JUDGMENT OF THE COURT OF FIRST INSTANCE
(Fourth Chamber, Extended Composition)
5 March 1997 *

In Case T-105/95,

WWF UK (World Wide Fund for Nature), a trust incorporated under English law, whose head office is at Godalming, Surrey (United Kingdom), represented by Georg M. Berrisch, Rechtsanwalt in Hamburg and Brussels, with an address for service in Luxembourg at the Chambers of Turk and Prüm, 13 B Avenue Guillaume,

applicant,

supported by

Kingdom of Sweden, represented by Erik Brattgård, Acting Ministerial Adviser in the Trade Department of the Ministry of Foreign Affairs, Box 16121, 103 23 Stockholm, acting as Agent,

intervener,

v

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

defendant,

* Language of the case: English.

supported by

French Republic, represented by Catherine de Salins, Assistant Director in the Legal Department of the Ministry of Foreign Affairs, and Denys Wibaux, Secretary for Foreign Affairs in the same department, acting as Agents, with an address for service in Luxembourg at the French Embassy, 9 Boulevard Prince Henri,

and

United Kingdom of Great Britain and Northern Ireland, represented by John E. Collins, of the Treasury Solicitor's Department, acting as Agent, assisted by Stephen Richards and Jessica Simor, Barristers, with an address for service in Luxembourg at the British Embassy, 14 Boulevard Roosevelt,

interveners,

APPLICATION for the annulment of the Commission Decision of 2 February 1995 refusing the applicant access to Commission documents relating to the examination of a project to build an interpretative centre at Mullaghmore (Ireland) and, in particular, to those documents relating to the question as to whether structural funds could be used for that project,

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

composed of: K. Lenaerts, President, R. García-Valdecasas, P. Lindh, J. Azizi and J. D. Cooke, Judges,

Registrar: H. Jung,

having regard to the written procedure and further to the hearing on 18 September 1997

gives the following

Judgment

Legislative context

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

'The Conference considers that transparency of the decision-making process strengthens the democratic nature of the institutions and the public's confidence in the administration. The Conference accordingly recommends that the Commission submit to the Council no later than 1993 a report on measures designed to improve public access to the information available to the institutions.'

2 At the close of the European Council held in Birmingham on 16 October 1992, the Heads of State and of Government issued a declaration entitled 'A Community close to its citizens' (Bull. EC 10-1992, p. 9), in which they stressed the necessity to make the Community more open. That commitment was reaffirmed by the European Council at Edinburgh on 12 December 1992 and the Commission was again invited to continue to work on improving access to the information available to Community institutions (Bull. EC 12-1992, p. 7).

3 In response to the Maastricht Declaration the Commission undertook a comparative survey on public access to documents in the Member States and in some non-member countries and the results of its survey were summarized in a communication addressed to the Council, the Parliament and the Economic and Social Committee on 5 May 1993 (93/C 156/05, OJ 1993 C 156, p. 5). In that communication the Commission concluded that there was a case for developing further the access to documents at Community level.

4 In furtherance of the above measures the Council and the Commission formulated and agreed a 'Code of Conduct on public access to Commission and Council documents' (hereinafter the 'Code of Conduct') and undertook severally to take steps to implement the principles thereby laid down before 1 January 1994.

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

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

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

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

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

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

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

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

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

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

— the protection of the individual and of privacy,

— the protection of commercial and industrial secrecy,

— the protection of the Community's financial interests,

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

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

Factual background to the proceedings

10 In 1991, the Irish authorities announced a plan to build a visitors' centre at Mullaghmore in the Burren National Park in the west of Ireland. They proposed to use structural funds for the project. The applicant lodged a complaint in relation to those proposals with the Commission, objecting that the project would infringe Community environmental law and involve a wrongful application of structural funds.

11 The Commission subsequently opened an investigation into the project, including the alleged infringement of environmental law and the eligibility of the project for structural funds in that context. On 7 October 1992 the Commission announced that it did not intend to initiate Treaty infringement proceedings against Ireland since it had found that the project did not infringe Community environmental law. On the same day, Commissioner Millan, who was then responsible for regional policies, confirmed that decision in similar terms to the Irish Department of Finance. Commissioner Millan indicated that there was now no obstacle to structural funds being allocated to assist the project.

12 The decision of the Commission on 7 October 1992 had been the subject of an action for annulment brought jointly by the applicant and An Taisce (an Irish non-governmental organization). In its judgment of 23 September 1994, this Court declared the application in question inadmissible (Case T-461/93 *An Taisce and WWF (UK)* v *Commission* [1994] ECR II-733). The judgment of the Court was appealed to the Court of Justice which, by order of 11 July 1996, dismissed the appeal (Case C-325/94 P *An Taisce and WWF UK* v *Commission*, [1996] ECR I-3727).

13 By two separate letters in identical terms, each dated 4 November 1994 and written to the Directors General of DG XI (Environment) and DG XVI (Regional Policies), counsel for the applicant, relying on Decision 94/90, requested access to all Commission documents relating to the examination of the Mullaghmore project and particularly to the examination of the question whether structural funds might be used for it. This demand for access was formulated as follows:

'On 21 June 1991 WWF UK lodged a complaint with the Commission against the project of the Irish Department of Finance concerning the construction of an interpretative centre for visitors at Mullaghmore (Ireland). An Taisce subsequently joined this complaint. My clients objected against the project and, in particular, that Community structural funds may be used by Ireland for the project. They argued that the project would violate EC environmental law.

In the following, several letters were exchanged between the Commission's services and my clients. They concerned the questions (1) whether the Commission would initiate proceedings under Article 169 of the Treaty against Ireland with regard to the project, and (2) whether the Commission would allow structural funds to be used for the project. On 7 October 1992 the Commission issued a press release stating that it had decided not to initiate infringement proceedings

against Ireland. On the same day, Commissioner Bruce Millan (responsible for regional policies) wrote to Mr Noel Treacy (Irish Minister of State, Department of Finance) a letter stating that following the decision not to initiate infringement proceedings there would now be no obstacle of structural funds assistance for the project.

On behalf of my clients I respectfully request access to all Commission documents relating to the examination of the Mullaghmore project, and in particular to the examination whether structural funds may be used for the project. Preferably, we should like to receive copies of the relevant documents.'

14 By letters dated 17 November 1994 and 24 November 1994, Mr Krämer, an official in DG XI, and Mr Landaburu, Director General of DG XVI, informed counsel for the applicant of the rejection of this request.

15 In the letter of 17 November 1994 from DG XI the refusal was explained as follows:

'I regret to inform you that the documents you have requested fall under the exceptions to access provided for under the access policy. Consequently, I do not intend to make the documents available.

The exceptions serve to protect public and private interests, and to ensure that the Commission's internal deliberations remain confidential. I attach a list of them for your information, and can inform you that the relevant exemptions in the case of the documents you have requested are the protection of the public interest (in particular, inspections and investigations) and the protection of the Commission's interest in the confidentiality of its own proceedings. The documents you have requested relate to the investigation of complaints, as well as to the Commission's internal deliberations.'

16 In the letter of 24 November 1994 from DG XVI the refusal was explained as follows:

'I regret to inform you that the additional documents you have requested fall under the exemptions to access provided for under the access policy. Consequently, I do not intend to make the documents available.

The exemptions serve in particular to ensure that the Commission's internal deliberations remain confidential. Such documents would include all internal notes, exchange of letters between services including the Legal Service, and all other information whose disclosure would infringe the confidentiality of the Commission's deliberations.'

17 Issue was then taken on behalf of the applicant with these refusals and, by letters dated 19 December 1994, counsel for the applicant submitted confirmatory applications, in accordance with the procedure described in the Code of Conduct, to the Secretary General of the Commission.

18 Writing to the Secretary General separately in relation to the request made to DG XI and after referring to the request of 4 November and the reply of 17 November 1994, counsel for the applicant took issue with the refusal to grant him access to the documents held by that DG in these terms:

'Mr Krämer argued that the documents would fall under the exemptions to access provided for under the Commission's access policy. He cited as relevant exemption the confidentiality of the Commission's internal deliberation procedure, and the protection of public interest (in particular, inspections and investigations).

On behalf of my clients I write to confirm my application for access to the above mentioned documents and formally to request that you review your intention to refuse access.

The right of public access to Commission documents has been granted in order to provide for transparency in the Commission's decision making process. In addition, the process is intended to strengthen the confidence of the public in the administration (cf. the preamble of the Code of Conduct concerning public access to Commission and Council documents; OJ 1994 No L 46/60). These objectives can only be achieved if access is granted to the greatest extent possible. Thus, the

Commission should only refuse access to its documents if this is absolutely indispensable. Consequently, the exemptions to access to Commission documents must be interpreted narrowly.

Moreover, the Code of Conduct merely provides that the Commission *may* refuse access in order to protect the institution's interest in the confidentiality of its proceedings. Thus, this exemption is not mandatory. The Commission can only invoke this exemption if the particular circumstances of a case make it necessary to keep the internal deliberation procedure confidential. No such circumstances were mentioned by the Director General. Indeed, it is clear from the list of circumstances in which the exemption policy may be applied that none are relevant to this case.

Finally, the present application constitutes a request for access to documents relating to proceedings which have been closed since October 1992. In such case the ability of the Commission to think in private is no longer at stake. This is also

mentioned in the internal guidelines of the Commission (COM Doc. SEC(94)321 of 16 February 1994). Therefore, the Commission can, in our view, not rely on the exemption of the protection of public interest.

In any event, the exemptions could only justify to refuse access to some of the documents for which access has been requested.'

19 A letter written on the same day to the Secretary General in respect of the request made to DG XVI was in the same terms as that cited in paragraph 18 above, save that the first paragraph read as follows:

'The Director General argued that the documents would fall under the exemptions to access provided for under the Commission's access policy. He cited as relevant exemption the confidentiality of the Commission's internal deliberation procedure.'

20 The Secretary General of the Commission replied to those letters by a single letter dated 2 February 1995 in which he reconfirmed the refusals of the requests made to the Directorates General XI and XVI and reiterated the grounds relied upon by the Commission in these terms:

'Thank you for your letters of 19 December 1994 in which you seek a review of the intention of Mr Krämer (DG XI) and Mr Landaburu (DG XVI) to refuse access to the Commission documents relating to the examination of the Mullaghmore project, and in particular to the examination of whether structural funds may be used for the project.

In your letters you argue that in the interests of promoting transparency in the Commission's decision making process and strengthening the confidence of the public in the administration, the Commission should only refuse access to its documents if this is absolutely indispensable, and that the exemptions to access to Commission documents must be interpreted narrowly.

That is actually the way the Commission applies its policy of transparency: each request is treated individually and thoroughly examined on a case-by-case basis. The fundamental principle guiding the consideration of each request is that the

public will have the widest possible access to documents held by the Commission, albeit with certain exemptions to protect public and private interests which could be damaged if access to certain documents were permitted, and to ensure that the Commission can deliberate in confidence.

These exceptions were expressly envisaged by the Code of Conduct concerning public access to Commission and Council documents, adopted on 8 February 1994.

Having examined your request, I have to confirm the position of Mr Landaburu and Mr Krämer, for the reason that the disclosure of these documents could affect the protection of the Commission interest in the confidentiality of its proceedings, and the protection of the public interest, in particular the proper progress of the infringement proceeding.

Indeed, it is essential for the Commission to be able to investigate matters with which it is concerned as guardian of the Treaties, whilst respecting the confidential nature of such proceedings. It is clear that it is indispensable for the Commission to ensure that a climate of mutual confidence is maintained, which would risk being severely disrupted by publicity. Such publicity is not easily reconciled with the search for a settlement to a dispute at a preliminary stage.

The disclosure, particularly of letters exchanged between the Commission and the Member State concerned, could prejudice the treatment of infringements of Community law.

Actually, in the case of the Interpretative Centre in Ireland, the Commission has made available to the public — in a press release — its reasons for not issuing infringement proceedings against Ireland on environmental grounds.

Finally, I should like to draw your attention to the means of redress that are available, i.e., judicial proceedings and complaints to the Ombudsman under the conditions specified respectively in Articles 173 and 138e of the Treaty establishing the European Community.'

21 This letter from the Secretary General of the Commission, dated 2 February 1995, contains the decision challenged in the present case (hereinafter the 'Contested Decision').

Procedure and forms of order sought

22 The applicant then brought the present action on 18 April 1995. After the defence had been lodged, the applicant informed the Court, by letter received on 10 August 1995, that it would not be lodging a reply.

23 By order of the President of the Fourth Chamber of the Court of First Instance of 16 November 1995, Sweden was granted leave to intervene in support of the applicant and France, Ireland and the United Kingdom were granted leave to intervene in support of the defendant. Ireland subsequently decided to withdraw its intervention.

24 The written procedure closed on 31 May 1996. Upon hearing the report of the Judge-Rapporteur, the Court decided to open the oral procedure without any preparatory inquiry but decided to put a question to the Commission in writing to which a reply was received on 18 July 1996.

25 The parties, with the exception of France, presented oral argument and answered questions put to them by the Court at the hearing on 18 September 1996.

26 The applicant, supported by Sweden, claims that the Court should:

— annul the decision of the Commission contained in its letter of 2 February 1995;

— order the Commission to pay the costs of the proceedings.

27 The Commission contends that the Court should:

— dismiss the application;

— order the applicant to pay the costs of the proceedings.

28 France and the United Kingdom, as interveners, contend that the Court should:

— dismiss the application as unfounded.

Substance

29 The applicant relies upon two pleas in law in support of its application. The first is based on breach of the Code of Conduct and infringement of Decision 94/90. The second is based upon infringement of Article 190 of the EC Treaty.

30 In view of the interdependence of the arguments advanced in support of both grounds of the application, the Court considers it appropriate to examine them together.

On the first and second pleas taken together: infringement of Decision 94/90, of the Code of Conduct and of Article 190 of the Treaty

Arguments of the parties

— Infringement of Decision 94/90 and the Code of Conduct

31 The applicant alleges that the Commission has infringed Decision 94/90 by mistakenly invoking the exceptions to the principle of access to documents provided for in the Code of Conduct as adopted by Article 1 of the Decision. The applicant first makes some observations as to the legal nature of the Code of Conduct and its interpretation.

32 Thus, it submits first that Decision 94/90 and the Code of Conduct are legally binding upon the Commission and operate to confer upon persons in the Community a right of access to documents 'to the widest extent possible'.

33 In this the applicant is supported by the Swedish Government which emphasizes that Decision 94/90 and the Code of Conduct, taken together, constitute a binding legal measure conferring rights on citizens and imposing obligations on the Commission.

34 The Commission disputes the legal effect attributed by the applicant to Decision 94/90 and the Code of Conduct and argues that the texts represent no more than the practical implementation of a policy orientation which is to be found in the declarations of the Member States and the European Council referred to in paragraphs 1 to 3 above. According to the Commission, Decision 94/90 and the Code of Conduct, properly construed, give rise to no absolute or fundamental right of access to documents in favour of citizens. Rather, they accord to applicants no more than a right to have their requests dealt with in accordance with the principles and procedures which are thereby laid down.

35 The applicant then submits that, especially as the general principle is particularly important, the exceptions provided for in the Code of Conduct should be construed restrictively and in the light of that principle so as to avoid defeating the particular purpose of the Code, namely, that of conferring on the public the right of 'the broadest possible access to documents'. In support of this argument, the applicant refers to the principles which flow from the case-law of the Court of Justice relating to free movement of persons and freedom of establishment (Case 13/68 *Salgoil* [1968] ECR 661; Case 2/74 *Reyners* [1974] ECR 631 and Case 30/77 *Bouchereau* [1977] ECR 1999) and to the free movement of goods (Case 46/76 *Bauhuis* [1977] ECR 5; Case 113/80 *Commission* v *Ireland* [1981] ECR 1625).

36 Moreover, the applicant submits that, given the importance of the objective of the Code of Conduct and having regard to its legislative history, the Commission is not entitled to invoke the exceptions in a general way but must establish by reference to the particularities of each case the 'imperative reasons' for which the conditions for application of an exception are fulfilled. In this regard the applicant relies upon the order of the Court of Justice in Case C-2/88 *J. J. Zwartveld and Others* [1990] ECR I-4405 (paragraphs 11 and 12).

37 In rebutting that argument the Commission contends that the applicant has misunderstood the status of the Code of Conduct and the nature of its exceptions. According to the Commission, the exceptions represent no more than the limits or parameters of the Commission's self-assumed obligation. Since it is designed to implement a general policy orientation, the Code of Conduct cannot be equated with fundamental rules derived directly from the Treaty and the Commission therefore considers the case-law relied upon by the applicant to be irrelevant.

38 The Commission goes on to add that the exceptions in the Code of Conduct are distinguished according to their mandatory or discretionary character. The Commission points out that when it relies upon a mandatory exception it has no need to engage in an exercise of balancing its interests against those of the person who has requested access to the documents. It argues that, having regard to the nature of the interests involved under the heading of mandatory exceptions, the balance of interests was in effect struck at the time when the Code of Conduct was adopted. On the other hand, when a discretionary exception is invoked, the balancing of interests is undertaken at that point.

39 Secondly, the applicant challenges the reference in the Contested Decision to the exception in favour of protection of the public interest (hereinafter the 'public interest exception') and to that in favour of protection of the institution's interest in the confidentiality of its proceedings (hereinafter the 'confidentiality exception').

40 Thus, on the one hand, the applicant argues that the Commission has interpreted the public interest exception too widely by refusing access to all documents relating to infringement proceedings with regard to their content, to the specific circumstances of the particular investigation and to the length of time elapsed since the closing of the investigation. Such an interpretation, according to the applicant, seriously jeopardizes the two main objectives of the Community's policy on access to documents, namely that of enhancing the transparency of the decision-making process and that of strengthening public confidence in the Community administration. There is no reason why, as a general rule, infringement proceedings must be conducted in conditions of absolute confidentiality. The applicant also submits that the Commission is entitled to refuse access to documents relating to infringement procedures only on a case-by-case basis where it can demonstrate, by reference to imperative reasons, why disclosure would undermine the protection of the public interest.

41 On the other hand, the applicant considers that the reliance in the Contested Decision on the confidentiality exception fails to fulfil the conditions required in the Code of Conduct. The applicant thus alleges that the Commission was content merely to claim that the documents in question related to its own internal deliberations, without undertaking any balancing of its own interests against the applicant's right to access to them. Moreover, having regard to the fact that the documents in question relate to infringement proceedings which had been closed since October 1992, the applicant argues that only exceptional circumstances could justify the fact that the Commission continues to rely on this exception. The applicant also emphasizes that the Commission has failed to provide the necessary 'imperative reasons', contrary to the requirements of the case-law (see the order in *Zwartveld*, cited above, paragraphs 11 and 12).

42 The Swedish Government, while acknowledging that the Commission enjoys a margin of discretion in invoking the confidentiality exception, submits that the necessary balancing exercise must be carried out in respect of each individual document separately. It notes that the applicant asked both for documents relating to examination of a possible infringement of Community law by Ireland and for

documents relating to the question of structural funding being used for the Mullaghmore project. The fact that the applicant did not receive a single document indicates that no balancing of interests in respect of each document had been carried out by the Commission.

43 The Commission denies that it wrongly invoked the exceptions provided for in the Code of Conduct in the Contested Decision. On the one hand, the Commission contends that the obligatory nature of certain exceptions in the Code of Conduct derives from its clear wording which stipulates that 'the institutions will refuse access to any documents where disclosure could undermine ...'. The public interest exception is one of the mandatory exceptions.

44 The Commission contends that it is clear from the very wording of the Code of Conduct that once there is a danger that disclosure of particular documents would undermine the public interest, the application of the exception is obligatory and the Commission has no choice but to refuse access. It argues that the mandatory exceptions constitute in themselves imperative reasons. It points out that the Code of Conduct consists otherwise of examples of the different interests to be protected.

45 In the Commission's view, the relationship between it and the Member States with regard to investigation of infringements is founded upon its obligation of cooperation with the Member States under Article 5 of the EC Treaty. Such cooperation permits negotiation between the parties with a view to reaching a settlement and it was the possibility of precisely such frank and open dialogue that enabled a compromise to be achieved in discussions with the Irish authorities in the present case. The Commission therefore considers that access to documents relating to an infringement procedure must be refused, given the duty to protect the public interest imposed by the Code of Conduct.

46 It cannot be criticized for having failed to take account of the factors peculiar to the Mullaghmore case, because, once the investigation of a possible infringement falls automatically within the public interest exception, it is not necessary to explain the application of the exception for each particular investigation.

47 The Commission also rejects the assertion that the exception can no longer be invoked because of the lapse of time since the closure of the Mullaghmore file in October 1992. The Commission argues that as no decision was taken on the infringement procedure, the Irish authorities were bound by virtue of their duty of due cooperation under Article 5 of the EC Treaty to abide by the guarantees they had given. Moreover, the subject-matter of the file remained the subject of litigation in the appeal against the judgment of the Court of First Instance of 23 September 1994 in Case T-461/93 which was still pending before the Court of Justice at that time (Case C-325/94 P *An Taisce and WWF (UK)* v *Commission*, cited above).

48 The French and United Kingdom Governments support the Commission's argument to the effect that the wording of the Code of Conduct in relation to this exception is clearly mandatory and that the Commission must therefore refuse access to documents when disclosure could damage the public interest. Both Member States support the Commission's argument regarding the vital need to foster a climate of mutual confidence in discussions which precede a possible infringement action. It is, they say, clearly in the interest of the Community that the Commission should be able to discuss possible breaches of Community law by Member States in conditions of absolute confidentiality with a view to achieving a settlement. Moreover, according to the United Kingdom Government, the very possibility of documents being released in the future is sufficient to damage that climate of confidence with the result that the mere fact that a procedure has been closed does not bring to an end the applicability of this exception.

49 On the other hand, the Commission argues that the use of the word 'may' in the wording of the confidentiality exception shows that in this instance it has a discretion. It contends that it is clear from the terms of the Contested Decision that the confidentiality invoked does not concern internal procedures or deliberations of an executive nature but relates to a particular type of quasi-judicial procedure, namely the examination and investigation of infringements, including the contacts between the Commission and the Member States in respect of such investigations. Since the confidentiality in question involves exactly the same elements as those of the public interest exception, the Commission's entitlement to invoke the former exception is precisely the same as its entitlement to rely upon the latter. Furthermore, the Commission rejects the submission of the Swedish Government and argues that if it were required to justify the use of the confidentiality exception by reference to the content of each document, the value of the confidentiality exception would effectively be nullified.

— Infringement of Article 190 of the Treaty

50 In the submission of the applicant, the Contested Decision fails to meet the requirement to provide sufficient reasons, laid down in Article 190 of the Treaty, because it consists merely of broad statements which fail to address the specific circumstances of the case. The applicant again points to the absence of any reference to 'imperative reasons' justifying the Commission's refusal and to the absence of any balancing of interests in this regard.

51 The Swedish Government asserts that the Contested Decision gives no indication of the reasons which would justify the maintenance of confidentiality in respect of each individual document. Nor is it clear from the terms of the Contested Decision, according to the Swedish Government, which of the two grounds of exception has been relied upon in respect of each document to which access has been refused.

52 In reply, the Commission maintains that the Contested Decision does give a clear account of the considerations, both of law and of fact, upon which it is based. The Commission contends that the applicant's arguments under this second plea are directed not so much against the sufficiency of the reasoning but against its validity and are, to that extent, founded on a mistaken understanding of the requirement laid down by Article 190 of the Treaty.

Findings of the Court

53 It seems necessary to consider, in the first place, the legal force to be attributed to Decision 94/90, Article 1 of which adopted the Code of Conduct, and, secondly, the scope of the exceptions provided for in the Code.

54 It is clear, first of all, that Decision 94/90 constitutes the Commission's response to the calls made by the European Council to reflect at Community level the right of citizens to have access to documents held by public authorities, a right which is recognized in the domestic legislation of most of the Member States. So long as the Community legislature has not adopted general rules on the right of public access to documents held by the Community institutions, it falls to those institutions themselves to take measures within their powers of internal organization to enable them to respond to and to process such requests for access in a manner commensurate with the interests of good administration (see Case C-58/94 *Netherlands* v *Council* [1996] ECR I-2169, paragraphs 34 to 37) in respect of the corresponding decision adopted by the Council on 20 December 1993 (Decision 93/731/EC on public access to Council documents (OJ 1993 L 340, p. 43), hereinafter 'Decision 93/731').

55 By adopting Decision 94/90, the Commission has indicated to citizens who wish to gain access to documents which it holds that their requests will be dealt with according to the procedures, conditions and exceptions laid down for the purpose.

Although Decision 94/90 is, in effect, a series of obligations which the Commission has voluntarily assumed for itself as a measure of internal organization, it is nevertheless capable of conferring on third parties legal rights which the Commission is obliged to respect.

56 Next, it is necessary to consider the scope to be given to the exceptions contained in the Code of Conduct. In that regard, it is important to note that where a general principle is established and exceptions to that principle are then laid down, the exceptions should be construed and applied strictly, in a manner which does not defeat the application of the general rule. In particular, the grounds for refusing a request for access to Commission documents, set out in the Code of Conduct as exceptions, should be construed in a manner which will not render it impossible to attain the objective of transparency expressed in the response of the Commission to the calls of the European Council (see paragraphs 2 and 54 above).

57 The Court considers that the Code of Conduct contains two categories of exception to the general principle of citizens' access to Commission documents and these correspond to the provisions of Article 4 of Decision 93/731.

58 According to the wording of the first category, drafted in mandatory terms, 'the institutions will refuse access to any document where disclosure could undermine ... [in particular] the protection of the public interest (public security, international relations, monetary stability, court proceedings and investigations) ...' (see paragraph 9 above). It follows that the Commission is obliged to refuse access to documents falling under any one of the exceptions contained in this category once the

relevant circumstances are shown to exist (see, in relation to the corresponding provisions of Decision 93/731, Case T-194/94 *John Carvel and Guardian Newspapers* v *Council* [1995] ECR II-2765, paragraph 64).

59 By way of contrast, the wording of the second category, drafted in discretionary terms, provides that the Commission 'may also refuse access in order to protect the institution's interest in the confidentiality of its proceedings' (see paragraph 9 above). It follows, accordingly, that the Commission enjoys a margin of discretion which enables it, if need be, to refuse a request for access to documents which touch upon its deliberations. The Commission must nevertheless exercise this discretion by striking a genuine balance between, on the one hand, the interest of the citizen in obtaining access to those documents and, on the other, its own interest in protecting the confidentiality of its deliberations (see, in relation to the corresponding provisions of Decision 93/731, the judgment in *Carvel and Guardian Newspapers* v *Council*, cited above, paragraphs 64 and 65).

60 The Court considers that the distinction between these two categories of exception in the Code of Conduct is explained by the nature of the interest which the categories seek respectively to protect. The first category, comprising the 'mandatory exceptions', effectively protects the interest of third parties or of the general public in cases where disclosure of particular documents by the institution concerned would risk causing harm to persons who could legitimately refuse access to the documents if held in their own possession. On the other hand, in the second category, relating to the internal deliberations of the institution, it is the interest of the institution alone which is at stake.

61 The Commission is, however, entitled to invoke jointly an exception within the first category and one within the second in order to refuse access to documents which it holds, since no provision of Decision 94/90 precludes it from doing so. In effect, the possibility cannot be ruled out that the disclosure of particular documents by the Commission could cause damage both to interests protected by the exceptions of the first category and to the Commission's interest in maintaining the confidentiality of its deliberations.

62 Having regard to these factors, it is necessary to consider, secondly, whether the documents relating to an investigation into a possible breach of Community law, leading potentially to the opening of a procedure under Article 169 of the Treaty, satisfy the conditions which must be met for the Commission to be able to rely upon the public interest exception, which is one of the exceptions within the first category provided for in the Code of Conduct.

63 In this regard, the Court considers that the confidentiality which the Member States are entitled to expect of the Commission in such circumstances warrants, under the heading of protection of the public interest, a refusal of access to documents relating to investigations which may lead to an infringement procedure, even where a period of time has elapsed since the closure of the investigation.

64 It is important, nevertheless, to point out that the Commission cannot confine itself to invoking the possible opening of an infringement procedure as justification, under the heading of protecting the public interest, for refusing access to the entirety of the documents identified in a request made by a citizen. The Court considers, in effect, that the Commission is required to indicate, at the very least by reference to categories of documents, the reasons for which it considers that the documents detailed in the request which it received are related to the possible opening of an infringement procedure. It should indicate to which subject-matter the documents relate and particularly whether they involve inspections or investigations relating to a possible procedure for infringement of Community law.

65 The duty identified in the preceding paragraph does not, however, mean that the Commission is obliged in all cases to furnish, in respect of each document, 'imperative reasons' in order to justify the application of the public interest exception and thereby risk jeopardizing the essential function of the exception in question, which follows from the very nature of the public interest to be protected and the mandatory character of the exception. It would be impossible, in practical terms, to give reasons justifying the need for confidentiality in respect of each individual document without disclosing the content of the document and, thereby, depriving the exception of its very purpose.

66 Thirdly, it is necessary to consider whether the Contested Decision meets the requirement to state reasons which flows from Article 190 of the Treaty. In that connection, it should be noted that the duty to give reasons for every decision has a two-fold purpose, namely, on the one hand, to permit interested parties to know the justification for the measure in order to enable them to protect their rights; and, on the other, to enable the Community judicature to exercise its power to review the legality of the decision (see, in particular, the judgments of the Court of Justice in Case C-350/88 *Delacre* v *Commission* [1990] ECR I-395, paragraph 15; and of the Court of First Instance in Case T-85/94 *Branco* v *Commission* [1995] ECR II-45, paragraph 32).

67 The Court next notes that in the Contested Decision, the Secretary General of the Commission relied simultaneously both on the confidentiality exception and on the public interest exception in justifying his decision to refuse access to the entirety of the documents identified in the applicant's request, in relation both to DG XVI and to DG XI, without making any distinction between the documents held by those Directorates General respectively. In the Contested Decision, the Secretary General of the Commission also confirmed the refusal which had been given to the applicant, on the one hand by DG XVI on the basis of the confidentiality exception alone (see paragraph 16 above) and, on the other hand, by DG XI on the dual basis of the public interest exception and the confidentiality exception (see paragraph 15 above). In order to assess the adequacy of the reasons given in the Contested Decision for the purposes of Article 190 of the Treaty, it is therefore necessary to examine the terms of the Contested Decision together with those of the letters from DG XVI and DG XI on 24 and 17 November 1994 respectively (see paragraphs 16 and 15 above).

68 So far as concerns the refusal of the applicant's request for access to the documents held by DG XVI, it is to be noted that the Contested Decision, apart from its general reference to the public interest exception, confirms the terms of the letter of 24 November 1994 from DG XVI. In this letter, DG XVI had relied solely on the confidentiality exception.

69 Given that the Commission confined itself in the Contested Decision to confirming the terms of the letter of 24 November 1994 from DG XVI without indicating either that the reference to the public interest exception applied equally to the documents covered by the applicant's request to DG XVI or that a connection existed between the documents held by that Directorate General and the possible commencement of an infringement proceeding, it necessarily follows that the Contested Decision confined its reasons for refusing that request solely to the confidentiality exception, as had been indicated in the letter of 24 November 1994.

70 It does not appear from the letter of 24 November 1994 from DG XVI or from the Contested Decision that the Commission had fulfilled its duty to undertake a genuine balancing of the interests involved as required by the Code of Conduct (see paragraph 59 above) because both the Contested Decision and the letter from DG XVI of 24 November confined themselves to mention of the confidentiality exception in order to refuse the applicant's request, and made no mention of any balancing of the interests involved.

71 Furthermore, it is not now open to the Commission to claim before the Court, as it did in its letter of 18 July 1996 in response to a question from the Court (see paragraph 24 above), that all of the documents in question, including those held by DG XVI, are covered by the public interest exception, since the Contested Decision refers expressly to the letter of 24 November 1994 from DG XVI, which makes no reference to the public interest exception.

72 It follows that, in so far as it deals with the request of the applicant in relation to the documents held by DG XVI, the Contested Decision does not meet the requirement to state reasons laid down in Article 190 of the Treaty, and must therefore be annulled to that extent.

73 In so far as concerns the refusal of the applicant's request for access to the documents held by DG XI, inasmuch as the Contested Decision confirmed the terms of the letter of DG XI of 17 November 1994 (see paragraph 20 above), invoking jointly the public interest exception and the confidentiality exception, it cannot be held incompatible with the provisions of the Code of Conduct (see paragraph 61 above).

74 The Court also notes that even though, in the Contested Decision, the Commission sets out in general terms the reasons for which it considers that the public interest exception ought to be applied to documents relating to investigations into a possible infringement of Community law, leading potentially to the opening of an infringement procedure under Article 169 of the Treaty, it has given no indication, even by reference to categories of documents, of its reasons for considering that the documents covered by the request to DG XI were all related to a possible infringement proceeding (see paragraph 64 above).

75 Furthermore, it is also clear that in its letter of 17 November 1994 DG XI had not indicated either, even by reference to categories of documents, the reasons for which the requested documents were in its view all covered by the public interest exception. It confined itself to the explanation that 'the relevant exemptions in the case of the documents you have requested are the protection of the public interest (in particular, inspections and investigations) and the protection of the Commission's interest in the confidentiality of its own proceedings. The documents you have requested relate to the investigation of complaints, as well as to the Commission's internal deliberations' (see paragraph 15 above).

76 Thus, as the Commission refrained both in the Contested Decision and in the letter of 17 November 1994 from DG XI from indicating that all the documents requested from DG XI were covered by the public interest exception and simultaneously relied upon the confidentiality exception, the applicant could not have

ruled out the possibility that some of the documents held by DG XI were refused to it because they were covered by the confidentiality exception alone. Neither the terms of the Contested Decision nor those of the letter of 17 November 1994 from DG XI enable the applicant and, therefore, the Court to ascertain whether the Commission fulfilled its obligation to undertake a genuine balancing of the interests involved as required by the Code of Conduct (see paragraph 59 above), given that they both rely upon the confidentiality exception and make no mention of any balancing of the interests involved.

77 It follows that, in so far as the Contested Decision deals with the request made by the applicant to DG XI, it again fails to meet the requirements to state reasons which it laid down in Article 190 of the Treaty and must therefore be annulled to that extent.

78 For all of these reasons, the Court considers that the application is well founded and that the Contested Decision must be annulled.

Costs

79 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, in substance, been unsuccessful and the applicant has applied for costs, the defendant must be ordered to pay the costs. Under Article 87(4) of those Rules, Member States and institutions which intervene in proceedings before the Court are required to bear their own costs. The Kingdom of Sweden, which intervened in support of the applicant, and the French Republic and the United Kingdom, which intervened in support of the defendant, must therefore bear their own costs.

On those grounds,

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

hereby:

1. **Annuls the decision of the Commission of 2 February 1995 refusing the applicant access to Commission documents relating to the examination of a project to build an interpretative centre at Mullaghmore (Ireland);**

2. **Orders the Commission to pay the costs of the applicant;**

3. **Orders the Kingdom of Sweden, the French Republic and the United Kingdom of Great Britain and Northern Ireland to bear their own costs.**

Lenaerts García-Valdecasas Lindh

Azizi Cooke

Delivered in open court in Luxembourg on 5 March 1997.

H. Jung K. Lenaerts

Registrar President