

ORDER OF THE PRESIDENT OF THE COURT OF FIRST INSTANCE
21 November 1990 *

In Case T-39/90 R,

Samenwerkende Elektriciteits-productiebedrijven NV, whose registered office is at Arnhem (Netherlands), represented by M. Van Empel and O. W. Brouwer, both of the Amsterdam Bar, with an address for service in Luxembourg at the Chambers of Mr Loesch, 8, rue Zithe,

applicant,

v

Commission of the European Communities, represented by B. J. Drijber, a member of its Legal Department, acting as Agent, with an address for service in Luxembourg at the office of Guido Berardis, a member of its Legal Department, Wagner Centre, Kirchberg,

defendant,

APPLICATION for the suspension of the operation of the Commission Decision of 2 August 1990 relating to a proceeding under Article 11(5) of Council Regulation No 17 of 6 February 1962 (IV/33.539-SEP/Gasunie),

THE PRESIDENT OF THE COURT OF FIRST INSTANCE

makes the following

* Language of the case: Dutch.

Order

Facts and procedure

- 1 By application lodged at the Registry of the Court of First Instance of the European Communities on 26 September 1990, Samenwerkende Elektriciteitsproduktiebedrijven NV (hereinafter referred to as 'SEP') brought an action under the second paragraph of Article 173 of the EEC Treaty for the annulment of the Commission Decision of 2 August 1990 relating to a proceeding under Article 11(5) of Council Regulation No 17 of 6 February 1962 (IV/33.539-SEP/Gasunie).
- 2 By a separate document lodged at the Registry on the same date, the applicant applied, under Article 186 of the EEC Treaty, for an order suspending the operation of the contested decision.
- 3 The Commission submitted its observations on that application for interim relief on 11 October 1990. The parties presented oral argument on 24 October 1990.
- 4 Before the Court considers the substance of the present application for interim relief, it is appropriate to describe the background to the case and, in particular, the circumstances which prompted the Commission's decision of 2 August 1990 to request information from the applicant, of which the latter seeks suspension.
- 5 SEP comprises four electricity-generating companies which are responsible for the public electricity supply in the Netherlands. Nederlandse Gasunie NV (hereinafter referred to as 'Gasunie') holds a *de facto* monopoly in the Netherlands over the supply of natural gas. SEP and Gasunie have entered into an agreement as to the manner in which they will consult each other with a view to possible supplies of gas. Their agreement is known as the 'SEP-Gasunie Cooperation Code' (hereinafter referred to as 'the Cooperation Code').

- 6 On learning at the end of 1989 that SEP had concluded certain new agreements with Gasunie, Commission officials initiated an inquiry to establish whether those agreements were compatible with the competition rules of the EEC Treaty, in particular Article 85 thereof.
- 7 By letter of 6 March 1990, Commission officials sent SEP a request for information under Article 11(3) of Council Regulation No 17 of 6 February 1962, the first regulation implementing Articles 85 and 86 of the Treaty (Official Journal, English Special Edition 1959-62, p. 87, hereinafter referred to as 'Regulation No 17'). The request sought disclosure of certain documents, namely the SEP-Gasunie Cooperation Code and the documents relating to the negotiations preceding its conclusion, the original contract for the supply of gas previously entered into between SEP and the Norwegian undertaking Statoil and the correspondence relating thereto, and any information concerning the role played by the Netherlands State regarding the conclusion of the agreement between SEP and Gasunie.
- 8 In that letter, the Commission stated that the Cooperation Code might have an effect on the contract for the supply of gas concluded between SEP and Statoil, in so far as it was stipulated that SEP would obtain supplies primarily from Gasunie, and only if it found the prices to be unacceptable would it be entitled to negotiate with foreign suppliers. In the Commission's view, the information requested ought to enable it to 'assess the compatibility of that agreement (those agreements) with the competition rules of the EEC Treaty, in particular Article 85 thereof, on the basis of full knowledge of the facts and their economic interdependence'.
- 9 By letter of 9 April 1990, SEP sent the Commission a copy of the Cooperation Code concluded with Gasunie, in the form in which it had been definitively adopted in the mean time, together with an earlier draft of it. However, SEP refused to disclose to the Commission the other information requested, on the ground that the contract concluded with Statoil had nothing to do with the Cooperation Code and that the Netherlands State had played no role in the conclusion of that code with Gasunie, and moreover there had been no correspondence relating thereto.

- 10 The Commission sent a further letter to the applicant on 23 April 1990 referring to its earlier request for information. SEP replied to that letter on 1 May 1990 informing the Commission that it saw no reason for departing from the views which it had expressed in its letter of 9 April 1990.

- 11 In those circumstances, by decision of 2 August 1990 the Commission required the applicant to provide it, within 10 days, with the original contract for the supply of gas concluded between SEP and Statoil, together with the correspondence relating thereto.

- 12 Following the adoption of the contested decision by the Commission, the applicant, by letter of 16 August 1990, requested a personal interview with the Director-General of Directorate-General IV, Claus Dieter Ehlermann, in order to explain to him the reasons for which it was unable to produce the text of the contract for the supply of gas which it had concluded with Statoil. It repeated on that occasion that it was extremely important for it that the confidentiality of the contract be strictly preserved as regards third parties.

- 13 The Commission replied by letter of 30 August 1990 that it was not prepared to enter into any discussions whatsoever with SEP and that in any event, by virtue of the obligation of professional secrecy to which the Commission is subject, the confidential nature of the Statoil contract could not justify a refusal to disclose that contract to it, whereupon SEP, by a letter from its lawyer of 12 September 1990, informed the Commission that the question of confidentiality related to the possibility that Member States might have access to the Statoil contract under Article 10 of Regulation No 17 and therefore proposed that the Commission examine the contract, provided that it took no copy of it, so that it could ascertain for itself that the contract was not needed for an appraisal of the Cooperation Code concluded with Gasunie.

- 14 By letter of 24 September 1990 the Commission rejected that proposal, pointing out in particular that Article 10 allowed it a sufficient margin of discretion not to disclose certain documents to the Member States and that, if there was no possibility of the Statoil contract being in any way affected by the Cooperation Code, it would have no reason to forward it to the competent authorities of the Member States.

Law

- 15 By virtue of the combined provisions of Article 186 of the EEC Treaty and Article 4 of the Council Decision of 24 October 1988 establishing a Court of First Instance of the European Communities, the Court may prescribe any necessary interim measures in proceedings before it.
- 16 Article 83(2) of the Rules of Procedure of the Court of Justice — which applies *mutatis mutandis* to proceedings before the Court of First Instance until the entry into force of its own Rules of Procedure pursuant to the third paragraph of Article 11 of the abovementioned Council decision — provides that applications for interim measures of the kind referred to in Article 186 of the EEC Treaty are to state the circumstances giving rise to urgency and the factual and legal grounds establishing a prima-facie case for the interim measure applied for. The measures applied for must be provisional in the sense that they do not prejudice the decision on the substance of the case.
- 17 In the present case, the applicant essentially claims, in support of its application, that the Commission Decision of 2 August 1990 infringes Article 11 of Regulation No 17 in so far as the contract for the supply of gas concluded with Statoil and the correspondence relating thereto do not constitute necessary information within the meaning of that provision.
- 18 The applicant also claims that implementation of the Commission decision is liable to cause it serious and irreparable harm since the Commission is required, in compliance with the procedure laid down by Article 10(1) of Regulation No 17, to forward the contract to the Member States. According to the applicant, disclosure of that document, which contains important business secrets, to the Member States and in particular to the Netherlands State, which owns 50% of the shares in Gasunie, would impose a severe handicap on it in its future negotiations with the Netherlands State (through Gasunie) or with other Member States supplying gas (including the undertakings owned by them), since the Member States would be able to ascertain the conditions of sale agreed between SEP and Statoil.

- 19 The Commission, for its part, considers that, in the present proceedings for interim relief, the requirement of a prima-facie case is not fulfilled and that the applicant has not established that the contested decision is liable to cause it serious and irreparable harm.
- 20 As the Court of Justice held in paragraph 15 of its judgment in Case 374/87 *Orkem v Commission* [1989] ECR 3283, 'it is for the Commission to decide . . . whether particular information is necessary to enable it to bring to light an infringement of the competition rules. . . the Commission may legitimately take the view that it is necessary to request further information to enable it better to define the scope of the infringement, to determine its duration or to identify the circle of undertakings involved'.
- 21 Whilst it is the responsibility of the Commission to decide whether information is necessary to enable it to discover an infringement of the competition rules, the assessment of such necessity nevertheless remains subject to review by the Court.
- 22 Although review of that kind forms no part of the present proceedings for interim relief but of the main proceedings, the Court dealing with an application for interim relief must verify whether, in the first place, the information requested by the Commission manifestly falls outside the scope of the powers conferred on it by Article 17 and, in the second place, whether the applicant's submissions justify, at first sight, suspension of the operation of the Commission decision.
- 23 Whilst the information requested by the Commission does not appear at first sight to fall outside the scope of the powers conferred on it by Regulation No 17, it likewise does not appear that the applicant's submissions are to be regarded as being manifestly without foundation and therefore they do not in themselves provide grounds for dismissing the present application for interim relief.
- 24 It is therefore necessary to consider whether the maintenance of the Commission decision until the Court of First Instance has given a decision on the substance would be liable to cause serious and irreparable harm to the applicant as a result of disclosure of the contract at issue to the Member States, in particular the Netherlands.

- 25 Article 10 (1) of Regulation No 17 provides: 'The Commission shall forthwith transmit to the competent authorities of the Member States a copy of the applications and notifications together with copies of the most important documents lodged with the Commission for the purpose of establishing the existence of infringements of Articles 85 or 86 of the Treaty . . . '.
- 26 It should be observed in the first place that, with the exception of the applications and notifications, the Commission is not required to transmit to the Member States all the documents lodged with it for the purpose of establishing infringements of Articles 85 and 86 but only 'the most important documents'.
- 27 In the second place, where such documents are to be transmitted, they must be transmitted only to the 'competent authorities' of the Member States.
- 28 Therefore, the Commission, before sending the contract at issue to the competent authorities of the Member States, must ascertain that it is one of the 'most important documents' lodged with it for the purposes of the inquiry. Only if a document contains information relevant to an inquiry into a possible infringement of the competition rules must it be regarded as one of 'the most important documents' which, in consequence, must be forwarded to the competent national authorities.
- 29 Even if that should prove to be the case in this instance, it would still not mean that the business secrets of the undertakings concerned would not be adequately protected. Article 20(2) of Regulation No 17 provides: 'Without prejudice to . . . Articles 19 and 21, the Commission and the competent authorities of the Member States, their officials and other servants shall not disclose information acquired by them as a result of the application of this regulation and of the kind covered by the obligation of professional secrecy'. Moreover, Article 20(1) provides: 'Information acquired . . . shall be used only for the purpose of the relevant request or investigation'.

- 30 It follows that not only the Commission but also the competent authorities of the Member States are bound by professional secrecy. In particular, the competent authority of a Member State to which the Commission sends, pursuant to Article 10 of Regulation No 17, a document containing business secrets may not transmit it to another national authority or use it for a purpose other than that of the investigation which, as in this case, is conducted by the Commission.
- 31 SEP's legitimate interest in not having the business secrets contained in the Statoil contract disclosed is thus sufficiently protected by Articles 10 and 20 of Regulation No 17, even if the Commission's decision is ultimately annulled in the main proceedings.
- 32 Furthermore, even if the contract in question — whose content and relevance to the inquiry being conducted by the Commission are unknown to the Court — is actually transmitted to the competent national authorities, the Court cannot, in the present proceedings for interim relief, adopt any measure restraining such transmission without thereby anticipating a breach by those national authorities of the obligations imposed on them by Article 20 of Regulation No 17.
- 33 Any disclosure of the contract at issue by the Commission to the competent authorities of a Member State does not therefore appear capable of causing serious and irreparable harm to the applicant.
- 34 It follows from the foregoing considerations that the legal conditions for the grant of the interim measure applied for are not fulfilled and that the application must therefore be dismissed.

On those grounds,

THE PRESIDENT OF THE COURT OF FIRST INSTANCE,

by way of interim measure,

hereby orders as follows:

- (1) The application for the suspension of the operation of the Commission decision of 2 August 1990 is dismissed.**
- (2) The costs are reserved.**

Luxembourg, 21 November 1990.

H. Jung
Registrar

J. L. da Cruz Vilaça
President