OPINION OF ADVOCATE GENERAL LÉGER

delivered on 10 July 2003 [1]

1. This appeal is brought by Mr Olli Mattila against the judgment of the Court of First Instance of the European Communities (Fifth Chamber) of 12 July 2001 [2] dismissing his action against the decisions of the Commission and the Council, of 5 and 12 July 1999 respectively, to refuse him access to certain documents. [3]

2. In this case Mr Mattila complains in particular that the Court of First Instance disregarded his right of partial access to the documents in question, as laid down in the case-law.

I — Legal background

3. The public's right of access to documents of the Community institutions has been the subject of progressive recognition.

4. At first, the right was stated in declarations of a political nature. The first of these was Declaration No 17 annexed to the Final Act of the Treaty on European Union signed in Maastricht on 7 February 1992, on the right of access to information, [4] according to which 'transparency of the decision-making process strengthens the democratic nature of the institutions and the public's confidence in the administration'. That declaration was followed by several other declarations of the Heads of State or Government of the Member States at the European Councils held in 1992 and 1993, according to which the Community should be more open [5] and citizens should have 'the fullest possible access to information'. [6]

5. On 6 December 1993 the Council and the Commission approved a Code of Conduct [7] concerning public access to Council and Commission documents. The Code of Conduct lays down the principles which those institutions must implement in order to ensure access to the documents held by

1 — Original language: French.

2 — Case T-204/99 *Mattila* v *Council and Commission* [2001] ECR II-2265 ('the contested judgment').

3 — 'The contested decisions'.

4 — OJ 1992 C 191, p. 95, 101.

5 — European Councils of Birmingham (Bull. EC 10-1992, p. 9) and Edinburgh (Bull. EC 12-1992, p. 7).

6 — European Council of Copenhagen (Bull. EC 6-1993, p. 16, point I.22).

7 — OJ 1993 L 340, p. 41 ('the Code of Conduct').

them. It states the general principle that the public are to have the widest possible access to the documents held by those institutions.

6. It also provides for exceptions which may be relied on to block the right of access. Thus, according to the Code of Conduct, the 'institutions will refuse access to any document whose disclosure could undermine... the protection of the public interest (public security, international relations, monetary stability, court proceedings, inspections and investigations)...'.

7. To implement the Code of Conduct, the Council and the Commission respectively adopted Decision 93/731/EC [8] and Decision 94/90/ECSC, EC, Euratom. [9]

8. The rules in Decisions 93/731 and 94/90 are essentially the same. With respect to the handling of applications for access, they provide that the applicant is to be informed within one month either that his application has been approved or that the institution intends to reject it. In the latter case, the applicant may, within one month, make a confirmatory application. The institution has another period of one month in which to respond to the confirmatory application. If the institution refuses access, it must notify the applicant of its decision in writing as soon as possible. Its decision must state the grounds on which it is based and indicate the possible means of appeal.

9. As regards the exceptions to the right of access to documents, Decision 93/731 takes over, in Article 4(1), the exceptions provided for in the Code of Conduct relating to the protection of the public interest. Decision 94/90 for its part states in Article 1 that the Code of Conduct is adopted and annexed to the decision.

10. In its judgment of 19 July 1999 in *Hautala* v *Council*, [10] the Court of First Instance held that Article 4(1) of Decision 93/731 is to be interpreted as meaning that the Council is obliged to examine whether partial access should be granted to documents covered by one of the exceptions mentioned in that provision, that is, access limited to the items of information in the document not themselves covered by the exception. [11] It considered that, since the institution concerned had not made such an examination, as it considered that the right of access applied only to documents as such and not to the information contained in them, the decision to refuse access to the

8 — Council Decision of 20 December 1993 on public access to Council documents (OJ 1993 L 340, p. 43).

9 — Commission Decision of 8 February 1994 on public access to Commission documents (OJ 1994 L 46, p. 58).

10 — Case T-14/98 [1999] ECR II-2489.

11 — Paragraph 87.

documents in question was vitiated by an error of law and had to be annulled. That interpretation was expressly confirmed by the Court of Justice in its judgment of 6 December 2001 in *Council* v *Hautala*. [12]

II — Facts

11. In March 1999 Mr Mattila applied for access to five documents of the Commission and six of the Council. They concern the European Union's relations with the Russian Federation and Ukraine and the negotiations to be carried on with the United States of America on relations with Ukraine. Inasmuch as they had in part been drawn up by the Council and the Commission jointly, the two institutions coordinated their response to the applications.

12. By letter of 19 April 1999, the Council granted Mr Mattila's application as regards one of the documents and rejected it as regards the other five. By letter of the same date, the Commission refused access to the five documents in its possession. Both institutions based their refusal on the protection of the public interest in the field of international relations.

13. By letters of 30 April 1999, Mr Mattila made a confirmatory application to each institution. The Commission and the Council confirmed their refusal by the contested decisions, on the ground that the documents in question (apart from one of the ones requested from the Commission which could not be identified) were covered by the mandatory exception of the protection of the public interest in the field of international relations.

14. On 23 September 1999 Mr Mattila brought an action before the Court of First Instance against the contested decisions.

III — The contested judgment

15. The Court of First Instance gave the following account of the applicant's pleas in law:

'28 In his application, the applicant puts forward five pleas in law in support of his action: first, manifest error of assessment in interpreting the exception concerning the protection of international relations, second, breach of the principle of proportionality in that partial access to the documents in question has not been granted or even

12 — Case C-353/99 P [2001] ECR I-9565, paragraphs 27 and 31.

considered, third, breach of the principle that an application for access to documents must be considered with regard to each individual document, fourth, failure in the duty to state reasons and, fifth, failure to take account of his private interest in having access to the documents.

16. The Court of First Instance dismissed as manifestly inadmissible the pleas alleging breach of the 'principle of independent review', misuse of powers, and failure to comply with a duty of cooperation incumbent on the institutions. It held that those pleas had not been raised directly or indirectly in the application and did not bear a close relationship with the other pleas in the application. They therefore constituted new pleas. Moreover, it had not been proved or even alleged that those pleas were based on points of law or fact that had arisen during the course of the proceedings.

29 In his reply, the applicant adds two pleas, which he presents in the following manner:

— the contested decisions violate the "principle of independent review" by the Council and the Commission...;

— the contested decisions are unlawful because of a misuse of powers... .

17. On the substance, the Court of First Instance considered the first and second pleas together. These alleged manifest error of assessment in interpreting the exception concerning the protection of international relations, and breach of the principle of proportionality in that partial access to the documents had not been granted or even considered.

30 At the hearing, the applicant put forward a further plea for annulment by which he alleged that the defendant institutions had failed in their duty of cooperation in that they rejected, in part, his applications on the ground that they lacked precision, without making any attempt to identify and locate the documents in question.'

18. On the first plea, it observed that it was common ground that the documents at issue contained information on the European Union's position as regards its relations with the Russian Federation and Ukraine and on negotiations to be held with the United States of America on the subject of Ukraine. It said that the documents to which access had been requested had been drafted in the context of inter-

national negotiations in which the interests of the European Union, viewed from the perspective of its relations with non-member countries, particularly the Russian Federation, Ukraine and the United States of America, were at stake.

19. It concluded that the defendant institutions had not made a manifest error of assessment in deciding that disclosure of the documents at issue was likely to undermine the public interest in the field of international relations.

20. On the second plea, the Court of First Instance held, in paragraph 74 of the contested judgment, that the defendant institutions had not infringed the principle of proportionality by failing to grant partial access to the documents at issue. It based this conclusion on the following grounds:

'66 The applicant also argues that, following what is stated in the judgment in *Hautala* v *Council*, cited above, the institutions ought to have considered whether to grant him at least partial access to the documents in question. In that case, the Court of First Instance held that the exception concerning the protection of the public interest must be interpreted in light of the principle of the right to information and the principle of proportionality. The Court found that the Council was thus obliged to examine whether partial access should be granted to the documents requested, that is, to the information not covered by the exceptions (see *Hautala* v *Council*, paragraph 87).

...

68 It is clear from the judgment in *Hautala* v *Council* that the principle of proportionality permits the Council and the Commission, in particular cases where the volume of the document or the passages to be removed would give rise to an unreasonable amount of administrative work, to balance the public's interest in gaining access to those fragmentary parts against the burden of work so caused (paragraph 86 of the judgment). The Council and the Commission could thus, in those particular cases, safeguard the interests of good administration.

69 Similarly, whilst, in accordance with *Hautala* v *Council*, the Council and the Commission are required to consider whether access ought to be granted to information not covered by the exceptions, the principle of sound administration requires that the duty to grant partial access should not result in an administrative burden which is disproportionate to the applicant's interest in obtaining that information. In light of this, it is clear that the Council and the Commission are in any event entitled to refuse partial access in cases where

examination of the documents in question shows that partial access would be meaningless because the parts of the documents that could be disclosed would be of no use to the applicant.

70 During the course of these proceedings, the Council and the Commission have asserted that partial access was not possible in this case, because the parts of the documents to which access could have been granted contained so little information as to be of no use to the applicant. At the hearing, the Council submitted that the documents in question cannot generally be taken individually, and that their component parts are not easily removable.

71 The defendant institutions do not therefore dispute that they failed to consider the possibility of granting partial access to the documents in question. Nevertheless, having taken account of the explanations they have proffered and in view of the nature of the documents in question, it seems that, had they done so, they would not in any event have agreed to partial access. Given the particular circumstances of the present case, the fact that the defendant institutions failed to consider the question of granting partial access had no effect on the outcome of their examination (see, to that effect, Case T-75/95 *Günzler Aluminium* v *Commission* [1996] ECR II-497, paragraph 55, and Case T-106/95 *FFSA and Others* v *Commission* [1997] ECR II-229, paragraph 199).

72 In this connection, it is appropriate to stress the fact already mentioned that the documents at issue were prepared in the context of negotiations and contain information on the European Union's position as regards its relations with Russia and Ukraine and on negotiations to be held with the United States on the subject of Ukraine...

73 Secondly, the Council's assertion that the documents in question cannot easily be taken separately and that their component parts are not easily removable is uncontested...'

21. The Court of First Instance then rejected as unfounded the third and fourth pleas, which alleged breach of the principle that an application for access to documents must be considered with regard to each individual document, and breach of the duty to state reasons.

22. Finally, the Court of First Instance held that the fifth plea, alleging failure to take account of the applicant's private interest in having access to the documents, was irrelevant. It observed that any person may request access to any Council or Commission document without being required to give reasons for the request, and that a balancing of interests is required only when those institutions are considering an application for access to documents relating to their deliberations, which was not the case in this instance.

IV — The appeal

A — *Preliminary observations*

23. The application by which Mr Mattila brought the appeal does not contain any formal claim for relief, although under Article 112(d) of the Rules of Procedure of the Court of Justice that document must include the form of order sought by the appellant. However, the Court's case-law attaches less importance to formal compliance with that requirement than to compliance with its purpose, which is to specify the subject-matter of the application so as to avoid the Court giving a ruling *infra* or *ultra petita*. Thus the Court takes the view that, in so far as it is easily identifiable, an implied form of order may be accepted. [13]

24. In the present case, an examination of the appeal shows that it expressly states that it seeks annulment of the contested judgment. Further, it is clear from the statements at page 2 of the appeal that Mr Mattila is requesting the Court:

'(1) ... to annul the decision of the Council and the Commission which the present application concerns;

(2) Invite the Council and the Commission to reconsider their position and give access to the applicant to the requested documents listed in the application letters;

(3) To give access, at least partial access, to such documents after cancelling or editing the sections which may justifiably qualify as liable to prejudice the international relations of the European Community;

13 — See Case 8/56 *ALMA* v *High Authority* [1957] ECR 95, at 100, and Case 80/63 *Degreef* v *Commission* [1964] ECR 391, at 408. See also the order in Case C-388/93 *PIA HiFi* v *Commission* [1994] ECR I-387, paragraph 10.

(4) To order jointly the Council and the Commission to pay the costs...'.

25. I therefore conclude that the appeal may be regarded as complying with the formal requirements of Article 112(d) of the Rules of Procedure.

26. In support of his appeal, Mr Mattila submits that the Court of First Instance applied Community law incorrectly, in particular Decisions 93/731 and 94/90. He relies on the following eight pleas in law:

(1) Manifest error of assessment in interpreting the exception concerning the protection of international relations,

(2) Breach of the principle of proportionality in that partial access to the documents in question has not been granted or even considered,

(3) Breach of the principle that an application for access to documents must be considered with regard to each individual document,

(4) Failure in the duty to state reasons,

(5) Failure to apply objectivity and equality in considering the appellant's interest in having access to the documents,

(6) Breach of the duty of independent review,

(7) Misuse of power,

(8) Failure to comply with the duty to cooperate.

27. The Council submits that the appeal is manifestly inadmissible in so far as the appellant asks the Court to give directions to the institutions or put itself in their place. The Council adds that, for the rest, it leaves it to the Court to assess whether the appeal meets the requirements of the case-law according to which an appeal cannot be directed merely at re-examination of the application submitted to the Court of First Instance. In the present case, it submits, the appellant essentially confines himself to repeating the arguments previously submitted to that Court.

28. The Commission considers that the appeal is clearly and wholly inadmissible, as it seeks a re-examination of the original application. In the alternative, the Commission submits that the second and third heads of claim are manifestly inadmissible.

B — *Admissibility*

(1) Admissibility of the second and third heads of claim [14]

29. Mr Mattila asks the Court, in his second head of claim, to invite the Council and the Commission to reconsider their position and grant him access to the documents applied for, and, in his third head of claim, to grant him at least partial access to the documents in question, after deleting passages regarded as liable to harm the international relations of the European Community.

30. I share the institutions' view as to the inadmissibility of these claims. Under Article 233 EC it is for the institution whose act has been declared void or whose failure to act has been declared contrary to the Treaty to take the necessary measures to comply with the Court's judgment. The Court and the Court of First Instance have consistently concluded from that provision that it is not for them, when they exercise judicial review of legality on the basis of Article 230 EC, to take the place of the Community institutions by specifying in the operative parts of their judgments the measures needed to comply with those judgments, or to issue directions to those institutions. [15] That limitation also applies in the same terms to the Court in the context of an appeal. [16] It also applies in the context of reviewing the lawfulness of decisions of the Community institutions concerning access to documents. [17]

31. The appellant's second and third heads of claim are therefore inadmissible.

(2) Admissibility of the pleas in law in the appeal

32. Contrary to the Commission's view, I consider that the appeal partially complies

14 — See point 24 above.

15 — See Case 53/85 *AKZO Chemie* v *Commission* [1986] ECR 1965, paragraph 23; Case C-199/91 *Foyer culturel du Sart-Tilman* v *Commission* [1993] ECR I-2667, paragraph 17; Joined Cases T-374/94, T-375/94, T-384/94 and T-388/94 *European Night Services and Others* v *Commission* [1998] ECR II-3141, paragraph 53; and Case T-126/99 *Graphischer Maschinenbau* v *Commission* [2002] ECR II-2427, paragraph 17.

16 — See Case C-5/93 P *DSM* v *Commission* [1999] ECR I-4695, paragraph 36.

17 — See the order in Case T-106/99 *Meyer* v *Commission* [1999] ECR II-3273, paragraph 21.

with the requirements of the case-law on admissibility, so that it cannot be declared manifestly and wholly inadmissible. It should be recalled what those requirements are.

33. They derive from the principle that the purpose of an appeal is to contest the way in which the Court of First Instance gave judgment on the application before it, not to obtain a mere re-examination of the application, which, under Article 49 of the EC Statute of the Court of Justice, falls outside the jurisdiction of the Court. Thus, according to settled case-law, it follows from Article 225 EC, the first paragraph of Article 51 of the EC Statute of the Court of Justice and Article 112(1)(c) of the Rules of Procedure that an appeal must indicate precisely the contested elements of the judgment which the appellant seeks to have set aside, and the legal arguments specifically advanced in support of the appeal. [18] An appeal which merely repeats or reproduces verbatim the pleas in law and arguments submitted to the Court of First Instance, including those which were based on facts expressly rejected by that Court, does not therefore comply with the requirements of the above provisions as to the explanations to be given. [19]

34. However, where an appellant challenges the interpretation or application of Community law by the Court of First Instance, the points of law examined at first instance may be discussed again in the course of an appeal. [20] If an appellant could not thus base his appeal on pleas and arguments already relied on before the Court of First Instance, the appeal procedure would be deprived of part of its purpose. [21]

35. In the present case, the way the appeal is presented is admittedly awkward, in that the appellant states that in his appeal he 'relies on and repeats all his arguments advanced in the Court of First Instance' and that 'in this brief those arguments are not repeated'. [22] It may also be seen that, as regards the sixth to eighth pleas, which the Court of First Instance held to be inadmissible, the appellant confines himself to asserting that they expand upon the pleas made in the original application and that they bear a close relationship to those pleas, without providing the slightest explanation to support those assertions. The same is true of the third and fourth pleas, in respect of which the appellant states that he disagrees with the Court of First Instance's reasoning, without advancing any argument to support that challenge.

18 — See *inter alia* Case C-352/98 P *Bergaderm and Goupil* v *Commission* [2000] ECR I-5291, paragraph 34, and Case C-248/99 P *France* v *Monsanto and Commission* [2002] ECR I-1, paragraph 68.

19 — See *inter alia* the order in Case C-174/97 P *FFSA and Others* v *Commission* [1998] ECR I-1303, paragraph 24.

20 — See Case C-210/98 P *Salzgitter* v *Commission* [2000] ECR I-5843, paragraph 43.

21 — See Case C-41/00 P *Interporc* v *Commission* [2003] ECR I-2125, paragraph 17 and the case-law cited there.

22 — Page 2.

36. However, a close reading of the appeal shows that in the first, second and fifth pleas in law the appellant calls into question the Court of First Instance's assessment on points of law and that the appeal contains a precise indication of the elements of the contested judgment which are criticised and of the arguments founding the claim for the judgment to be set aside.

37. Thus in his first plea in law the appellant contests the Court of First Instance's conclusion in paragraph 65 of the contested judgment that the defendant institutions did not make a manifest error in considering that disclosure of the documents at issue was liable to harm the public interest in the field of international relations. He bases his argument on a comparison of the documents at issue with those at issue in *Council* v *Hautala*.

38. In his second plea the appellant contests the Court of First Instance's conclusion in paragraph 71 of the contested judgment that, in the particular circumstances of the case, the fact that the defendant institutions failed to consider the possibility of granting partial access had no effect on the outcome of their assessment. He also submits that the ground stated in paragraph 70 of the contested judgment, namely that the parts of the documents to which partial access could have been granted contained so little information as to be of no use to him, is wrong in law in view of the fundamental right of access to documents, as described in my Opinion in *Council* v *Hautala*. He also submits that in paragraph 73 of the contested judgment the Court of First Instance disregarded the burden of proof, where access to documents is concerned, as to whether or not extracts could be easily removed from the documents.

39. Finally, in the fifth plea in law, it is submitted that the Court of First Instance erred in law in considering that the appellant had applied for access to the documents in question in his private interest. According to the appellant, it is of no importance, in the light of *Hautala* v *Council*, whether the application comes from a Member of the European Parliament or from a person against whom a court has ruled in Finland. The appellant submits that the private reasons for an application can only strengthen it, not weaken it. He relies on the equality of the citizens of the Union.

40. In the light of the above, I consider that the first, second and fifth pleas in law are admissible.

C — *Substance*

41. I shall begin by examining the second plea in law. In this plea the appellant

essentially complains that the Court of First Instance disregarded his right to partial access to the documents at issue, in that it did not annul the contested decisions, although the Commission and the Council had not considered the possibility of granting him such access.

(1) Breach of the right to partial access

(a) Arguments of the parties

42. In support of this plea, the appellant puts forward two complaints. First, he contests the Court of First Instance's conclusion that the fact that the defendant institutions failed to consider the possibility of granting partial access did not, in the light of the explanations provided by them and the nature of the documents at issue, have any effect on the outcome of their assessment. Second, he criticises the Court of First Instance for accepting that the refusal of partial access could be justified by the fact that the parts of the documents to which access could have been given 'contained so little information as to be of no use to the applicant' and on the ground that 'the documents in question cannot easily be taken separately and... their component parts are not easily removable'.

43. The Council submits that, while as a general rule it is for an applicant to assess whether the passages communicated are of use to him, there may be objective factors from which it is clear that partial communication of a document could not provide him with any information that he does not already possess. In the present case, the information would have been limited to the dates, titles and subjects of the documents, which Mr Mattila already knew as a result of the Council's answer to his request. Moreover, Mr Mattila had stated, in points 22 and 23 of his reply before the Court of First Instance, that he had a 'certain knowledge' of the documents asked for because of his work in the Finnish Ministry of Foreign Affairs or because of his having taken part in the Council's working group on Russia and Eastern Europe, and had given a fairly detailed description of their content. It would be absurd and contrary to the principles of sound administration and proportionality to disclose edited versions of the documents consisting almost entirely of blank pages.

44. According to the Council, my Opinion in *Council* v *Hautala* is not relevant in the present case, because it concerned the general question of partial access to documents, whereas in the contested judgment the Court of First Instance addressed solely the question whether the fact that the institutions did not consider granting partial access had had an effect on the decision to refuse access altogether. In the light of the information before the Court of First Instance on the content of the documents at issue, that Court cannot be criticised on this point.

45. Finally, the contested judgment does not call into question the *Hautala* v *Council* judgment, which says that the Council is obliged to consider whether partial access may be granted to the items of information not covered by an exception. In accordance with the case-law, the Court of First Instance confined itself to examining whether the error of law had affected the outcome of the examination by the institution concerned. It rightly concluded that it had not, and that the contested decisions should be upheld.

46. According to the Commission, the Court of First Instance did not disregard the principle of proportionality in the circumstances of the case. It specifically accepted the appellant's argument that the institutions ought to have considered whether to grant him at least partial access to the documents in question. It confirmed and applied the analysis in *Hautala* v *Council*, both as regards the principle of proportionality and as regards the safeguarding of the interests of good administration.

(b) Assessment

(i) The first complaint

47. It is common ground that the Commission and the Council, at the time of adoption of the contested decisions, did not consider the possibility of granting partial access to the documents at issue because they took the view that the Code of Conduct and Decisions 94/90 and 93/731 did not impose such an obligation on them. It is also not contested by those institutions in the context of this appeal that, in accordance with the interpretation of the right of access to documents made by the Court of First Instance in *Hautala* v *Council* and confirmed by the Court of Justice, their interpretation was wrong, so that they should have considered that possibility. As the Court of First Instance rightly said in paragraph 67 of the contested judgment, while the judgment in *Hautala* v *Council* had not yet been delivered when the contested decisions were adopted, that judgment clarified the extent of a pre-existing right, namely the right of access to documents held by the Council and the Commission as provided for in the Code of Conduct implemented by those two institutions in Decisions 93/731 and 94/90.

48. It follows that the contested decisions are vitiated by an error of law.

49. The question which arises in the present appeal is whether the Court of First Instance was entitled to hold that, 'having taken account of the explanations [the defendant institutions] have proffered' during the judicial proceedings and 'in view of the nature of the documents in question', that error of law did not justify annulling the contested decisions, as it had had no effect on the outcome of the examination by the institutions.

50. Contrary to the defendant institutions, I do not think that the Court of First Instance's assessment can be approved, for the following reasons.

51. First of all, the Court of First Instance could not, in my view, base itself on the explanations offered by the Commission and the Council during the judicial proceedings with the aim of showing that partial access would not have been possible in this case, when those institutions had not considered the possibility of such access in the contested decisions.

52. It should be recalled that, according to the Court's settled case-law, in the context of an application for annulment under Article 230 EC the lawfulness of a Community act must be assessed on the basis of the facts and the law as they stood at the time of its adoption. [23] This rule prevents the court from taking into account circumstances which arise subsequent to the act. It follows that, in the same way as the rule prevents an applicant from challenging the lawfulness of an act by relying on points of fact or law subsequent to that act, [24] it likewise prevents the unlawfulness of the act from being covered or regularised afterwards by the author of the act.

53. To that extent, the rule is intended to ensure that the European Community functions as a Community of law. Its aim is that the institutions should exercise their powers in compliance with the provisions of law, by ensuring that if the contested act is unlawful, that entails its nullity. It is thus by virtue of the principle of legality that a decision must be assessed at the date on which it was taken.

54. While the Court has accepted that, in very limited conditions, that rule may be departed from in the case of a formal or procedural error and that such errors affecting the external legality of an act may be regularised during the judicial proceedings, [25] I cannot find any similar

23 — See Joined Cases 15/76 and 16/76 *France* v *Commission* [1979] ECR 321, paragraph 7, and Case C-449/98 P *IECC* v *Commission* [2001] ECR I-3875, paragraph 87.

24 — See, for example, Case 225/81 *Geist* v *Commission* [1983] ECR 2217, paragraph 25, and Case T-252/97 *Dürbeck* v *Commission* [2000] ECR II-3031, paragraph 97 and the case-law cited there.

25 — In staff cases, the Court has accepted that explanations given in the course of the proceedings may, in exceptional cases, render devoid of purpose a plea that insufficient reasons were given, so that it no longer justifies annulment of the contested decision (Joined Cases 64/86, 71/86 to 73/86 and 78/86 *Sergio and Others* v *Commission* [1988] ECR 1399, paragraph 52 and the case-law cited there). It has also been held that reasoning the beginnings of which are set out in the contested measure may be enlarged upon and clarified during the proceedings (Case T-16/91 RV *Rendo and Others* v *Commission* [1996] ECR II-1827, paragraph 55). However, in the latter case, this is not regularisation in the strict sense, that is to say, the correction of a pre-existing illegality, since the act did in fact originally contain reasoning in accordance with Article 253 EC. As regards the right to a fair hearing, the Court held in Case 85/76 *Hoffmann-La Roche* v *Commission* [1979] ECR 461, paragraph 15, that if irregularities have been put right during the proceedings before the Court they do not necessarily lead to the annulment of the contested decision 'in so far as remedying them at a later stage has not affected the right to be heard'. However, that decision remains an isolated case, and an infringement of the right to a fair hearing cannot, in principle, be the subject of regularisation at a later stage (Case C-51/92 P *Hercules Chemicals* v *Commission* [1999] ECR I-4235, paragraph 78). It is true that the Court ascertains according to the particular circumstances of each case whether, in the absence of the irregularity, the procedure could have reached a different outcome (ibid., paragraph 82). That decision does not, however, mean that the Court accepts subsequent regularisation of a breach of the right to a fair hearing. See, on the problem of regularisation, Ritleng, D., *Le contrôle de légalité des actes communautaires par la Cour de justice et le Tribunal de première instance des Communautés européennes*, thesis, Strasbourg (points 121 to 128).

exception in the case-law concerning internal legality. Thus, when the Court considered that an error affecting the internal legality of a decision should not lead to its annulment, this was in a situation where that decision was also founded on another ground which proved sufficient to justify its legality.[26] In such a case, the error is declared to have no effect on the legality of the decision at issue because that decision in itself, that is, as it appeared when it was adopted, contained sufficient reasoning to justify its legality. To that extent, the plea of error of law in question is of no effect.[27]

55. This analysis also holds good with respect to the judgments in *Günzler Aluminium* v *Commission* and *FFSA and Others* v *Commission*, to which the Court of First Instance refers in paragraph 71 of the contested judgment. In those two judgments the Court of First Instance based its conclusion that the error of law in the contested decision had not had any effect on the outcome of the assessment by the institution on elements in the reasoning of that decision.[28]

56. However, in the contested judgment, the Court of First Instance based its assessment that the failure to consider the possibility of granting partial access had not affected the outcome of the assessment by the two institutions on elements which were produced by those institutions during the judicial proceedings and did not appear in the contested decisions. By so doing, the Court of First Instance accepted regularisation after the event of the error of law vitiating those decisions. Such a practice is contrary to the principle of legality, which requires that an unlawful act should be annulled.

57. Moreover, to accept that practice would amount to seriously reducing the effectiveness of the right of partial access to documents laid down in the Court's case-law, since the institutions could dispense with consideration of partial access by taking the view that, should the applicant bring an action, they could always regularise that omission in the course of the

26 — See Case 312/84 *Continentale Produkten Gesellschaft* v *Commission* [1987] ECR 841, paragraph 21; Case C-169/84 *CdF Chimie AZF* v *Commission* [1990] ECR I-3083, paragraph 16; and Case C-86/89 *Italy* v *Commission* [1990] ECR I-3891, paragraph 20.

27 — See *Italy* v *Commission*, paragraph 20.

28 — In *Günzler Aluminium* v *Commission*, which concerned the recovery after the event of import duties, the Court of First Instance held that the Commission's error of law in the decision at issue was purely formal, since the provision applied by the Commission and the applicable provision pursued the same aim and laid down the same conditions. In *FFSA and Others* v *Commission*, the Court of First Instance gave judgment on an application brought against a decision of the Commission on a tax advantage granted by the French Government to La Poste. It found that the advantage in question constituted State aid within the meaning of Article 87(1) EC which was compatible with the common market under Article 86(2) EC. It considered that the Commission's assessment in the decision at issue, namely that under Article 86(2) EC the measure in question did not constitute State aid, had had no effect on the outcome of the examination of the aid in question and should not entail the annulment of the contested decision (paragraph 199).

proceedings. That seems to me to be all the more unjustified in that the right of partial access acknowledged in the case-law has been expressly enshrined by the legislature in Regulation (EC) No 1049/2001 of the European Parliament and of the Council, [29] which has replaced Decisions 93/731 and 94/90.

58. As to the nature of the documents in question, also referred to in paragraph 71 of the contested judgment, the Court of First Instance could not conclude from that that the failure to consider the possibility of granting partial access had had no effect on the assessment of the institutions in the contested decisions. First, it is precisely when the documents are covered by an exception relating to the protection of the public interest and are of a 'sensitive' character, as the Court of First Instance stated in paragraph 72 of the contested judgment, that the question arises of the possibility of granting partial access. Second, it is for the institutions to assess whether partial access is possible, and the Court of First Instance cannot substitute its assessment for theirs.

59. Next, the conclusion reached by the Court of First Instance in the contested judgment seems to me to be open to criticism because it deprives the applicant of the procedural guarantees surrounding the examination of an application for access and of his right to a fair hearing.

60. Under Articles 230 EC and 231 EC, if an action brought against a decision on the ground that it is vitiated by an error of law is well founded, the decision in question must be declared void. As I have observed, under Article 233 EC, it is then for the institution whose decision has been declared void to take the necessary measures to comply with the judgment of the Community judicature. Where access to documents is concerned, the institution which failed to consider the possibility of granting partial access to the documents in question will thus have to reopen the dialogue with the applicant and inform him of the reasons for its total or partial refusal.

61. Where, as in the present case, the institutions consider that partial access cannot be granted, they will have to communicate the reasons to the applicant, who will then have an opportunity to challenge them in a confirmatory application. If the institutions maintain their position, they must inform him precisely of the grounds on which the arguments he has put forward do not allow them to grant his application. [30] Those grounds will also have to show that the institutions carried out a specific assessment of each document concerned. [31] In the light of those reasons, the applicant will then be able to decide whether or not to bring an action for annulment against those decisions.

29 — Regulation of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (OJ 2001 L 145, p. 43). Article 4(6) provides: 'If only parts of the requested document are covered by any of the exceptions, the remaining parts of the document shall be released.'

30 — See, to that effect, Case T-188/98 *Kuijer* v *Council* [2000] ECR II-1959, paragraphs 44 to 46.

31 — See Case T-105/95 *WWF UK* v *Commission* [1997] ECR II-313, paragraphs 64 and 74; Case T-124/96 *Interporc* v *Commission* [1998] ECR II-231, paragraph 54; Case T-174/95 *Svenska Journalistförbundet* v *Council* [1998] ECR II-2289, paragraph 117; *Kuijer* v *Council*, paragraph 38; and Case T-123/99 *JT's Corporation* v *Commission* [2000] ECR II-3269, paragraph 64.

62. It is clear that the contested judgment deprives the appellant of all those procedural guarantees and of the possibility of mounting an effective challenge to the grounds on which the defendant institutions consider in the present case that partial access to the documents at issue is not possible. Those grounds were communicated to the appellant for the first time during the judicial proceedings. He was therefore unable to discuss them during the administrative procedure, nor could he learn of them in time to assert his rights before the Court of First Instance.

63. In the light of all the above factors, I consider that the Court of Justice disregarded the appellant's right of partial access by holding that the fact that the institutions had not considered the possibility of such access had had no effect on the outcome of their assessments in the contested decisions.

64. Since that error of law suffices to justify setting aside the contested judgment, my observations on the appellant's second complaint are made purely in the alternative.

(ii) The second complaint

65. In my opinion, the Court of First Instance's analysis in paragraph 69 of the contested judgment that the institutions are entitled not to grant partial access where the parts of the documents which could be communicated would be of no use to the applicant, regardless of any consideration of the amount of work such access would involve, interprets much too broadly the derogation from the obligation of granting partial access recognised by the case-law.

66. Similarly, by considering that in the present case partial access could be refused on the grounds that 'the parts of the documents to which access could have been granted contained so little information as to be of no use to the applicant' and that, in general, the documents in question did not have parts which were easily detachable, the Court of First Instance, in my view, misapplied the right of partial access laid down in the Court of Justice's case-law.

67. The legal context in which the derogation in question was recognised should be recalled.

68. First, according to settled case-law, it is apparent from the scheme of Decisions 93/731 and 94/90 that any person may apply for access to any unpublished document of the Council and the Commission

without having to give reasons for his request. [32] The fact that that rule was taken up in Article 6 of Regulation No 1049/2001 confirms very clearly that the right of access to documents is not subject to the condition that the documents are of any use to the applicant.

69. Next, the right of access to documents, that is to say, to the items of information contained in them, [33] constitutes the principle and a refusal is only valid if it is based on one of the exceptions expressly provided for in Article 4 of Decision 93/731 or in the Code of Conduct annexed to Decision 94/90. Since those exceptions to the right of access must be interpreted and applied strictly, [34] they cannot block access to the items of information which are not themselves covered by the exceptions. The effectiveness of the right of access to documents would otherwise be considerably lessened. Moreover, to refuse access to those items of information would constitute a measure manifestly disproportionate to ensuring confidentiality of the items covered by one of the exceptions.

70. That was the context in which the Court of First Instance, in paragraph 86 of *Hautala* v *Council*, said that the principle of proportionality would allow the institution, 'in particular cases where the volume of the document or the passages to be removed would give rise to an unreasonable amount of administrative work [for the institution], to balance the interest in public access to those fragmentary parts against the burden of work so caused'. The Court of Justice confirmed that analysis in paragraph 30 of *Council* v *Hautala*, referring to 'particular cases' in which the obligation to ensure partial access would entail an 'excessive administrative burden'.

71. In the light of the above, the derogation recognised by the case-law from the obligation of the institution concerned to grant partial access to the documents in question cannot, in my opinion, be interpreted as meaning that the institution is entitled to refuse access to non-confidential information because it considers that such access is of no use to the applicant.

72. While, in the context of good administration, the institution concerned may, in response to an initial application, inform the applicant that the partial access which he can be granted will be limited to items of information which appear to be already known to him, in my view it is not entitled,

32 — See, with respect to Decision 93/731, *Svenska Journalistförbundet* v *Council*, paragraph 109, and, with respect to Decision 94/90, *Interporc* v *Commission*, paragraph 48; Case T-309/97 *Bavarian Lager* v *Commission* [1999] ECR II-3217, paragraph 37; and Case T-111/00 *British American Tobacco International (Investments)* v *Commission* [2001] ECR II-2997, paragraph 42.

33 — See *Council* v *Hautala*, paragraph 23.

34 — See Joined Cases C-174/98 P and C-189/98 P *Netherlands and Van der Wal* v *Commission* [2000] ECR I-1, paragraph 27, and *Council* v *Hautala*, paragraph 25.

on the other hand, to refuse to grant access to those items if the applicant maintains his request in a confirmatory application.

73. Only where the extent of the task entailed by concealing the items which cannot be communicated would exceed the bounds of what may reasonably be required of the institution concerned may that institution, in the interests of sound administration, be permitted to consider whether such access is of interest and to assess that interest. Moreover, in such a case, as the appellant submits, the existence of a private interest of an applicant might require the administration to grant him partial access to the documents in question despite the very substantial burden of work that access will cause. [35]

74. It follows that an institution cannot be entitled to refuse access to the items of information not covered by an exception on the ground that it considers that those items are too few to be of any use and in reliance on mere administrative difficulties.

75. Such an interpretation of the derogation would amount in fact to conferring on the administration a real discretionary power to assess the appropriateness of granting access to the items of non-confidential information by reference to what it considers to be the usefulness for the applicant of that information and the work that access to the information involves for it. It would call into question the effectiveness of the right of access to documents, which, it may be recalled, is intended to confer on any person the right of access to any item of information not covered by an exception without that person having to demonstrate an interest in that access.

76. Following this analysis, I consider it important to point out that in Regulation No 1049/2001 the derogation, stated in the case-law, from the obligation to grant partial access in connection with an excessive burden of work was not repeated. Without taking a position here on the question of the extent to which that derogation under the case-law can be applied in the context of that regulation, that circumstance, in the light of the affirmation of the right of access in primary Community law in Article 255 EC and Articles 41 and 42 of the Charter of Fundamental Rights of the European Union signed in Nice on 7 December 2000, [36] confirms in my view the very strict interpretation which must be given to that derogation in the context of Decisions 93/731 and 94/90.

35 — Since the administration is obliged to delimit, in each document containing confidential information, the passages which are actually covered by the exception in question, the concealment of those passages logically should not entail an excessive burden of work.

36 — OJ 2000 C 364, p. 1.

77. In the light of the above considerations, I consider that the Court of First Instance also misapplied the right of partial access by considering that such access was not possible in the present case because the parts to which access could have been given contained so little information that they would have been of no use to the appellant and that, generally, the documents in question did not contain easily removable parts.

78. I therefore propose that the Court should set aside the contested judgment, without there being any need to examine the appellant's other pleas in law.

V — Costs

(1) Consequences of the appeal

79. Under Article 54 of the EC Statute of the Court of Justice, if an appeal is well founded and the Court quashes the decision of the Court of First Instance, it may give final judgment in the matter, where the state of the proceedings so permits. Should the Court set aside the contested judgment as I propose, I consider that it will be in a position to give judgment on the application. It is common ground that the Commission and the Council, when adopting the contested decisions, did not consider whether partial access to the documents at issue was possible, since they considered that the right of access to documents did not impose such an obligation on them.

80. Since the contested decisions are vitiated by an error of law, I propose that the Court should annul them.

81. In accordance with the first paragraph of Article 122 of the Rules of Procedure of the Court, where the appeal is well founded and the Court itself gives final judgment in the case, the Court is to make a decision on costs.

82. I propose that the Court should order the institutions to bear their own costs and pay those incurred by the appellant, both in the proceedings before the Court and in those before the Court of First Instance.

VI — Conclusion

83. In view of the above considerations, I propose that the Court should:

(1) set aside the judgment of the Court of First Instance of the European Communities of 12 July 2001 in Case T-204/99 *Mattila* v *Council and Commission*;

(2) annul the decisions of the Commission and the Council of 5 and 12 July 1999 respectively refusing the appellant access to certain documents;

(3) order the Council and the Commission to pay the costs of the proceedings at first instance and on appeal.