismiss the action as inadmissible or, in the alternative, as unfounded, for lack of an interest in bringing an action in so far as it concerns the refusal to authorise access to the mission report of November-December 1996;

- dismiss the action as unfounded as to the remainder;

— order the applicant to pay the costs.

Admissibility

The admissibility of the action in so far as it concerns the reports or summaries compiled or received by the Commission regarding the operation of the generalised preference scheme for textile products imported from Bangladesh between 1991 and 1996

- 22 The Commission states that it did not refuse access to the documents in Category 5, but merely asked the applicant to be more specific about its application, which the applicant subsequently failed to do.
- 23 The Commission concludes that it did not take a decision in relation to this category of documents. Therefore, the present action for annulment is partly inadmissible.
- 24 The Court finds that the applicant's request for access, in particular to the documents in Category 5, met initially with a rejection decision by the Commission. In that respect, it should be noted that Article 2(4) of Decision 94/90 provides that 'failure to reply within one month of an application for review being made constitutes a refusal'. In this case, the Commission did not reply to the confirmatory application within that period of one month from receipt. The documents before the Court show that the Commission, which received the applicant's confirmatory application on 18 January 1999, merely informed the applicant, by letter of 18 February 1999, that it would deal with the application as soon as possible and that it would send its reply later. Therefore, at the expiry of the one-month period following the Commission's receipt of the confirmatory application, there was in existence a decision rejecting that

application. However, the letter of 11 March 1999 replaced that implicit rejection decision and constitutes, in relation to the latter, a decision containing a new factor, namely the replacement of the previous refusal to give the applicant access to the Category 5 documents with an invitation to be more specific about the request for access to those documents.

- 25 The next point to note is that, by inviting the applicant to make its request more specific, in view of the large number of documents concerned, the Commission expressly left open the examination of that part of the request for access and clearly did not exclude the possibility of granting access to some of those documents (see, by analogy, the order of the Court of Justice in Case C-64/93 *Donatab v Commission* [1993] ECR I-3595, paragraphs 13 and 14, and the order of the Court of First Instance in Case T-182/98 *UPS Europe v Commission* [1999] ECR II-2857, paragraphs 39 to 45). The Commission's position concerning access to that category of documents is not therefore final.
- 26 It follows that the action is inadmissible in so far as it relates to the Category 5 documents.

The admissibility of the action in so far as it concerns the mission report of November-December 1996

Arguments of the parties

- 27 The Commission observes that the applicant already has this 'Category 1' document, which is, moreover, reproduced in Annex 5 to the application. The document was sent to the applicant by the British customs authorities on 22 July 1998, after the removal of certain information. The Commission emphasises in

that respect that the applicant has not specified in any of its letters that it wished to have access to the information removed by the British authorities.

28 The Commission concludes that the applicant has no interest in obtaining access to that document.

29 The applicant explains that it received an extract from the mission report in question and copies of the correspondence concerning the negotiations between the Commission and the Government of Bangladesh, but that certain information such as the 'statements of Bangladeshi companies' in Annex 1 to the report has been removed. Nor, moreover, were the reports, notes, statements, invoices and correspondence collected by the mission and annexed to the report sent to the applicant. The applicant also observes that it received the extract from that mission report on 11 May 1999, and thus after the contested decision was adopted.

Findings of the Court of First Instance

30 The Court finds that the applicant has not had full access to the mission report of November-December 1996. The fact that the applicant has had access to part of one of the documents referred to in its application cannot deprive it of the right to apply for disclosure of the other parts of that document and of the other documents to which it has not yet obtained access (Case T-92/98 *Interporc v Commission* [1999] ECR II-3521, paragraph 46). Therefore, contrary to what the Commission maintains, the applicant has an interest in obtaining the annulment of the refusal to grant access to the mission report of November-December 1996.

Substance

- 31 The applicant raises, essentially, two pleas in law in support of its action, alleging infringement, first, of Decision 94/90 and Regulation No 1468/81, and, secondly, of Article 190 of the EC Treaty (now Article 253 EC).

The first plea, alleging infringement of Decision 94/90 and Regulation No 1468/81

- 32 This plea needs to be examined in relation to the various documents to which access has been requested.

Mission reports and correspondence from the Commission to the Bangladesh Government

Arguments of the parties

- 33 The applicant states that exceptions to the rule that access is to be given must be interpreted narrowly, so that application of the general principle of conferring on the public the widest possible access to documents held by the Commission should not be thwarted. It also points out that the Commission must examine in relation to each document requested whether disclosure is in fact likely to undermine one of the interests protected.

- 34 In this case, the applicant maintains, there is no evidence that disclosure of the information sought might prejudice an inspection or an investigation, especially since the inspection and investigation work has already been completed. Nor, in its submission, can the fact that the documents concerned were produced in the context of mutual cooperation between the Commission, the Member States and the government of a non-member country alter the nature of the information contained in those documents. That information deals with purely factual questions as to the entitlement of certain exports of goods to duty reliefs, such exports having previously been certified as attracting such relief. The applicant does not regard the information in question as inherently confidential or sensitive. It does not relate, for example, to matters of public or commercial policy or to diplomatic issues.
- 35 The applicant further states that, under Article 19(2) of Regulation No 1468/81, the use, in legal actions or proceedings subsequently instituted in respect of non-compliance with customs legislation, of information obtained pursuant to the same regulation may not be impeded. In this case, the information requested of the Commission was intended precisely for use in legal proceedings. Therefore, to claim that such information is confidential, as the Commission does, runs contrary to Article 19(2) of Regulation No 1468/81.
- 36 In this case, moreover, refusal of access infringed the principle of compliance with the rights of defence. The information to which the applicant requested access was used to justify demands for post-clearance recovery of customs duties, whilst the applicant was unable to defend itself effectively by reason of the refusal by the Commission. On that point, the applicant adds that, in the United Kingdom, it is for the person appealing against a demand for post-clearance recovery to establish that the customs duties were not due. Moreover, the national court hearing the dispute as to whether the duties were due has no jurisdiction to compel the Commission to produce documents.

- 37 The Commission makes the preliminary observation that a national court can order the Commission to communicate specified documents to it unless such communication is likely to interfere with the functioning and independence of the Communities, in which situation the institution may be justified in refusing. Consequently, the national court before which the applicant has challenged the customs duties demanded of it could request the Commission to communicate documents to it in so far as communication of them does not fall within the exception referred to above.
- 38 The Commission then states that the documents in question were drawn up within the context of investigations conducted pursuant to Regulation No 1468/81. They therefore belong to the category of documents relating to inspections and investigations which fall within the mandatory exception relating to the protection of the public interest. The Commission explains in that respect that a climate of mutual confidence between the Commission, the Member States and the Government of Bangladesh is necessary to ensure that Community customs legislation is complied with. The inspections carried out from July 1996 onwards were designed to establish whether the Bangladeshi authorities had issued certificates of origin in accordance with the legislation in force. A climate of cooperation was essential in that context, especially since the Community considered it unsafe to make inspections in Bangladesh from 1995 until May 1996.
- 39 The Commission challenges the applicant's interpretation of Regulation No 1468/81, and states that that regulation lays down a principle that information obtained in the context of investigations is confidential. It acknowledges that there is an exception to that principle in respect of judicial proceedings, but argues that that exception only releases the competent authorities of the Member States or the Commission from their strict obligation of confidentiality if that information is needed by the authorities in connection with judicial proceedings. The individuals concerned cannot, on the strength of that exception, claim a right of access to that information simply because judicial proceedings are pending. That right is granted to those individuals and may be exercised by them only in the context defined by national legislation on procedure, where the competent authorities use that information in judicial proceedings.

- 40 The Commission further observes that its investigation into the circumstances in which the Bangladeshi authorities issued certificates of origin has not yet been completed. Even if it had been completed, the Commission would legitimately have been able to refuse the access requested.
- 41 Finally, the Commission states that the national administration, which is a party to the proceedings before a British court, may communicate the documents concerned to the applicant pursuant to Article 19(2) of Regulation No 1468/81. The question whether that national administration is obliged to communicate them is a matter of domestic law. In any event, a possible infringement of the applicant's rights of defence in the course of the national proceedings is not a circumstance which is capable of conferring upon the applicant greater rights pursuant to Decision No 94/90 than those of any other person seeking access to the documents.
- 42 In its reply, the applicant refers to the judgment in Case T-14/98 *Hautala v Council* [1999] ECR II-2489, in which the Court of First Instance held that an institution that has been presented with a request for access to documents is required to examine whether partial access should be granted to information not covered by the exceptions, and that the public interest might in some cases be adequately protected by the removal, after examination, of passages in a document which might harm that interest.
- 43 The Commission maintains that the applicant's reference to the judgment in *Hautala v Council* constitutes a new plea in law and is thus inadmissible under Article 48(2) of the Rules of Procedure. It submits, moreover, that the plea, which it regards as being based on infringement of the principle of proportionality, is unfounded in any event.

Findings of the Court of First Instance

- 44 As a first point, the Court finds that the Commission's argument that the reference in the reply to the judgment in *Hautala* constitutes a new, and therefore inadmissible, plea cannot be accepted. That judgment merely clarifies the scope of the right of access as laid down by the Code of Conduct, by specifying that the exceptions to that right must be interpreted in the light of the principle of the right to information and the principle of proportionality and that, therefore, the institution is required to examine whether partial access should be granted, that is to say access to information that is not covered by the exceptions (*Hautala*, paragraph 87). Therefore, the reference to that judgment in the applicant's reply forms part of the plea, already contained in the application, alleging infringement of Decision 94/90, to which the Code of Conduct is annexed.
- 45 Moreover, in reply to a question put to it during the oral procedure, the Commission stated that it is accustomed when dealing with requests for access to examining the possibility of granting partial access. It follows that the Commission does not in any way deny the relevance of the principles raised in *Hautala*.
- 46 However, the contested decision does not contain any indication that such an examination took place. On the contrary, the reasons given for that decision (see paragraph 15 above) show that the Commission reasoned by reference to categories of documents and not on the basis of the actual information contained in the documents in question. The Commission limited itself to stating that the mission reports 'are covered by the exception regarding the protection of the public interest, since they concern the Commission's inspection and investigation tasks', explaining only that, for the Commission, it is 'essential... to be able to conduct such investigations whose aim is to investigate the authenticity and regularity of certificates whilst respecting the confidential nature of such proceedings' and that 'sincere cooperation and a climate of mutual confidence... are required in order to ensure compliance with customs legislation'. By

expressing itself in those terms, the Commission implies that it has not assessed specifically whether the exception concerning the protection of the public interest genuinely applies to the whole of the information contained in those documents.

- 47 Moreover, the Commission's argument is invalidated by the extract from the mission report of November-December 1996, which was sent to the applicant by the British authorities and which is annexed to its application. An examination of that extract shows that much of the information which it contains consists of descriptions and factual findings that clearly do no harm to inspection and investigation tasks or, therefore, to the public interest (see Case T-188/98 *Kuijjer v Council* [2000] ECR II-1959, paragraph 57).
- 48 It follows from the above that, in so far as it concerns the mission reports ('Category 1') and correspondence sent by the Commission to the Government of Bangladesh ('Category 4', part), the contested decision is vitiated by manifest errors in the application of Decision 94/90 and must therefore be annulled (*Hautala*, paragraphs 87 and 88).
- 49 That conclusion is not invalidated either by the Commission's argument concerning the possibility that the national court hearing the dispute between the applicant and the British authorities might have jurisdiction to ask the Commission to produce the documents concerned (see paragraph 37 above), or by its argument that the right of access of a party to national legal proceedings is a matter for domestic law (see paragraph 41 above). Those arguments are irrelevant to the decision in this case. Communication 94/C 67/03 makes it plain that any person may at any time submit a request for access to documents held by the Commission (see paragraph 7 above). Once such a request has been submitted, the provisions of Decision 94/90 apply, and the Commission must examine that request in the light of the general principle contained in the Code of Conduct, annexed to that decision, whereby the public is to have the widest possible access to the documents which it holds (see Joined Cases C-174/98 P and C-189/98 P *Netherlands and Van der Wal v Commission* [2000] ECR I-1, paragraphs 27 to 29; *Interporc*, paragraphs 44 and 45).

50 Similarly, the Commission cannot justify its refusal to grant access to the documents referred to in the applicant's request on the basis of Regulation No 1468/81 or Regulation No 515/97, which lay down the principle that information obtained in customs investigations is confidential. The Code of Conduct, the text of which is annexed to Decision 94/90, sets out an essential right, namely that of access to documents. That code was adopted with the aim of making the Community more transparent, 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). Regulation No 1468/81, as far as it is to be applied as a *lex specialis*, cannot be interpreted in a sense contrary to Decision 94/90, whose fundamental objective is to give citizens the opportunity to monitor more effectively the lawfulness of the exercise of public powers (*Interporc*, paragraphs 37 to 39 and 43 to 47; Case T-188/97 *Rothmans v Commission* [1999] ECR II-2463, paragraph 53; Case T-309/97 *Bavarian Lager v Commission* [1999] ECR II-3217, paragraphs 36 and 37). Moreover, Article 19(2) of Regulation No 1468/81 and Article 45(3) of Regulation No 515/97, applicable as from 13 March 1998, provide that the confidential nature of the information in question 'shall not impede the use, in any legal actions or proceedings subsequently instituted in respect of non-compliance with the law on customs or agricultural matters, of information obtained pursuant to this Regulation'. In this case, as the applicant has rightly pointed out, its request for access has indeed been made within the context of a legal action.

Correspondence sent by the Government of Bangladesh to the Commission

— Arguments of the parties

51 The applicant maintains that the authorship rule should be interpreted as meaning that an application for documents must be made to the authors only where the Commission does not hold originals or copies. To require an applicant to seek documents from bodies that do not come within the ambit of judicial

review, when those documents are in the possession of the Commission, would circumvent the purpose of Decision 94/90 and Declaration No 17. In that respect, the applicant further states that Decision 94/90 must be applied in such a way as to give effect to the clear intention of the parties to the Treaty on European Union. Moreover, if the authorship rule were not interpreted in the way suggested by the applicant, it would contravene the principle of proportionality, by virtue of which the measures adopted must be necessary to achieve the objective of protecting confidentiality and the public interest.

- 52 The Commission submits that the applicant's argument is contradicted by the clear wording of the authorship rule. It states that it cannot give access to documents of the governments of non-member countries simply on the ground that it is in possession of those documents. The decision whether or not to disclose documents drawn up by third parties is a matter exclusively for those parties, since they are the only ones able to decide whether or not they wish to conduct a policy of transparency.

Findings of the Court of First Instance

- 53 It should be pointed out that the authorship rule may be applied by the Commission when handling a request for access so long as there is no higher rule of law prohibiting it from excluding from the scope of the Code of Conduct documents of which it is not the author. The fact that Decision 94/90 refers to declarations of general policy, namely Declaration No 17 and the conclusions of several European Councils does nothing to alter that finding, since those declarations do not have the force of a higher rule of law (*Interporc*, paragraphs 66, 73 and 74).
- 54 It follows that the Commission made a correct assessment in holding that it was not required to give access to documents that had been sent to it by the

Government of Bangladesh. Therefore, the first plea must be rejected in so far as it concerns correspondence sent by that government to the Commission.

Decisions of the Commission concerning the mission reports

— Arguments of the parties

- 55 The applicant challenges the Commission's assertion that no decisions exist in relation to the mission reports. It observes in particular that, following the mission report of November-December 1996, several Member States initiated actions for post-clearance recovery of customs duties, which must have resulted from a decision of the Commission adopting the report's recommendations. The applicant further emphasises that it appears from page 2 of Appendix 5 to the mission report of November-December 1996 that three meetings took place at the Commission between officers of that institution and representatives of the Member States to discuss the report.
- 56 The Commission notes that the applicant has systematically defined the documents requested as Commission 'Decisions'. The Commission therefore understood the request to relate to decisions within the meaning of Article 189 of the EC Treaty (now Article 249 EC). No decision of that type was adopted in respect of the mission reports.
- 57 In its reply, the applicant maintains that the Commission admits by the statements in its defence that a document exists. The applicant assumes that the document in question is the Commission's decision on the mission report of November-December 1996. It reiterates that, if the Commission had not taken any decision, no post-clearance recovery action would have been undertaken by

the Member States. The applicant submits that, by raising the question whether the measure in question constituted a decision within the meaning of Article 189 of the Treaty, the Commission avoids justifying its refusal to disclose the minutes of its decision requesting Member States to take the necessary measures.

— Findings of the Court of First Instance

- 58 The Court finds that the applicant has not produced relevant or consistent evidence to support its assertion that there are one or more decisions in existence taken by the Commission in respect of the mission reports. The fact that meetings took place between Commission officials and representatives of the Member States on the subject of those reports and of the national actions for post-clearance recovery of customs duties does not necessarily show that any decision had been taken by the Commission in addition to its recommendations at the end of the mission reports. Nor has the applicant produced evidence to refute the Commission's assertion that the authorities of the Member States may, or must, initiate post-clearance recovery procedures following the recommendations contained in the mission reports, without a decision of the Commission being necessary or, indeed, possible.
- 59 It follows that the first plea in law must be dismissed in so far as it concerns the alleged decisions of the Commission concerning the mission reports.
- 60 It follows from all of the foregoing considerations that the contested decision must be annulled in so far as it relates to the mission reports and correspondence from the Commission to the Government of Bangladesh, and that the remainder of the first plea in law must be dismissed.

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

— Arguments of the parties

- 61 The applicant argues that insufficient reasons were stated for the contested decision. The Commission did not examine in respect of each document requested whether disclosure was in fact likely to undermine one of the interests protected.
- 62 The Commission contends that the reasoning of the contested decision is exhaustive. As regards the mission reports and correspondence from the Commission to the Bangladesh Government, the decision clearly shows that those documents belong to the category concerning inspections and investigations and are therefore covered by the public-interest exception. The decision also sets out the reasons for which public disclosure of those documents could harm the public interest. The Commission stresses that it did not satisfy itself simply by concluding that the documents fell within the public-interest exception. The reasoning of the contested decision indicates not only why the category of documents concerned fell within the ambit of the exception but also why in practice their public disclosure would harm the public interest.

Findings of the Court of First Instance

- 63 It is settled case-law that the duty to give reasons for individual decisions has the dual purpose of, first, allowing interested parties to know the reasons justifying the measure so as to enable them to protect their rights and, secondly, to enable the Community judicature to exercise its power to review the legality of the decision (Case C-350/88 *Delacre and Others v Commission* [1990] ECR I-395, paragraph 15; Case T-105/95 *WWF UK v Commission* [1997] ECR II-313,

paragraph 66). Whether a statement of reasons satisfies those requirements is a question to be assessed by 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; *Kuijer*, paragraph 36).

- 64 It is also clear from the case-law that the Commission is obliged to consider, in the case of each document to which access is sought, whether, in the light of the information available to the Commission, disclosure is in fact likely to undermine one of the aspects of the public interest protected by the exceptions (Case T-174/95 *Svenska Journalistförbundet v Council* [1998] ECR II-2289, paragraph 112; *Kuijer*, paragraph 37).
- 65 The Commission must therefore make clear in the grounds stated for its decision that it has carried out an assessment of the documents at issue in the particular case (*Kuijer*, paragraph 38). In this case, as the Court has already found above in relation to the mission reports and the correspondence from the Commission to the Government of Bangladesh (paragraph 46), that such an assessment does not appear in the contested decision. On the contrary, the Commission based its reasoning exclusively on the general characteristics of the categories of documents requested.
- 66 The second plea is therefore well founded in so far as it concerns the mission reports ('Category 1') and the correspondence from the Commission to the Government of Bangladesh ('Category 4', part).
- 67 However, the reasons stated in the contested decision are sufficient as regards the other documents referred to in the applicant's request. As regards the

correspondence from the Government of Bangladesh to the Commission, the latter has cited the authorship rule and indicated to the applicant that it was for it to request copies of the documents in question from the Bangladesh authorities. The applicant was therefore in a position to know the reasons for the contested decision and the Court of First Instance to exercise its power of review of the legality of that decision. The applicant therefore has no grounds for maintaining that a more specific statement of reasons was necessary (*Interporc*, paragraph 78). Similarly, as regards the alleged decisions concerning the mission reports, it must be held that the Commission was entitled to limit itself to indicating that such documents did not exist, without being under any obligation to specify why such decisions had not been taken.

- 68 It follows from all the foregoing considerations that the contested decision must be annulled in so far as it refuses access to the mission reports of the European Union from 1993 to 1996 concerning Bangladesh, including their annexes, and to the correspondence from the Commission to the Government of Bangladesh concerning the annulment of the GSP Forms A, and that the remainder of the application must be dismissed.

Costs

- 69 Under Article 87(3) of the Rules of Procedure of the Court of First Instance, where each party succeeds on some and fails on other heads, the Court may order that the costs be shared or that each party bear its own costs. In this case, the Court decides that, on a fair assessment of the circumstances, the Commission must bear its own costs and pay one half of those incurred by the applicant, which must therefore bear one half of its own costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Fourth Chamber),

hereby:

1. Annuls the Commission decision of 11 March 1999 in so far as it refuses the applicant access to the mission reports of the European Union from 1993 to 1996 concerning Bangladesh, including their annexes, and to the correspondence sent by the Commission to the Government of Bangladesh concerning the annulment of the certificates of origin under the generalised system of preferences;
2. Dismisses the remainder of the action;
3. Orders the applicant to bear one half of its own costs;
4. Orders the Commission to bear its own costs, and to pay one half of the costs incurred by the applicant.

Tiili

Moura Ramos

Mengozi

Delivered in open court in Luxembourg on 12 October 2000.

H. Jung

P. Mengozzi

Registrar

President

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