



Reports of Cases

ORDER OF THE PRESIDENT OF THE GENERAL COURT

29 November 2012*

(Interim relief — Competition — Commission decision to transmit documents to a national court — Confidentiality — Right to effective judicial protection — Application for interim measures — Prima facie case — Urgency — Weighing up of interests)

In Case T-164/12 R,

Alstom, established in Levallois-Perret (France), represented by J. Derenne, lawyer, and by N. Heaton, P. Chaplin and M. Farley, Solicitors,

applicant,

v

European Commission, represented by A. Antoniadis, and N. Khan and P. Van Nuffel, acting as Agents,

defendant,

supported by

National Grid Electricity Transmission plc, represented by A. Magnus, C. Bryant and E. Coulson, Solicitors, and by J. Turner QC and D. Beard QC,

intervener,

APPLICATION for suspension of operation of the Commission's decision of 26 January 2012 contained in letters No D/2012/006840 and No D/2012/006863 from the Director General of the Commission's Directorate-General for Competition, concerning the transmission of certain documents to the High Court of England and Wales for use in evidence in proceedings brought against the applicant, and an application for confidential treatment to be ordered in the present proceedings in respect of the professional secrets contained in the applicant's reply of 30 June 2006 to the statement of objections in Case COMP/F/38.899 — Gas insulated switchgear,

THE PRESIDENT OF THE GENERAL COURT,

makes the following

* Language of the case: English.

Order

Background to the dispute

Preliminary remarks

- 1 Areva T&D Holding SA, Areva T&D SA and Areva T&D AG were part of the Alstom group until 8 January 2004, when they were acquired by Areva. On 7 June 2010 Areva sold them back to the applicant, which renamed them T&D Holding (then, following internal restructuring on 30 and 31 March 2012, Alstom Holdings), Alstom Grid SAS and Alstom Grid AG, respectively. Those three undertakings are referred to in this order as ‘the Grid companies’, irrespective of their parent company.

The proceedings before the Commission and the Courts of the European Union

- 2 On 20 April 2006 the Commission issued a statement of objections in Case COMP/F/38.899 — Gas insulated switchgear (the ‘GIS’ decision) to which the applicant replied on 30 June 2006 (‘the applicant’s reply’) and Areva and the Grid companies replied jointly on the same day as the applicant (‘the Areva and Grid companies reply’).
- 3 On 24 January 2007 the Commission adopted Decision C(2006) 6762 final in that case, penalising, inter alia, the applicant, Areva and the Grid companies for their participation in a cartel on the market for gas insulated switchgear. On 18 April 2007 the applicant brought an action for annulment of that decision, as did Areva and the Grid companies.
- 4 By judgment of 3 March 2011 in Joined Cases T-117/07 and T-121/07 *Areva and Others v Commission* [2011] ECR II-633, the Court reduced the fines imposed on the applicant and on Areva and the Grid companies. Areva appealed against that judgment on 24 May 2011, as did the applicant and the Grid companies on 25 May 2011 (Joined Cases C-247/11 P and C-253/11 P *Areva v Commission*).

The proceedings before the High Court of England and Wales

- 5 On 17 November 2008 National Grid Electricity Transmission plc (‘NGET’) brought a claim for damages against, inter alia, the applicant, Areva and the Grid companies before the High Court of England and Wales (‘the High Court’) on the ground that the prices that it had paid for gas insulated switchgear purchased between 1988 and 2004 from the companies involved in the cartel had been excessive as a result of the existence of that cartel.
- 6 In those proceedings, NGET made an application for disclosure of the replies of the applicant and of Areva and the Grid companies to the statement of objections in Case COMP/F/38.899 — Gas insulated switchgear. The High Court ruled on that application by judgment of 4 July 2011. Then, having issued an order dated 11 July 2011 (‘the confidentiality order’) establishing a ‘confidentiality ring’ the aim of which was to protect the confidential information contained in the documents provided to the parties to the High Court proceedings, the High Court requested, by letter of 13 July 2011, the transmission by the Commission pursuant to Article 15(1) of 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) of the applicant’s reply and the Areva and Grid companies reply. By letter of 25 July 2011 the applicant and the Grid companies submitted their observations to the Commission with regard to the High Court’s request for transmission.

- 7 On 28 October 2011 the Commission sent a letter to the High Court informing the High Court that it intended to accede to the request, indicating however that it first had to inform, in particular, the applicant and the Grid companies. By letter dated 26 January 2012 the Commission accordingly communicated to those undertakings its decision to accede to the High Court's request ('the contested decision') and the documents that it was intending to send if they did not contest that decision before the General Court and the judge hearing applications for interim measures.
- 8 On 21 February 2012 the applicant and the Grid companies informed the Commission of their intention to bring an action against that decision and to make an application for interim measures to the President of the General Court.

Procedure

The application for interim measures and the application for partial discontinuance

- 9 On 10 April 2012 the applicant and the Grid companies brought an action for annulment of the contested decision. By separate document of the same date they lodged an application for interim measures seeking the suspension of operation of the contested decision, pursuant to Articles 278 TFEU and 279 TFEU.
- 10 On receiving the application for interim measures, the Commission noted the complaint of the applicant and the Grid companies that, despite the exclusion of material provided in connection with the Commission notice on immunity from fines and reduction of fines in cartel cases (OJ 2002 C 45, p. 3; 'the 2002 Leniency Notice') from the scope of the High Court's request, the version of the replies that it was intending to transmit to the High Court included such material. By letter of 26 April 2012 the Commission informed those undertakings that it had decided to amend those versions by removing that material.
- 11 On 10 May 2012 the Commission lodged its observations on the application for interim measures.
- 12 On 21 May 2012 the applicant and the Grid companies lodged a letter at the Court Registry informing it that, following the Commission's decision of 26 April 2012, the amended version of the Areva and Grid companies reply no longer raised any issues of sufficient significance, and therefore the Grid companies had decided to discontinue the main proceedings and to withdraw their application for interim measures. In addition, the applicant, having taken note of the Commission's decision, also amended the form of order sought, to take account of the fact that some of its pleas and documents annexed in support of its application were no longer relevant.
- 13 On 29 May 2012 the Commission lodged its observations on the application for partial discontinuance and the amendment of the form of order sought in the application for interim measures.
- 14 On 13 June 2012 the President of the General Court made an order of partial removal from the register in Case T-164/12 R, to remove the names of the Grid companies from the list of applicants. On 10 July 2012 the President of the Fourth Chamber of the General Court, by order, also removed the names of the Grid companies from the list of applicants in the main proceedings and ordered the Commission to bear its own costs and to pay one third of those incurred by the Grid companies in Case T-164/12 and Case T-164/12 R.

NGET's application to intervene and the applicant's application for confidential treatment

- 15 On 1 May 2012 NGET lodged an application for leave to intervene in Case T-164/12 R in support of the presumed form of order sought by the Commission. By letter of 22 May 2012 the Commission informed the President of the Court that it had no objection in that regard. On 23 May 2012 the applicant submitted its observations on the application for leave to intervene, in which it stated, in essence, that it did not object to it. By separate document of the same date the applicant applied for confidential treatment of information and documents provided in Case T-164/12 R. On 6 June 2012 NGET lodged a letter indicating that an aspect of national procedure had been presented incorrectly in the applicant's observations on the application for leave to intervene, and took the opportunity to reiterate the importance of its being granted leave to intervene so as to be able to assist the General Court in relation to the nature and status of the proceedings before the High Court.
- 16 On 10 July 2012 NGET lodged an application for leave to intervene in support of the form of order sought by the Commission in Case T-164/12, to which no objection was raised either by the Commission or by the applicant. The applicant did, however, make an application on 7 August 2012 for confidential treatment in respect of information and documents provided in Case T-164/12.
- 17 By order of 4 September 2012 the President of the Fourth Chamber of the General Court granted NGET leave to intervene in Case T-164/12. On 13 September 2012 the President of the General Court made an order granting NGET leave to intervene in Case T-164/12 R. Without prejudice to the findings of the judge hearing the application for interim measures as to the merits of the application for confidential treatment, a non-confidential version prepared by the applicant of the documents provided in connection with the application for interim measures was, inter alia, transmitted to the intervener, who was invited to submit any observations in that regard.
- 18 On 27 September 2012 the intervener lodged (i) its statement in intervention and (ii) its observations on the application for confidential treatment submitted by the applicant, in which it declared that it would leave it to the Court to consider whether any procedural arrangements should be adopted to enable it to be heard on that issue. On 8 October 2012 the Registrar of the General Court served those two documents on the applicant and on the Commission.

Forms of order sought

- 19 The applicant claims, in essence, that the President of the Court should:
- order the suspension of operation of the contested decision until the Court has ruled on the main action;
 - order confidential treatment in the present proceedings in respect of the professional secrets contained in its reply;
 - order the Commission to pay the costs.
- 20 In view of the amendment by the applicant of the form of order sought (see paragraph 12 above), the applicant must be deemed to have withdrawn its application for interim measures in so far as it concerns the information provided in the context of the 2002 Leniency Notice.
- 21 The Commission, supported by the intervener, contends, in essence, that the President of the Court should:
- dismiss the application for interim measures;

— order the applicant to pay the costs.

Law

The application for confidential treatment to be ordered in the present proceedings in respect of the professional secrets contained in the applicant's reply

- 22 In its observations dated 10 May 2012 the Commission contends that the application for interim measures should be dismissed as inadmissible in so far as it seeks confidential treatment in the present proceedings in respect of the professional secrets contained in the applicant's reply.
- 23 In that regard, it should be noted that, as drafted, the application for confidential treatment in the present proceedings in respect of the professional secrets contained in the applicant's reply can only be understood as being directed against the defendant. Such an application makes no sense in this case, as the Commission is in possession of the confidential version of the documents at issue. If, however, the applicant had intended by that application to call for such treatment vis-à-vis a possible intervener, the application would have been premature. In any event, it must be noted that, as stated in paragraphs 17 and 18 above, the intervener has only had access to the non-confidential version of the documents provided in the context of the present application.

The application for suspension of operation of the contested decision

- 24 In accordance with Articles 278 TFEU and 279 TFEU read in conjunction with Article 256(1) TFEU, the judge hearing an application for interim measures may, if he considers that the circumstances so require, order that operation of a measure challenged before the General Court be suspended or prescribe any necessary interim measures.
- 25 Article 104(2) of the Rules of Procedure provides that applications for interim measures must state the subject-matter of the proceedings, the circumstances giving rise to urgency and the pleas of fact and law establishing a prima facie case for the interim measures applied for. Thus, the judge hearing an application for interim measures may order suspension of operation of an act and other interim measures if it is established that such an order is justified, prima facie, in fact and in law and that it is urgent in so far as, in order to avoid serious and irreparable harm to the applicant's interests, it must be made and produce its effects before a decision is reached in the main action. Where appropriate, the judge hearing the application must also weigh up the interests involved (order of the President in Case C-445/00 R *Austria v Council* [2001] ECR I-1461, paragraph 73).
- 26 In the context of that overall examination, the judge hearing the application enjoys a broad discretion and is free to determine, having regard to the specific circumstances of the case, the manner and order in which those various conditions are to be examined, there being no rule of law imposing a pre-established scheme of analysis within which the need to order interim measures must be analysed and assessed (order of the President in Case C-149/95 P(R) *Commission v Atlantic Container Line and Others* [1995] ECR I-2165, paragraph 23, and order of the President of 3 April 2007 in Case C-459/06 P(R) *Vischim v Commission*, not published in the ECR, paragraph 25).
- 27 Having regard to the material in the case-file, the President of the Court considers that he has all the information needed to rule on the present application for interim measures without there being any need first to hear oral argument from the parties or to adopt a measure of organisation of procedure as requested by the intervener.
- 28 In the circumstances of the present case, it is necessary first to weigh up the interests involved.

Weighing up of interests

- 29 In accordance with settled case-law, the weighing up of the various interests involved requires the judge hearing the application for interim measures to determine whether or not the applicant's interest in obtaining the interim measures sought outweighs the interest in immediate application of the contested measure by examining, more specifically, whether annulment of that measure by the Court when ruling on the main application would allow the situation which would have been brought about by its immediate operation to be reversed, and, conversely, whether suspension of its operation would prevent it from being fully effective in the event of the main application being dismissed (see, to that effect, the orders of the President in Joined Cases 76/89 R, 77/89 R and 91/89 R *RTE and Others v Commission* [1989] ECR 1141, paragraph 15, and in Joined Cases C-182/03 R and C-217/03 R *Belgium and Forum 187 v Commission* [2003] ECR I-6887, paragraph 142). In that context, the judge hearing the application may also consider it appropriate to take into account the interests of third parties.
- 30 As regards more particularly the condition that the legal situation created by an interim relief order must be reversible, it must be recalled that the purpose of the procedure for interim relief is merely to guarantee the full effectiveness of the future decision on the main action (see, to that effect, the order of the President in Case C-7/04 P(R) *Commission v Akzo and Akcros* [2004] ECR I-8739, paragraph 36). Consequently, such a procedure is merely ancillary to the main action to which it is an adjunct (order of the President in Case T-228/95 R *Lehrfreund v Council and Commission* [1996] ECR II-111, paragraph 61), and accordingly the decision made by the judge hearing an application for interim measures is by its nature interim in the sense that it must not either prejudice the future decision on the substance of the case nor render it illusory by depriving it of effectiveness (see, to that effect, the orders of the President in Case C-313/90 R *CIRFS and Others v Commission* [1991] ECR I-2557, paragraph 24, and in Case T-203/95 R *Connolly v Commission* [1995] ECR II-2919, paragraph 16).
- 31 It necessarily follows that the interest defended by a party to interim relief proceedings does not merit protection where that party's request is that the judge hearing the application should adopt a decision which, far from being a merely interim measure, serves to prejudice the future decision on the main action and to render it illusory by depriving it of its effectiveness.
- 32 In the present case, the General Court will be called upon to rule, in the main action, on whether the contested decision — by which the Commission decided to accede to the High Court's request in particular for the applicant's reply — should be annulled, inter alia, for infringement of the obligation of professional secrecy protected in Article 339 TFEU.
- 33 First of all, as regards the interest defended by the intervener, it must be noted that, in its statement in intervention, the intervener draws the attention of the President of the Court to the fact that, in weighing up the various interests concerned, it is appropriate to consider the various possibilities to which the respective timetables of the General Court and of the High Court give rise.
- 34 Should the application for suspension of operation be granted, the documents at issue would not be transmitted by the Commission to the High Court as long as the General Court had not delivered its judgment in the main proceedings. However the intervener submits that if the General Court rules in favour of the Commission but delivers its judgment after the High Court has issued its own, the intervener will be deprived of documents relevant to its claim and the suspension will effectively give the applicant the benefit of the effects of a final judgment in its favour, even though the General Court will have dismissed the main action as being unfounded.
- 35 Next, should the application for interim measures be refused, the documents at issue would be transmitted by the Commission to the High Court which, in turn, would disclose them to the confidentiality ring established by the order of 11 July 2011, so that they could be taken into account

in the proceedings for damages. The intervener submits that if the General Court rules in favour of the applicant before the High Court has delivered its decision, the information transmitted unlawfully will be excluded from the national proceedings.

- 36 However, it must be observed that the intervener disregards a further possible situation — one that is crucial in the light of the interest defended by the applicant — in which the application for interim measures is refused and the High Court rules before the General Court has had time to deliver its ruling on the main application. In that situation a judgment ordering annulment would be rendered illusory and would be deprived of its effectiveness. Thus, the consequence of dismissal of the present application would be to prejudge the future decision in the main action, namely a dismissal of the action for annulment.
- 37 In the light of the case-law recalled in paragraphs 30 and 31 above, it must therefore be observed that, proceedings concerning the transmission of disputed documents by an institution to a national court which has been requested in the ongoing litigation, as in this case, can undermine the ancillary nature of the interim relief proceedings before the judge hearing an application for interim measures.
- 38 However if the present application were to be granted and the High Court were in a position to deliver judgment before the General Court had delivered its decision in the main proceedings, the intervener has not established that it would be unable to safeguard its interests by applying, as a claimant before the High Court, for a stay of proceedings in the action for damages.
- 39 Moreover, such an application appears more likely to succeed than if that stay were requested by the applicant as a defendant in the High Court action in a situation where (i) the present application had been refused and the documents consequently transmitted to the High Court and (ii) the High Court was in a position to deliver judgment before the General Court had done so in the main proceedings.
- 40 Secondly, with regard to the interest defended by the Commission, it must be noted that, in its observations of 10 May 2012, the Commission takes the view that its only interest is that of preserving the national courts' powers to apply the provisions of EU law by ensuring that those rules take full effect and by protecting the rights which they confer on natural and legal persons. It explains that the interests at stake are not only those of the entities claiming damages for loss caused to them by conduct liable to restrict or distort competition, but also the general interest in the effective application of European Union competition rules, since actions for damages before national courts may significantly contribute to the maintenance of effective competition. The intervener adds in that respect that both the Commission and the Courts of the European Union have recognised the importance of ensuring that the victims of infringements of competition law are able to bring damages claims and to assert their rights under EU law. In that context, the Commission states that, in the judgment of 12 June 2009 ruling, *inter alia*, on the application for a stay of proceedings made by the applicant and all the other defendants before the High Court, in the light of the action for annulment of the GIS decision, the High Court specifically emphasised the need not to delay the pre-trial stage, even if actions were still pending before the General Court.
- 41 As regards the effective application of European Union competition rules and, more particularly, the procedures relating to actions for damages at national level, while the importance of justice being dispensed swiftly is echoed in the assessment carried out by the judge hearing the application for interim measures in weighing up the interests concerned, it must be noted that although the Commission accepts the High Court's position, it has not requested that an expedited procedure be applied before the General Court, as the applicant invited it to do by stating in the present application that it would not oppose any such request. In accordance with Article 76a of the Rules of Procedure of the General Court it was for the Commission to make such an application — an intervener being unable to do so — in so far as a swift end to the proceedings was a crucial aspect of the Commission's case.

- 42 Furthermore, having regard to the matters set out in paragraphs 37 to 39 above concerning the preservation of the effectiveness of the Court's decision in the main proceedings and the particular circumstances of the present case, the effective application of the European Union competition rules must be weighed against respect for the ancillary nature of interim relief proceedings. A similar balancing exercise was, moreover, implicitly carried out when an application for interim relief asking the President of the General Court to order the 'provisional' disclosure of allegedly confidential information held by the Commission was declared to be inadmissible, inasmuch as the order acceding to such an application might have nullified in advance the effects of the decision to be subsequently delivered on the main action (see, to that effect, the order of the President of 23 January 2012 in Case T-607/11 R *Henkel and Henkel France v Commission*, not published in the ECR, paragraphs 23 to 25).
- 43 Thirdly, in its statement in intervention dated 27 September 2012 the intervener emphasised the need for the judge hearing the application for interim relief to take into account in the weighing up of interests the strategy of opposition displayed by the applicant in its use of delaying tactics to impede the progress of the proceedings before the High Court. It must be noted in that regard that none of the procedural steps listed by the intervener as impeding its claim for damages has been characterised as an abuse of rights, which the intervener acknowledges. Accordingly, those steps are merely an expression of the legal means that a party has at its disposal in order to safeguard its rights. Where those steps have been held to be unjustified, the intervener has had its claims upheld and the proceedings before the High Court have continued in the appropriate manner. Moreover, although those proceedings have, according to the intervener, been unusually long, the intervener does not show that it has suffered such harm as a result of the length of those proceedings that its interest in disclosure of the information at issue before the General Court has delivered its judgment in the main proceedings should outweigh the interest in preserving the effectiveness of that judgment (see paragraphs 37 to 39 above).
- 44 Consequently, the interest defended by the applicant must prevail over the interest of the Commission and of the intervener in the dismissal of the application for interim measures, *a fortiori* as the grant of the suspension of operation requested amounts to no more than maintaining, for a limited period, the status quo which has existed for several years (see, to that effect, the order in *RTE and Others v Commission*, paragraph 15; see also the order of the President of 16 November 2012 in Case T-345/12 R *Akzo Nobel and Others v Commission* [2012] ECR, paragraph 29), and does not cause such difficulties as to make it appropriate for that waiting period to be brought to an end immediately. It must be added in that regard that the applicant objects only to the transmission of the confidential version of the disputed documents. Accordingly, the granting of the application for suspension of operation of the contested decision does not preclude the Commission from adopting a new decision permitting the transmission of the non-confidential version of the documents at issue while awaiting the General Court's ruling on the action for annulment in the main proceedings. Thus, the proceedings before the High Court can to a certain extent be pursued.

Urgency

- 45 There is a clear urgency in protecting the interest defended by the applicant where it is likely to suffer serious and irreparable harm in the event of its application for interim measures being dismissed. In that context, the applicant maintains, in essence, that the situation which would result from the transmission of the documents at issue could not be undone. Once the confidential information was transmitted, a subsequent annulment of the contested decision, in particular because of an infringement of the obligation of professional secrecy protected by Article 339 TFEU, would not reverse the effects of transmission. Consequently, the right to an effective judicial remedy would be no more than an 'empty shell' if the disputed information were to be communicated before the resolution of the main action.

- 46 As a preliminary point, it must be noted that, in the light of the specific nature of proceedings concerning the transmission of confidential documents in the context of interim relief proceedings (see paragraph 37 above) and the particular circumstances of the present case (see paragraphs 38 and 39 above), it is sufficient to assess the seriousness and irreparability of the harm suffered by the applicant in the present case, as a result of the actual transmission of disputed information, by reference to its right to effective judicial protection.
- 47 It is clear that if the present application were to be refused and the documents transmitted by the Commission to the High Court and, moreover, the High Court delivered judgment before the General Court had had time to deliver a ruling on the action in the main proceedings concerning the possible unlawfulness of the transmission of information, the applicant's right to effective judicial protection would be rendered meaningless.
- 48 It is interesting to note that the intervener, which rightly stated in its application for leave to intervene that it would be in a position to assist this Court in relation to the nature and status of its claim in the United Kingdom, states, on the one hand, in its letter of 6 June 2012, that the High Court does not have to wait for the decision of the Court of Justice in cases under appeal from the judgments delivered by the General Court in response to actions brought against the GIS decision and, on the other hand, in its statement in intervention of 27 September 2012, that it is likely that it will take longer for the General Court to determine the action in the main proceedings than it will take the High Court to bring the national proceedings to a close. In the light of that information, the risk that the national court might reach its decision, taking the information transmitted into account, before the General Court has had the opportunity to rule on the lawfulness of that transmission, appears to be a serious and far from hypothetical one.
- 49 Thus, given that the Commission would immediately transmit the disputed information if this application for interim measures were to be dismissed, there is a risk that the applicant's fundamental right to an effective remedy, enshrined in Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950, and in Article 47 of the Charter of Fundamental Rights of the European Union (OJ 2010 C 83, p. 389), would be jeopardised if the Commission were to be allowed to transmit the disputed information before the General Court had ruled on the main action. Consequently, since the fundamental right enjoyed by the applicant may be seriously and irreparably harmed, subject to an examination of the condition that there should be a *prima facie* case (see, in respect of the close link between that condition and the condition of urgency, the order of the President of 8 April 2008 in Joined Cases T-54/08 R, T-87/08 R, T-88/08 R and T-91/08 R to T-93/08 R *Cyprus v Commission*, not published in the ECR, paragraphs 56 and 57), it is clearly urgent that the suspension of operation requested be granted (see also the order in *Akzo Nobel and Others v Commission*, paragraphs 31 to 33).

Whether there is a *prima facie* case

- 50 According to settled case-law, the condition relating to a *prima facie* case is satisfied where at least one of the pleas in law put forward by the applicant for interim measures in support of the main action appears, *prima facie*, to be relevant and in any event not unfounded, in that it reveals the existence of difficult legal issues the solution to which is not immediately obvious and therefore calls for a detailed examination that cannot be carried out by the judge hearing the application for interim measures but must be the subject of the main proceedings, or where the discussion of issues by the parties reveals that there is a major legal disagreement whose resolution is not immediately obvious (see order of the President of 19 September 2012 in Case T-52/12 R *Greece v Commission* [2012] ECR, paragraph 13 and the case-law cited; see also, to that effect, the order of the President in Case C-39/03 P-R *Commission v Argean and Others* [2003] ECR I-4485, paragraph 40).

- 51 The applicant submits, in particular, that the contested decision infringes, first, Article 339 TFEU; secondly, paragraph 25 of the Commission Notice on the co-operation between the Commission and the courts of the EU Member States in the application of Articles 81 [EC] and 82 EC (OJ 2004 C 101, p. 54); and, thirdly, Article 4(3) TEU.
- 52 In that context it is submitted, in essence, that the transmission of the applicant's reply, as envisaged by the Commission, infringes Article 339 TFEU, in so far as the guarantees offered by the High Court in order to protect the confidentiality of the information transmitted would not guarantee the same level of protection as that which stems from the FEU Treaty.
- 53 Recalling its duty, clarified in Case T-353/94 *Postbank v Commission* [1996] ECR II-921, paragraph 90, to take all necessary precautions to ensure that that right is not undermined by or during the transmission of documents to the national courts, the Commission submits that it is clear from that judgment that it is for the national court to guarantee the confidentiality of the information transmitted and, accordingly, the Commission respects that duty where it indicates to the national court the documents or passages which contain confidential information or business secrets and verifies that that information is only transmitted where the national court has offered specific guarantees that it can and will protect the confidentiality of that information.
- 54 First, with regard to the first precaution, relating to the Commission's indication of the documents or passages covered by confidentiality or business secrets, it must be pointed out that, in this instance, the Commission did not judge it necessary to examine the actual classification of that information prior to transmission but confined itself to indicating the passages that were regarded as confidential or business secrets by the applicant. It is remarkable that the Commission should revisit recognition of that status in its observations of 10 May 2012, since it could be inferred from the mere fact of its communication of that information to the national court in accordance with the precautions applicable to the transmission of information protected by Article 339 TFEU that such information does indeed fall within the scope of that provision. In any event, verification of that classification, if it was necessary, requires a detailed examination which it is not for the judge hearing an application for interim measures to carry out.
- 55 Secondly, with regard to the specific guarantees offered by the national court and which the Commission must ensure exist before it transmits the information concerned, it is apparent from the contested decision that the Commission merely stated that the confidentiality order enabled all confidential information contained in the documents requested to be protected in accordance with the guarantees laid down by Article 339 TFEU. In that regard, it is not apparent from the contested decision that there is any assessment of the actual effects of the protection provided for by the confidentiality order in the light of the duty under Article 339 TFEU, as interpreted by the case-law.
- 56 In the first place, it must be noted that, in its observations dated 10 May 2012, the Commission states that the national court had informed it that the documents requested would be communicated only within the confines of the confidentiality ring established in the High Court proceedings by agreement of the parties to the dispute, and that the applicant had not expressed any concerns about the scope or conditions of the confidentiality ring in the observations that it had submitted to the Commission on 25 July 2011. However, the fact that the parties to the dispute before the High Court, including the applicant, were involved in the definition of those within the confidentiality ring should not cause the fact to be overlooked that, in its judgment of 4 July 2011 (paragraph 13), the national court specifically mentioned the possibility of the parties making submissions to the Commission as to whether or not it would be appropriate for the Commission to accede to the request for transmission of the information concerned. Furthermore, it is apparent from the observations (paragraph 34) sent by the applicant on 25 July 2011 that it had informed the Commission of the need to alter the content of certain documents should the High Court's request be granted. In other words, the composition of the confidentiality ring clearly presented difficulties for the applicant since it objected to the disclosure within that circle of the confidential versions of the documents requested. Consequently, in the light

of such matters, the possibility cannot be ruled out that the General Court might examine in the main proceedings the question whether, in order to comply with the protection of professional secrecy under Article 339 TFEU, the Commission should not have taken precautions other than those provided for in the contested decision.

- 57 In the second place, it follows from analysis of the confidentiality order sent by the High Court to the Commission as an annex to the request for transmission of the documents at issue that the confidentiality ring, the composition of which may be subject to amendment in the future, is made up of a large number of people (92 names appear on that list) who hold various positions, such as that of external lawyer, in-house counsel (as in the case, for example, of the two employees of the intervener), secretary or even IT support. Admittedly, they are all bound by a duty of confidentiality and, according to the intervener, none of them carry out commercial functions. However, in the light of the considerations at EU law level concerning the protection of the confidentiality of exchanges between lawyers and clients, and the requirement of independence implying the absence of any employment relationship, even where obligations of professional conduct and discipline exist, the question — whether, in the light of the arrangements in this instance for dissemination at national level of the information requested which were known to the Commission, the Commission should have examined in detail the specific consequences of that guarantee for the protection of professional secrecy and perhaps have concluded that the request for transmission, as formulated, should be refused lest it give rise to an infringement of Article 339 TFEU — could reasonably be raised in the context of the main proceedings. It must be added that the Commission cannot, in order to demonstrate that the proposed disclosure cannot be equated to disclosure to the parties to the English proceedings, simply maintain that the purpose of a confidentiality ring is to enable the parties' lawyers to inspect the documents disclosed, when in fact the composition of that ring is neither immutable nor restricted to those having the status of lawyer.
- 58 In the light of those findings, it is not inconceivable that the Court when ruling on the main application would find it appropriate to rule on the extent of the control to be exercised by the Commission in ensuring that the confidential information is transmitted only if the national court offers specific guarantees that it can and will protect the confidentiality of that information. In other words, the Court might be led, when ruling on the substance, to question whether the precautions taken by the Commission in the present case in order to fulfil its duty under Article 339 TFEU were sufficient, or whether it ought to have carried out a more detailed assessment of the arrangements proposed by the national court in order to protect the confidentiality of the information requested.
- 59 Furthermore, even if those precautions were found to be adequate, in principle, for the fulfilment of that duty, it should be noted that, according to *Postbank v Commission*, even if the Commission takes all the necessary precautions, it might not be possible for the protection of third parties to be fully ensured in certain cases. In those exceptional cases, the Court indicates that the Commission may refuse to disclose documents to national judicial authorities. Having regard to the facts of the present case, it is conceivable that the Court, when ruling on the main application, must determine whether the Commission found itself in that situation.
- 60 These analyses raise novel issues of law. It must be noted that both in its letter to the High Court of 28 October 2011 (paragraph 6) and in the contested decision (paragraph 14) the Commission itself remarks on the novelty of the request and of the issues at stake.
- 61 In the light of the foregoing, it is clear that this case raises novel questions of law which cannot, *prima facie*, be considered as of no relevance, and their resolution deserves thorough examination within the main proceedings. Accordingly, it must be held that there is a *prima facie* case (see also the order in *Akzo Nobel and Others v Commission*, paragraphs 44 to 56).

- ⁶² It follows that, since all the requisite conditions are satisfied, the application for interim measures must be upheld and interim measures must be granted prohibiting the Commission from transmitting the disputed information as envisaged in the contested decision.

On those grounds,

THE PRESIDENT OF THE GENERAL COURT

hereby orders:

- 1. Operation of the Commission's decision of 26 January 2012 is suspended in so far as that decision concerns the transmission to the High Court of England and Wales of the confidential version of Alstom's reply of 30 June 2006 to the statement of objections in Case COMP/F/38.899 — Gas insulated switchgear.**
- 2. The application for interim measures is dismissed as to the remainder.**
- 3. The costs are reserved.**

Luxembourg, 29 November 2012.

E. Coulon
Registrar

M. Jaeger
President