JUDGMENT OF THE COURT (Sixth Chamber)
19 October 1995 *

In Case C-19/93 P,

Rendo NV, a company incorporated under Netherlands law, established in Hoogeveen (Netherlands),

Centraal Overijsselse Nutsbedrijven NV, a company incorporated under Netherlands law, established in Almelo (Netherlands),

Regionaal Energiebedrijf Salland NV, a company incorporated under Netherlands law, established in Deventer (Netherlands),

represented by T. R. Ottervanger, of the Rotterdam Bar, with an address for service in Luxembourg at the Chambers of S. Oostvogels, 13 Rue Aldringen,

applicants,

APPEAL against the judgment of the Court of First Instance of the European Communities (First Chamber) of 18 November 1992 in Case T-16/91 *Rendo and Others* v *Commission* [1992] ECR II-2417), seeking to have that judgment set aside,

* Language of the case: Dutch.

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 C. Gómez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

supported by

Samenwerkende elektriciteits-produktiebedrijven NV, a company incorporated under Netherlands law, established in Arnhem (Netherlands), 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, 8 Rue Zithe,

intervener,

THE COURT (Sixth Chamber),

composed of: C. N. Kakouris, President of the Chamber, F. A. Schockweiler (Rapporteur), P. J. G. Kapteyn, J. L. Murray and H. Ragnemalm, Judges,

Advocate General: G. Tesauro,
Registrar: L. Hewlett, Administrator,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 1 June 1995,

after hearing the Opinion of the Advocate General at the sitting on 11 July 1995,

gives the following

Judgment

1 By application lodged at the Registry of the Court of Justice on 21 January 1993, Rendo NV, Centraal Overijsselse Nutsbedrijven NV and Regionaal Energiebedrijf Salland NV (hereinafter 'Rendo and others') brought an appeal under Article 49 of the Protocol on the Statute of the Court of Justice of the EC against the judgment of 18 November 1992 in Case T-16/91 *Rendo and Others* v *Commission* [1992] ECR II-2417 (hereinafter 'the contested judgment') in which the Court of First Instance dismissed their action for the annulment of Commission Decision 91/50/EEC of 16 January 1991 relating to a proceeding under Article 85 of the EEC Treaty (IV/32.732—IJsselcentrale (IJC) and Others, OJ 1991 L 28, p. 32, hereinafter 'the contested decision').

2 It appears from the findings made by the Court of First Instance in the contested judgment (paragraphs 2 to 23) that:

'(1) *The undertakings concerned*

— The applicants are local electricity distribution companies in the Netherlands. Their electricity is supplied to them by a regional distribution undertaking, known as IJsselcentrale (or IJsselmij, hereinafter "IJC").

— In May 1988, the applicants (or their predecessors in title) made an application to the Commission under Article 3(2) of Council Regulation No 17 of 6 February 1962, First regulation implementing Articles 85 and 86 of the EEC Treaty (OJ, English Special Edition 1959-1962, p. 87, hereinafter "Regulation No 17"), against, amongst others, IJC and Samenwerkende Elektriciteitsproduktiebedrijven NV (hereinafter "SEP"), which is intervening in these proceedings. They alleged that various infringements of Articles 85 and 86 of the Treaty had been committed by SEP and the Netherlands Electricity Generating Company.

— SEP is a company set up in 1949 by the Netherlands electricity generating companies to serve as a vehicle for cooperation. Its tasks under its statutes include operating the high-voltage grid and concluding agreements with foreign electricity undertakings on imports and exports of electricity and the use of international interconnections.

— As a result of the applicants' complaint, the Commission adopted the contested decision relating to a cooperation agreement (Overeenkomst van Samenwerking, hereinafter "the OVS") concluded between the electricity generating companies, on the one hand, and SEP, on the other.

(2) *The OVS Agreement*

— The OVS Agreement was concluded on 22 May 1986 between SEP and its shareholders (the predecessors in title of the four present electricity generators in the Netherlands). The agreement was not notified to the Commission.

— Article 21 of the OVS Agreement restricts imports and exports of electricity to SEP alone and requires the parties to the agreement to stipulate in supply contracts concluded with the undertakings distributing electric power that

those undertakings will not import or export electricity. It is that provision which is the subject of the contested decision and of these proceedings.

(3) *Relevant national legislation*

— In the grounds of the contested decision, the Commission observes that the Netherlands legislation in force when the OVS was concluded did not prohibit undertakings other than suppliers from importing electricity themselves but made such imports subject to authorization, which in principle could be obtained by anyone. The contested decision does not indicate whether there was any legislation on exports of electricity.

— On 8 December 1989, most of the provisions of the new Netherlands Electricity Law (Elektriciteitswet 1989) entered into force. According to Article 2 of that Law, the licensees (that is to say the four electricity generating undertakings) and the "designated company" (a company designated by the Minister for Economic Affairs under Article 8 of the Law in order to carry out certain tasks laid down by the Law) are jointly to ensure the reliable and efficient operation of the national public electricity supply. By Ministerial Order of 20 March 1990, SEP was appointed as the designated company.

— Article 34 of the Electricity Law, which entered into force on 1 July 1990, provides that the "designated company" has the sole right to import electric power with a view to public supply (with the exception of electricity of under 500 V). The Law therefore prohibits the distribution companies from importing electricity with a view to public supply. According to the contested decision,

however, it follows from Article 34 that certain final consumers may import electric power for their own consumption and no longer need authorization to do so. Under Article 47, undertakings operating supply lines are obliged to make them available to anyone who applies to transmit electricity imported in this way.

— The 1989 Electricity Law does not govern exports of electricity. The Commission assumes as a result — in accordance with the information provided by the Netherlands Government — that both distributors and final consumers are free to export. However, unlike in the case of imports, the Law does not impose any obligation to transmit electricity for export.

(4) *The administrative procedure*

— The origin of the complaint lodged with the Commission by the applicants in May 1988 lies in civil proceedings concerning the imposition by IJC of an import and export ban coupled with an exclusive purchasing obligation, and the imposition of a charge, known as the extra cost equalization charge (egalisatiekostentoeslag). The complaint was directed against the following:

(1) The import ban expressly laid down both in the 1971 General SEP Agreement (Article 2) and in the 1986 Cooperation Agreement ('the OVS') (Article 21);

(2) The exclusive purchasing obligation deriving from the agreements between the complainants and IJC, which, according to the complainants, is a consequence of, *inter alia*, the relevant provisions of the OVS;

(3) IJC's power to determine prices unilaterally and the equalization charge imposed unilaterally on the complainants.

— By letter dated 14 June 1989, signed by a Head of Division in the Directorate-General for Competition ("DG IV"), the Commission informed the applicants that it had sent a statement of objections to SEP and the other parties to the OVS on 8 June 1989. The letter made it clear that the procedure did not deal with the extra cost equalization charge, since the charge did not have an appreciable effect on trade between Member States.

(5) *The contested decision*

— The subject of the contested decision is Article 21 of the OVS in so far as it relates to imports by private consumers, or is applied by SEP to such imports, and combined with SEP's control of the interconnections has the effect of restricting imports and exports by those consumers and exports by distributors (last paragraph of section 20). It therefore deals with the first two allegations made by the applicants in their complaint to the Commission. On the other hand, the decision is not concerned with the third allegation made in the complaint, relating to the extra cost equalization charge imposed by IJC (penultimate paragraph of section 1).

— In the contested decision, the Commission finds, in the first place, that the OVS is an agreement between undertakings within the meaning of Article 85(1) of the Treaty and that the prohibition of imports and exports of electricity by undertakings other than SEP restricts competition.

— Secondly, as regards the effects of the 1989 Electricity Law on the OVS, the Commission notes that SEP takes the view that the new law has not altered the scope of Article 21 of the OVS in any way. As for imports of electricity, it observes that whereas the Law prohibits anyone other than SEP from importing electric power with a view to public supply, imports by final consumers for their own consumption are unrestricted. It infers from this that Article 21 of the OVS applies in that respect to an area not covered by the Law. As for exports, the Commission notes that the Netherlands Government has informed it that they are completely unrestricted in the case of both the distribution companies and private consumers and that this applies whether the electricity is supplied from the public grid or autogenerated. Unlike in the case of imports, to the extent to which they are permitted, the Electricity Law does not impose an obligation to transmit power for export. The Commission emphasizes that a potential exporter must therefore reach agreement with SEP on the use of the high-voltage grid for that purpose and the way in which SEP plays that role will depend on the way in which it applies Article 21 of the OVS. The Commission concludes from this set of findings that the application of Article 21 of the OVS under the rules of the new law continues to infringe Article 85.

— Thirdly, the Commission examines the question whether Article 90(2) of the Treaty precludes the application of Article 85(1) in this case.

— In that connection, it finds that both SEP and the generating companies participating therein are undertakings entrusted with the operation of services of general economic interest. Nevertheless, it considers, as regards imports and exports by private final consumers, that the application of Article 85 to the OVS would not obstruct those undertakings in the performance of the tasks assigned to them. It takes the view that the absolute control over imports and exports given to SEP by Article 21 of the OVS is not indispensable to the performance of its general tasks.

— In contrast, as far as concerns imports for public supply, the Commission finds that the ban on imports by the generating and distribution companies otherwise than through SEP is now laid down by Article 34 of the 1989 Electricity Law.

— It draws the following conclusion:

> "The present proceeding is a proceeding under Regulation No 17, and the Commission will not pass judgment here on the question whether such restriction of imports is justified for the purposes of Article 90(2) of the Treaty. To do so would be to anticipate the question whether the new law is itself compatible with the Treaty, and that is outside the scope of this proceeding" (section 50 of the decision).

— For the same reason, the Commission states that it can make no judgment on the export ban imposed on the generating companies in the field of public supply. Such a ban can be inferred from the supply obligation imposed on them by Article 11 of the 1989 Electricity Law. That provision obliges those companies to supply their electricity only to SEP and to supply exclusively to the distribution companies the electricity supplied to them by SEP (first paragraph of section 51 of the decision).

— Lastly, as for the ban on exports imposed on the distribution companies by Article 21 of the OVS both in and outside the field of public supply, the Commission considers that it conflicts with the scheme of the new law, under

which exports are unrestricted, and that it is therefore doubtful whether the parties to the OVS can retain it and continue to apply it. The Commission takes the view that if the ban should nevertheless continue to be imposed, it cannot be justified by Article 90(2) (sections 51, second and third paragraphs, and 52 of the decision).

— After finding that exemption under Article 85(3) could not be envisaged, the Commission adopted the contested decision, the operative part of which provides, *inter alia*, as follows:

"*Article 1*

Article 21 of the Cooperation Agreement concluded on 22 May 1986 by the predecessors of the present four electricity generating companies on the one hand and by NV Samenwerkende Elektriciteitsproduktiebedrijven on the other, as applied in conjunction with the control and influence in fact exercised over the international supply of electricity, constitutes an infringement of Article 85(1) of the Treaty in so far as it has as its object or effect the restriction of imports by private industrial consumers and of exports of production outside the field of public supply, by distributors and private industrial consumers, including autogenerators.

Article 2

The companies referred to in Article 3 shall take all necessary steps to bring the infringement referred to in Article 1 to an end. Within three months of reception

of this decision they shall submit to the Commission proposals for the ending of the infringement."

According to Article 3 of the decision, SEP and the four Netherlands electricity generators constitute the addressees of the decision, which was also notified to the applicants.'

3 It is apparent from the contested judgment (paragraph 30) that Rendo and others claimed that the Court of First Instance should:

— 'annul the Commission's decision of 16 January 1991 in so far as it does not rule on the application of Article 21 of the OVS to imports and exports by the distribution companies, including the applicants, in the field of the public supply of electricity;

— order the Commission to declare at this stage, in a decision pursuant to Article 3(1) of Regulation No 17, that Article 21 of the agreement referred to in Article 1 of the contested decision, as applied in conjunction with the control and influence exercised in practice over the international supply of electricity, also constitutes an infringement of Article 85(1) of the Treaty in so far as it has as its object or effect the restriction of imports and exports by distribution companies in the field of public supply, and to order the companies listed in Article 3 of the contested decision to put an end to the infringements found;

— make such other dispositions as the Court may deem appropriate;

— order the Commission to pay the costs.'

4 The Commission contended that the application should be dismissed and the applicants jointly and severally ordered to pay the costs.

5 The Court of First Instance examined first the admissibility and then the merits of the first head of claim distinguishing between the period prior to and the period subsequent to the entry into force of the Electricity Law.

6 On the question of admissibility, the Court of First Instance stated in the contested judgment (paragraphs 57 to 62) that

— 'Consequently, the application is admissible in so far as it seeks the annulment of the Commission's decision to refrain from ruling on the import restrictions imposed on the distribution undertakings by Article 21 of the OVS as regards the period subsequent to the entry into force of the Electricity Law.

— As regards the period prior to the entry into force of the Electricity Law, the contested decision contains no indication as to what action the Commission

intends to take on the complaint in so far as it relates to the import restrictions arising under Article 21 of the OVS alone. It neither definitively rejects the allegations relating thereto nor in any way defers consideration of those restrictions for other proceedings.

— Moreover, although the contested decision was adopted as a result of the applicants' complaint, the subject-matter overlaps only to some extent. On the one hand, the Commission has considered allegations which were not raised by the applicants; on the other, it has dealt with only some of the allegations actually raised. Thus, neither the equalization charge nor the allegations that Article 86 of the Treaty has been infringed are subjected to legal appraisal in the decision.

— Accordingly, the contested decision cannot be construed as a response to aspects of the complaint which are not mentioned either in the statement of reasons or in the operative part of the decision as approved by the Commission.

— Consequently, the Court finds that the contested decision does not rule at all on the import restrictions which were applicable in the period before the Electricity Law came into force. It therefore had no legal effects in that respect and to that extent there is no decision of the Commission.

— The application must therefore be dismissed as inadmissible in so far as it seeks the annulment of an alleged Commission decision refraining from ruling on the import restrictions applicable during that period.'

7 As regards the merits of the Commission's refusal to rule on the ban on imports of electricity during the period subsequent to the entry into force of the Electricity

Law, the Court of First Instance held (paragraphs 98, 99, 102, 105, 106, 107, 111 and 112 of the contested judgment) that

— '... the first point to note is that the argument that once the Commission has found that there is an infringement it is bound to adopt a decision requiring the undertakings concerned to bring it to an end is contrary to the actual wording of Article 3(1) of Regulation No 17, according to which the Commission may take such a decision. Likewise, Article 3(2) of Regulation No 17 does not give a person who makes an application under that article the right to obtain a decision from the Commission as to whether or not the alleged infringement exists (see the judgment of the Court of Justice in Case 125/78 *GEMA* v *Commission* [1979] ECR 3173, at 3189)' (paragraph 98).

— 'The position might be different only if the subject-matter of the complaint fell within the exclusive competence of the Commission. As far as the application of Article 90(2) is concerned, the Court of Justice held in Case C-260/89 *ERT* [1991] ECR I-2925, at I-2962, that it is for the national court to verify whether practices contrary to Article 86 of an undertaking entrusted with the operation of a service of general economic interest may be justified by needs arising from the particular tasks entrusted to that undertaking. It appears from that case-law that the Commission does not have exclusive competence to apply the first sentence of Article 90(2) of the Treaty (see also the judgment of the Court of Justice in Case 66/86 *Ahmed Saeed* [1989] ECR 803, at 853). It follows that in this case the Netherlands courts also have jurisdiction to consider the question raised in the applicants' complaint' (paragraph 99).

— 'In that regard, the Court finds that both Article 21 of the OVS and Article 34 of the Electricity Law contain restrictions on distribution undertakings' importing electricity. Article 21 of the OVS seeks to ensure, by means of supply contracts concluded with distributors by parties to the agreement, that the distributors do not import electricity, except possibly for some minor supplies in border areas. As for Article 34 of the Electricity Law, it prohibits

distributors from importing electricity, with the exception of electricity of under 500 V, by restricting the importation of electricity for public supply to SEP alone. Consequently, the scope of the prohibition embodied in the OVS differs slightly from that of the prohibition laid down in the Electricity Law' (paragraph 102).

— 'Accordingly, examination of the compatibility of the national Law with Community law took precedence over examining the OVS. Indeed, so long as it has not been established that that Law is incompatible with the Treaty, a finding that the OVS constitutes an infringement cannot have any practical effect except in so far as the restrictions which it lays down exceed those arising under the Law' (paragraph 105).

— 'That is the outcome in particular of the fact that the Commission cannot, with a view to terminating an infringement of Article 85, require undertakings to adopt conduct which is contrary to a national law without assessing that law in the light of Community law' (paragraph 106).

— 'However, the question of the compatibility of Article 34 of the Electricity Law with the Treaty is likely to be the subject of political and institutional debate. The proper procedure available to the Commission to deal with questions involving national public policy interests is that provided for in Article 169 of the Treaty, in which the Member States are directly involved and in which it is for the Court of Justice to find, if that is the case, that a national law constitutes an infringement of the Treaty' (paragraph 107).

— 'It follows that the contested Commission decision appears to be justified. Moreover, this outcome does not detract from the judicial redress to which

individuals who make a complaint to the Commission pursuant to Article 3 of Regulation No 17 are entitled. Admittedly it is possible that the complainants will regard the outcome of the proceedings under Article 169 of the Treaty as unsatisfactory. However, it should be borne in mind that the applicants' complaint has not been rejected but is still pending before the Commission. Consequently, if need be, the applicants can apply for the procedure initiated under Regulations Nos 17 and 99/63 to be continued and in that procedure they will be able to assert their procedural rights in full. The Court is conscious of the fact that in that event the exercise of those procedural rights will be subject to a considerable delay, yet that is inevitable in view of the fact that the proceedings under Article 169 of the Treaty take precedence in this case over the procedure under Article 3 of Regulation No 17' (paragraph 111).

— 'Accordingly, the Court's consideration of the contested decision has not disclosed an error of law or of fact or a manifest error of assessment on the part of the Commission in so far as it refrained from ruling on the question whether the import restrictions at issue were justified under Article 90(2) of the Treaty. Consequently, the plea alleging infringement of Community competition law and of certain general principles of law is unfounded' (paragraph 112).

8 Upon application by the appellants, the proceedings were suspended until January 1995 in order to examine the consequences to be drawn from the judgment of 27 April 1994 in Case C-393/92 *Almelo and Others* [1994] ECR I-1477).

9 In the *Almelo* judgment the Court, ruling on questions submitted to it by the Gerechtshof, Arnhem (Netherlands), held *inter alia* that:

(a) Article 85 of the Treaty precludes the application, by a regional electricity distributor, of an exclusive purchasing clause contained in the general conditions

of sale which prohibits a local distributor from importing electricity for public supply purposes and which, having regard to its economic and legal context, affects trade between Member States;

(b) Article 86 of the Treaty precludes the application, by a regional electricity distributor where it belongs to a group of undertakings occupying a collective dominant position in a substantial part of the common market, of an exclusive purchasing clause contained in the general conditions of sale which prohibits a local distributor from importing electricity for public supply purposes and which, in view of its economic and legal context, affects trade between Member States;

(c) Article 90(2) of the Treaty is to be interpreted as meaning that the application by a regional electricity distributor of such an exclusive purchasing clause is not caught by the prohibitions contained in Articles 85 and 86 of the Treaty in so far as that restriction of competition is necessary in order to enable that undertaking to perform its task of general interest. It is for the national court to consider whether that condition is fulfilled.

10 The appellants raise three pleas alleging erroneous reasoning in the judgment, failure to state reasons for the priority accorded to the Article 169 procedure and error of law by the Court of First Instance.

11 The Commission questions the admissibility of the appeal and disputes the pleas on their merits.

The admissibility of the appeal

12 At the hearing before the Court of Justice on 1 June 1995 the Commission, without formally raising an objection of inadmissibility, questioned the appellants' interest in maintaining the appeal. In that connection, it stated that, after the appeal was lodged, it had initiated proceedings against the Kingdom of the Netherlands under Article 169 of the Treaty concerning the import ban imposed by the Electricity Law. Furthermore, the Court had held in the *Almelo* judgment that Article 90(2) of the Treaty may be applied by the national court, which would enable Rendo and others to challenge the exclusive purchasing clause before it.

13 The Court may of its own motion raise the objection that a party has no interest in bringing or in maintaining an appeal on the ground that an event subsequent to the judgment of the Court of First Instance removes the prejudicial effect thereof as regards the appellant, and declare the appeal inadmissible or devoid of purpose for that reason. For an applicant to have an interest in bringing proceedings the appeal must be likely, if successful, to procure an advantage to the party bringing it.

14 On the question of the appellants' interest in maintaining the appeal, it should be pointed out that the Court has not yet determined the action brought by the Commission against the Kingdom of the Netherlands for failure to fulfil its obligations.

15 With regard to the second limb of the objection raised, the Court found in the *Almelo* judgment that it was inconsistent with the Treaty for a regional electricity distributor to apply an exclusive purchasing clause contained in the general

conditions of sale which prohibits a local distributor from importing electricity for public supply purposes. That judgment thus requires the national court to declare the clause in question null and void in the context of the contractual relationship between the parties to the main proceedings.

16 That judgment was given in proceedings whose subject-matter was at least in part different. It cannot therefore affect the appellants' interest in pursuing the proceedings to set aside the judgment dismissing their action against the Commission's decision relating to a proceeding under Article 85 of the Treaty.

Erroneous reasoning in the judgment

17 The appellants maintain that the contested judgment is vitiated by erroneous reasoning. The Court of First Instance held that if the subject-matter of the complaint had been within the exclusive purview of the Commission, the complainants would have been entitled to obtain a definitive decision from the Commission as to the existence of the infringement alleged for the period subsequent to the entry into force of the Electricity Law. In that connection the Court of First Instance rejected the view that the Commission had exclusive competence to apply the first sentence of Article 90(2) of the Treaty, without having regard to the second sentence of that provision.

18 It should be noted that, set in the context of the reasoning of the Court of First Instance, the reference to the first sentence of Article 90(2) of the Treaty cannot be interpreted as meaning that the Court of First Instance sought to make a distinction between those two sentences and acknowledge that the Commission has exclusive competence to apply the second sentence.

19 As the Commission rightly points out, this ground of appeal is based on an inaccurate reading of paragraph 99 of the judgment of the Court of First Instance before which, moreover, the question of the application of the second sentence of Article 90(2) of the Treaty did not arise.

20 It follows from the foregoing that this ground of appeal must be rejected.

Failure to state reasons for the priority accorded to the procedure under Article 169 of the Treaty

21 The appellants maintain that the Court of First Instance did not adequately explain the reasons why the Commission was entitled to accord priority to the procedure under Article 169 of the Treaty as opposed to that provided for in Article 3 of Regulation No 17.

22 In that connection, it must be emphasized that the Court of First Instance merely stated, in paragraphs 105 to 107 of the contested judgment, that the finding that the OVS is incompatible with the Treaty cannot have any practical effect so long as it has not been established that the Electricity Law is incompatible with the Treaty. The proper procedure to establish the inconsistency of that Law with the Treaty is that provided for in Article 169 of the Treaty.

23 It follows from those considerations that the Court of First Instance did not seek to establish an order of priority as between the procedure provided for in Regulation No 17 and the procedure against a State for failure to fulfil its obligations, which, moreover, concern separate persons and separate acts, but held that the Commission was entitled to take the view that the most appropriate procedure for examining the question whether the Electricity Law was consistent with the Treaty was the initiation of proceedings for failure to fulfil obligations.

24 Accordingly, this ground of appeal must also be rejected.

An error of law in the judgment

25 The appellants maintain that the Court of First Instance misdirected itself with regard to the classification of the contested decision by holding that it does not in any way rule on the import restrictions applicable during the period prior to the entry into force of the Electricity Law, whereas the Commission itself acknowledged, according to paragraph 34 of the contested judgment, 'that the contested decision contains a partial, implied rejection of the applicants' complaint'. The Court of First Instance accordingly erred in declaring the action inadmissible on that point.

26 In that connection, it should be noted that the classification of an act for legal purposes by the Court of First Instance, in particular a finding that the act has no legal effect, is a question of law which may be raised in an appeal.

27 In order to determine the merits of this ground of appeal, it should be borne in mind that the Court of Justice has had occasion to hold that, even if the Commission is not obliged to adopt a decision establishing the existence of an infringement of the rules on competition or to investigate a complaint brought before it under Regulation No 17, it is none the less required to examine closely the matters of fact and of law raised by the complainant in order to ascertain whether there has been any anti-competitive conduct. Moreover, where an investigation is terminated without any action being taken, the Commission is required to state reasons for its decision in order to enable the Court of First Instance to verify whether the Commission committed any errors of fact or of law or is guilty of a misuse of powers.

28 In those circumstances, an institution empowered to find that there has been an infringement and to impose a sanction in respect of it and to which private persons may make complaint, as is the case with the Commission in the field of competition, necessarily adopts a measure producing legal effects when it terminates, wholly or in part, an investigation initiated upon a complaint by such a person (see the judgment in Case C-39/93 P *SFEI and Others* v *Commission* [1994] ECR I-2681, paragraph 27, and the case-law cited).

29 It follows from the foregoing that the Court of First Instance misdirected itself in law by holding that the contested decision had had no legal effect as regards the import restrictions applicable during the period prior to the entry into force of the Electricity Law and by declaring the application inadmissible on that point.

30 The plea is therefore well founded, with the result that the judgment must be set aside on this point.

Referral back to the Court of First Instance

31 Under the first paragraph of Article 54 of the Protocol on the Statute of the Court of Justice of the EC:

'If the appeal is well founded, the Court of Justice shall quash the decision of the Court of First Instance. It may itself give final judgment in the matter, where the state of the proceedings so permits, or refer the case back to the Court of First Instance for judgment.'

32 Since the state of the proceedings does not permit the Court of Justice to give final judgment in the matter, the case must be referred back to the Court of First Instance.

Costs

33 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 appellants have been unsuccessful in regard to two of the three grounds of appeal and in the third ground have secured that the judgment of the Court of First Instance should in part be set aside, the parties must be ordered to bear their own costs in these proceedings.

On those grounds,

THE COURT (Sixth Chamber)

hereby:

1) Sets aside the judgment of the Court of First Instance of 18 November 1992 in Case T-16/91 in so far as it held that Commission Decision 91/50/EEC of 16 January 1991 relating to a proceeding under Article 85 of the EEC Treaty (IV/32.732 — IJsselcentrale (IJC) and Others) had had no legal effect as regards the import restrictions applicable during the period prior to the entry into force of the Electricity Law and declared the application inadmissible on that point;

2) Dismisses the remainder of the appeal;

3) Refers the case back to the Court of First Instance;

4) Orders the parties to bear their own costs in these proceedings.

Kakouris Schockweiler Kapteyn

Murray Ragnemalm

Delivered in open court in Luxembourg on 19 October 1995.

R. Grass

Registrar

C. N. Kakouris

President of the Sixth Chamber