

JUDGMENT OF THE COURT (Fifth Chamber)
19 May 1994 *

In Case C-36/92 P,

Samenwerkende Elektriciteits-produktiebedrijven NV ('SEP'), a Netherlands company whose registered office is at Arnhem, represented by M. van Empel and O. W. Brouwer, of the Amsterdam Bar, with an address for service in Luxembourg at the Chambers of M. Loesch, 11 Rue Goethe,

appellant,

APPEAL against the judgment of the Court of First Instance of the European Communities of 12 December 1991 in Case T-39/90 *SEP v Commission* [1991] ECR II-1497, seeking to have that judgment set aside,

the other party to the proceedings being:

Commission of the European Communities, represented by B. J. Drijber, of its Legal Service, acting as Agent, with an address for service in Luxembourg at the office of Georgios Kremis, of its Legal Service, Wagner Centre, Kirchberg,

THE COURT (Fifth Chamber),

composed of: J. C. Moitinho de Almeida, President of the Chamber, R. Joliet, G. C. Rodríguez Iglesias (Rapporteur), F. Grévisse and M. Zuleeg, Judges,

* Language of the case: Dutch.

Advocate General: F. G. Jacobs,
Registrar: R. Grass,

having regard to the report of the Judge-Rapporteur,

after hearing the Opinion of the Advocate General at the sitting on 15 December 1993,

gives the following

Judgment

- 1 By application lodged at the Court Registry on 12 February 1992 SEP appealed, pursuant to Article 49 of the Statute of the Court of Justice of the EEC, against the judgment of the Court of First Instance of 12 December 1991 in Case T-39/90 *SEP v Commission* [1991] ECR II-1497 in so far as it dismissed SEP's application and ordered it to pay the costs.
- 2 In its judgment the Court of First Instance found as follows (paragraphs 2 to 9):
 - SEP is a limited company comprising the four Netherlands public electricity-generating utilities. About 50% of the electricity produced in the Netherlands is made from natural gas.
 - Nederlandse Gasunie NV (hereinafter 'Gasunie') has a *de facto* monopoly in the Netherlands of the supply of natural gas. The Netherlands State owns 50% of it directly or indirectly. Fundamental decisions on Gasunie's sales policy are subject to approval by the Minister for Economic Affairs.

- On 16 June 1989 SEP for the first time concluded a contract for the supply of gas with a supplier other than Gasunie, namely the Norwegian undertaking Statoil ('the Statoil contract').
- Following the conclusion of the Statoil contract, Gasunie agreed a code of cooperation with SEP on 9 April 1990, with the aim of providing in the future against any unforeseen consequences which might arise from the subsequent conclusion between SEP and third parties of contracts for the supply of gas.
- The conclusion of the Statoil contract and the negotiations between SEP and Gasunie on the code of cooperation came to the knowledge of the Commission, which opened an investigation, pursuant to Article 11 of Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles 85 and 86 of the Treaty (OJ, English Special Edition 1959-1962, p. 87, hereinafter 'Regulation No 17'), to establish whether the agreements or concerted practices between SEP and Gasunie relating to the supply of gas were compatible with the competition rules of the EEC Treaty, in particular Article 85.
- In a letter of 6 March 1990 the Commission requested SEP to produce to it *inter alia* the code of cooperation with Gasunie and the Statoil contract. SEP produced the code of cooperation but not the Statoil contract.
- The Commission then adopted the decision of 2 August 1990 relating to a proceeding under Article 11(5) of Council Regulation No 17 (IV/33.539 — SEP/Gasunie, hereinafter 'the decision'). The decision required SEP to send to the Commission within 10 days the Statoil contract and the correspondence relating to it.
- SEP raised the issue of the confidential nature of the Statoil contract. The Commission argued that the confidential nature of the contract could not justify the refusal to produce it, in view of the obligation of professional secrecy binding on the Commission under Article 20 of Regulation No 17; SEP replied that it was concerned above all about the Netherlands State, in that Article 10 of Regulation No 17 provides that the Commission is to transmit forthwith to

the competent authorities of the Member States copies of the most important documents lodged with the Commission.

- 3 Attempts to reach a settlement of the dispute were unsuccessful, and on 26 September 1990 SEP brought an action against the decision of 2 August 1990. That action was concluded by the judgment under appeal.
- 4 Concurrently with that action SEP made an application for interim measures. That application was dismissed by an order of the President of the Court of First Instance of 21 November 1990 (T-39/90 R *SEP v Commission* [1990] ECR II-649). SEP brought several appeals against that order, but withdrew them following the Commission's undertaking not in any way to communicate the contents of the Statoil contract to the authorities of the Member States until the Court of First Instance had given judgment on SEP's application for annulment (order of the President of the Court of Justice of 3 May 1991 in Cases C-372/90 P, C-372/90 P-R and C-22/91 P [1991] ECR I-2043, paragraph 7).
- 5 The appellant puts forward eight grounds of appeal.
- 6 The first ground of appeal is that there was an infringement of Article 11(1) of Regulation No 17 in that the Court of First Instance interpreted 'necessary information' which the Commission could request as meaning merely that there had to be 'a correlation between the request for information and the putative infringement'.
- 7 The second ground of appeal is that the Court of First Instance did not give adequate and correct reasons for its finding that Article 11 of Regulation No 17 had not been infringed by the Commission.

- 8 The third ground of appeal is that there was an infringement of Article 12 of Regulation No 17, which relates to inquiries into sectors of the economy, in that the Court of First Instance did not accept that the Commission's inquiry should have been based on that article, even though the Commission expressly admitted that it was inquiring into the Dutch gas market.
- 9 The fourth ground of appeal is that there was an infringement of Article 190 of the EEC Treaty in that the Court of First Instance declared that the Commission's decision of 2 August 1990 was adequately reasoned.
- 10 The fifth ground of appeal is that the Court of First Instance did not give correct and adequate reasons for rejecting SEP's argument that the decision was not adequately reasoned.
- 11 The sixth ground of appeal is that there was an infringement or misinterpretation of Article 20 of Regulation No 17.
- 12 SEP considers that, contrary to what was held by the Court of First Instance, that article does not prohibit transmission of the information to other departments by the department which receives the communication from the Commission. The safeguard which the Court of First Instance took into account in concluding that the Commission had not infringed the principle of proportionality does not exist. In SEP's opinion, the Court of First Instance thus deprived itself of the possibility of correctly applying the principle of proportionality.
- 13 SEP states, without being contradicted by the Commission, that the Directorate General for Energy in the Ministry of Economic Affairs, which deals with Gasunie, forms part of the 'competent authorities' in the Netherlands with respect to matters such as this one which fall within the energy sector, that the Ministry of

Economic Affairs rotates its staff, with the consequence that officials in charge of competition cases are abruptly moved to other departments, and that higher ranking officials coordinate competition policy and energy policy.

- 14 The seventh ground of appeal is that there was an infringement of Article 20(1) of Regulation No 17.
- 15 SEP argues that the Court of First Instance committed an error of law by interpreting that provision as containing a general prohibition on using the information obtained pursuant to Regulation No 17 otherwise than for the purposes of the application of Articles 85 and 86 of the Treaty. In SEP's opinion that prohibition is not so extensive and applies only to the Commission. SEP adds that if the competent authority in question merely benefits from the information received from the Commission, without taking action against the undertaking concerned, that does not constitute 'use' as referred to in that provision.
- 16 The eighth ground of appeal is that the reasons given in the judgment by the Court of First Instance for finding that the Commission, when adopting the decision, had not infringed the principle of proportionality were inadequate.
- 17 Firstly, SEP criticizes the contradiction which it claims to find in the judgment between the Court's interpretation of Article 20, to the effect that a department regarded as the competent authority within the meaning of Regulation No 17 cannot communicate the information which it receives to another department, and the Court's argument to the effect that that information can circulate without causing problems since the recipient cannot use it in any other way.

- 18 Secondly, SEP disagrees with the statement in the judgment that the problem raised in the present case will recur whenever an inquiry by the Commission concerns the commercial relations between a private undertaking and a public undertaking. According to SEP, the problem will in fact recur whenever the competent authority within the meaning of Regulation No 17 is the same as the authority which determines the policy of the public undertaking in question. SEP therefore criticizes the finding by the Court of First Instance that there can be no derogation from the obligations of the Member States, which are laid down in general and absolute terms in Article 20.
- 19 Thirdly, SEP complains that the Court of First Instance did not address the argument that there was a breach of the principle of proportionality in that the Commission immediately demanded the Statoil contract instead of first asking questions.
- 20 Fourthly, SEP considers that the Court of First Instance was wrong to regard its argument as based on a risk that the Dutch authorities might commit a breach of business secrecy. SEP states that on the contrary it always argued that once it had communicated the Statoil contract to the Commission, there would be no rule of law to prevent it from finding its way to the persons who determine Gasunie policy.

The first five grounds of appeal

- 21 For the reasons stated in paragraphs 21 to 42 of the Advocate General's Opinion, the first, second, third, fourth and fifth grounds of appeal must be rejected as unfounded.

The sixth, seventh and eight grounds of appeal

- 22 In these grounds of appeal, which may be taken together, SEP contests the conclusion of the Court of First Instance that Article 20 of Regulation No 17 provides an effective safeguard against the disproportionate damage allegedly caused it by the Commission's decision.
- 23 SEP argued before the Court of First Instance (paragraph 41 of the judgment) that the Statoil contract was of a particularly confidential nature and that, since Article 10(1) of Regulation No 17 provides for the transmission by the Commission to the competent authorities of the Member States, including the Netherlands, of 'the most important documents lodged with the Commission', it would suffer damage in that the persons who direct the commercial policy of Gasunie, its principal supplier of gas, would be able by means of the Statoil contract to learn the terms of business granted by Statoil.
- 24 In reply to that argument, the Court of First Instance held that 'the restrictions imposed on Member States by Article 20 of Regulation No 17, as regards both the disclosure and the use of information sent to them pursuant to Article 10(1) of that regulation, constitute an adequate safeguard for [SEP] . It follows that the contested decision, whereby the Commission calls for the disclosure by it of the Statoil contract, does not involve the excessive risk alleged by [SEP] and does not therefore infringe the principle of proportionality' (paragraph 60 of the judgment).
- 25 In reaching the conclusion that Article 20 provides an adequate safeguard, the Court of First Instance held (paragraph 55) that:

' The protection provided by Article 20 is twofold. First, paragraph 2 of that article prohibits the disclosure of information acquired as a result of the application of

Regulation No 17 and of the kind covered by the obligation of professional secrecy. Secondly, Article 20(1) prohibits the use of information acquired as a result of the application of Regulation No 17 for any purpose other than that for which it has been requested. Those two safeguards, which are of a complementary nature, are intended to ensure the confidential treatment of information transmitted to Member States as a result of the application of Article 10(1) of Regulation No 17. '

- 26 The Court of First Instance thus held, in paragraph 56, that the twofold protection provided by Article 20 prohibited national officials not only from disclosing the contents of the Statoil contract but also from 'using the information contained in it in order to establish the commercial policy pursued by certain public undertakings'.
- 27 It should be noted that according to Article 20(2) the competent authorities of the Member States, their officials and other servants are required not to disclose information which is acquired by them as a result of the application of Regulation No 17 and which is of the kind covered by the obligation of professional secrecy (judgment in Case C-67/91 *Dirección General de Defensa de la Competencia v Asociación Española de Banca Privada and Others* [1992] ECR I-4785, paragraph 21). That prohibition of disclosure does not, however, guarantee that the information in question will not be taken into consideration by the authorities which receive it or the officials who learn of it in the performance of their duties.
- 28 As regards Article 20(1), which states that 'information acquired as a result of the application of Articles 11, 12, 13 and 14 [of Regulation No 17] shall be used only for the purpose of the relevant request or investigation', the Court of Justice held in its judgment in *Asociación Española de Banca Privada* (cited above, paragraph 37) that professional secrecy involves the need for authorities lawfully in possession of information to be unable to use it for a reason other than that for which it has been obtained. It concluded (paragraph 42) that such information may not be relied on by the authorities of the Member States either in a preliminary investigation procedure or to justify a decision based on provisions of competition law.

- 29 The procedural safeguard thus given to undertakings may not, however, go so far as to call for the information transmitted to be actually ignored by the national authorities. Thus the Court also held in that judgment that the authorities of the Member States were not required to ignore the information disclosed to them and thereby suffer 'acute amnesia'; that information constituted circumstantial evidence which might, if necessary, be taken into account in order to justify the initiation of a national procedure (paragraph 39).
- 30 In the present case the restriction imposed by Article 20(1) on the use of the information received could not avert the irreversible consequences of the mere fact that a supplier (or its supervisory authority) has knowledge of the terms of business accorded to its customer by a rival supplier. Thus in the present case the Dutch authorities and officials who had legitimately consulted the Statoil contract transmitted by the Commission could not effectively be required to disregard the terms granted by Statoil to SEP, if it fell to them to determine the commercial policy of Gasunie.
- 31 Whichever paragraph is referred to, Article 20, contrary to what was held by the Court of First Instance, therefore does not prevent the use of that information in connection with the determination of the commercial policy of Gasunie, with the possible consequence that damage might be caused to SEP. That article therefore does not constitute an effective safeguard for SEP.
- 32 By interpreting Article 20 as it did, the Court of First Instance therefore infringed Community law.
- 33 It does not necessarily follow that the appeal must be upheld. As the Court of Justice held in its judgment in Case C-30/91 P *Lestelle v Commission* [1992] ECR I-3755 (paragraph 28), if the grounds of a judgment of the Court of First Instance disclose a breach of Community law but the operative part appears well founded for other reasons of law, the appeal must be dismissed.

- 34 In the appeal, the appellant wrongly assumes that Article 10 of Regulation No 17, which states that 'the Commission shall forthwith transmit to the competent authorities of the Member States ... copies of the most important documents lodged with the Commission ...', obliges the Commission automatically to transmit the Statoil contract to the Netherlands authorities.
- 35 Firstly, the wording of Article 10 itself gives the Commission power to determine which are the most important documents, with a view to transmitting them to the authorities of the Member States.
- 36 Secondly, Article 10(1) must be interpreted in the light of the general principle of the right of undertakings to the protection of their business secrets, a principle which finds expression in Article 214 of the Treaty and various provisions of Regulation No 17, such as Articles 19(3), 20(2) and 21(2) (see the judgment in Case 53/85 *AKZO Chemie v Commission* [1986] ECR 1965, paragraph 28).
- 37 In cases such as the present one where an undertaking has expressly raised before the Commission the confidential nature of a document as against the competent national authorities, on the ground that it contains business secrets, and where that argument is not irrelevant, the general principle of the protection of business secrets, referred to above, may limit the Commission's obligation under Article 10(1) to transmit the document to the competent national authorities.
- 38 In proceedings between the Commission and an undertaking relating to the communication by the Commission to a third party who had submitted a complaint of documents which the undertaking claimed were of a confidential nature, the Court held that it is for the Commission to judge whether or not a particular document contains business secrets. After giving an undertaking an opportunity to state its views, the Commission is required to adopt a decision in that connection which contains an adequate statement of the reasons on which it is based and which must

be notified to the undertaking concerned. Having regard to the extremely serious damage which could result from improper communication of documents to a competitor, the Commission must, before implementing its decision, give the undertaking an opportunity to bring an action before the Court with a view to having the assessments made reviewed by it and to preventing disclosure of the documents in question (*AKZO Chemie v Commission*, cited above, paragraph 29).

- 39 In the present case, analogous considerations require the Commission, if it wishes to transmit a document to the competent national authorities, notwithstanding the claim that in the particular circumstances of the case that document is of a confidential nature with respect to those authorities, to adopt a properly reasoned decision amenable to judicial review by means of an action for annulment.
- 40 It is in an action for the annulment of such a decision that SEP might effectively rely on its right to protection of its business secrets.
- 41 It follows that the obligation to produce the Statoil contract, imposed on SEP by the contested decision, does not necessarily mean that the contract can be transmitted to the Netherlands authorities.
- 42 Accordingly, notwithstanding legally defective reasoning, the judgment under appeal rightly rejected the plea alleging breach of the principle of proportionality.
- 43 The appeal must therefore be dismissed in its entirety.

Costs

Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the appeal has been dismissed, the appellant ought to be ordered to pay all the costs. However, as examination of the judgment under appeal has disclosed an error of law pleaded by the appellant in its appeal, the parties should be ordered to bear their own costs, pursuant to Article 69(3).

On those grounds,

THE COURT (Fifth Chamber)

hereby:

1. Dismisses the appeal;
2. Orders the parties to bear their own costs.

Moitinho de Almeida Joliet Rodríguez Iglesias Grévisse Zuleeg

Delivered in open court in Luxembourg on 19 May 1994.

R. Grass
Registrar

J. C. Moitinho de Almeida
President of the Fifth Chamber