JUDGMENT OF THE COURT OF FIRST INSTANCE (Grand Chamber)

12 September 2007 *

In Case T-36/04,

Association de la presse internationale ASBL (API), established in Brussels (Belgium), represented by S. Völcker, F. Louis and J. Heithecker, avocats,

applicant,

v

Commission of the European Communities, represented by C. Docksey and P. Aalto, acting as Agents,

defendant,

APPLICATION for the annulment of the Commission's decision of 20 November 2003 rejecting an application by the applicant for access to the pleadings lodged by the Commission in proceedings before the Court of Justice and the Court of First Instance,

* Language of the case: English.

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

composed of B. Vesterdorf, President, M. Jaeger, J. Pirrung, M. Vilaras, H. Legal, E. Martins Ribeiro, E. Cremona, I. Pelikánová, D. Šváby, K. Jürimäe, N. Wahl, M. Prek and V. Ciucă, Judges,

Registrar: E. Coulon,

having regard to the written procedure and further to the hearing on 28 February 2007,

gives the following

Judgment

The legal context

1 Under Article 255 EC:

'1. Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, shall have a right of access to European Parliament, Council and Commission documents, subject to the principles and the conditions to be defined in accordance with paragraphs 2 and 3.

2. General principles and limits on grounds of public or private interest governing this right of access to documents shall be determined by the Council, acting in accordance with the procedure referred to in Article 251 within two years of the entry into force of the Treaty of Amsterdam.

...'

2 Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (OJ 2001 L 145, p. 43) lays down the principles, conditions and limits of the right of access to documents of those institutions provided for by Article 255 EC. The regulation has applied from 3 December 2001.

3 Recitals 2 and 4 in the preamble to that regulation are worded as follows:

'(2) Openness enables citizens to participate more closely in the decision-making process and guarantees that the administration enjoys greater legitimacy and is more effective and more accountable to the citizen in a democratic system. Openness contributes to strengthening the principles of democracy and respect for fundamental rights as laid down in Article 6 [EU] and in the Charter of Fundamental Rights of the European Union.

...

(4) The purpose of this Regulation is to give the fullest possible effect to the right of public access to documents and to lay down the general principles and limits on such access in accordance with Article 255(2) [EC].'

4 Paragraphs 1 and 3 of Article 2 of Regulation No 1049/2001 provide as follows:

'1. Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, has a right of access to documents of the institutions, subject to the principles, conditions and limits defined in this Regulation.

...

3. This Regulation shall apply to 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.'

5 Under Article 3(a) of Regulation No 1049/2001, a document means 'any content ... concerning a matter relating to the policies, activities and decisions falling within the institution's sphere of responsibility'.

6 Article 4 of Regulation No 1049/2001, which concerns exceptions to the right of access, provides:

'...

2. The institutions shall refuse access to a document where disclosure would undermine the protection of:

— ...

— court proceedings and legal advice,

— the purpose of inspections, investigations and audits,

unless there is an overriding public interest in disclosure.

...

6. If only parts of the requested document are covered by any of the exceptions, the remaining parts of the document shall be released.

7. The exceptions as laid down in paragraphs 1 to 3 shall only apply for the period during which protection is justified on the basis of the content of the document. ...'

7 Article 6(1) of Regulation No 1049/2001 provides as follows:

'Applications for access to a document shall be made in any written form, including electronic form, in one of the languages referred to in Article 314 [EC] and in a sufficiently precise manner to enable the institution to identify the document. The applicant is not obliged to state reasons for the application.'

8 Under Article 7(2) of Regulation No 1049/2001, '[i]n the event of a total or partial refusal, the applicant may, within 15 working days of receiving the institution's reply, make a confirmatory application asking the institution to reconsider its position'.

9 Paragraphs 1 and 2 of Article 8 of Regulation No 1049/2001, which concerns the processing of confirmatory applications, are worded as follows:

'1. A confirmatory application shall be handled promptly. Within 15 working days from registration of such an application, the institution shall either grant access to the document requested and provide access in accordance with Article 10 within that period or, in a written reply, state the reasons for the total or partial refusal. In the event of a total or partial refusal, the institution shall inform the applicant of the remedies open to him or her, namely instituting court proceedings against the institution and/or making a complaint to the Ombudsman, under the conditions laid down in Articles 230 [EC] and 195 [EC], respectively.

2. In exceptional cases, for example in the event of an application relating to a very long document or to a very large number of documents, the time-limit provided for in paragraph 1 may be extended by 15 working days, provided that the applicant is notified in advance and that detailed reasons are given.'

Background to the dispute

10 The Association de la presse internationale ASBL (API) is a non-profit-making organisation of foreign journalists of all categories and specialisations who are based in Belgium. The aim of API is to assist its members to report back to their home countries about the European Union.

11 By letter of 1 August 2003, API applied to the Commission, pursuant to Article 6 of Regulation No 1049/2001, for access to all the written submissions made by the Commission to the Court of First Instance or the Court of Justice in the proceedings relating to the following cases:

— Case T-209/01 *Honeywell International* v *Commission* and Case T-210/01 *General Electric* v *Commission*;

— Case T-212/03 *MyTravel* v *Commission*;

— Case T-342/99 *Airtours* v *Commission*;

— Case C-203/03 *Commission* v *Austria*;

— Case C-466/98 *Commission* v *United Kingdom*; Case C-467/98 *Commission* v *Denmark*; Case C-468/98 *Commission* v *Sweden*; Case C-469/98 *Commission* v *Finland*; Case C-471/98 *Commission* v *Belgium*; Case C-472/98 *Commission* v *Luxembourg*; Case C-475/98 *Commission* v *Austria*; and Case C-476/98 *Commission* v *Germany* ('the *Open Skies* cases');

— Case C-224/01 *Köbler*;

— Case C-280/00 *Altmark Trans and Regierungspräsidium Magdeburg.*

12 By letter of 27 August 2003, the Commission, first, informed API that in so far as its request concerned Case T-212/03 *MyTravel* v *Commission*, it was premature and, second, asked API to specify whether its request related only to the pleadings or also to the annexes thereto. In the same letter the Commission told API that, in view of the questions of principle raised by its request for access to the documents, the time-limit for replying to that request had to be extended by 15 working days. By letter of 29 August 2003, API stated that its request related only to the Commission's pleadings, without annexes.

13 By letters of 17 September 2003, the Commission granted access to the documents concerning Cases C-224/01 and C-280/00, but refused access to the documents relating to Cases T-209/01, T-210/01, T-342/99 and C-203/03, as well as those relating to the *Open Skies* cases.

14 By letter of 6 October 2003, API made a confirmatory application, pursuant to Article 7(2) of Regulation No 1049/2001, concerning the documents to which the Commission had refused access. In reply to that application, and after extending the time-limit by letter of 28 October 2003, the Commission adopted the decision of 20 November 2003, confirming the refusal of access to the documents in question ('the contested decision').

15 First, with regard to the refusal of access to its submissions in connection with Case T-209/01 *Honeywell* v *Commission* and Case T-210/01 *General Electric* v *Commission*, the Commission stated, in the contested decision, that, since those cases were still pending, disclosure of its submissions would adversely affect its position as the defending party in the proceedings. The Commission added that, as the Community judicature had observed (Case T-174/95 *Svenska Journalistеförbundet* v *Council* [1998] ECR II-2289), according to a general principle of the proper administration of justice, the parties had the right to defend their interests free from all external influences and particularly from influences on the part of members of the public. Since the documents to which the applicant had requested access had been drafted solely for the purpose of the two actions in question, the Commission took the view that they fell within the exception regarding the protection of court proceedings (Case T-92/98 *Interporc* v *Commission* [1999] ECR II-3521, '*Interporc II*'). The Commission went on to say that the grant of access to the observations which it had submitted in Case C-224/01 *Köbler* could not be invoked as a precedent since the proceedings in *Köbler* had been closed, even though the case was formally still pending at the material time; moreover, *Köbler* concerned a request for a preliminary ruling, which was not therefore comparable with direct actions. Furthermore, the very fact that access was granted to those submissions showed that API's application had been examined document by document.

16 Second, with regard to the refusal of access to the documents relating to Case T-342/99 *Airtours* v *Commission*, the Commission stated that the judgment of the Court of First Instance which closed the case ([2002] ECR II-2585) had been

followed by an action for damages against the Commission (Case T-212/03 *MyTravel* v *Commission*), in which the arguments put forward by the Commission in Case T-342/99 to justify its decision would be the subject of discussion. The Commission took the view that there was a strong connection between the two cases and that disclosure of the submissions requested by the applicant would adversely affect proceedings in the pending case.

17 Third, with regard to the refusal of access to the documents relating to Case C-203/03 *Commission* v *Austria*, the Commission stated that it was a pending case and that disclosure of the Commission's submissions would harm its position before the Court of Justice and vis-à-vis the Austrian authorities. It maintained, therefore, that the same reasoning relied upon for refusing access to the submissions concerning Case T-209/01 *Honeywell* v *Commission* and Case T-210/01 *General Electric* v *Commission* also applied to that case. The Commission added that it had to refuse access to any document concerning infringement proceedings if disclosure would undermine the protection of the purpose of the investigations, that purpose being, as the Court of First Instance found in Case T-191/99 *Petrie and Others* v *Commission* [2001] ECR II-3677, to reach an amicable resolution of the dispute between the Commission and the Member State concerned. The Commission pointed out that, although *Petrie and Others* related to the refusal of access to letters of formal notice and reasoned opinions, the Court did not state that the refusal of access in order to preserve the objective of reaching an amicable resolution of the dispute was limited to those categories of documents. Thus the justification for such a refusal was also relevant as regards the pleadings submitted to the Court of Justice since the arguments used to prove failure to fulfil Treaty obligations are identical.

18 Fourth, regarding the refusal of access to the Commission's pleadings in the *Open Skies* cases, the Commission stated that, although those cases were closed by the judgments of the Court of Justice of 5 November 2002, the Member States concerned have not yet complied with the judgments, so negotiations are still in progress to ensure that they put an end to the infringement found by the Court. For

that reason, the Commission took the view that disclosure of its pleadings in those cases would undermine the protection of the purpose of the investigation concerning the failure of the Member States to fulfil their Treaty obligations.

19 Fifth, after recalling that the last line of Article 4(2) of Regulation No 1049/2001 provides that access must be refused 'unless there is an overriding public interest in disclosure', the Commission observed in the contested decision that API had not put forward arguments establishing that the public interest in disclosure of the documents in question outweighed the public interest in ensuring adequate protection of the pending court proceedings and of the investigations regarding infringement cases. It added that the public interest is best served by safeguarding the proper conduct of proceedings before the Community Courts, as well as the investigative powers of the Commission.

20 Sixth, and finally, the Commission confirmed that partial access to the documents requested could not be granted because all their parts were closely interrelated and covered by the abovementioned exceptions.

Procedure and forms of order sought by the parties

21 The applicant brought the present action by application lodged at the Registry of the Court of First Instance on 2 February 2004.

22 On 9 November 2006, the Court, after hearing the parties, decided to refer the case to the Grand Chamber of the Court.

23 Upon hearing the Report of the Judge-Rapporteur, the Court (Grand Chamber) decided to open the oral procedure.

24 The parties presented oral argument and replied to the questions put by the Court at the hearing on 28 February 2007.

25 The applicant claims that the Court should:

— annul the contested decision;

— order the Commission to pay the costs.

26 The Commission contends that the Court should:

— dismiss the action as unfounded;

— order the applicant to pay the costs.

Law

27 In support of its action, the applicant raises a single plea in law, alleging infringement of Articles 2 and 4(2) of Regulation No 1049/2001. That plea consists essentially of two limbs. The first limb concerns refusal of access to documents on the basis of the exception relating to the protection of court proceedings, as provided for in the second indent of Article 4(2) of Regulation No 1049/2001. The second limb concerns refusal of access to documents on the basis of the exception relating to the protection of the purpose of investigations, as provided for in the third indent of Article 4(2) of Regulation No 1049/2001.

Refusal of access to documents on the basis of the exception relating to the protection of court proceedings, as provided for in the second indent of Article 4(2) of Regulation No 1049/2001

Arguments of the parties

28 In the first place, the applicant, after observing that its application for access is covered by Article 2 of Regulation No 1049/2001, which enshrines the principle of the widest possible access to documents of the institutions, claims that the exception relating to the protection of court proceedings cannot justify a general exclusion of the Commission's pleadings from the principle of open access to documents.

29 On that point the applicant submits, first, that that exception, according to which access to a document may be refused only if its disclosure 'would undermine' court proceedings, must be construed narrowly. It is clear from a comparison of Regulation No 1049/2001 with its predecessor, namely Commission Decision 94/90/

ECSC, EC, Euratom, of 8 February 1994 on public access to Commission documents (OJ 1994 L 46, p. 58), which formally adopted the Code of conduct concerning public access to Council and Commission documents (OJ 1993 L 340, p. 41, 'the 1993 Code of Conduct'), approved by the Council and the Commission on 6 December 1993, that the Community legislature deliberately chose to restrict the scope of the exception relating to court proceedings. Whilst the 1993 Code of Conduct provided that access could be refused to any document where disclosure 'could undermine' the protection of court proceedings, Regulation No 1049/2001 refers to documents the disclosure of which 'would undermine' the protection of such proceedings. Furthermore, the 1993 Code of Conduct — unlike Regulation No 1049/2001 — did not provide for the possibility of an overriding public interest outweighing the interest in the protection of court proceedings.

30 The limited purpose of the exception provided for in the second indent of Article 4(2) of Regulation No 1049/2001 is also illustrated by the 11th recital in the preamble to the Regulation, which refers expressly to the principle that all documents of the institutions should be accessible to the public, and by the Explanatory Memorandum to the proposal for a Regulation of the European Parliament and of the Council regarding public access to European Parliament, Council and Commission documents [COM(2000) 30 final-COD 2000/0032, section 5], in which it is stated that the exceptions apply only in order to protect clearly defined specific interests. A general refusal of access to an entire category of documents is therefore possible only if the institution concerned is able to show, in relation to each document requested, that disclosure would so seriously harm the protection of one of the specific interests listed in Article 4(2) of Regulation No 1049/2001 that the public interest in disclosure would never outweigh it.

31 Second, the applicant claims that disclosure of the Commission's pleadings before the Community Courts in no way undermines the protection of court proceedings, because such disclosure would neither give rise to the exertion of undue influence

on the part of the public, nor affect the 'serenity' of proceedings before the Community Courts in such a way as to harm the functioning of the judicial process. In any case, such general reasons as those relied upon in the contested decision cannot satisfy the test of serious and concrete harm required under the second indent of Article 4(2) of Regulation No 1049/2001.

32 The applicant adds that public interest in the workings of courts dealing with important issues of public policy is healthy and natural in any system based on the rule of law and that the Community Courts have themselves welcomed and supported this development by making an increasing amount of information concerning pending proceedings available to the general public through their internet site and press service. Moreover, hearings are public and the Report for the Hearing is available to the public from the day on which the hearing is held.

33 It is therefore difficult to understand how disclosure of the Commission's pleadings could seriously harm the proper conduct of the court proceedings to which those pleadings relate. On the contrary, if they were made public knowledge, that would have a positive effect because correct information for the public would demonstrate the impartiality of the Community Courts, which would further encourage public acceptance of their rulings. The applicant adds that the courts of several States, as well as the European Court of Human Rights, make documents relating to court proceedings available to the public, particularly in cases involving governmental agencies, although at the same time those courts provide for exceptions to the principle of transparency, for example, for the protection of business secrets or privacy. None of those courts views the principle of transparency as hindering the efficiency of the judicial process or the proper administration of justice.

34 Third, the applicant submits that disclosure of the Commission's pleadings before the Community Courts is a matter of public interest in that it would enable the

dissemination of the Commission's point of view in relation to fundamental questions of interpretation of the Treaties and of secondary Community law. With regard to competition law, for example, the dissemination of such information would be particularly beneficial in view of the opinions that the Commission may be required to transmit to national courts pursuant to Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 [EC] and 82 [EC] (OJ 2003 L 1, p. 1). The applicant adds that, although hearings before the Community Courts are public and a summary of the parties' arguments is available on the day of the hearing, the picture of the cases dealt with is incomplete, which prevents journalists from giving correct and comprehensive information. The only way of ensuring adequate transparency is therefore to disclose the Commission's pleadings.

35 Fourth, the applicant argues that the Commission cannot base its refusal on existing case-law because both *Svenska Journalistförbundet* v *Council* and *Interporc II*, cited at paragraph 15 above, refer to the 1993 Code of Conduct as opposed to Regulation No 1049/2001, which falls to be construed more narrowly. In addition, *Svenska Journalistförbunde* v *Council*, cited at paragraph 15 above, relates to a particular situation as the association in question had published on the internet an edited version of the Council's defence and had invited the public to send their comments directly to the Agents of the Council, whose telephone and fax numbers were provided, whereas API is not a party to any of the actions in question and does not propose to take any such steps. *Interporc II*, cited at paragraph 15 above, is likewise irrelevant, since the Court's statement, at paragraph 40 of that judgment, that the protection of the public interest precludes the disclosure of the content of documents drawn up by the Commission solely for the purposes of specific court proceedings is merely an *obiter dictum* because the issue in that case was whether access to documents drawn up in the context of an administrative procedure could be refused on the ground that they had become connected with such proceedings. The Court found moreover that the purpose of the exception in question was 'to ensure both the protection of work done within the Commission and confidentiality and the safeguarding of professional privilege for lawyers' (*Interporc II*, cited at paragraph 15 above, paragraph 41).

36 Such an interpretation of the exception relating to court proceedings does not preclude public access to the Commission's pleadings since such pleadings are not meant to be internal and privileged documents: on the contrary, they are submitted to the courts and to the opponents in the respective cases. In this connection the applicant adds that the assessment at paragraph 40 of *Interporc II*, cited at paragraph 15 above, was subsequently overruled when the Court of Justice held that in Case T-83/96 *van der Wal* v *Commission* [1998] ECR II-545, paragraph 50, the Court of First Instance had erred in law by interpreting that exception as meaning that the Commission is obliged to refuse access to documents which it has drafted solely for the purposes of court proceedings (Joined Cases C-174/98 P and C-189/98 P *Netherlands and van der Wal* v *Commission* [2000] ECR I-1, paragraph 30).

37 It follows, according to the applicant, that the relevant Community case-law cannot be interpreted in the manner contended for by the Commission and that the second indent of Article 4(2) of Regulation No 1049/2001 does not justify a blanket exclusion of the institutions' pleadings from the principle of open access to Community documents.

38 In the second place, the applicant challenges the contested decision inasmuch as the Commission refused, on the basis of the exception relating to the protection of court proceedings, to disclose its pleadings on the ground that the case in which they were submitted or a related case was still pending.

39 On that point the applicant maintains that such a severe limitation of the exception at issue cannot be justified and would seriously undermine the principle of open access to documents precisely in those cases in which the public interest in disclosure is the most pronounced, there being no judgment or Report for the Hearing. Refusal of access is even more inexplicable where the documents requested relate to proceedings which have already been closed, as in Case T-342/99 *Airtours* v

Commission, but are connected with other proceedings which are still pending. The Commission did not explain how disclosure of the pleadings in the closed case would adversely affect proceedings in the pending case, even though the applicant in both cases is the same and it therefore has knowledge of the Commission's arguments in its pleadings relating to the first case.

40 The Commission observes, first of all, that, contrary to the applicant's assertions, there was no 'blanket' refusal to handle the applicant's request or to disclose an entire category of documents. The Commission recognises that its pleadings before the Community Courts are not, in themselves, exempt from disclosure, since the exceptions to the general principle of access to documents must be interpreted narrowly. However, where an exception applies, it must be respected, so where the disclosure of a document 'would undermine' the protection of court proceedings or of investigations, the Commission must not disclose it. The Commission adds that the use of the conditional ('would undermine'), which implies a margin of appreciation, means that a negative effect must be likely to occur, not that it must be absolutely certain to occur.

41 Regarding the exception relating to the protection of court proceedings, the Commission states, first, that each national and international court system has its own policy on how to handle pleadings submitted to a court. As the applicant itself noted, the European Community courts ensure a very high level of transparency, since, in addition to the fact that a notice announcing each case must be published in the *Official Journal of the European Union*, with a summary of the pleas and main arguments in the application, the hearing is public and the parties' arguments are summarised in the Report for the Hearing and are repeated and examined in the Opinion of the Advocate General and in the judgment.

42 In the view of the Commission, the protection of court proceedings requires it to take account of the approach followed by each court in that respect. Neither the Court of Justice nor the Court of First Instance publishes the pleadings submitted to it and, so far as the latter is concerned, third party access to the case-file is strictly controlled in accordance with the third subparagraph of Article 5(3) of the Instructions to the Registrar of the Court of First Instance, adopted on 3 March 1994 (OJ 1994 L 78, p. 32) as amended, lastly, on 5 June 2002 (OJ 2002 L 160, p. 1), under which '[n]o third party, private or public, may have access to the case-file or to the procedural documents without the express authorisation of the President, after the parties have been heard' and '[t]hat authorisation may be granted only upon written request accompanied by a detailed explanation of the third party's legitimate interest in inspecting the file'. Furthermore, Regulation No 1049/2001 does not lay down how the courts must manage their proceedings. In that connection the Court of Justice has pointed out that there is no general rule on the confidentiality of pleadings or as to whether the parties to proceedings may disclose their own written submissions to third parties. However, the Court has stressed that special considerations apply where 'disclosure of a document might adversely affect the proper administration of justice' (Order in Case C-376/98 *Germany* v *Parliament and Council* [2000] ECR I-2247, paragraph 10).

43 The Court of First Instance has confirmed and applied to pleadings the general principle of the due administration of justice according to which parties have the right to defend their interests free from all external influences and particularly from influences on the part of members of the public (*Svenska Journalistförbundet* v *Council*, cited in paragraph 15 above, paragraph 136). The issue of the public knowledge of pending cases should not be confused with the issue of the right of the parties not to conduct their written argument in public.

44 According to the Commission, it is not necessary in the public interest that the full written submissions be disclosed: such disclosure might even be counter-productive, since the written dialogue between the parties could be transformed into a public debate during which pressure could be put on the agents in a case and the merits of particular arguments could be exposed to other external pressures. The need to

protect the serenity of the debate therefore outweighs the need for journalists to be adequately prepared for the oral hearing. Furthermore, systematic disclosure could create an unfavourable imbalance between the institutions and some or all of the other parties in a case, who would not be required to provide access to their pleadings under the same conditions as apply to the institutions.

45 The Commission states, second, that, when it receives a request for access within the meaning of Regulation No 1049/2001, it first considers whether the proceedings to which the document requested relates have reached the stage of the hearing and then whether, in view of the foregoing, the protection of court proceedings necessitates the refusal of access to that document. It was on that basis that the Commission refused to disclose its pleadings in Case T-209/01 *General Electric* v *Commission* and Case T-210/01 *Honeywell* v *Commission*, which were pending before the Court of First Instance.

46 There may also be valid reasons for refusing access to a document after the hearing has been held or judgment has been handed down, where it may be found necessary to protect the formulation of a written argument identical to that set out in a related case which is still pending. Such a reason formed the basis for the refusal of access to the documents in Case T-342/99 *Airtours* v *Commission*, which had been closed by judgment of the Court of First Instance, because the same applicant then brought an action for damages (Case T-212/03 *MyTravel* v *Commission*), which is still pending. The connection between the two cases lies in the fact that certain arguments put forward in the annulment action may also be the subject of discussion in the action for damages.

47 In relation to the balance of interests involved, the Commission contends that the existence of an overriding public interest justifying disclosure of the documents requested can never be presumed in respect of any category of documents but always falls to be established in each particular case, with regard to the other

interests involved. The overriding public interest, a notion which is not defined in Regulation No 1049/2001, can be taken into consideration only once it has been established that one of the exceptions applies.

48 Furthermore, according to the Commission, if the exception of overriding public interest — which is an exception to an exception — were systematically applied to justify the disclosure of pleadings at any stage of the procedure, the exception for court proceedings would be deprived of any *effet utile*. The balancing of the interests involved must also take into account the fact that information on the case is already made available to the public, first at the stage of the lodging of the application (publication of the applicant's pleas in law and main arguments in the Official Journal) and later by means of the Report for Hearing. With regard to the documents requested by the applicant in the present case, the Commission took the view that the public interest was best served by safeguarding the proper conduct of the court proceedings in question.

49 The fact that the applicant is not a party to any of the proceedings to which the documents whose disclosure has been requested relate and that neither it nor its members intend to put pressure on the Commission in no way deprives *Svenska Journalistförbundet* v *Council*, cited at paragraph 15 above, of its relevance. At paragraph 138 of that judgment, the Court of First Instance held that the purpose for which disclosure of the pleadings in that case was sought was improper. The Commission additionally points that the disclosure of a document confirms that it may be freely distributed, which means that an undertaking given by the applicant not to exert pressure is no guarantee that other members of the public will behave in the same way.

50 Furthermore, the Commission states that, in *Interporc II*, cited at paragraph 15 above (paragraphs 40 and 41), the Court made it clear that the category of documents to which the exception for court proceedings applies covers all documents drawn up by the Commission solely for the purposes of specific court proceedings. That judgment defined the scope of the court proceedings exception

but did not exclude such documents as a category from the right of public access, and *Netherlands and van der Wal* v *Commission*, cited at paragraph 36 above (paragraphs 27 to 30), confirmed that there is no blanket exclusion for such documents obliging the Commission not to disclose them. Consequently, *Interporc II* remains good law and has been correctly applied by the Commission in the present case, since, far from meeting the request with a blanket refusal, the Commission carried out a case-by-case review of each document.

Findings of the Court

— Preliminary observations

51 It should be recalled, in the first place, that the purpose of Article 1 of Regulation No 1049/2001 — read, in particular, in the light of the fourth recital in the preamble to that regulation — is to give the fullest possible effect to the right of public access to documents held by the institutions (Case C-266/05 P *Sison* v *Council* [2007] ECR I-1233, paragraph 61).

52 However, it also follows from that regulation, in particular from the 11th recital in its preamble and Article 1(a) — as well as from Article 4, which provides for a scheme of exceptions in that regard — that the right of access to documents is nonetheless subject to certain limitations based on grounds of public or private interest (*Sison* v *Council*, cited at paragraph 51 above, paragraph 62).

53 As they derogate from the principle of the widest possible public access to documents, such exceptions must be interpreted and applied strictly (*Sison* v *Council*, cited at paragraph 51 above, paragraph 63; Joined Cases T-391/03 and T-70/94 *Franchet and Byk* v *Commission* [2006] ECR II-2023, paragraph 84; see,

also, by analogy, as regards the 1993 Code of Conduct, *Netherlands and van der Wal* v *Commission*, cited at paragraph 36 above, paragraph 27, and Case C-353/99 P *Council* v *Hautala* [2001] ECR I-9565, paragraph 25; Case T-309/97 *Bavarian Lager* v *Commission* [1999] ECR II-3217, paragraph 39, and *Petrie and Others* v *Commission*, cited at paragraph 17 above, paragraph 66).

54 It should also be recalled that, according to settled case-law, the examination required for the purpose of processing a request for access to documents must be specific in nature. First, the mere fact that a document concerns an interest protected by an exception cannot justify application of that exception (see, to that effect, Joined Cases T-110/03, T-150/03 and T-405/03 *Sison* v *Council* [2005] ECR II-1429, paragraph 75, and *Franchet and Byk* v *Commission*, cited at paragraph 53 above, paragraph 105). Such application may, in principle, be justified only if the institution has previously assessed, firstly, whether access to the document would specifically and actually undermine the protected interest and, secondly, in the circumstances referred to in Article 4(2) and (3) of Regulation No 1049/2001, whether there was no overriding public interest in disclosure. Further, the risk of a protected interest being undermined must be reasonably foreseeable and not purely hypothetical. Consequently, the examination which the institution must undertake in order to apply an exception must be carried out in a concrete manner and must be apparent from the reasons given for the decision (Case T-2/03 *Verein für Konsumenteninformation* v *Commission* [2005] ECR II-1121, '*VKI*', paragraph 69, and *Franchet and Byk* v *Commission*, cited at paragraph 53 above, paragraph 115).

55 That concrete examination must, moreover, be carried out in respect of each document covered by the request. It is apparent from Regulation No 1049/2001 that all the exceptions mentioned in paragraphs 1 to 3 of Article 4 thereof are specified as being applicable to 'a document' (*VKI*, cited at paragraph 54 above, paragraph 70, and *Franchet and Byk* v *Commission*, cited at paragraph 53 above, paragraph 116). Furthermore, as regards the scope *ratione temporis* of those exceptions, Article 4(7) of that regulation provides that they are to apply only for the period during which protection is justified on the basis of 'the content of the document'.

56 It follows that a concrete, individual examination is in any event necessary where, even if it is clear that a request for access refers to documents covered by an exception, only such an examination can enable the institution to assess the possibility of granting the applicant partial access under Article 4(6) of Regulation No 1049/2001 (*VKI*, cited at paragraph 54 above, paragraph 73, and *Franchet and Byk* v *Commission*, cited at paragraph 53 above, paragraph 117). In the context of the application of that regulation, the Court has moreover already held that an assessment of documents by reference to categories, rather than on the basis of the actual information contained in those documents, is in principle insufficient since the examination required of an institution must enable it to assess specifically whether an exception invoked actually applies to all the information contained in those documents (*VKI*, cited at paragraph 54 above, paragraphs 74 and 76; as regards the application of the 1993 Code of Conduct, see, to that effect, Case T-123/99 *JT's Corporation* v *Commission* [2000] ECR II-3269, paragraphs 46 to 48).

57 The obligation for an institution to undertake a concrete, individual assessment of the content of the documents covered in the application for access is an approach to be adopted as a matter of principle (*VKI*, cited at paragraph 24 above, paragraph 75), as regards all the exceptions mentioned in paragraphs 1 to 3 of Article 4 of Regulation No 1049/2001, whatever the field to which those documents relate. Since that regulation contains no specific provision concerning the exception relating to the protection of court proceedings, that approach also applies as a matter of principle to the exception at issue.

58 However, the application of that approach as a matter of principle does not mean that such an examination is required in all circumstances. Since the purpose of the concrete, individual examination which the institution must in principle undertake in response to a request for access under Regulation No 1049/2001 is to enable that institution to assess, on the one hand, the extent to which an exception to the right of access is applicable and, on the other, the possibility of partial access, such an examination may not be necessary where, owing to the particular circumstances of the individual case, it is obvious that access must be refused or, on the contrary,

granted. Such a situation could arise, for example, if certain documents were (i) manifestly covered in their entirety by an exception to the right of access or, conversely, (ii) manifestly accessible in their entirety, or, finally, (iii) had already been the subject of a concrete, individual assessment by the Commission in similar circumstances (*VKI*, cited at paragraph 54 above, paragraph 75).

59 In the second place, as regards the exception relating to the protection of court proceedings, it should be recalled, first, that it follows from the broad definition of the notion of document, as set out in Article 3(a) of Regulation No 1049/2001, and from the wording and the very existence of the exception relating to the protection of court proceedings, that the Community legislature did not intend to exclude the institutions' litigious activities from the public's rights of access, but that it provided, in that regard, that the institutions are to refuse to disclose documents relating to court proceedings where such disclosure would undermine the proceedings to which those documents relate.

60 Second, the Court of First Instance has already had occasion to hold that the notion of 'court proceedings' — which was interpreted in the context of the 1993 Code of Conduct as covering the pleadings or other documents lodged, internal documents concerning the investigation of the case, and correspondence concerning the case between the Directorate-General concerned and the Legal Service or a lawyers' office (*Interporc II*, cited at paragraph 15 above, paragraph 41) — is also relevant in the context of Regulation No 1049/2001 (see *Franchet and Byk* v *Commission*, cited at paragraph 53 above, paragraph 90). The Commission's pleadings before the Community judicature therefore fall within the scope of the exception relating to the protection of court proceedings, in that they relate to a protected interest.

61 Third, the fact that the scope of that exception covers all documents drawn up solely for the purposes of specific court proceedings (*Interporc II*, cited at paragraph 15 above, paragraph 40, and *Franchet and Byk* v *Commission*, cited at paragraph 53 above, paragraphs 88 and 89), and in particular pleadings lodged by the institutions,

cannot, in itself, justify application of the exception invoked. As the Court of Justice has already held, as regards the application of the 1993 Code of Conduct, the exception based on protection of the public interest in the context of court proceedings cannot be interpreted as obliging the Commission to refuse access to all documents which it has drafted solely for the purposes of such proceedings (*Netherlands and van der Wal* v *Commission*, cited at paragraph 36 above, paragraph 30).

62 An interpretation along those lines is necessary in the context of Regulation No 1049/2001, all the more so because the exception relating to the protection of court proceedings, as provided for in the second indent of Article 4(2) of that regulation, is framed in narrower terms than that set out in the 1993 Code of Conduct. First, refusal to grant access is justified, in the context of Regulation No 1049/2001, only if disclosure of the document concerned 'would undermine' the interest in question, and no longer, as was provided for in the 1993 Code of Conduct, merely if that disclosure 'could undermine' that interest. That means that the institution concerned must consider, for each document requested, whether — in the light of the information in its possession — disclosure is in fact likely to undermine one of the interests protected under the scheme of exceptions (as regards application of the 1993 Code of Conduct, see, to that effect, Case T-124/96 *Interporc* v *Commission* [1998] ECR II-231, paragraph 52, and *JT's Corporation* v *Commission*, cited at paragraph 56 above, paragraph 64). Second, Regulation No 1049/2001 provides that, even if disclosure of the document requested would undermine protection of the court proceedings in question, access is to be granted if there is an overriding public interest in disclosure. No such provision is made in the 1993 Code of Conduct.

63 Fourth, it must be pointed out that the purpose of the exception to the general principle of access to documents — for the protection of court proceedings — is primarily to ensure observance of the right of every person to a fair hearing by an independent tribunal, which constitutes a fundamental right under Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ('the ECHR') and which forms an integral part of the general principles of Community law which the Community judicature enforces, drawing inspiration

from the constitutional principles common to the Member States and from the guidelines supplied, in particular, by the ECHR (Case C-341/04 *Eurofood IFSC* [2006] ECR I-3813, paragraph 65, and Case C-411/04 P *Salzgitter Mannesmann* v *Commission* [2007] ECR I-959, paragraphs 40 and 41), and to ensure the proper course of justice. That exception therefore covers not only the interests of the parties in the context of court proceedings, but more generally the proper conduct of those proceedings.

64 It is therefore for this Court to ascertain, in the light of the principles outlined in paragraphs 51 to 63 above, whether, in the present case, the Commission erred by taking the view that the refusal to disclose its pleadings in Case T-209/01 *Honeywell* v *Commission*, Case T-210/01 *General Electric* v *Commission*, Case C-203/03 *Commission* v *Austria*, and Case T-342/99 *Airtours* v *Commission* was covered by the exception relating to the protection of court proceedings.

— Refusal of access to the pleadings relating to Cases T-209/01, T-210/01 and C-203/03

65 In the first place, it must be ascertained, as regards the documents specifically identified in the application for access, whether the Commission carried out a concrete examination of the content of each document requested, contrary to the submission of the applicant, which bases its challenge in this respect on the general nature of the justification relied on in order to refuse access.

66 It is not apparent from the reasons given for the contested decision that the Commission carried out such an examination. In that decision, the Commission made no reference, either to the content of the pleadings in question, or to the specific subject-matter of each set of proceedings to which they related, in order to demonstrate the existence of a real need for protection in relation to those

pleadings. It merely stated, in a general manner, that the refusal to grant access to the pleadings in the pending cases to which it was a party was covered by the exception relating to the protection of court proceedings, in that disclosure of those pleadings would undermine its position as a party by exposing it to the risk of external pressure. Those reasons can also apply to all the Commission's pleadings relating to pending cases to which it is a party.

67 It must be observed in that regard that the general nature of the statement of reasons on which a refusal of access is based, as well as its brevity or its formulaic character, can be indicative of failure to carry out a concrete examination only where it is objectively possible to give the reasons justifying the refusal of access to each document, without disclosing the content of the document or an essential aspect of it and thereby depriving the exception of its very purpose (see, to that effect, *Sison* v *Council*, cited at paragraph 54 above, paragraph 84; see, by analogy, as regards the 1993 Code of Conduct, Case T-105/95 *WWF UK* v *Commission* [1997] ECR II-313, paragraph 65). As the Court of Justice has stated, the need for the institutions to abstain from referring to matters which would indirectly undermine the interests which the exceptions are specifically designed to protect is emphasised in particular by Article 9(4) and Article 11(2) of Regulation No 1049/2001 (*Sison* v *Council*, cited at paragraph 51 above, paragraph 83).

68 In the present case, however, the absence of any concrete examination is apparent from the reasons given by the Commission in justification of the refusal of access, since those reasons are wholly unrelated to the content of the pleadings requested. The purported obligation to follow the approach of the Community judicature as regards access by third parties to procedural documents, as well as the reference to the need to ensure the serenity of proceedings and to prevent any pressure being put on its agents, which is in no way linked in the contested decision to the nature of the information concerned and/or the possibly sensitive nature of the subject-matter of the dispute, show that, according to the Commission, a concrete assessment of the content of each pleading requested was not necessary for the purposes of taking a decision on the application for access made by the applicant.

69 That conclusion is not invalidated by the Commission's statement, in the contested decision, that the grant of access to the observations in Case C-224/01 *Köbler*, a reference for a preliminary ruling which is still pending before the Court, shows that API's request was examined document by document. That fact indicates merely that the Commission drew a distinction based on the nature of the action and the stage reached in each set of proceedings in question. It is on the basis of such a distinction that the Commission granted access to the observations it lodged in relation to the reference for a preliminary ruling closed by the judgment in Case C-280/00 *Altmark Trans and Regierungspräsidium Magdeburg* [2003] ECR I-7747, as well as to those it lodged in Case C-224/01 *Köbler*, still pending before the Court, but in respect of which the oral procedure had already come to an end, and refused access in respect of the pleadings lodged in the direct actions still pending before the Community judicature.

70 Furthermore, in response to a question put by the Court at the hearing, the Commission stated that, when it adopts a decision on an application for access to pleadings in pending cases, the date of the hearing is a decisive factor inasmuch as the Commission takes the view that those documents require confidential treatment, by way of minimum protection, at the very least until the date on which the oral argument is presented to the court. It is only after the date of the hearing that there is, in its view, a presumption of access and that, in the case of references for preliminary rulings, it carries out a case–by-case examination, taking into consideration the information contained in the documents requested, as well as the sensitive nature of the dispute. By contrast, in the case of direct actions, the Commission takes the view that access must be refused until delivery of the final judgment and, in the case of connected pending cases, until the connected case in question has been closed.

71 It follows from the foregoing not only that the Commission did not carry out a concrete examination of each document requested, but also that it took the view that all the pleadings in the cases to which it was a party and which were pending were automatically and as a whole to be regarded as covered by the exception relating to the protection of court proceedings, and that such an examination was not necessary.

72 In the second place, it is necessary to examine whether, because of the particular circumstances of this case, the Commission was entitled to dispense with carrying out a concrete examination of the content of the pleadings relating to Cases T-209/01 *Honeywell* v *Commission*, T-210/01 *General Electric* v *Commission*, and C-203/03 *Commission* v *Austria*. Accordingly, it is necessary first of all to establish whether the documents in question all fell within the same category, so that the same justification can be applied to all of them. If that is so, it is then necessary to ascertain whether the exception relating to the protection of court proceedings, as applied in the present case by the Commission, covers manifestly and in their entirety the documents falling within that category, in that the need for protection invoked was real (see, to that effect, *VKI*, cited at paragraph 54 above, paragraphs 83 and 84).

73 In principle, it is on account of the nature of the information contained in the documents at issue that their disclosure may undermine a protected interest, in the present case the protection of court proceedings. An assessment by category therefore presupposes — if it is to be able to determine the likely consequences of the act of disclosure on the court proceedings — that the documents which form part of the category identified contain the same type of information. The absence of a concrete examination can be justified only in cases where it is clear that the exception invoked actually applies to all the information contained in the documents requested (*VKI*, cited at paragraph 54 above, paragraph 75).

74 However, given the specific nature of the interests that the exception in question seeks to protect, as is apparent from the observations set out in paragraph 63 above, and since the documents to which access has been requested are the pleadings of one of the parties to the proceedings, it cannot be ruled out that non-disclosure may be justified for a certain length of time for reasons independent of the content of each document sought, provided that those reasons justify the need to protect the documents in question in their entirety.

75 In the present case, it must be noted, first, that the pleadings to which access was requested were drawn up by the Commission as a party in three direct actions which

were still pending on the date of adoption of the contested decision. For that reason, the pleadings relating to the three cases in question may all be regarded as falling within the same category and it was therefore possible to base the refusal of access on one and the same justification.

76 Second, the Commission essentially based the refusal of access to the pleadings in Cases T-209/01 *Honeywell* v *Commission*, T-210/01 *General Electric* v *Commission*, and C-203/03 *Commission* v *Austria* on the need to safeguard its position as a party, whether as a defendant or as an applicant, contending that disclosure of those pleadings would be liable to create an imbalance between it and the other parties to the proceedings, would harm the serenity of the proceedings before the court and would run counter to the approach followed in this respect by the Community judicature. It is therefore necessary to examine whether those reasons justify the view that the pleadings in question were manifestly covered in their entirety by the exception relating to the protection of court proceedings.

77 Accordingly, it is necessary to consider the relevance of the fact that the contested decision was adopted at a time when the pleadings in question had not yet been discussed before the court, bearing in mind that, according to the Commission, the date of the hearing constitutes a decisive factor as regards the decision to be taken concerning access to the pleadings sought, in that refusal of access is essential before such a date in order to prevent the Commission's agents from being subjected to outside pressure, particularly from members of the public.

78 On that point, it must be recognised that disclosure of its pleadings before the hearing could place the Commission in the situation of having to deal with criticism and objections which could be levelled against the arguments in those pleadings by specialists and by the press and public opinion in general. In addition to possible pressure on its agents, those criticisms and objections could in particular have the

effect of imposing an additional task on the Commission, since it might consider itself obliged to take account of them in the defence of its position before the court, whereas the parties to the proceedings which are under no obligation to disclose their pleadings can defend their interests free from all external influences.

79 In this respect, this Court recalls that the principle of equality of arms — one of the elements of the broader concept of fair trial — requires each party to be given a reasonable opportunity to present his case under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent (see Eur. Court H.R., *Dombo Beheer BV* v *Netherlands*, judgment of 27 October 1993, Series A No 274, paragraph 33; *Ernst and Others* v *Belgium*, judgment of 15 July 2003, paragraph 60, and *Vezon* v *France*, judgment of 18 April 2006, paragraph 31). However, although the fact of disclosing its own pleadings is not in itself likely to place the institution concerned at a substantial disadvantage in the presentation of its case before the court, the fact remains that the guarantee of an exchange of information and opinion free from all external influences may require, in the interests of the proper course of justice, that public access to pleadings of the institutions be refused so long as the arguments contained therein have not been debated before the court.

80 Furthermore, as the Court of First Instance held in *Svenska Journalistförbundet* v *Council*, cited at paragraph 15 above (paragraphs 136 to 138), parties have the right to defend their interests free from all external influences and particularly from influences on the part of members of the public. Although that point was made by the Court in order to find that the use that a party had made of the defence of the other party to the proceedings was improper, it must none the less be understood as meaning that, until the hearing has been held, the proceedings must be protected from all external influences.

81 Like the other parties to the proceedings, the Commission must be able to present and debate its position free from all external influences, especially since the position which it defends is in principle designed to ensure the proper application of

Community law. Because of the nature of the interests, referred to in paragraph 63 above, that the exception in question seeks to protect, the fulfilment of such an objective requires that the Commission's pleadings not be disclosed before it has had an opportunity to debate them before the court at the hearing and that the Commission therefore be entitled to exclude public access to them, because of the possible pressure on its agents to which a public debate triggered by their disclosure could give rise, and it is not necessary, for this purpose, that it carry out a concrete assessment of their content.

82 Thus, it must be concluded that, since the proceedings to which the pleadings to which access has been requested relate have not yet reached the hearing stage, the refusal to disclose those pleadings must be considered to cover all aspects of the information contained therein. On the other hand, after the hearing has been held, the Commission is under an obligation to carry out a concrete assessment of each document requested in order to ascertain, having regard to the specific content of that document, whether it may be disclosed or whether its disclosure would undermine the court proceedings to which it relates.

83 Those conclusions cannot be invalidated by the arguments of the parties in this connection.

84 First, the conclusion that there should be a blanket and automatic exclusion of pleadings from the right of access until the date of the hearing cannot be called in question by the fact, relied on by the applicant in its pleadings, that the disclosure of procedural documents is possible in several Member States and that it is also provided for in Article 40(2) of the ECHR, which states that '[d]ocuments deposited with the Registrar shall be accessible to the public unless the President of the Court decides otherwise'. The scope of that provision is clarified in Article 33 of the Rules of Procedure of the European Court of Human Rights which provides, at paragraph 2, for the possibility of refusing access to a document on grounds of certain clearly identified public or private interests or 'to the extent strictly necessary in the opinion

of the President of the Chamber in special circumstances where publicity would prejudice the interests of justice'.

85 In this respect, it is sufficient to note that, unlike those provisions, the Rules of Procedure of the Community Courts do not provide for a third party right of access to procedural documents lodged with the Registrar by the parties.

86 Second, the conclusion that it is necessary to carry out a concrete assessment of the content of the pleadings requested if they relate to a case in which the hearing has already taken place cannot be called in question by the fact that the Commission, as it claims, is obliged to follow the approach of the court before which the case is pending, so that it is required, as regards pending cases to which it is a party, to refuse access to the pleadings requested until final judgment is given.

87 It is true that the parties' pleadings are in principle confidential as regards their treatment by the Community judicature. The second paragraph of Article 20 of the Statute of the Court of Justice ('the Statute'), which is also applicable to the Court of First Instance by virtue of Article 53 of the Statute, requires only that the pleadings be communicated to the parties and to the institutions of the Communities whose decisions are being disputed. In addition, the second subparagraph of Article 16(5) of the Rules of Procedure of the Court of Justice and the second subparagraph of Article 24(5) of the Rules of Procedure of the Court of First Instance provide with respect only to the parties to a case that copies of the pleadings may be obtained, and the third subparagraph of Article 5(3) of the Instructions to the Registrar of the Court of First Instance makes access by third parties to procedural documents subject to the existence of a legitimate interest which must be properly justified.

88 Those provisions do not, however, prohibit parties from disclosing their own pleadings, since the Court of Justice has stated that no rule or provision authorises

or prevents parties to proceedings from disclosing their own written submissions to third parties and that, apart from exceptional cases where disclosure of a document might adversely affect the proper administration of justice, which was not the position in the case before it, the principle is that parties are free to disclose their own written submissions (Order in *Germany* v *Parliament and Council*, cited at paragraph 42 above, paragraph 10). Not only does such a statement by the Court rule out the existence of an absolute principle of confidentiality, it also implies that the disclosure of written submissions concerning pending cases does not necessarily undermine the principle of the proper administration of justice.

89 Nor do those provisions require the institutions to follow, as regards the application of the rules concerning access to documents, the approach of the court before which the case to which the pleadings requested relate is pending, since the Court of Justice has already held, pursuant to the 1993 Code of Conduct, that it is not possible to infer from the right of every person to a fair hearing by an independent tribunal that the court hearing a dispute is necessarily the only body empowered to grant access to the documents in the proceedings in question, especially since the risks that the independence of the court might be undermined are sufficiently taken into account by that code and by the protection afforded by the courts at Community level with respect to measures of the Commission granting access to documents which it holds (*Netherlands and van der Wal* v *Commission*, cited at paragraph 36 above, paragraphs 17 and 19). It cannot therefore be accepted, in the absence of specific provisions laid down to that effect, that the scope of application of Regulation No 1049/2001 may be restricted on the ground that the provisions of the Rules of Procedure referred to in paragraph 87 above do not govern access of third parties and that they are applicable as a *lex specialis* (as regards the application of the 1993 Code of Conduct, see, to that effect, *Interporc II*, cited at paragraph 15 above, paragraphs 37, 44 and 46).

90 Lastly, it must be stated that the only procedural provisions which prohibit the parties from disclosure are Article 56(2) of the Rules of Procedure of the Court of Justice and Article 57 of the Rules of Procedure of the Court of First Instance, which provide that the oral proceedings in cases heard *in camera* are not to be published. In accordance with Article 31 of the Statute, the hearing in court is public, unless the Court, of its own motion or on application by the parties, decides otherwise for

serious reasons. Such a provision on the public nature of court hearings constitutes the application of a fundamental principle enshrined in Article 6(1) of the ECHR. However, in accordance with the settled case-law of the European Court of Human Rights (see Eur. Court H.R., *Sutter* v *Switzerland*, judgment of 22 February 1984, Series A No 74, paragraph 26; *Diennet* v *France*, judgment of 26 September 1995, Series A No 325-A, paragraph 33, and *Exel* v *Czech Republic*, judgment of 5 July 2005, paragraph 45):

'This public character protects litigants against the administration of justice in secret with no public scrutiny; it is also one of the means whereby confidence in the courts can be maintained. By rendering the administration of justice transparent, publicity contributes to the achievement of the aim of Article 6 § 1, namely a fair trial, the guarantee of which is one of the fundamental principles of any democratic society, within the meaning of the Convention.'

91 By providing that it is on an exceptional basis that the court is to decide to hold a hearing *in camera*, Article 31 of the Statute confirms, first, that disclosure of pleadings which have already been discussed in public during the hearing and which are also the subject of a summary to which members of the public have access at that hearing is not likely, in principle, to undermine the proper conduct of the proceedings at issue. Second, a possible need for confidentiality, whether absolute or partial, can be decided on by a court only before the hearing has been held, so that the fact that the institution concerned grants access only from the date of the hearing safeguards the *effet utile* of any decision by a court, of its own motion or on application by a party, to hold the hearing *in camera*.

92 It follows from all the foregoing that the Commission did not err in law by not carrying out a concrete assessment of the pleadings relating to Cases T-209/01 *Honeywell* v *Commission*, T-210/01 *General Electric* v *Commission*, and C-203/03 *Commission* v *Austria*, and that it did not commit an error of assessment in taking the view that there was a public interest in the protection of those pleadings.

93 In accordance with the last line of Article 4(2) of Regulation No 1049/2001, access to the pleadings requested by the applicant had none the less to be granted, even if their disclosure was in fact likely to undermine the protection of the court proceedings in question, if an overriding public interest justified their disclosure.

94 It must be stated that Regulation No 1049/2001 does not define the concept of overriding public interest. It should also be pointed out that, in the case of interests protected by the exception in question and unlike the interests protected by the exceptions provided for in Article 4(1) of that regulation — in respect of which it is the legislature itself which balanced the interests at stake — it is for the institution concerned to strike a balance between the public interest in disclosure and the interest which is served by a refusal to disclose, in the light, where appropriate, of the arguments put forward by the applicant in that connection.

95 In this instance, the applicant has merely claimed that the public's right to be informed about important issues of Community law, such as those concerning competition, and about issues which are of great political interest, which is true of the issues raised by the infringement proceedings, prevails over the protection of the court proceedings. For its part, the Commission has contended that the last line of Article 4(2) of Regulation No 1049/2001 constitutes an exception to an exception and that, consequently, if it were to be applied systematically, as an expression of the principle of transparency, the exception relating to the protection of court proceedings would be deprived of all *effet utile*. In the absence of any specific arguments by the applicant attesting to the existence of an overriding need for the public to be informed on the abovementioned issues, the Commission took the view, in the contested decision, that the public interest is best served if the proper conduct of the court proceedings in question is protected.

96 Certainly freedom of the press plays an essential role in a democratic society. It is for the press to communicate information on all matters of general interest, including as

regards reports and commentaries on court proceedings, which contributes to raising awareness of them and is perfectly compatible with the requirement that hearings be held in public, as recalled in paragraph 90 above. It is also clear that the public's right to receive that information constitutes the expression of the principle of transparency, to which the provisions of Regulation No 1049/2001, as a body, give effect, as is apparent from the second recital in the preamble to that regulation, according to which openness enables citizens to participate more closely in the decision-making process and guarantees that the administration enjoys greater legitimacy and is more effective and more accountable to them, and contributes to strengthening the principle of democracy.

97 The overriding public interest, as referred to in the last line of Article 4(2) of Regulation No 1049/2001, which is capable of justifying the disclosure of a document which undermines the protection of court proceedings must, as a rule, be distinct from the above principles which underlie that regulation. However, the fact that, as is the case here, a party requesting access does not invoke a distinct public interest does not automatically imply that it is unnecessary to weigh up the interests at stake. The invocation of those same principles may, in the light of the particular circumstances of the case, be so pressing that it overrides the need to protect the documents in question.

98 However, that is not the case here. First, the possibility for members of the public to receive information concerning pending cases is guaranteed by the fact that each action, from the time that it is lodged, is the subject, in accordance with Article 16(6) of the Rules of Procedure of the Court of Justice and Article 24(6) of the Rules of Procedure of the Court of First Instance, of a notice in the Official Journal, which is also transmitted by internet on the Eur-Lex website and the website of the Court of Justice, stating, in particular, the subject-matter of the dispute and the forms of order sought in the application, as well as the pleas in law and main arguments put forward. Moreover, the Report for the Hearing, which contains a summary of the parties' arguments, is made public on the day of the hearing, during which, moreover, the parties' arguments are debated in public.

99 Second, the objective pursued through the application of the exception relating to the protection of court proceedings is primarily to prevent all external influences on the proper conduct of those proceedings. However, as is apparent from the foregoing observations, the interest in the protection of that objective is necessary irrespective of the content of the pleadings requested by the applicant, since it is an interest the protection of which is necessary for the proper course of justice.

100 It must therefore be held that the Commission was right to take the view that the interest that there was in ensuring protection of the court proceedings in question overrode the general interest that there might be in disclosure, as invoked by the applicant. Furthermore, such a restriction is not absolute, in that it covers all the pleadings to which access has been refused only until the date of the hearing.

101 It follows that the Commission did not commit a manifest error of assessment in taking the view that the interest invoked by the applicant was not capable of justifying disclosure of the pleadings in question.

102 It follows from all the foregoing that the application for annulment of the contested decision in so far as concerns the refusal of access to the pleadings relating to Cases T-209/01 *Honeywell* v *Commission*, T-210/01 *General Electric* v *Commission*, and C-203/03 *Commission* v *Austria* must be rejected.

— Refusal of access to the pleadings relating to Case T-342/99

103 As regards the refusal to grant access to the pleadings in Case T-342/99 *Airtours* v *Commission*, which was closed by judgment of the Court of First Instance of 6 June

2002 — that is to say, approximately one and a half years before the adoption of the contested decision — the Commission stated, in that decision, that the need to protect the court proceedings subsisted because that judgment had been followed by an action for damages lodged against the Commission (Case T-212/03 *MyTravel* v *Commission*). It observed that Case T-212/03, which is still pending before the Court of First Instance, is closely linked to the proceedings closed by the judgment in Case T-342/99, in that the arguments put forward by the Commission in order to defend the lawfulness of the decision annulled by that judgment of the Court of First Instance would also be debated in the pending proceedings.

104 Furthermore, it must be pointed out that the Commission lodged its defence in Case T-212/03 *MyTravel* v *Commission* on 28 February 2004, whilst the contested decision was adopted on 20 November 2003. As the Commission itself stated at the hearing, at the time of the adoption of the contested decision, it had not yet decided which, among those arguments in the pleadings submitted in connection with the closed case, it would also put forward in the pending case. The total refusal of access to those pleadings therefore stems from the Commission's desire to remain free to choose the arguments to be used for defending its position in the pending case.

105 However, such a justification is clearly not capable of establishing that the refusal of access to the pleadings in question was covered by the exception at issue, in the sense that those pleadings needed to be protected in their entirety because their disclosure would have undermined the pending proceedings connected to those to which the pleadings relate.

106 In the first place, the pleadings to which the applicant requested access concern a case which has been closed by a judgment of the Court of First Instance. It follows that their content was not only made public (in the form of a summary by means of the Report for the Hearing drawn up by the Court) and debated at a hearing, but was also reproduced in the judgment of the Court. Since the arguments involved are already in the public domain, at least in summary form, the need invoked by the

Commission to refuse access to the pleadings requested in their entirety, on the sole ground that the arguments set out therein will be discussed in a separate case which is still pending, is liable to negate the general principle of granting the widest possible access to documents held by the institutions. The actual consequence of such an approach is manifestly to invert the relationship between the rule laid down in Regulation No 1049/2001, which consists in the right of access, and the exceptions to it, which, in accordance with the case-law referred to in paragraph 53 above, must be interpreted and applied strictly.

107 In the second place, it is not unusual for the institution concerned to use the same arguments in cases which may concern the same parties, but have a different subject-matter or, alternatively, which concern different parties, but have the same subject-matter. The nature of the risk of an adverse effect on the proceedings which are still pending in no way emerges from the mere fact that arguments already submitted before the court in a closed case are likely also to be debated in a similar case, or in an action for damages brought by the same party as was successful in its action for annulment.

108 The reasons put forward by the Commission in order to justify the refusal of access to the pleadings relating to Case T-342/99 *Airtours* v *Commission* could also apply, if accepted, in all cases where the arguments in pleadings relating to a closed case are likely also to be put forward in a pending case.

109 Moreover, in the present case, as was pointed out in paragraph 104 above, the Commission decided to refuse access because it took the view that it must be free to choose, amongst the arguments in those pleadings, those which it would also use in the pending case. That argument, which also implies that the possibility of partial access could not be contemplated, in breach of Article 4(6) of Regulation No 1049/2001, confirms that the Commission has failed to demonstrate that disclosure

of the content of the pleadings requested by the applicant would undermine the proper conduct of the proceedings in T-212/03 *MyTravel* v *Commission,* which is still pending before the Court of First Instance.

110 The purported need to protect arguments which will, if appropriate, be used in proceedings which are still pending cannot therefore constitute a reason for refusing access to pleadings relating to a case which has already been closed by a judgment of the Court of First Instance, in the absence of any specific statement of reasons showing that their disclosure would undermine the pending court proceedings. The fears expressed by the Commission therefore remain mere assertions and are, consequently, utterly hypothetical (see, to that effect, *VKI,* cited at paragraph 54 above, paragraph 84).

111 It follows from the foregoing that the Commission committed an error of assessment by refusing access to the pleadings relating to Case T-342/99 *Airtours* v *Commission.* The application for annulment of the contested decision must therefore be granted in so far as concerns that refusal.

Refusal of access to documents on the basis of the exception relating to the protection of the purpose of investigations, as provided for in the third indent of Article 4(2) of Regulation No 1049/2001

Arguments of the parties

112 The applicant submits that the Commission may not refuse to disclose its pleadings on the basis of the exception relating to the protection of the purpose of investigations, on the ground that they have been submitted in infringement proceedings still pending before the Court of Justice or which, although closed by

judgment of the Court, relate to procedures still pending before the Commission. The applicant maintains that infringement proceedings are of great political significance, so that the public interest in access to the documents in such proceedings is considerable and increases as the investigation proceeds.

113 Since the exception for the protection of the purpose of investigations has a strong factual component and is principally concerned with the suppression or alteration of evidence, the possibility that the public interest in the protection of investigations will be harmed decreases in proportion to the evidence obtained. The applicant submits that, since the public interest in disclosure steadily grows and the public interest in the protection of investigations steadily diminishes, the documents of the institutions relating to infringement proceedings must be disclosed at least in part or in a non-confidential version. Accordingly, if access is refused, the Commission should be under a duty to furnish proof of serious harm to the public interest in question.

114 According to the applicant, the point at which the public interest in disclosure gains priority over the protection of investigations is marked by the bringing of the action before the Court, because of the fact that, by that stage in the case, efforts to reach an amicable settlement of the dispute have failed. That position is supported by *Petrie and Others* v *Commission*, cited at paragraph 17 above, in which the Court of First Instance found that the documents drafted by the Commission before the infringement action was brought, namely letters of formal notice and reasoned opinions which arose in the context of the pre-litigation procedure, were excluded from public access. In addition, it should be observed that that judgment concerns the 1993 Code of Conduct and that Article 4(2) of Regulation No 1049/2001 falls to be more narrowly construed as regards the exceptions to the right of access.

115 The Commission contends that the aim of the infringement procedure is to ensure that national law complies with Community law, not to 'prosecute' Member States. So long as the Court has not given a ruling it is possible, therefore, to arrive at an

amicable settlement, which requires a dialogue protected by confidentiality, as the Court of First Instance recognised in *Petrie and Others*, cited at paragraph 17 above (paragraph 68). On that point, the applicant's argument that *Petrie and Others* relates only to the pre-litigation procedure — since the documents requested in that case were letters of formal notice and reasoned opinions — is unfounded because the Court of First Instance made it clear in that judgment that the requirement of confidentiality applies to the entire infringement procedure up to the delivery of the judgment (*Petrie and Others*, cited at paragraph 17 above, paragraph 68).

116 Referring to Annex II to the XXth Report on monitoring the application of Community law, the Commission adds that the statistics for 2002 show the effectiveness of the dialogue between the Commission and the Member States on the subject of infringements, those statistics showing that, of 361 cases brought before the Court of Justice, 69 were withdrawn before judgment was handed down and 22 were withdrawn before a further application was made to the Court under Article 228 EC. Thus, since the dialogue may continue, if need be, until the ruling in a subsequent action under Article 228 EC, disclosure of the Commission's arguments could adversely affect the infringement procedure by undermining the climate of trust between the Commission and the Member States.

117 The request for the Commission's pleadings in Case C-203/03 *Commission* v *Austria*, which is still pending, was refused precisely in order not to endanger the aim of reaching an amicable settlement of the dispute between the Austrian authorities and the Commission. Access to the pleadings in the *Open Skies* cases was refused for similar reasons as the Member States concerned have still not complied with the judgments of the Court of Justice finding that they had failed to fulfil their Treaty obligations, and related proceedings against other Member States are still pending.

118 Finally, according to the Commission, there is no overriding public interest requiring the disclosure of pleadings in all infringement proceedings, otherwise the exception relating to the protection of the purpose of investigations would be wholly

deprived of *effet utile*. The Commission points out that, in the statement made at the time when Regulation No 1049/2001 was adopted, it had stated that it could 'agree to infringement proceedings not being expressly included in the list of exceptions in Article 4(2) of the Regulation, as it consider[ed] that the text as worded [did] not affect current practice with regard to the protection of confidentiality for the purposes of its duties in monitoring compliance with Community law' (Council Minutes, 6 June 2001, doc. 9204/01 ADD 1, p. 3). Furthermore, the public interest to be protected lies in the Commission being able to persuade Member States to comply with Community law, which requires the climate of trust between them to be maintained and all access to documents before a case is closed to be refused.

Findings of the Court

119 It must be recalled that the exception relating to the protection of the purpose of investigations was already provided for in the 1993 Code of Conduct. As was pointed out at paragraph 62 above concerning the protection of legal proceedings, the differences between that code and Regulation No 1049/2001 consist, first, in the fact that the code provided for the possibility of excluding from public access any document whose disclosure 'could undermine' the activities of the investigation, whilst the second refers to the case where disclosure 'would undermine' those activities and, second, in the fact that the Code did not provide that an overriding public interest could override the interest in the protection of the purpose of the investigations. On the other hand, in common with the 1993 Code of Conduct, Regulation No 1049/2001 does not include any definition of investigations.

120 According to the related case-law, established under the 1993 Code of Conduct, that exception was deemed to have been validly relied on by the Commission in order to refuse access to documents relating to investigations into a possible breach of Community law, leading potentially to the opening of a proceeding under Article

226 EC (*WWF UK* v *Commission*, cited at paragraph 67 above, and *Bavarian Lager* v *Commission*, cited at paragraph 53 above) or having actually led to the opening of such a proceeding (*Petrie and Others* v *Commission*, cited at paragraph 17 above). In those cases, the refusal of access was considered justified because of the fact that the Member States are entitled to expect the Commission to observe confidentiality as regards investigations which may lead to an infringement proceeding, even where a period of time has elapsed since the closure of those investigations (*WWF UK* v *Commission*, cited at paragraph 67 above, paragraph 63) and even after the matter has been brought before the Court of Justice (*Petrie and Others* v *Commission*, cited at paragraph 17 above, paragraph 68).

121 Thus, it follows from the case-law that the disclosure of documents relating to the investigation stage, during the negotiations between the Commission and the Member State concerned, could undermine the proper conduct of the infringement proceeding inasmuch as its purpose, which is to enable the Member State to comply of its own accord with the requirements of the Treaty or, if appropriate, to justify its position (Case C-191/95 *Commission* v *Germany* [1998] ECR I-5449, paragraph 44) could be jeopardised (*Bavarian Lager* v *Commission*, cited at paragraph 53 above, paragraph 46). That requirement of confidentiality, as the Court of First Instance has also stated in connection with the application of the 1993 Code of Conduct, remains even after the matter has been brought before the Court of Justice, on the ground that it cannot be ruled out that the discussions between the Commission and the Member State in question regarding the latter's voluntary compliance with Treaty obligations may continue during the court proceedings and up to the delivery of the judgment. The preservation of that objective, namely an amicable settlement of the dispute between the Commission and the Member State concerned before the Court of Justice has delivered judgment, therefore justifies refusal of access to documents drawn up in connection with Article 226 EC proceedings (*Petrie and Others* v *Commission*, cited at paragraph 17 above, paragraph 68).

122 As regards the issue of whether such a justification applies to all the pleadings submitted by the Commission in connection with infringement proceedings pending before the Court of Justice, irrespective of the content of each document requested, it must be observed that, as follows from the observations set out in paragraph 73

above, it is permissible not to carry out a concrete examination of the content of each document requested if the documents in question are manifestly covered in their entirety by an exception to the right of access.

123 That is the case where the pleadings requested contain the same type of information and where the infringement to which they relate is contested by the Member State concerned. To the extent that the possibility of reaching an amicable settlement of the dispute between the Commission and the Member State in question constitutes an essential purpose of the Commission's investigations concerning infringements by Member States of their obligations under Community law, it must be stated that the confidentiality of procedural documents, which is necessary for achieving that purpose, is a requirement which it must be possible to safeguard until such time as the Court of Justice adjudicates on the possible existence of the infringement in question, thereby closing the process as regards the consequences which may flow from the investigation carried out by the Commission. Moreover, in so far as those documents refer to the results of the investigation carried out in order to prove the existence of the contested infringement, they must be covered in their entirety by that exception.

124 In the present case, the Commission refused to grant the applicant access to its pleadings concerning, first, infringement proceedings which were still pending at the time of the adoption of the contested decision (Case C-203/03 *Commission* v *Austria*) — that refusal thus also being based on the exception relating to the protection of court proceedings — and, second, eight similar infringement proceedings (*Open Skies* cases), in which, at the time of the adoption of the contested decision, judgment had already been given by the rulings of the Court of Justice of 5 November 2002, although the Member States concerned had still not complied with those judgments.

125 Since, as is apparent from paragraph 102 above, the refusal to grant access to the pleadings relating to Case C-203/03 *Commission* v *Austria* is covered by the

exception relating to the protection of court proceedings, there is no need to examine whether that refusal could also be based on the exception relating to the protection of the purpose of investigations. The application of that exception must therefore be considered only as regards the refusal of access to the pleadings relating to the *Open Skies* cases.

126 It must be stated that all those pleadings, in so far as they refer necessarily to the results of the investigations carried out by the Commission in order to establish the existence of an infringement of Community law, are closely related to the opening of the infringement proceedings in connection with which they were submitted and therefore relate to investigations within the meaning of the third indent of Article 4(2) of Regulation No 1049/2001.

127 However, given that, as was pointed at paragraph 53 above, all exceptions to the right of access must be interpreted and applied strictly, the fact that the documents requested concern a protected interest cannot, in itself, justify application of the exception invoked, since the Commission must establish that their disclosure was actually likely to undermine the protection of the purpose of its investigations concerning the infringements in question.

128 It is therefore for this Court to ascertain whether the Commission committed an error of assessment by taking the view that the refusal to disclose its pleadings in the infringement proceedings in question was covered by the exception provided for in the third indent of Article 4(2) of Regulation No 1049/2001.

129 The Commission stated, in the contested decision, that it could not allow access to those pleadings owing to the fact that, although the cases in question had been closed by judgments of the Court of Justice, the Member States concerned had still

not complied with those judgments, so that those cases were still pending before the Commission. According to the Commission, the negotiations in progress with those Member States with a view to inducing them to comply voluntarily with the requirements of Community law would be jeopardised if the pleadings requested by the applicant were disclosed. It follows that the purpose of the protection of its investigations subsists so long as those States have not complied with the judgments of the Court. In addition, as the Commission stated in its defence, a number of proceedings, which are connected to the *Open Skies* cases in that they have the same subject-matter, have been brought against other Member States and are still pending before the Court.

130 The applicant disputes the Commission's position, arguing, first, that *Petrie and Others* v *Commission*, cited at paragraph 17 above, is irrelevant in the present case, since it concerned documents drawn up before the action was brought before the Court of Justice and, second, that the referral of the matter to the Court implies that the efforts to reach an amicable settlement have failed. It adds that *Petrie and Others* concerns the application of the 1993 Code of Conduct and that Regulation No 1049/2001 is to be interpreted more strictly as regards exceptions to the right of access.

131 It must be pointed out, first, that it cannot be inferred from *Petrie and Others* v *Commission*, cited at paragraph 17 above, that it is possible to exclude from public access only documents drawn up before the matter was brought before the Court of Justice. The purpose of documents such as letters of formal notice and reasoned opinions is to delimit the subject-matter of the dispute, which implies that those documents and the action must necessarily be based on the same grounds and pleas (Case 298/86 *Commission* v *Belgium* [1988] ECR 4343, paragraph 10, and Case C-203/03 *Commission* v *Austria* [2005] ECR I-935, paragraph 28). As the Commission claimed in the contested decision, the evidence and arguments in the pleadings are therefore identical to those in the documents concerning the pre-litigation stage, and therefore the distinction drawn by the applicant is without foundation.

132 Second, whilst it true that the objective of reaching an amicable settlement is the *raison d'être* for the pre-litigation stage, the fact remains that, as the statistics provided by the Commission show, such a result is often attained only after the matter has been brought before the Court of Justice. It would therefore be contrary to the purpose of infringement proceedings, which is to induce the Member State concerned to comply with Community law, to exclude the possibility that this may be achieved after the action has been brought. Moreover, the Court of First Instance has expressed the same view, by stating that the requirement of confidentiality remains even after the matter has been brought before the Court of Justice, on the ground that it cannot be ruled out that the negotiations between the Commission and the Member State in question regarding the latter's voluntary compliance with Treaty obligations may continue during the court proceedings and up to the delivery of the judgment of the Court (*Petrie and Others* v *Commission*, cited at paragraph 17 above, paragraph 68).

133 Such a conclusion cannot be invalidated by the applicant's argument that the exception in question is designed to prevent alteration of evidence, and such a risk is very slight after the Commission's action has been brought before the Court. The aim of the exception in question, as is clear from its wording, is not to protect the investigations as such, but rather their purpose, which, as is apparent from the case-law cited in paragraphs 120 and 121 above, in the case of infringement proceedings, is to induce the Member State concerned to comply with Community law. It is for that reason that various acts of investigation may remain covered by the exception in question so long as that goal has not been attained, even if the particular investigation or inspection which gave rise to the document to which access is sought has been completed (*Franchet and Byk* v *Commission*, cited at paragraph 53 above, paragraph 110, and, by analogy, as regards the application of the 1993 Code of Conduct, Case T-20/99 *Denkavit Nederland* v *Commission* [2000] ECR II-3011, paragraph 48).

134 In the present case, on the date of the adoption of the contested decision, the Court had already delivered — approximately one year earlier — the judgments finding the infringements alleged by the Commission against the Member States concerned. It

cannot therefore be disputed that, on that date, there was no investigation in progress to prove the existence of the infringements in question which could have been jeopardised by the disclosure of the requested documents.

135 It must none the less be ascertained whether, as the Commission contends, documents relating to investigations may be considered to be covered by the exception referred to in the third indent of Article 4(2) of Regulation No 1049/2001, even though the activities in question have been completed and have led not only to the bringing of an action before the Court of Justice, but also to judgments delivered by the latter. It is therefore a question of establishing whether the purpose of attaining an amicable settlement, as invoked by the Commission in order to justify the refusal of access, can subsist after the delivery of judgments finding the existence of the infringements in respect of which the Commission's investigations were carried out.

136 In that regard, it must be pointed out that, following judgments finding infringements, the Member States concerned are required, under Article 228(1) EC, to take the necessary measures to comply with them. Although Article 228 EC does not specify the period within which a judgment must be complied with, it is apparent from settled case-law that the importance of immediate and uniform application of Community law means that the process of compliance must be initiated at once and completed as soon as possible (Case C-387/97 *Commission* v *Greece* [2000] ECR I-5047, paragraphs 81 and 82, and Case C-278/01 *Commission* v *Spain* [2003] ECR I-14141, paragraphs 26 and 27). Once the Court has found that a Member State has failed to fulfil its obligations under the Treaty, that State is required to take the measures to comply with that judgment, and such a result cannot depend on the outcome of the negotiations in progress with the Commission.

137 Admittedly, it cannot be ruled out that the Member State concerned will continue with its infringement, including as regards compliance with the judgment of the Court, which may lead the Commission, in accordance with Article 228(2) EC, to

initiate fresh infringement proceedings. However, in such a situation, the Commission must carry out a fresh investigation which involves a new pre-litigation procedure and leads, if necessary, to the matter being brought before the Court again. The investigations leading to an action being brought on the basis of Article 228 EC are therefore distinct from those which led to the bringing of an action on the basis of Article 226 EC, in that they seek to prove that the infringement found by judgment of the Court has continued after the delivery of that judgment.

138 Moreover, because it is directed against non-compliance with a judgment of the Court of Justice, Article 228(2) EC provides for instruments which have the specific objective of inducing a defaulting Member State to comply with a judgment establishing an infringement, and thereby of ensuring that Community law is in fact applied by that State. The measures provided for in that provision, namely a lump sum and a penalty payment, are both intended to achieve this objective, which is therefore to place that State under economic pressure which induces it to put an end to the infringement established (Case C-304/02 *Commission* v *France* [2005] ECR I-6263, paragraphs 80 and 91, and Case C-177/04 *Commission* v *France* [2006] ECR I-2461, paragraphs 59 and 60).

139 Finally, to accept that the various documents relating to investigations are covered by the exception provided for in the third indent of Article 4(2) of Regulation No 1049/2001 until the follow-up action to be taken has been decided, even in the case where a fresh investigation leading potentially to the bringing of an action on the basis of Article 228(2) EC is necessary, would make access to those documents dependent on uncertain events, namely non-compliance by the Member State concerned with the judgment of the Court establishing the infringement and the bringing of an action under Article 228(2) EC, which falls within the discretion of the Commission. In any event, they are uncertain and future events, which depend on the speed and diligence of the various authorities concerned.

140 Such an approach would be contrary to the objective of guaranteeing the widest possible public access to documents emanating from the institutions, with the aim

of giving citizens the opportunity to monitor more effectively the lawfulness of the exercise of public powers (see, to that effect, *Franchet and Byk* v *Commission*, cited at paragraph 53 above, paragraph 112; see also, by analogy, as regards the application of the 1993 Code of Conduct, *Interporc II*, cited at paragraph 15 above, paragraph 39, and *JT's Corporation* v *Commission*, cited at paragraph 56 above, paragraph 50).

141 As regards the fact, relied on in the defence, that cases having the same subject-matter as the *Open Skies* cases are still pending before the Court of Justice, it is sufficient to point out, first, that the Commission has given no explanation whatsoever as to how the possibility of reaching an amicable settlement with the Member States concerned by those cases would be undermined by the disclosure of pleadings which it submitted in connection with proceedings against other Member States and which have already been closed by judgments of the Court. Second, as stated at paragraphs 106 and 107 above, a mere link between two or more cases, whether they have the same parties or the same subject-matter, cannot in itself justify a refusal of access: otherwise, there would a manifest inversion of the relationship between the principle and the exceptions thereto, that is to say, between the principle of free access to the documents of the institutions and the exceptions to that principle, as set out in Regulation No 1049/2001.

142 It follows from all the foregoing that the Commission committed an error of assessment by refusing to grant access to the documents concerning the *Open Skies* cases. The application for annulment of the contested decision must therefore be granted as regards that refusal.

Costs

143 Under the first subparagraph of Article 87(3) of the Rules of Procedure, where each party succeeds on some and fails on other heads, the Court of First Instance may order that costs be shared or that each party bear its own costs. In the circumstances

of the present case, since each party has failed in one of its heads of claim, each party must be ordered to bear its own costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Grand Chamber)

hereby

1. **Annuls the Commission's decision of 20 November 2003 in so far as it refused access to the pleadings submitted by the Commission before the Court of Justice in Case C-466/98 *Commission* v *United Kingdom*; Case C-467/98 *Commission* v *Denmark*; Case C-468/98 *Commission* v *Sweden*; Case C-469/98 *Commission* v *Finland*; Case C-471/98 *Commission* v *Belgium*; Case C-472/98 *Commission* v *Luxembourg*; Case C-475/98 *Commission* v *Austria* and Case C-476/98 *Commission* v *Germany* and before the Court of First Instance in Case T-342/99 *Airtours* v *Commission*;**

2. **Dismisses the remainder of the action;**

3. Orders each party to bear its own costs.

Vesterdorf	Jaeger	Pirrung
Vilaras	Legal	Martins Ribeiro
Cremona	Pelikánová	Šváby
Jürimäe		Wahl
Prek		Ciucă

Delivered in open court in Luxembourg on 12 September 2007.

E. Coulon — B. Vesterdorf

Registrar — President