of the investigation and are set out in the request for information. It follows from the combined effect of Article 11(1) and (3) of Regulation No 17 and from the requirements relating to regard for the right to a fair hearing of the undertakings concerned that the criterion of necessity laid down in Article 11 must be assessed according to the purpose of the investigation, which must be stated in the request for information itself.

The requirement that there must exist a correlation between the request for information and the putative infringement must be considered to be satisfied, since at that stage in the proceeding the request may legitimately be regarded as having a connection with the putative infringement.

2. The provisions of Article 20 of Regulation No 17, which prohibit, first, the disclosure of information acquired as a result of the application of that regulation and of the kind covered by the obligation of professional secrecy and, secondly, the use of such information for any purpose other than that for which it has been requested, 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.

Those provisions preclude the disclosure of information not only outside the national administration of a Member State but also to anyone in the departments of the national administration apart from those in charge and the officials or other servants of the competent departments dealing with competition matters. It follows that an undertaking cannot claim to avoid a request for information sent to it by the Commission pursuant to Article 11 of Regulation No 17 by invoking a breach of the principle of proportionality arising from the risk that the documents sought from it may circulate between different administrative departments of a Member State, which could use them to the detriment of its commercial interests.

JUDGMENT OF THE COURT OF FIRST INSTANCE (Second Chamber)
12 December 1990 *

In Case T-39/90,

Samenwerkende Elektriciteits-produktiebedrijven NV, whose registered office is in Arnhem (Netherlands), represented by M. van Empel and O. W. Brouwer, of the

* Language of the case: Dutch.

Amsterdam Bar, with an address for service in Luxembourg at the Chambers of J. Loesch, 8 Rue Zithe,

applicant,

v

Commission of the European Communities, represented by B. J. Drijber, a member of its Legal Service, acting as Agent, with an address for service in Luxembourg at the office of Roberto Hayder, a national official on secondment to the Commission's Legal Service, Wagner Centre, Kirchberg,

defendant,

APPLICATION for the annulment of the Commission Decision of 2 August 1990 relating to a proceeding under Article 11(5) of Council Regulation No 17,

THE COURT OF FIRST INSTANCE (Second Chamber),

composed of: A. Saggio, President of the Chamber, C. P. Briët, D. P. M. Barrington, B. Vesterdorf and J. Biancarelli, Judges,

Registrar: H. Jung,

having regard to the written procedure and further to the hearing on 3 July 1991,

gives the following

Judgment

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 Elektriciteits-produktiebedrijven NV (hereinafter referred to as 'SEP') brought an action for the annulment of the Commission Decision of 2 August 1990 (IV/33.539 — SEP/Gasunie; hereinafter referred to as 'the decision') relating to a proceeding under Article 11(5) of Council Regulation No 17 of 6 February 1962, being the first regulation implementing Articles 85 and 86 of the Treaty (Official Journal, English Special Edition 1959 to 1962, p. 87; hereinafter referred to as 'Regulation No 17').

2 The applicant, SEP, is a limited company comprising the four Netherlands public electricity-generating utilities, which are responsible for the production of electric power in the Netherlands and, where necessary, its importation. According to the information provided by the parties, one of SEP's particular tasks — as is borne out by the 1989 Netherlands Law on Electricity (Elekticiteitswet, *Staatsblad*, 1989, p. 535) — is to secure the lowest possible consumer price for electricity whilst ensuring that supplies are maintained. With this end in view, it organizes on behalf of its shareholders the coordination of electricity production together with the purchase of fuel, which constitutes the most substantial element of the cost of electricity production. At the present time approximately 50% of the electricity produced in the Netherlands is made from natural gas.

3 Nederlandse Gasunie NV (hereinafter referred to as 'Gasunie') holds a *de facto* monopoly in the Netherlands over the supply of natural gas. According to the information contained in the documents before the Court, all natural gas extracted on Netherlands territory must be offered for sale to it. It is owned as to 50% by the oil companies Shell and Esso and as to 50% either directly or indirectly by the Netherlands State. Fundamental decisions regarding Gasunie's sales policy are subject to the approval of the Minister for Economic Affairs. The documents before the Court reveal that under the Netherlands Law on Natural Gas Prices (Wet Aardgasprijzen) natural gas constitutes a national asset to be exploited in the best interests of the Netherlands; it forms the subject-matter of an integrated policy and the resources obtained from it are fed into the State budget, either directly or in the form of VAT.

4 It was against that background that a contract for the supply of gas (hereinafter referred to as 'the Statoil contract') was signed on 16 June 1989 between SEP and the Norwegian undertaking Statoil, which thereby gained access for the first time to the Netherlands natural gas market. According to the parties, this was the first contract of its kind to be entered into between SEP and a company other than Gasunie. Nevertheless, Gasunie remains the supplier of majority of the gas used by SEP.

5 According to the information provided by the parties, the conclusion of the Statoil contract led to the negotiation by Gasunie during the second quarter of 1989 of a code of cooperation with SEP, the aim of which was to provide in the future against any unforeseen consequences arising from the subsequent conclusion between SEP and third parties of contracts for the supply of gas in the event of there being any fresh need for the provision of natural gas. It appears from the documents before the Court that that code of cooperation was adopted in its final form on 9 April 1990.

6 At the end of 1989 the Commission learned simultaneously of the Statoil contract and of new agreements, or at least negotiations, between Gasunie and SEP regarding the 'code of cooperation' setting out the 'manner in which (those two undertakings) will consult each other with a view to possible future supplies of gas', as referred to in the preceding paragraph. In the light of this information, the Commission initiated an investigation pursuant to Article 11 of Regulation No 17 to establish whether the agreements or concerted practices between SEP and Gasunie were compatible, as regards the supply of natural gas, with the competition rules of the EEC Treaty, in particular Article 85 thereof. The contested decision was adopted on 2 August 1990 in the context of those investigations.

7 The inquiry proceeding took place as follows. By letter of 6 March 1990, the Commission requested the applicant, pursuant to Article 11(1) of Regulation No 17 — under which the Commission, in carrying out its duty to monitor compliance with Articles 85 and 86 of the Treaty, may obtain 'all necessary information', particularly from undertakings and associations of undertakings — to send to it:

'(a) the original gas supply contract concluded between SEP and Statoil and the correspondence relating to that agreement;

(b) the new contract between SEP and Gasunie and the documents relating to the negotiations preceding its conclusion;

(c) information concerning the role played by the Netherlands State in the conclusion of the agreement between SEP and Gasunie and any correspondence between the Netherlands State and SEP relating to that agreement'.

In response to the aforesaid request the applicant sent, by letter of 9 April 1990, the code of cooperation with Gasunie, in the form in which it had been definitively adopted in the mean time, together with an earlier draft of that code. However, it refused to send the other information requested, on the grounds, first, that the Statoil contract had nothing to do with the code of cooperation, and secondly, that the Netherlands State had played no role in the adoption of that code, and moreover that there had been no correspondence relating to it. By letter of 23 April 1990, the Commission repeated its request for the submission of the Statoil contract and the applicant, on 1 May 1990, again refused to comply.

8 In those circumstances, the Commission adopted its decision of 2 August 1990 under Article 11(5) of Regulation No 17, which provides that 'where an undertaking or association of undertakings does not supply the information requested within the time limit fixed by the Commission, or supplies incomplete information, the Commission shall by decision require the information to be supplied. The decision shall specify what information is required, fix an appropriate time limit within which it is to be supplied and indicate the penalties provided for in Article 15(1)(b) and Article 16(1)(c) and the right to have the decision reviewed by the Court of Justice'. The decision of 2 August 1990 requires the applicant to provide the Commission, within ten days, with the original gas supply contract between SEP and Statoil and the correspondence relating to it. The decision does not impose any fine or periodic penalty to be paid in the event of failure to supply the information within the time-limits set by it.

— Following the adoption of the abovementioned decision of 2 August 1990, the applicant persisted in its refusal and requested, by letter of 16 August 1990, a personal interview with the Director-General for Competition, Mr Ehlermann, in order to explain to him the reasons for the stance adopted by it and to seek an amicable resolution of the dispute. The applicant relied in its letter for the first time on the confidential nature of the Statoil contract as regards third parties and announced its intention to bring an action contesting the decision, in order to safeguard its rights.

— The Commission replied by letter of 30 August 1990 from the Director-General for Competition, stating that the discussion proposed by SEP could not constitute an appropriate solution and that the confidential nature of the Statoil contract could not, by virtue of the obligation of professional secrecy binding the Commission under Article 20 of Regulation No 17, justify SEP's refusal to disclose it.

— In a letter of 12 September 1990 SEP stated that in relying on the confidentiality of the Statoil contract with regard to third parties it was alluding in essence to the Netherlands State, inasmuch as Article 10 of Regulation No 17 provides that the Commission is forthwith to transmit to the competent authorities of the Member States copies of the most important documents lodged with the Commission for the purpose of establishing the existence of infringements of Articles 85 or 86. It therefore proposed that the Commission examine the Statoil contract, provided that it took no copies of it, so that it could ascertain for itself that the contract was not needed for an appraisal of the code of cooperation concluded with Gasunie.

— By letter of 24 September 1990 from the Director-General for Competition, the Commission rejected that proposal on the ground that it did not fulfil the requirements of Article 11 of Regulation No 17. It also pointed out that Article 10 allowed it a sufficient margin of discretion regarding the transmission of documents to the Member States and that if, as the applicant maintained, the Statoil contract was incapable of being affected by the code of cooperation, it would have no reason to disclose it to them.

9 The Commission defined the purpose of its request for information as follows. In its letter of 6 March 1990, referred to above, the subject-matter of which is stated to be the 'agreement between SEP and Gasunie', the Commission indicated that its officers had learned that 'SEP has entered into a code of conduct with Gasunie regarding gas supplies, following the exertion of certain pressure by the Ministry of Economic Affairs'. It observed that the implementation of the Statoil contract 'appears to be affected' by that code of conduct. The purpose of its request for information regarding the Statoil contract and the code of conduct was thus to enable it to assess the compatibility of the code of conduct with Article 85 of the EEC Treaty, 'on the basis of full knowledge of the facts and their economic interdependence'.

In giving its reasons for the decision of 2 August 1990, the Commission stated that the code of conduct sent to it by SEP and forming the subject-matter of its inquiry 'gives Gasunie a preferential right to supply gas. In the light of a previous draft of that code . . . it would appear that the negotiations with Gasunie were conducted on the basis of exclusivity and that quotes were to be sought from third parties only if the negotiations with Gasunie failed to result, within six months, in an outcome satisfactory to SEP. The Statoil . . . contract (may be affected) by that code of cooperation and supplies made by Statoil may be subject to the approval of Gasunie or may form the subject-matter of a concerted practice. It is therefore important to examine the gas supply contract in question . . . That contract may be an agreement affecting competition within the common market' (sixth recital).

10 Concurrently with this application for the annulment of the decision of 2 August 1990, lodged on 26 September 1990, SEP also applied, by a separate document lodged at the Registry of the Court of First Instance on the same date, for an order suspending the operation of the contested decision. By order of the President of the Court of First Instance of 21 November 1990, that application was dismissed (T-39/90 R [1990] ECR II-649).

11 By decision of 26 November 1990, the Commission imposed on SEP, pursuant to Articles 11(5) and 16(1)(c) of Regulation No 17, a periodic penalty payment, to take effect from the fifth day following its notification, of ECU 1 000 for each day's delay in fulfilling the obligations set out in the decision of 2 August 1990. As a consequence of this, SEP produced the Statoil contract to the Commission, whilst expressly reserving all its rights.

12 On 14 December 1990 the applicant brought an appeal before the Court of Justice against the abovementioned interlocutory order of the President of the Court of First Instance (Case C-372/90 P). By a separate document lodged at the Registry of the Court of Justice on the same date, it also applied for an order suspending the operation of the decision of 2 August 1990 and/or for interim measures. In this connection, the applicant requested the Court of Justice in the alternative 'to order the Commission not to provide the Member States with a copy of the Statoil contract . . . until the Court of First Instance has given judgment . . . on the application for annulment . . . against (the) Commission's decision of 2 August 1990 or, in the event that the Court of Justice gives its decision before the Court of First Instance, until the Court of Justice has delivered a final judgment in Case T-39/90 R on the appeal by SEP against the order of the President of the Court of First Instance' (Case C-372/90 P-R).

Finally, on 23 January 1991 the applicant lodged as a precautionary measure a second appeal against that order of the President of the Court of First Instance, seeking in addition an order from the Court of Justice requiring the Commission to return to it the Statoil contract, which it had sent to that institution in the light of the latter's aforementioned decision of 26 November 1990 imposing a periodical penalty payment. The applicant requested the Court of Justice in the alternative to make an order restraining the Commission from communicating copies of the contract in question to the authorities of the Member States (Case C-22/91 P).

13 By order of 3 May 1991 the President of the Court of Justice took note of the discontinuance of the applicant's claims 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 has given judgment on the annulment applications brought by SEP', and ordered the removal from the register of Cases C-372/90 P, C-372/90 P-R and C-22/91 P.

14 The written procedure in respect of the present application for annulment was completed on 19 December 1990. Upon hearing the report of the Judge-Rapporteur, the Court of First Instance decided to open the oral procedure without any preparatory inquiry.

Forms of order sought by the parties

15 The applicant claims that the Court of First Instance should:

— annul or at least declare void the decision of the Commission of the European Communities of 2 August 1990 relating to a proceeding under Article 11(5) of Council Regulation No 17 (IV/33.539 — SEP/Gasunie);

— order the Commission to pay the costs.

The defendant contends that the Court of First Instance should:

— dismiss the application;

— order SEP to pay the costs.

Arguments of the parties and assessment in law

16 The applicant relies in support of its application for the annulment of the decision on three pleas in law, founded respectively on infringement of Article 11 of Regulation No 17, failure to give sufficient reasons and breach of the principle of proportionality.

Infringement of Article 11 of Regulation No 17

Arguments of the parties

17 In support of the first plea, the applicant asserts, first, that the Statoil contract does not contain any necessary information within the meaning of Article 11 of Regulation No 17 and secondly, that the Commission was not entitled to call for its disclosure, since it has not established that such disclosure is necessary for the purpose of the inquiry.

18 With regard to the first of those points, the applicant maintains that the disclosure of the Statoil contract is not necessary within the meaning of Article 11 of Regulation No 17. It points out that the contested decision was adopted in the context of investigations intended solely to check whether the code of cooperation between SEP and Gasunie was compatible with Article 85 of the Treaty. In those circumstances, the Statoil contract, which in the applicant's view has no connection with the code of cooperation, is not absolutely necessary for the inquiry carried out in this instance by the Commission.

In support of this argument, the applicant points out, first, that the fact that the code of cooperation was negotiated precisely by reason of the existence of the Statoil contract does not imply that that contract is necessary for an assessment of the code of cooperation. That code was adopted simply because of the existence of the Statoil contract, and not because of its terms, which were unknown to Gasunie. Furthermore, since the code of cooperation was not formulated with Gasunie until after the Statoil contract had been concluded, that code did not and cannot, according to the applicant, affect the negotiation or the provisions of the contract. It considers therefore that the code of cooperation could affect only an amendment made to the Statoil contract subsequent to the formulation of the code. It stated at the hearing that the only amendment made to the Statoil

contract, on 27 December 1990, was communicated to the Commission and merely defined the way in which the gas was to be transported, which had not been laid down in the original contract, but did not affect the price of such transportation.

The applicant asserts, secondly, that an examination of the terms of the code of cooperation shows the disclosure of the Statoil contract to be unnecessary in the context of the inquiry, which was concerned solely with the code. That code merely establishes a framework for future negotiations between SEP and Gasunie regarding possible further supplies of gas. It sets out the terms on which SEP is in future to compare offers from Gasunie and those made by third parties including, as the case may be, Statoil. It is thus quite clear from the code of cooperation that it does not involve any change in SEP's actions in the context of the implementation of the Statoil contract. In order, therefore, to assess the compatibility of the code of cooperation with Article 85, all that is needed is an examination of the way in which SEP and Gasunie may act with regard to potential future suppliers from whom SEP seeks quotations pursuant to the code of cooperation.

19 With regard to the second point, the applicant asserts that the Commission was not entitled to call for the disclosure of the Statoil contract, for the very reason that it has not proved that that contract contains information necessary for an assessment of the lawfulness of the code of conduct. It points out that the Commission may request information pursuant to Article 11 of Regulation No 17 only in order to check on a putative infringement of Article 85 or 86, the scope of the inquiry being limited to this. In the present case, the putative irregularity referred to in the letter of 6 March 1990, which opened the inquiry, was concerned solely with the code of cooperation, and the scope of the inquiry could not extend therefore beyond the lawfulness of that code. On the other hand, the contested decision of 2 August 1990 gives no clear indication of the putative infringement which the Commission intended to investigate by means of its request for the production of the Statoil contract.

20 The applicant considers in that regard that by demanding, in the contested decision, the disclosure of the Statoil contract, the Commission altered the subject-matter of its inquiry. This is particularly apparent from the sixth recital in the preamble to that decision, which suggests that the Statoil contract may in itself constitute a separate infringement of Article 85 and that it forms itself the subject-matter of the inquiry. According to the applicant, in order for the Commission to be in a position to demand the disclosure of the Statoil contract for the purpose of assessing its regularity, it was bound to initiate a new proceeding under Article 11

of Regulation No 17 by sending a fresh request for information on the ground of a suspected infringement. Consequently, by demanding in the contested decision the production of the Statoil contract within the context of an inquiry into the commercial relationship between SEP and Gasunie, the Commission was seeking to give credence to a new interpretation of its powers of investigation under Article 11 and to screen that interpretation from all judicial review. In the light of the foregoing, it appears moreover that the Commission wishes to carry out a more general inquiry into the Netherlands gas market. This would involve an inquiry into a sector of the economy under Article 12 of Regulation No 17, in the context of which the Commission would not be bound to establish the existence in any individual case of a putative infringement of Article 85 or Article 86.

21 The Commission for its part maintains that the first plea is unfounded. It rejects, first, the claim that it sought to re-interpret Article 11 by arrogating to itself the right to request information even where there existed no indication suggesting that any infringement has occurred. It states that the inquiry in question concerns the relationship between SEP and Gasunie. It asserts in that regard that SEP's refusal, during the initial phase of its negotiations with Gasunie regarding the formulation of a code of cooperation, to enter into an exclusive purchasing relationship with Gasunie, for the very reason that that would have infringed the provisions of Article 85, indicates that the code of cooperation in its final form may constitute an infringement of that article.

22 The Commission also rejects the argument that it altered the subject-matter of its inquiry in the contested decision. It maintains that it included the Statoil contract in its inquiry from the outset. In particular, it alleges that there are clear indications, especially in the sixth recital in the preamble to the contested decision, that the request for the production of the Statoil contract is primarily intended to enable the Commission to assess the impact of the code of conduct on competition by investigating its effect on contracts with third-party suppliers such as Statoil. It was therefore that consideration which warranted the request, irrespective of the fact that the Statoil contract may itself be contrary to Article 85. In this connection, the Commission stressed at the hearing that, as regards the purpose of the inquiry under consideration, the reference in the sixth recital in the preamble to the decision to the effects of the Statoil contract on competition was of no relevance.

23 As regards the need for disclosure of the Statoil contract for the purpose of investigating the lawfulness of the code of conduct, the Commission maintains that it is

for it, and not the undertaking concerned, to decide whether particular information is 'necessary' within the meaning of Article 11(1) of Regulation No 17, as the Court of Justice held in its judgment in Case 374/87 *Orkem* v *Commission* [1989] ECR 3283, paragraph 15. It points out that it enjoys a wide discretion for that purpose, which implies marginal control by the Court of First Instance.

24 The defendant institution points out that in order to examine the effect of the code of conduct on competition it has to take account of the general economic context into which it fits and, consequently, of the situation in the natural gas market in the Netherlands. It relies in that regard on the judgment of the Court of Justice in Joined Cases 56/64 and 58/64 *Grundig* v *Commission* [1966] ECR 299.

Viewed in that perspective, the Statoil contract constitutes, prima facie, an essential factor in determining the extent to which the code of conduct gives rise in practice to an exclusive or preferential relationship between SEP and Gasunie. The Commission alleges in that regard that the code of conduct was concluded 'as a result of' the Statoil contract. The fact that that contract predated the code of conduct is thus inconsequential. It states that it wished in particular to check whether the way in which the contract is applied is influenced by the code of conduct, especially as regards the quantities of gas purchased by SEP from Statoil and the transportation of that gas within the territory of the Netherlands, for which Gasunie's cooperation is essential. The Commission stated in that regard at the hearing that according to the information at its disposal, and contrary to the applicant's assertions, the amendment of the Statoil contract on 27 December 1990, which was disclosed to the Commission in January 1991, involves provisions relating to the prices charged to large purchasers and an allowance for transportation. The Commission concludes from this that the Statoil contract, as amended, does indeed refer to the selling price of Netherlands gas. Furthermore, the Statoil contract, as thus amended, shows that the sale of gas is not confined to Statoil. Other large oil companies, including in particular Shell Nederland, one of Gasunie's parent companies, also form part, with Statoil, of a consortium selling gas to the applicant; those companies are thus involved in the Statoil contract as amended.

Legal assessment

25 As regards the first plea in law — whereby the applicant alleges in essence that the disclosure of the Statoil contract is not 'necessary' since it has no connection with the code of conduct forming the subject-matter of the inquiry — it should be

noted, as a preliminary point, that there must exist a connection between the information requested by the Commission under Article 11 of Regulation No 17 and the infringement under investigation, to which reference is made in the request. Article 11(1) empowers the Commission to obtain, particularly from undertakings, 'all necessary information' for the purposes of the application by that institution of the principles set out in Articles 85 and 86 of the Treaty. That article additionally provides, in paragraph 3, that the Commission must in particular state in its request 'the legal basis and the purpose of the request'. It therefore follows from the two aforementioned provisions, taken together, and from the requirements relating to regard for the right to a fair hearing of the undertakings concerned, that the criterion of necessity laid down in Article 11 must be assessed according to the purpose of the inquiry, which must be stated in the request for information itself. As the Court held in a sphere comparable with that of Article 11, in paragraph 29 of its judgment in Joined Cases 46/87 and 227/88 *Hoechst* v *Commission* [1989] ECR 2859, relating to the Commission's powers of investigation under Article 14 of Regulation No 17, 'the Commission is required to specify the subject-matter and purpose of the investigation . . . (That obligation) is a fundamental requirement not merely in order to show that the investigation to be carried out on the premises of the undertakings concerned is justified but also to enable those undertakings to assess the scope of their duty to cooperate while at the same time safeguarding the rights of the defence'. It follows that the Commission is entitled to require the disclosure only of information which may enable it to investigate putative infringements which justify the conduct of the inquiry and are set out in the request for information.

26 In that regard, the Court finds that in the present case the contested decision was adopted in the context of an inquiry into the relationship between the applicant and Gasunie, as the Commission rightly points out. This is apparent from the contents of the initial request for information of 6 March 1990, which opened the investigation under Article 11 of Regulation No 17, and is confirmed by the decision adopted and by the defendant institution's statements at the hearing. In this instance, there has been full compliance with the two-stage procedure provided for in Article 11, involving an initial request for information specifying the purpose of the inquiry and thereafter, if the addressee undertaking refuses to provide it, a decision which orders the disclosure of that information without altering the purpose of the request.

27 It is apparent from the contents of the request of 6 March 1990 — which, moreover, expressly specifies its subject-matter to be the 'agreement between SEP

and Gasunie' — that the disclosure of the Statoil contract was requested by the Commission in this case for the sole purpose of assessing the effects of the code of conduct on competition. This is quite clear from the statement of the reasons for the request, according to which 'the information requested is needed in order to enable the Commission to assess the compatibility of that agreement (those agreements) (between SEP and Gasunie) 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' (paragraph 1 of the request). Similarly, the Commission states in the contested decision that it is requesting the disclosure of the Statoil contract in the context of investigations initiated by it 'because it suspects the existence of agreements and/or concerted practices between SEP and Nederlandse Gasunie NV which are contrary to the competition rules of the EEC Treaty, in particular Article 85 thereof' (second recital in the preamble to the decision). In particular, the contested decision calls for the disclosure of the Statoil contract on the express ground that by enabling the effect of the code of conduct on the Statoil contract to be assessed it constitutes a significant factor in examining the extent to which that code is compatible with the Community rules on competition (sixth recital in the preamble to the decision) (see paragraph 9 above).

28 In the light of the foregoing, the applicant's allegations that the decision alters the subject-matter of the inquiry, or at the very least fails clearly to specify the putative infringement which the Commission proposes to investigate, are unfounded.

It should be noted in that regard that the Commission acknowledged at the hearing the potential for misunderstanding arising from the passage in the decision which states that the Statoil contract 'may be an agreement capable of affecting competition within the common market'. It nevertheless pointed out that despite that ambiguity the request for the production of the Statoil contract is intended in the present case to enable the economic context of the relationship between SEP and Gasunie to be examined, as appears from the reasons given for the decision.

Consequently, in view of the clear and explicit contents of the initial request and of the contested decision, set out above, and in the light of the clarification provided by the Commission at the hearing, the Court finds that the supplementary reference in the contested decision to the possible unlawfulness of the Statoil contract cannot give rise to any change in the subject-matter of the inquiry proceeding, despite the ambiguity which it may pose for the undertaking concerned. The purpose of the inquiry in this case is clearly to assess the lawfulness of the code of conduct, irrespective of the question whether the Statoil contract may in itself constitute an infringement of Article 85 of the Treaty.

29 In the light of the foregoing, it falls to the Court to verify whether, as the Commission maintains, there is a sufficient nexus between the Statoil contract and the code of conduct forming the subject-matter of the inquiry. It should be noted as a preliminary point in that regard that the term 'necessary information' contained in Article 11(1) must be interpreted according to the objectives for the achievement of which the powers of investigation in question have been conferred upon the Commission. The requirement that there must exist a correlation between the request for information and the putative infringement is satisfied, since at that stage in the proceeding the request may legitimately be regarded as having a connection with the putative infringement.

30 That analysis is borne out by the case-law of the Court of Justice, which held in its judgments in Case 374/87 *Orkem* v *Commission*, cited above, paragraph 15, and Case 27/88 *Solvay* v *Commission* [1989] ECR 3355 (summary publication), as well as the Opinion of Mr Advocate General Darmon in the *Orkem* case, p. 3301, especially p. 3320 (see also the judgment in Case 136/79 *National Panasonic* v *Commission* [1980] ECR 2033, paragraph 13) that 'Regulation No 17 confers on the Commission wide powers to make investigations and to obtain information by providing in the eighth recital in its preamble that the Commission must be empowered . . . to require such information to be supplied and to undertake such investigations as are necessary to bring to light infringements of Articles 85 and 86 of the Treaty. . . . 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'.

31 The Court finds in the present case that the Commission had reasonable grounds for considering that there was a connection between the Statoil contract and the code of conduct. A number of factors entitle it to assume that the code may have an effect on the Statoil contract.

It should be noted, first, that the two agreements in question, that is to say the code of conduct and the Statoil contract, were concluded by the same undertaking, the applicant, with two of its natural gas suppliers, namely Gasunie and Statoil respectively. To this first feature common to the two agreements — concluded by SEP and relating to the same field of economic activity, namely the supply of natural gas — must be added their temporal concurrence, inasmuch as the code of conduct was negotiated and adopted shortly after the conclusion of the Statoil contract. In those circumstances, the Commission was entitled to regard the Statoil contract as a necessary item of

information for the purposes of the inquiry, with a view to assessing the economic context into which the code of conduct fits.

It should further be noted that the applicant expressly acknowledged in its written observations that the adverse effect of the conclusion of the Statoil contract on the *de facto* position of Gasunie — until then the exclusive supplier of natural gas to the applicant — prompted Gasunie to negotiate a code of conduct with the applicant, with a view to regulating their relationship in the future in the event of the applicant needing further supplies of natural gas. In those circumstances, whilst the code of conduct refers solely to future supplies and does not in principle concern those provided for in the Statoil contract, it was reasonable to regard the disclosure of that contract as necessary for an investigation, in particular, into the question whether the code of conduct might have an effect on the performance of that contract, which governs, according to the parties, the commercial relationship between the applicant and Statoil until the year 2000. The correlation between the very existence of the Statoil contract, irrespective of its contents, and the formulation of the code of conduct is thus such as to confirm that the Statoil contract could legitimately have been regarded as a necessary item of information, within the meaning of Article 11 of Regulation No 17, for the purpose of examining the lawfulness of the code of conduct.

It follows from all those considerations that the Commission did not commit any manifest error of judgment in considering that the agreements between SEP and Gasunie might influence the implementation of the Statoil contract, as amended.

32 In the light of the foregoing considerations, the first plea must be rejected.

Failure to give sufficient reasons for the contested decision

Arguments of the parties

33 The applicant maintains that insufficient reasons have been given for the contested decision because the reasons put forward by the Commission are not in its opinion such as to justify the request for the production of the Statoil contract, inasmuch as they alter the subject-matter of the inquiry.

34 The Commission rejects this complaint, pointing out that it has from the outset included the Statoil contract in its inquiry. In those circumstances, sufficient reasons have been given for the contested decision.

Legal assessment

35 In pleading the failure to give sufficient reasons for the decision, the applicant suggests that the Commission has failed in that decision to establish the existence of a link between the Statoil contract and the code of conduct.

36 It should be noted in that regard, first, that the Court has already found, in its examination of the first plea in law, that the inquiry in question concerns the code of conduct and that in its contested decision the Commission relies expressly on the existence of a link between the Statoil contract and the code of conduct as justification for its request for the supply of the Statoil contract (see in particular paragraphs 26 and 27 above).

37 It should further be noted, as regards the considerations which led the Commission to suspect the existence of such a link between the Statoil contract and the code of conduct, that the Commission relied expressly in its decision on the need to know the economic context of the code of conduct. It refers in that regard to certain indications which prompted it to suppose that the Statoil contract may be influenced by the code. It relies in particular on an initial draft of the code of conduct suggesting the establishment of an exclusive commercial relationship between SEP and Gasunie, and envisages circumstances in which supplies from Statoil could be subject to the approval of Gasunie or form the subject-matter of a concerted practice (see paragraph 9 above).

38 It follows from this analysis that the Commission has given sufficient reasons in the contested decision for the request for disclosure of the Statoil contract, by showing clearly the links between that contract and the code of conduct forming the subject-matter of the inquiry.

39 It follows that the second plea must be rejected.

Breach of the principle of proportionality

Arguments of the parties

40 In putting forward its third and final plea in law, the applicant maintains that the contested decision constitutes a manifest breach of the principle of proportionality, which the Commission is obliged to observe in the context of the investigations required for the fulfilment of its duties, as the Court of Justice held in its judgment in Case 31/59 *Acciaiera e Tubificio di Brescia* v *High Authority* [1960] ECR 71. It points out that the general view expressed in academic legal writing is that that principle also applies to requests for information under Article 11 of Regulation No 17. Moreover, the Commission has acknowledged that the principle of proportionality applies to decisions taken by it pursuant to Article 11(5), by stating in the case of Deutsche Castrol Vertriebsgesellschaft GmbH that the questions posed 'do not go beyond what is relevant to this case and what Castrol might reasonably be expected to supply' (Commission Decision 83/205/EEC of 10 January 1983, Official Journal 1983 L 114, p. 26).

41 In the present case the breach of the principle of proportionality arises, according to the applicant, from the fact that the Statoil contract, the disclosure of which has been required by the Commission from the outset of the proceeding, is of a particularly confidential nature. The disclosure of the contract to the Commission would result in the Member States, including the Netherlands, gaining knowledge of the contract pursuant to Article 10(1) of Regulation No 17, which provides that 'the Commission shall forthwith transmit to the competent authorities of the Member States . . . 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 or of obtaining negative clearance or a decision in application of Article 85(3)'. The transmission of the contract to the Netherlands authorities would adversely affect the applicant's interests by reason of the particular circumstances of this case, a feature of which is that the Netherlands official authorities would be parties to the dispute in their capacity as a main supplier of gas to SEP through the intermediary of Gasunie, which is controlled by the Netherlands State. If the terms of the Statoil contract were to come to the knowledge of the Netherlands official authorities, both SEP's room for manoeuvre in its negotiations with Gasunie and its credibility as a purchaser *vis-à-vis* other suppliers, who would become aware of the fact that the official authorities were in possession of the Statoil contract, would be compromised.

42 The applicant points out that the Member States are entitled to receive copies of the documents sent to the Commission, without the Commission being able in the circumstances of this case to refuse, in reliance on the provisions of Article 20 of Regulation No 17 relating to professional secrecy, to transmit to them the Statoil contract in its entirety. It asserts that the Commission has no margin of discretion in the of application of Article 10(1). This argument is confirmed by the case-law of the Court of Justice, which held in its order in Case C-2/88 Imm. *Zwartfeld and Others* [1990] ECR I-3365 — relating to a request for judicial cooperation made to the Commission by a judicial authority with a view to the application of Community law in the national legal system — that the Commission may refuse to produce documents to Member States only where such production would jeopardize the functioning and independence of the European Communities. Moreover, the Commission itself is legitimately declining to give any assurance that the Statoil contract will not be transmitted sooner or later to the Netherlands authorities.

43 The applicant states by way of explanation in that regard that its interests are not protected by the obligation incumbent on the authorities of the Member States under Article 20 of Regulation No 17 to observe professional secrecy. There exists no administrative rule within the Ministry of Economic Affairs enabling any effective guarantee to be given that in the event of the Statoil contract being transmitted to the competent Netherlands authorities — in this instance the competition directorate of the Netherlands Ministry of Economic Affairs — it may not come to the knowledge of another ministerial department, such as the general directorate for energy. The applicant points out in that regard that it is not claiming that the Netherlands authorities would take improper advantage of the Statoil contract in their capacity as a majority shareholder in Gasunie. In its view, it has only to show that it is not unreasonable to envisage a risk of the contract being disclosed to Gasunie, for the very reason that the Netherlands authorities are involved in this matter both as official authorities and as a party. The applicant further points out that regardless of whether the Netherlands authorities are effectively aware of, or make use of, the Statoil contract, its room for manoeuvre as a purchaser *vis-à-vis* other suppliers is at stake, since those suppliers will know that the Statoil contract is in the possession of the official authorities.

44 The Commission for its part acknowledges that it is bound to observe the principle of proportionality in its inquiries into competition matters. However, it considers, unlike the applicant, that that principle has been observed in this case.

45 The defendant institution asserts, first, that it has 'a wide margin of discretion' in assessing whether a document sent to it should be transmitted to the Member States, inasmuch as Article 10(1) of Regulation No 17 provides that only 'the most important documents are to be communicated to them'. It points out that in practice it frequently waits, before deciding whether or not to transmit a document, until a proceeding is initiated under Article 9(3) of the Regulation. The Commission thus observes that 'the decision whether or not to transmit the Statoil contract . . . will depend on the decision whether or not to initiate a proceeding in this case and, if that decision is in the affirmative, on the significance of the contract in relation to the subject-matter of such proceeding (to be specified in any statement of objections)'.

46 Secondly, the Commission maintains that the confidentiality of an item of information cannot justify a refusal to disclose it, inasmuch as the observance of professional secrecy — which is protected by Article 214 of the Treaty and Article 20(2) of Regulation No 17 — goes hand in hand with the obligation of cooperation which is incumbent on undertakings. It points out that the professional secrecy referred to in that provision expressly extends to the 'competent authorities of the Member States'. It goes on to state that in the Netherlands those authorities are the officials of the 'economic competition' directorate of the Ministry of Economic Affairs. If those officials considered it appropriate to transmit the contract in question to colleagues in other ministerial departments, those colleagues would likewise be bound by the same duty of professional secrecy.

47 Thirdly, the Commission asserts that Article 20(1) of Regulation No 17 provides that information obtained by virtue of the application of Article 11 'may be used only for the purpose for which it has been requested', that is to say 'for the proceeding by the Commission on the basis of Regulation No 17'. The Commission goes on to state that even if Article 20(1) is interpreted as meaning that Member States are authorized to use information obtained through the intermediary of the Commission for the purpose of applying their national competition rules, this would not produce the results feared by the applicant.

48 Fourthly, the Commission points out that the applicant has failed to provide any evidence to suggest that confusion might arise as to the spheres of competence of the Netherlands authorities who are also concerned in the dispute. According to the Commission, the risks involved in the transmission of the Statoil contract are

thus of a purely speculative nature. The argument that officials of the 'energy' directorate of the Netherlands Ministry of Economic Affairs take part in discussions in Brussels on questions relating to competition in the energy market is irrelevant to the problem posed by the transmission of the Statoil contract. Moreover, the applicant itself insisted that the 'energy' directorate should also be represented in the Netherlands delegation attending the hearing in this case.

49 Fifthly, and in any event, the prejudicial consequences of such transmission, as described by the applicant, could result only from a breach by the Netherlands authorities of their obligations under Article 20 of Regulation No 17; according to the Commission, this is a curious hypothesis. Even in those circumstances, however, the applicant would have legal remedies under Netherlands law enabling it to safeguard its interests. It could claim damages in the event that its position as a purchaser in the natural gas market were actually compromised as a result of unlawful conduct on the part of national officials.

50 Lastly, the Commission considers that it showed restraint in the contested decision, inasmuch as it limited its request, at that initial stage of the inquiry, to the code of conduct and the Statoil contract, of the existence of which it is aware, and did not impose — until after the Court of First Instance had made its order of 21 November 1990 — any periodic penalty payment or fine.

Legal assessment

51 As regards the third plea in law, alleging a breach of the principle of proportionality, it should first of all be observed that the implementation of Article 11 of Regulation No 17 is subject to compliance with that principle. It is not enough for the information requested to be connected with the subject-matter of the inquiry. What is also necessary is that an obligation imposed on an undertaking to supply an item of information should not constitute a burden on that undertaking which is disproportionate to the requirements of the inquiry.

52 That view is confirmed by settled case-law. In its judgment in Case 136/79 *National Panasonic*, cited above, paragraph 30, the Court of Justice considered

whether, in implementing Article 11 of Regulation No 17, 'the Commission's action . . . was disproportionate to the objective pursued and therefore violated the principle of proportionality'. Similarly, it expressly recognized in its judgment in Joined Cases 46/87 and 227/88 *Hoechst*, cited above, paragraph 19, relating to a proceeding applying Article 14 of Regulation No 17, that the need for protection against arbitrary or disproportionate intervention by public authorities in the sphere of the activities of any person, whether natural or legal, constitutes a general principle of Community law.

53 In the present case, the Court finds that the request for the disclosure of the Statoil contract to the Commission does not appear to be of a disproportionate nature. The applicant's claims regarding the alleged risk of the Statoil contract coming to the knowledge of Gasunie through the intermediary of the Netherlands State, which controls it, cannot be upheld. Even if the Statoil contract were to be communicated to the competent authorities of the Member States by the Commission in the exercise of its duty under Article 10(1) of Regulation No 17 to transmit to them the most important documents sent to it with a view to the investigation of infringements of Articles 85 and 86 of the Treaty, the observance of the confidentiality of that document, particularly with regard to Gasunie, is guaranteed by the provisions of Article 20 of Regulation No 17, which refers not only to the Commission but also to the competent authorities of the Member States and their officials and other servants.

54 In that regard, the Court is bound to reject the applicant's argument that Article 20 provides merely a formal guarantee and does not in practice offer any effective guarantee that the contents of the Statoil contract will not be brought to the knowledge of a third party, in particular Gasunie, if it is transmitted to the Netherlands authorities. The adequacy of the guarantee provided by Community law for the avoidance of the risk apprehended by the applicant emerges from the following considerations.

55 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.

56 In the present case, if the Statoil contract were to be transmitted to the competent authorities of the Member States, the provisions of Article 20 would prevent not only the disclosure of information relating to that contract outside the administrative directorate concerned but also the circulation of such information within that directorate itself. Both those responsible at the highest level and the officials and other servants of the competent departments dealing with competition matters who gained knowledge of the contents of the Statoil contract in their capacity as competent authorities within the meaning of Article 10(1) of Regulation No 17 as a result of its transmission by the Commission would be bound to refrain from disclosing those contents within that directorate of the administration in general, and to the departments dealing with energy questions in particular.

In the present case the effect of the provisions in question is to eliminate the specific risk which the applicant claims would result from any confusion as to competence in respect of competition and energy matters within the Netherlands administration. They prohibit the competent authorities of the Member States within the meaning of Article 10(1) of Regulation No 17 to whom the Statoil contract may be transmitted by the Commission from using the information contained in it in order to establish the commercial policy pursued by certain public undertakings.

57 In the light of the foregoing considerations, the Court finds the argument relating to the absence of effectiveness of the safeguard of confidentiality arising from Article 20, relied upon by the applicant as justification for its refusal to transmit the Statoil contract to the Commission, to be unfounded. The Member States are bound, by virtue of the duty of cooperation laid down in Article 5 of the Treaty, to take all measures necessary for the fulfilment of their obligations, the obligations in question in the present case being those arising from Article 20. Consequently, in the event of transmission of the Statoil contract to the Member States, each of them will be obliged to ensure that the provisions of that article are given full effect, by ensuring that they are not disregarded for the benefit or to the detriment of any undertaking, and particularly of any undertaking controlled by them.

It should be pointed out in this connection, as regards the emphasis placed by the applicant on the special nature of this dispute, that the issue raised in this case is

likely to arise every time an inquiry by the Commission involves the commercial relationship between a private undertaking and a public undertaking or a private company with government participation. Such situations, which in practice arise very frequently, do not bestow upon the Commission's inquiry any special characteristic and cannot therefore result in any special factors being taken into account in the application of Regulation No 17. There can be no derogation from the obligations of the Member States, which are laid down in general and absolute terms in Article 20.

58 In particular, the applicant's argument that an analysis of the composition of the Netherlands civil service reveals the danger of a breach of professional secrecy must be rejected. The alleged absence in this case of administrative rules for ensuring, in this instance, that confidential information relating to the contents of the Statoil contract will not circulate between the various directorates of the Netherlands Ministry of Economic Affairs, and more especially between the directorates general for competition and energy, does not justify the assumption that the competent national authorities will fail to ensure, when the time comes, that their obligations under Article 20 of Regulation No 17 are complied with.

59 It should be noted in that regard that the Member States are entitled, in accordance with the principle of their institutional autonomy, to discharge their obligations under Community law by whatever methods they choose, since those methods do not adversely affect the rights of the undertakings concerned under Community law (see paragraph 4 of the judgment in Joined Cases 51/71 to 54/71 *International Fruit Company* [1971] ECR 1107, paragraph 8 of the judgment in Case 6/71 *Rheinmühlen* v *Einfuhr- und Vorratsstelle Getreide* [1971] ECR 823 and, in the context of cooperation by Member States with the Commission in the exercise of its powers of investigation under Regulation No 17, paragraph 30 of the judgment in Joined Cases 97/87 to 99/87 *Dow Chemical Iberica and Others* v *Commission* [1989] ECR 3165 and paragraph 44 of the judgment in Case 85/87 *Dow Benelux* v *Commission* [1989] ECR 3137, as well as paragraph 33 of the judgment in Joined Cases 46/87 and 227/88 *Hoechst*, cited above).

60 For all of those reasons, the Court considers 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 the applicant. 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 the applicant and does not therefore infringe the principle of proportionality.

61 It follows that the application must be dismissed in its entirety.

Costs

62 Under Article 87(2) of the Rules of Procedure of the Court of First Instance, 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 applicant has been unsuccessful, it must be ordered to pay the costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Second Chamber)

hereby:

1. Dismisses the application;

2. Orders the applicant to pay the costs.

Saggio Briët

Barrington Vesterdorf Biancarelli

Delivered in open court in Luxembourg on 12 December 1991.

H. Jung
Registrar

A. Saggio
President