REPORT FOR THE HEARING *

(Transparency – Access to information – Commission Decision 94/90/ECSC, EC, Euratom on public access to Commission documents – Decision refusing access to documents – Scope of the exception relating to protection of the public interest – Reasoned opinion under Article 169 of the Treaty)

In Case T-309/97,

The Bavarian Lager Company Ltd, a company incorporated under English law, whose registered office is in Lancashire, United Kingdom, represented by Stephen Hornsby, Solicitor, with an address for service in Luxembourg at the Chambers of André Marc, 36-58 Rue Charles Martel,

applicant,

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,

supported by

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

intervener,

APPLICATION for the annulment of a Commission decision refusing the applicant access to a reasoned opinion of the Commission.

Legal Framework

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, which states:

* Language of the case: English.

'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 2 June 1993 the Commission submitted Communication COM(93) 258 on openness in the Community (OJ 1993 C 166, p. 4), in which basic principles governing access to documents are set out.

3. On 6 December 1993 the Commission and the Council jointly adopted a code of conduct concerning public access to Council and Commission documents (OJ 1993 L 340, p. 41; hereinafter 'the code of conduct') and respectively undertook to take steps to implement the principles laid down by the code of conduct before 1 January 1994.

4. In order to implement that undertaking, 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. Article 1 of Decision 94/90 formally adopts the code of conduct which is annexed to the decision.

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

6. After briefly setting out the principles governing the submission and processing of applications for access to documents, the code of conduct describes as follows the procedure to be followed when it is intended to refuse an application for access:

'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 for 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.'

7. The grounds which may be relied on by an institution to reject an application for access to documents are enumerated in the code of conduct in the following terms:

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

- the protection of the public interest (public security, international relations, monetary stability, court proceedings, inspections and investigations),
- the protection of the individual and of privacy,
- the protection of commercial and industrial secrecy,
- the protection of the Community's financial interests,
- the protection of confidentiality as requested by the natural or legal persons that supplied the information or as required by the legislation of the Member State that supplied the information.

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

8. On 4 March 1994 a Commission communication on improved access to documents (OJ 1994 C 67, p. 5), which specifies the criteria for the implementation of Decision 94/40, was published. It is apparent from that communication that 'anyone may ... ask for access to any unpublished Commission document, including preparatory documents and other explanatory material'. It is then stated that 'the Commission guarantees that applications for access to documents will be treated fairly and within a reasonable period'. On that point, the communication specifies that 'applicants for Commission documents will receive an answer within one month'. As to the exceptions provided for by 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 ...'. In that regard, it is made clear that 'there is nothing automatic about the exemptions, and each request for access to a document will be considered on its own merits'.

Facts

9. The applicant company was formed on 28 May 1992 to import German beer for sale in public houses and bars in the United Kingdom, principally in the north of England.

10. However, it was unable to sell its product, since a large number of public houses in the United Kingdom are bound by 'tie' arrangements under which they are obliged to obtain their supplies of beer from particular breweries under exclusive purchasing agreements.

11. Under United Kingdom regulations relating to the supply of beer, namely the Supply of Beer (Tied Estate) Order 1989 (S.I. 1989 No 2390), United Kingdom breweries with an interest in more than 2 000 public houses were required to allow the tenants of those public houses to purchase a beer from another brewery ('a guest beer'). Article 7(2)(a) of that Order provided that the guest beer was to be a cask-conditioned beer with an alcoholic strength exceeding 1.2% by volume. That provision is generally known as the guest beer provision (hereinafter 'the GBP').

12. Under Article 7(3) of the same Order, 'cask-conditioned beer' is defined as 'beer which undergoes fermentation in the container from which it is served for consumption'. Most beers brewed outside the United Kingdom are in actual fact not produced by that method. They therefore do not satisfy the necessary conditions in order for them to be regarded as 'cask-conditioned beer' for the purposes of the GBP and are thus unable to benefit from it.

13. Since the applicant took the view that the GBP constituted a measure having an effect equivalent to a quantitative restriction on imports and was accordingly incompatible with Article 30 of the EC Treaty, it lodged a complaint with the Commission by letter of 3 April 1993.

14. Following its investigation, the Commission decided on 12 April 1995 to initiate a procedure against the United Kingdom under Article 169 of the Treaty. On 28 September 1995, it informed the applicant that it had begun an investigation relating to the GBP and that it had sent a letter of formal notice to the United Kingdom Government on 15 September 1995. On 26 June 1996 the Commission decided, pursuant to Article 169, to address a reasoned opinion to the United Kingdom. On 5 August 1996 the Commission issued a press release announcing that it had decided to send a reasoned opinion to the United Kingdom, in accordance with the procedure laid down in Article 169.

15. On 15 March 1997 the United Kingdom Department of Trade and Industry announced a proposal to amend the GBP. Under that amendment, a bottle-conditioned beer may be sold as a guest beer, in addition to cask-conditioned beer. The Commission suspended its decision to send a reasoned opinion to the United Kingdom Government on two occasions (on 13 March 1997 and 26 June 1997). In a letter of 21 April 1997, the Head of Unit DG XV.B.2 informed the applicant that, in view of the proposed amendment of the GBP, the procedure under Article 169 of the EC Treaty had been suspended and that the reasoned opinion had not been served on the United Kingdom Government. He stated that that procedure would be terminated as soon as the amended GBP entered into force. The Order entered into force on 22 August 1997. The reasoned opinion was

therefore never sent and the Commission finally decided on 10 December 1997 to take no further action in the infringement procedure.

16. By a fax sent on 21 March 1997 the applicant's adviser asked the Director-General of DG XV for a copy of the reasoned opinion, in accordance with the code of conduct concerning public access to Commission documents. By letter of 16 May 1997, Mr Mogg, the Director-General of DG XV, responded to that request by refusing to provide a copy of the reasoned opinion on the ground that, 'as an internal rule of the Commission, an EC Commission's reasoned opinion is confidential except in the case of a specific decision to release it to the public'.

17. By letter of 27 May 1997 the applicant's adviser repeated his request, relying on the judgment of the Court of First Instance in Case T-194/94 *Carvel and Guardian Newspapers* v *Council* [1995] ECR II-2765 and on the principle of good administration. By letter of 9 July 1997 Mr Mogg again refused to provide a copy of the reasoned opinion on the ground that the reasoned opinion was covered by the confidentiality exemption, stating that it fell within the 'public interest' exception in the rules laid down by the code. Specifically, he maintained that disclosure of the document in question could:

- harm the proper administration of justice, in particular the application and implementation of Community law;

- compromise the treatment of infringements of that law;

- undermine the climate of mutual confidence required for a full and frank discussion between the Commission and a Member State with a view to ensuring compliance by that State with its Treaty obligations.

18. Since the applicant's adviser did not accept the Commission's views set out above, he lodged a confirmatory application with the Secretary-General of the Commission by letter of 7 August 1997, in accordance with the procedure laid down by the code of conduct.

19. By letter of 18 September 1997, the Secretary-General of the Commission replied to the abovementioned letter from the applicant's adviser and confirmed, in the following terms, the refusal of the application sent to DG XV and the arguments put forward by the Commission:

'Having examined your request, I have to confirm Mr Mogg's refusal to give you access to this document where disclosure could undermine the protection of the public interest, in particular Commission inspections and investigation tasks. This exception is expressly foreseen in the code of conduct concerning public access to Commission and Council documents, adopted by the Commission on 8 February 1994.

As Mr Mogg already explained to you in his letter of 9 July 1997, it is indeed essential for the Commission to be able to investigate matters with which it is concerned as guardian of the Treaty, whilst respecting the confidential nature of such proceedings. In the matter of investigation of infringements, sincere cooperation and a climate of mutual confidence between the Commission and the Member State concerned are required, which allow for both parties to engage in a process of negotiation and compromise with the search for a settlement to a dispute at a preliminary stage.

The Court of First Instance itself considered in Case T-105/95 (*WWF* v *Commission*) 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" (par. 63).

It must also be emphasised that investigation into a possible infringement is still continuing, since the Commission decided to defer sending a reasoned opinion to the British authorities.

I remind you that by way of contrast with the optional exception of the protection of the Commission's interest in the confidentiality of its proceedings, this mandatory exception of protection of public interest does not require a balance of interests. As stated by the Court in the abovementioned case in its paragraph 58, "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".'

Procedure and forms of order sought

20. It was in those circumstances that, by application lodged at the Registry of the Court of First Instance on 9 December 1997, the applicant brought this action.

21. By a document lodged at the Court Registry on 25 May 1998, the Government of the United Kingdom of Great Britain and Northern Ireland applied for leave to intervene in support of the form of order sought by the defendant. By order of the President of the Third Chamber of 7 July 1998, the United Kingdom Government was granted such leave to intervene.

22. Since the applicant did not lodge a reply and the intervener waived his right to lodge a statement in intervention, the written procedure came to an end on 9 September 1998.

23. The applicant claims that the Court should:

- annul the decision of the Commission of 16 May 1997, 9 July 1997 and 18 September 1997 in so far as it relates to refusal of access to the reasoned opinion of the Commission formulated following an investigation into Article 7(3) of the Supply of Beer (Tied Estates) Order 1989 (S.I. 1989 No 2390);

- order the Commission to pay the costs.

24. The Commission claims that the Court should:

- declare the action inadmissible so far as concerns the letters of 16 May 1997 and 9 July 1997;

- dismiss the action;

- order the applicant to pay the costs.

Pleas in law and arguments

Admissibility

25. The defendant states that the only Commission decision covered by Decision 94/90 is that contained in the letter from the Secretary-General dated 18 September 1997. The letters of 16 May and 9 July 1997, signed by the Director General of DG XV, cannot amount to a decision for the purposes of Decision 94/90. It is clear from the wording of Decision 94/90 that the power to decide on applications for a review rests in the first place with the President of the Commission in agreement with the relevant Commissioner. That power may, however, be delegated to the Secretary-General of the Commission. Such delegation took place. Thus, only the abovementioned persons have the power to take a decision on an application for review. The Commission accordingly disputes the admissibility of the action in so far as it relates to a decision of 16 May and 9 July 1997.

Substance

The sole plea, alleging a breach of the fundamental principle of Community law under which access is to be granted to documents of the institutions of the European Union

26. The applicant bases its arguments on the judgment in Case T-1005/95 *WWF UK* v *Commission* [1997] ECR II-313 in which the Court of First Instance stated that the code of conduct constituted 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 recognised in the domestic

legislation of most of the Member States. It also refers to paragraphs 34 to 37 of the judgment of the Court of Justice in Case C-58/94 *Netherlands* v *Council* [1996] ECR I-2169 and to the Opinion of Advocate General Tesauro in the same case (points 14, 15 and 16). According to the applicant, the code of conduct and the *WWF* judgment, interpreted correctly, must mean the following:

- access to documents is a right; a person applying for a document need not invoke a legitimate purpose in support of his request;

- the aim of transparency is an end in itself; the Commission can deny access to documents by relying on the mandatory public interest exception only if it proves that that access could actually 'undermine' the public interest;

- the public interest is 'undermined' only if the impact is significant and adverse;

- under the public interest exception, harm to the interests of a third party or of the general public must be established (the exception does not protect the Commission's interests);

- the code of conduct does not allow the Commission to refuse disclosure of entire categories of documents. Each application must be considered on its merits and the terms of the code must be applied. The Commission is not entitled as a matter of law to create internal rules under which certain categories of documents are confidential *per se*.

27. The applicant states that the Commission's view, reiterated in its letter of 9 July 1997, is misguided on two counts. First, the overriding public interest is that of proper administration. The Commission, in its role as guardian of the Treaty, is required to carry out its functions effectively and in the interests of the European Community. Furthermore, it must be seen to be doing so by the peoples of Europe. In the case of the GBP, there is at least the appearance that the Commission has failed to ensure proper compliance by the United Kingdom with its obligations under the Treaty. The public interest demands that the reasoned opinion, which reflects the formal views of the Commission, be disclosed, because disclosure will ensure full transparency of the decision-making process and generate confidence in the workings of the institutions.

28. According to the applicant, the second ground relied on by the Commission under the public interest exception, namely the confidentiality which the United Kingdom must enjoy with regard to possible infringement proceedings, does not arise in this case. The Commission specifically stated in its letter of 16 May 1997 that the infringement proceedings were to be closed as soon as the proposed amendment entered into force. The Court of First Instance held at paragraph 63 of the *WWF* judgment that Member States subject to investigations which could potentially lead to the opening of an infringement procedure were entitled to expect that the

Commission would respect the confidentiality of their affairs. It will be seen that the confidentiality argument in relation to possible infringement proceedings therefore applies only to proceedings which are in prospect and not to those which have already been brought to a close. In the instant case, the public interest demands the release of the reasoned opinion, which contains the result of the Commission's deliberations.

29. The Commission observes that there is an overall tension inherent in the code of conduct and the exceptions for which it provides. The Commission is under a duty duly to state, in accordance with Article 190 of the Treaty, the reasons which have lead it invoke a particular exception, but a very detailed statement of reasons would necessarily entail consideration of the substance of the documents and risk revealing the very matters which it seeks not to disclose. The Commission considers that the Community judicature, particularly in the *WWF* judgment, has provided it with a number of signposts in that regard. According to the case-law, the Commission is obliged to demonstrate that the relevant circumstances for the public interest exemption exist (*Carvel and Guardian Newspapers*, paragraph 64, and *WWF*, paragraph 58). It is then obliged to establish that the documents at issue are related to those circumstances (*WWF*, paragraph 64). The Commission states that under the code of conduct there is a presumption that, in the circumstances listed, for example on grounds of public security, international relations, monetary stability, court proceedings and inspections and investigations, there would be a risk to the public interest. Furthermore, in *WWF* the Court of First Instance centred on the nature of the interest to be protected in relation to infringement investigations – the confidentiality which Member States are entitled to expect of the Commission – in order to conclude that the Commission could rely on the public interest exception. Finally, the Commission maintains that the public interest exception is applicable to the document in question and was correctly invoked by it.

30. The Commission acknowledges that a person applying for access does not have to show an interest in obtaining the documents requested. As regards the other questions, the Commission disputes the applicant's interpretation of the *WWF* judgment and the code of conduct. It contends that the applicant is mistaken about the import of the code of conduct when it states that the overriding public interest is that of proper administration. According to the Commission, the applicant is seeking to balance the public interest regarding inspections and investigations with another public interest. The Commission points out that the essential difference between the two categories of exceptions is that, where the circumstances substantiating a mandatory exception exist, no balance is to be struck and the institution must refuse access. The existence of relevant circumstances is deemed to outweigh any other interest, including the public interest in transparency or any specific interest of the applicant. The essence of the public interest exception is, in the Commission's view, that proper administration is in fact presumed to be

secured by the very invocation of the exception when the circumstances laid down by the code exist.

31. The Commission disputes the applicant's contention that the public interest exception does not arise in this case. It refers to the *WWF* judgment in which the Court of First Instance specifically stated that documents relating to investigations which could lead to an infringement procedure came under the protection of the public interest and in particular under the notion of inspections and investigations (*WWF*, paragraph 63).

32. As regards the contested document, the Commission points out that there was an investigation into a possible infringement of Community law at the time of the applicant's request and that the said document related to that investigation.

33. So far as concerns the nature of the interest to be protected, the Commission refers to the *WWF* judgment, where the Court pointed out very clearly the nature of the interest to be protected, namely 'the confidentiality which the Member States are entitled to expect of the Commission in such circumstances'. It considers that there is nothing in the grounds of the judgment to support the conclusion that confidentiality applies only to proceedings which are in prospect and not to those which have reached their conclusion. In the instant case, an investigation into an infringement was in progress at the time of the contested decision. The fact that DG XV mentioned the closing of the case in the letter of 16 May 1997 is entirely irrelevant. The *raison d'être* of the Article 169 procedure is to ensure that the Member States comply with Community law. The procedure must therefore be one of winning over, even where the dialogue has reached the more institutionalised stages under Article 169, namely those of a letter of formal notice or even a reasoned opinion. The Member State must be assured that compromises can be made, sensitivities aired and frank views exchanged. That necessary dialogue between the Member State and the Commission would not be best served by subjecting it to the glare of publicity and thus to the vagaries of outside influences. In infringement proceedings the only relationship which matters is that of the Member State and the Commission.

34. The Commission contends that a reasoned opinion, which by definition is a document that 'involves' an infringement procedure, is thus a document which by definition falls within the public interest exception. The reason why that exception is by definition applicable is the confidentiality which is a legitimate expectation and which the Member State is entitled to expect from the Commission when the latter investigates an infringement. Thus, it is not a question of the Commission refusing access to entire categories of documents, but rather of the very nature of the document in question.

35. The Commission considers, finally, that the statement of reasons for the decision was sufficient. It fails to see how its decision could have been more precise without

disclosing the content of the document and thereby depriving the exception of its very purpose.

Virpi Tilli
Judge-Rapporteur