JUDGMENT OF THE COURT OF FIRST INSTANCE (Fifth Chamber)

16 October 2003 (1)

(Action for annulment - Access to documents - Decision 94/90/ECSC, EC, Euratom - Refusal - Authorship rule - Misuse of powers)

In Case T-47/01,

Co-Frutta Soc. coop. rl, established in Padua (Italy), represented by W. Viscardini, M. Paolin and S. Donà, lawyers,

applicant,

v

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

defendant,

APPLICATION for annulment of the Commission's decision contained in the letters of 31 July 2000 from the Directorate-General for Agriculture and 5 December 2000 from the Secretary-General of the Commission, by which access to the documents sought by the applicant in connection with the arrangements for importing bananas was partly refused,

THE COURT OF FIRST INSTANCE

OF THE EUROPEAN COMMUNITIES (Fifth Chamber),

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

Registrar: J. Palacio González, Principal Administrator,

having regard to the written procedure and further to the hearing on 20 March 2003,

gives the following

Judgment
Legal background

The Community rules on access to documents

1.
Following Declaration No 17 on the right of access to information

annexed to the Final Act of the Treaty on European Union signed at Maastricht on 7 February 1992, the Council and the Commission adopted, on 6 December 1993, a Code of Conduct concerning public access to Council and Commission documents (OJ 1993 L 340, p. 41, hereinafter the Code of Conduct) to establish the principles governing access to the documents they hold.

2.
So far as concerns the Commission, it adopted Decision 94/90/ECSC, EC, Euratom of 8 February 1994 on public access to Commission documents (OJ 1994 L 46, p. 58, hereinafter Decision 94/90), which implements the Code of Conduct.

3.
The Code of Conduct provides as follows under the heading General principle:

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

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

4.
The third paragraph of the section headed Processing of initial applications 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.

5.
The circumstances in which an institution may refuse an application

for access to documents are set out in the Code of Conduct, under the heading Exceptions, in the following terms:

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

...

- the protection of commercial and industrial secrecy,

...

- 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.

...

6.
As regards the treatment of applications for public access to Commission documents, Article 2(2) of Decision 94/90 provides:

The ... Director-General ... shall inform the applicant in writing, within one month, whether the application is granted or whether he intends to refuse access. In the latter case the applicant shall also be notified that he has one month in which to apply to the Secretary-General of the Commission for review of the intention to refuse access, failing which he shall be deemed to have withdrawn his initial application.

7.
The Code of Conduct provides also that 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 [now Articles 230 EC and 195 EC] of the Treaty establishing the European Community.

8.
The Treaty of Amsterdam, which entered into force on 1 May 1999, expressly recognised, in Article 255 EC, the right of public access to documents. In accordance with Article 255(2) EC, the Parliament and the Council adopted Regulation (EC) No 1049/2001 of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, which took effect from 3 December 2001 (OJ 2001 L 145, p. 43).

The arrangements for the common organisation of the market in bananas

9.
Council Regulation (EEC) No 404/93 of 13 February 1993 on the common organisation of the market in bananas (OJ 1993 L 47, p. 1) introduced in Title IV, relating to trade with third countries, a common system for imports from third countries which replaced, from 1 July 1993, the various previously existing national arrangements.

10.
In the context of that system, as implemented by Commission Regulation (EEC) No 1442/93 of 10 June 1993 laying down detailed rules for the application of the arrangements for importing bananas into the Community (OJ 1993 L 142, p. 6) and, from 1 January 1999, by Commission Regulation (EC) No 2362/98 of 28 October 1998 laying down detailed rules for the implementation of [Regulation No 404/93] regarding imports of bananas into the Community (OJ 1998 L 293, p. 32), the competent authorities of the Member States are required to notify the Commission each year of the lists of the operators registered with them together with the data relating to the quantities marketed by each of them during a reference period, to the volumes covered by the

applications made by the operators in the current year and to the quantities actually marketed, with the serial numbers of the licences used (see, in particular, Article 4 of Regulation No 1442/93 and Articles 6 and 28 of Regulation No 2362/98), as well as certain quarterly statistical and economic information relating, inter alia, to the import licences (see, in particular, Article 21 of Regulation No 1442/93 and Article 27 of Regulation No 2362/98).

11.
Communication of the lists in question enables the Commission to check the data available to the competent national authorities and, in so far as required, to forward the lists to the other Member States with a view to facilitating the detection or prevention of false claims by operators. On the basis of the data transmitted, the Commission may where appropriate set a single correction or adjustment coefficient to be applied by the Member States to the operators' reference quantities (see Article 4 of Regulation No 1442/93 and Articles 6 and 28 of Regulation No 2362/98).

Facts

12.
The applicant is an Italian cooperative society of banana ripeners which has operated in that sector for about 20 years and which imports bananas from what is called the dollar area. It claims that it learnt through the Italian press of fraudulent imports of bananas into the Community between March 1998 and June 2000, at a reduced tariff, on the basis of false import licences.

13.
The applicant considers itself to have been affected by those imports by reason of serious price distortions caused by additional quantities being put on the Community market, which meant that the tariff quota was exceeded, and submits that the loss suffered would be even greater if it became clear that the imports were made not with false licences but with licences which had been properly issued, but on the basis of false or erroneous reference quantities.

14.
In order to protect its interests the applicant applied, by letter of 27 June 2000, to the Commission's Directorate-General for Agriculture (DG Agriculture) and on the basis of the provisions of the Code of Conduct for access to the following documents:

1. The list of traditional operators showing, for each operator, the quantity of bananas imported during the period 1994-1996 and the respective provisional reference quantity, as well as the serial numbers of the licences used and extracts from the licences used relating thereto.

2. The lists, for 1998 and 1999, of all the operators registered in the Community showing, for each operator, the import licences applied for and the quantities actually imported.

3. The data relating to 1998 and 1999 and, if available, those for the first quarter of the current year 2000, of the quantities of bananas from Ecuador the import of which has been applied for, separately from the quantities actually marketed in the Community.

15.
By letter of 31 July 2000 (hereinafter the letter from DG Agriculture), the Assistant Director-General of DG Agriculture sent the applicant the data relating to paragraph 3 of its application. On the other hand, he refused access to the documents covered by paragraphs 1 and 2 of the application, citing the protection of commercial and industrial secrecy, as well as the protection of confidentiality required by the natural or legal person, or provided for by the legislation of the Member State, that supplied the information. He referred also to the exceptions laid down by the Code of Conduct, to Article 287 EC and to Article 20 of Council Regulation No 17/62 of 6 February 1962, First Regulation implementing Articles [81] and [82] of the Treaty (OJ, English Special Edition 1959-1962, p. 87).

16.
By letter of 1 September 2000 and in accordance with the provisions of the Code of Conduct, the applicant submitted a confirmatory application to the Secretariat-General of the Commission for reconsideration of that position.

17.
By letter of 5 December 2000 (hereinafter the Secretary-General's letter), received by the applicant on 21 December 2000, the Secretary-General informed the applicant that it was not possible to send it the documents sought because of the authorship rule laid down by the Code of Conduct. The Secretary-General's letter reads as follows:

...

Having reconsidered your application, I have, unfortunately, to inform you that it is not possible to send you those documents because of the authorship rule laid down by the Code of Conduct concerning public access to documents adopted on 8 February 1994 by Commission Decision [94/90/ECSC, EC, Euratom], which provides that:

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

Complying with your application would mean giving you access to data relating to individual operators, collected and used by the Member States. Such data, which contain information relating to the reference quantities of the undertakings, to licence applications and to the quantities actually imported by each of them, were transmitted to the Commission in order to ensure compliance with the arrangements governing imports and particularly the detection or prevention of irregularities, especially fraudulent claims by operators, as is provided for by Article 4(5) of [Regulation No 1442/93] and Article 6(2) of [Regulation No 2362/98].

I therefore suggest that you apply to the competent authorities of the Member States directly for copies of the documents you wish to obtain.

Procedure and forms of order sought

18.
The applicant brought this action by application lodged at the Registry of the Court of First Instance on 1 March 2001.

19.
By a separate document lodged at the Registry on the same date, the applicant applied for the proceedings to be expedited under Article 76a of the Rules of Procedure of the Court of First Instance. By decision of 5 April 2001, the Court of First Instance, Fifth Chamber, rejected that application.

20.
Upon hearing the report of the Judge-Rapporteur, the Court of First Instance (Fifth Chamber) decided to open the oral procedure. The parties presented oral argument and replied to the questions put to them by the Court at the hearing on 20 March 2003.

21.
The applicant claims that the Court should:

- annul the Commission's decision contained in the letters from DG Agriculture of 31 July 2000 and from the Secretary-General of the Commission of 5 December 2000;

- order the Commission to pay the costs.

22.
The Commission contends that the Court should:

- declare the application for annulment of the decision contained in the letter from DG Agriculture of 31 July 2000 to be inadmissible;

- dismiss in its entirety the application for annulment of the decision contained in the letter from the Secretary-General of the Commission of 5 December 2000;

- order the applicant to pay the costs.

Admissibility

Arguments of the parties

23.
Without formally raising an objection of inadmissibility, the Commission maintains that the action against the decision contained in the letter from DG Agriculture is inadmissible on the ground that it is not a challengeable act for the purposes of Article 230 EC.

24.
The applicant argues that its action is not intended to seek the annulment separately of the letter from DG Agriculture and of the Secretary-General's letter and accepts that, since the procedure was concluded by the latter, only the annulment of the Secretary-General's decision is to be sought.

25.
However, it maintains that since it became clear during the procedure that there was an earlier decision based on different reasoning inconsistent with that expressed by the Secretary-General, it would have been impossible to challenge the Secretary-General's decision alone, disregarding that of DG Agriculture, because it is that aspect which indicates that there was misuse of powers.

26.
Also, it is in the applicant's interest to seek annulment of the Commission's decision as it emerges from all the replies received, in order to avoid the risk that, if the Court annuls the decision resulting from the Secretary-General's letter, the Commission gives another negative response based on DG Agriculture's reasoning, which would not have been declared unlawful by the Court (see, for example, the facts in Case T-92/98 Interporc v Commission [1999] ECR II-3521, paragraph 54).

27.
At the hearing, the applicant requested that, even if the action concerning the letter from DG Agriculture should be declared inadmissible, the Court should rule, for reasons of procedural economy and effectiveness, on the reasons for refusal relied upon in that letter.

Findings of the Court

28.
It has consistently been held that only a measure the legal effects of which are binding on and capable of affecting the interests of an applicant by bringing about a distinct change in his legal position is an act against which an action for annulment may be brought under Article 230 EC. In the case of acts or decisions adopted by a procedure involving several stages, in particular where they are the culmination of an internal procedure, only measures definitively establishing the position of the institution on the conclusion of that procedure, and not provisional measures intended to pave the way for the final decision, may be the subject of an action for annulment (Case 60/81 IBM v Commission [1981] ECR 2639, paragraph 10, and Case T-277/94 AITEC v Commission [1996] ECR II-351, paragraph 51).

29.
In the present context, it must be noted that under the procedure established by Decision 94/90 the decision of the Secretary-General of the Commission constitutes the final statement of the institution's position on the application for access to documents made by the applicant.

30.
In this case, it is clear from the combined effect of Article 2(2) of Decision 94/90 and the Code of Conduct's provisions on the treatment of confirmatory applications that the response contained in the letter from DG Agriculture was only an initial statement of position, conferring on the applicant the right to request the Secretary-General of the Commission to reconsider the position in question. Under Article 2(2) of Decision 94/90, in the case of refusal, the Director-General's reply constitutes an initial statement of position which shows an intention to refuse access, which can be made the subject of a confirmatory application for review of the intention to refuse access.

31.
Consequently, only the measure adopted by the Secretary-General of the Commission, which is a decision and which entirely replaces the previous statement of position, is capable of producing legal effects such as to affect the interests of the applicant and, therefore, of being the subject of an action for annulment under Article 230 EC.

32.
In addition, the applicant has admitted, in its pleadings and at the hearing, that only the annulment of the Secretary-General's decision can be sought, since the procedure was closed by that statement of position.

33.
It follows that the action is inadmissible in so far as concerns the claim for annulment of the letter from DG Agriculture of 31 July 2000 and, therefore, that the Court need not rule on the reasoning on which DG Agriculture based its initial statement of position, which was not relied upon by the Secretary-General.

Substance

34.
The arguments relied upon by the applicant can be brought together under two pleas in law: first, infringement of the Code of Conduct

adopted by the Commission by Decision 94/90, and secondly misuse of powers.

The first plea in law, alleging infringement of the Code of Conduct adopted by Decision 94/90

35.
The applicant's principal argument is that the authorship rule is not applicable to this case because the documents required were drawn up not by the national authorities, but by the Commission. In the alternative, the applicant submits that, even if the documents required were actually drawn up by the national authorities, the authorship rule is not applicable since it should be strictly construed, in accordance with the general principle of access to documents laid down by the Code of Conduct.

(a) Determination of the author of the documents in question

- Arguments of the parties

36.
The applicant asserts that the Secretary-General's contention that the application concerns documents the author of which is not the Commission but the Member States is mistaken, since the purpose of the application is to obtain the overall lists of the Community's traditional operators, and not the individual lists of each Member State.

37.
First, the applicant maintains that, in the light of the essential tasks entrusted to the Commission in the context of the arrangements for banana imports, it is evident that the Member States have no independent role in establishing the lists of operators and of their

reference quantities, but have the function of assisting the Commission, which is responsible for managing and monitoring the arrangements.

38.
Secondly, in order to exercise those powers of management and monitoring, the Commission must necessarily have an independent list drawn up by itself which brings together, at the Community level, all the information concerning the Community's traditional operators provided by the Member States. That collation is undertaken by the Commission and not the Member States.

39.
If the Commission merely confines itself to receiving the data prepared by the Member States and consolidating it without making any alterations or corrections, it fails in its duty of action and monitoring, on its own initiative, the figures transmitted by the Member States and its decision fixing the adjustment coefficient will rely purely on the diligence of the national authorities. Consequently, given that the Commission does not confine itself to pointing out errors but also intervenes on its own initiative, even if there were no list properly described as being of Community origin it is legitimate to consider that the Commission is the author of the documents in question.

40.
The Commission contends that the authorship rule has been correctly invoked and is fully applicable because the data requested by the applicant in paragraph 1 of its application of 27 June 2000 are in the form of documents drawn up by the Member States. Furthermore, as regards the documents mentioned in paragraph 2 of the application for access, the defendant maintains that there is no document which provides the data requested with the degree of precision required by the applicant and that, in any case, if any did exist, the authorship rule would still apply because it would be in the form of a document drawn up by the Member States.

- Findings of the Court

41.
The applicant disputes the application in this case of the authorship rule because the lists to which access was sought were drawn up not by the Member States but by the Commission.

42.
That raises the question, therefore, whether the documents sought by the applicant are documents drawn up by the Commission or by the Member States. In that respect, a distinction must be drawn between the documents referred to in paragraphs 1 and 2 respectively of the application made by the applicant in its letter of 27 June 2000.

43.
In the first place, in relation to the first series of documents to which access was requested, that is to say the list of traditional operators showing, for each operator, the quantity of bananas imported during the period 1994-1996 and the respective provisional reference quantity, as well as the serial numbers of the licences used and extracts from the licences used relating thereto, the documents sought correspond to those which, under Articles 6(2) and 28(2) of Regulation No 2362/98, the Member States must draw up and notify to the Commission. They are, therefore, documents of which the authors are the Member States.

44.
Secondly, concerning the second series of documents sought, namely, the lists, for 1998 and 1999, of all the operators registered in the Community showing, for each operator, the import licences applied for and the quantities actually imported, the Commission maintained in the proceedings before the Court that it had no such documents, since none of the Member States' documents provided the data in question with the degree of precision required by the applicant, in other words, making reference to each operator individually, and that, in any case, they are documents drawn up by the Member States.

45.
However, it is stated in the second paragraph of the Secretary-General's letter that such data, which contain information relating to the reference quantities of the undertakings, to licence applications and to the quantities actually imported by each of them, were transmitted to the Commission in order to ensure compliance with the arrangements governing imports and particularly the detection or prevention of irregularities. Therefore, since the Commission did not deny in the

contested decision the existence of the documents sought in paragraph 2 of the applicant's application for access, it cannot validly claim at this stage of the proceedings that such documents do not exist.

46.
It is important to note that under Article 28(2)(a) of Regulation No 2362/98 the Member States were to send to the Commission the lists for 1999 of all the registered operators, with a statement of the provisional quantities individually applied for as well as, in accordance with Article 27(c) of that regulation, quarterly data for the total quantities of bananas imported by all the operators. As regards 1998, Article 4(4) and (5) and Article 21 of Regulation No 1442/93 required the Member States to notify to the Commission the lists of all the registered operators, as well as global data concerning the quantities under import licences issued and those relating to licences used, collected on a quarterly national basis, and by categories of operators. It is therefore clear that the second series of documents sought by the applicant also refers to documents drawn up by the Member States.

47.
So far as concerns the question of the collection of such national data in a single computer database - the existence of which the Commission admitted in relation to the first series of documents to which access was sought - it is important to note that, as is apparent from Articles 6 and 28 of Regulation No 2362/98 and from Article 4 of Regulation No 1442/93, the national authorities alone are responsible for establishing and correcting the reference quantities of each operator according to the adjustment coefficient fixed globally by the Commission, since the institution has no power itself to alter the national data notified (see, to that effect, Case T-160/98 Van Parys and Pacific Fruit Company v Commission [2002] ECR II-233, paragraph 65). The Commission confines itself to collecting the data, for the simple purposes of facilitating the tasks of comparison and checking for double counting of the data, but without being able itself to effect alterations, corrections or other treatment, since the appropriate checks or corrections of that data must be requested of the national authorities. Therefore, the collection by the Commission of the data notified by the Member States in relation to the first series of documents sought - and, assuming it is established, in relation to the second series of documents sought - is not enough to deprive the Member States of their authorship of those documents for the purposes of Decision 94/90. Consequently, the Commission was entitled to decide that the authors of the documents for which the applicant sought access were exclusively the competent national authorities of the Member States.

48.
Consequently, the complaint concerning the authorship of the documents referred to in paragraphs 1 and 2 of the applicant's application for access must be rejected.

(b) Whether the authorship rule is to be strictly construed, with the result that it is not applicable to the documents upon which the Community decision-making process is based

- Arguments of the parties

49.
The applicant asserts that if the authors of the documents sought were considered to be the Member States, the authorship rule would not be applicable in this case, because it must be construed strictly and it cannot be relied on in the case of applications for access to the documents of third parties used by the Commission as the basis of the Community decision-making process.

50.
It points out, first of all, that the general principle of the Code of Conduct guarantees access to documents held by the Commission and that its refusal to give access to the documents of third parties which it holds does not appear to be compatible with that principle.

51.
Next, according to settled case-law (Case T-105/95 WWF UK v Commission [1997] ECR II-313 and Case T-188/97 Rothmans v Commission [1999] ECR II-2463) all exceptions to or limitations of the right of access must be construed strictly in order to ensure observance of the principle of transparency of the decision-making process. In the light of that case-law, the Commission is under a duty to allow access to all the documents in its possession on which it has based its decision, especially where such documents are sought by operators whose interests may be harmed by a decision of the Commission. That is the case here, since the Commission has fixed the

adjustment coefficient for the provisional quantities established by the Member States on the basis of the data they provided, which has affected the applicant by reducing its reference quantity.

52.
Consequently, a broad construction of the authorship rule, which would exclude that type of documents from the scope of the Code of Conduct, would be unlawful.

53.
Furthermore, whilst the Court of First Instance has accepted the lawfulness of the authorship rule, it has pointed out that it is precisely where its application may raise doubts as to the authorship of a document that it is important to construe it strictly (Interporc v Commission, cited above, paragraph 70). That principle applies here, given that the documents in question are the result of close cooperation between the Commission and the Member States and that it is impossible to establish which is really the author. The applicant points out that, in that judgment, the Court of First Instance annulled the decision refusing access to the internal records of the Commission, drawn up on the basis of data provided by the Member States in a context comparable to that of the banana sector.

54.
It is absurd, moreover, to suppose that the applicant could obtain the data to which it is entitled by applying to fifteen national administrations. It points out in the reply that it has applied to the Member States and at present has received practically nothing but refusal of access in various forms, usually based on technicalities or national rules on confidentiality.

55.
Finally, it is apparent from the new Regulation No 1049/2001 adopted to implement Article 255 EC that the authorship rule cannot be relied on in order to refuse an application for documents used in the decision-making process even if their provenance is from third parties, since Article 2(3) provides for access for all documents held by an institution, that is to say, documents drawn up or received by it and in its possession, in all areas of activity of the European Union. The applicant argues that even if the new regime does not apply immediately it may be invoked in this case to justify strict construction of the authorship rule, to the effect that the institutions must allow the

widest access to the documents drawn up or received by them in cases where they act as legislator in the widest sense.

56.
The Commission contends that it correctly construed the authorship rule in the contested decision and that the rule so applied is perfectly lawful in the context of the current Community legal order.

- Findings of the Court

57.
It has been held that the authorship rule, which makes an exception to the right of access provided for in Decision 94/90, must be construed and applied strictly so as not to restrict that right of access (see, to that effect, Rothmans v Commission, cited above, paragraph 55, and Case T-191/99 Petrie and Others v Commission [2001] ECR II-3677, paragraph 66).

58.
Nevertheless, the applicant's argument that since the authorship rule must be construed strictly it is not applicable to cases such as this one, where the documents sought are those on which the Commission's decision-making process was based, cannot be accepted.

59.
In the first place, it is appropriate to note that whilst the Code of Conduct laid down the general principle of access to documents it established, by means of the authorship rule, an absolute and unqualified exception for documents authored by a third party.

60.
Secondly, a construction such as that suggested by the applicant would deprive the authorship rule of any useful effect, because almost all third-party documents held by the Commission are the basis of, or connected with, its decision-making process. Therefore, since the Code of Conduct does not provide for any restriction on the application of

that rule, it must be construed as meaning that it is fully applicable to every sort of third-party document to which access is sought, and it is not possible to have different levels of applicability according to whether such documents may affect the commercial player concerned or according to their use by the Commission in its decision-making process.

61.
Thirdly, it is important to make clear that the legal test invoked by the applicant, that of strict construction and application of the authorship rule, is necessary particularly when there are doubts as to the authorship of the document sought. As the Court of First Instance has pointed out, it is precisely where there is a doubt as to the authorship of a document that it is important to construe and apply the authorship rule strictly (Interporc v Commission, cited above, paragraph 70, confirmed on appeal in Case C-41/00 P Interporc v Commission [2003] ECR I-0000). However, as has been held above, in this case there are no doubts in that regard, since the Member States alone are the authors of the documents in question. That case-law cannot therefore be relied upon in this case.

62.
In addition, in relation to the applicant's argument that the Court of First Instance annulled, in Interporc v Commission, the decision refusing access to the internal records of the Commission in a context comparable to that of the banana sector, it is sufficient to point out that in that case the Court of First Instance annulled the Commission's decision refusing access to the internal records drawn up by DG VI on the basis of the statements of the Member and other States in so far as the documents in question were documents emanating exclusively from the Commission, for which it had invoked the exception based on protection of the public interest. In this case, the documents for which the applicant sought access are not, as has been held, internal records analysing national data or lists compiled by the Commission resulting from checking or correcting that data, but simply a collection of the basic documents drawn up and transmitted by the Member States. Since the two cases are not the same, therefore, the applicant cannot rely on Interporc v Commission.

63.
It follows that the strict construction advocated by the applicant under which the authorship rule is not applicable to third-party documents upon which the Community decision-making process is based cannot be upheld.

64.
For the sake of completeness, it is appropriate to note, with regard to the applicant's argument that it is impossible to gain access to the documents sought by applying to the Member States, that those difficulties are, as the Commission correctly maintains, irrelevant as regards the lawfulness of the decision in question. The position taken by the Member States on the information sought is a matter of domestic law and is governed by the restrictions laid down by the relevant national legislation, so that it cannot undermine the correct application by the Commission of the authorship rule laid down by the Community legislature.

65.
Finally, the Court observes that the applicant's argument that Regulation No 1049/2001 can serve to justify a strict construction on the basis of which the rule would not apply in this case cannot be accepted either. Since that regulation entered into force on 3 June 2001 and applied only from 3 December 2001, it is clear that the contested decision, which was adopted on 5 December 2000, had to comply only with the regime laid down by Decision 94/90.

66.
In those circumstances, since the Code of Conduct was the only relevant provision applying to this case at the date on which the Commission took the contested decision, it must be held that it did not act unlawfully in construing and applying the authorship rule in conformity with the legislation in force at the time of the facts.

67.
Therefore, the first plea in law, alleging infringement of the Code of Conduct adopted by Decision 94/90, must be rejected as unfounded.

The second plea in law, alleging misuse of powers

Arguments of the parties

68.
The applicant claims that access to the documents was refused for purposes other than those stated.

69.
In the first place, the inconsistent reasoning adopted by the Commission in its letters is a clear indication of misuse of powers.

70.
Secondly, with regard to the real purpose of the rejection, the applicant first of all claims that the Secretary-General's refusal, together with the invitation to apply to each Member State to obtain the list of Community operators, appear to disregard the power conferred on the Commission by the Council in relation to the management and monitoring of the Community market in bananas in order to evade any responsibility and pass it to others. By its refusal the Commission is also seeking to deprive the applicant of the opportunity to check the attribution and distribution of banana import licences as well as their actual use and, by the same token, the opportunity to scrutinise the decision-making process followed by the defendant.

71.
The Commission contends that this plea in law should be rejected as wholly unfounded. In particular, the sole purpose of the Secretary-General's letter was to reply to the applicant's application for reconsideration, and it in no way seeks to disregard the powers of the Commission with regard to the arrangements for banana imports.

Findings of the Court

72.
According to settled case-law, a measure is vitiated by misuse of powers only if it appears on the basis of objective, relevant and consistent evidence to have been taken with the exclusive, or at least

the main, purpose of achieving an end other than that stated or evading a procedure specifically prescribed by the Treaty for dealing with the circumstances of the case (Case C-285/94 Italy v Commission [1997] ECR I-3519, paragraph 52, and Case T-143/89 Ferriere Nord v Commission [1995] ECR II-917, paragraph 68).

73.
In this case, as regards the applicant's argument that the inconsistency between the two sets of reasoning relied on in order to refuse its application is a clear indication of the misuse of powers, the Court notes that, as has been previously declared, the system established by the Code of Conduct and put in place by Decision 94/90 makes refusal to grant access to documents subject to a procedure involving two applications, in which only the Secretary-General's confirmatory decision constitutes the institution's final statement of position. Therefore, any discrepancy in the reasoning stated by the Commission in the course of such a procedure cannot be regarded as an indication of misuse of powers since the review procedure conceived by that provision is intended precisely to enable the Secretary-General to reconsider the matter, without constraint from previous statements of position by the competent services. If the Secretary-General could not base his decision on reasoning different to that stated by the competent service, the procedure would, as the Commission correctly argues, lose all purpose.

74.
Furthermore, it must be noted that the applicant has adduced no evidence to show that, as it submits, the Commission's refusal pursued purposes other than those stated in the contested decision.

75.
Therefore, it must be held that the applicant has adduced no objective, relevant and consistent evidence to substantiate its allegation of misuse of powers by the Commission.

76.
Consequently, the second plea in law must be rejected and, therefore, so must the action as a whole.

Costs

77.
Under Article 87(2) of the Rules of Procedure of the Court of First Instance, the unsuccessful party must be ordered to pay the costs if they have been applied for by the successful party. Since the applicant has been unsuccessful, it must be ordered to pay its own costs together with those of the defendant, in accordance with the form of order sought by the latter.

On those grounds,

THE COURT OF FIRST INSTANCE (Fifth Chamber)

hereby:

1. Dismisses the application for annulment of the decision contained in the letter from DG Agriculture of 31 July 2000 as inadmissible;

2. Dismisses the rest of the action as unfounded;

3. Orders the applicant to bear its own costs, as well as those of the Commission.

García-Valdecasas
Lindh
Cooke

Delivered in open court in Luxembourg on 16 October 2003.

H. Jung

R. García-Valdecasas
Registrar

President