JUDGMENT OF THE COURT OF FIRST INSTANCE
(First Chamber, Extended Composition)
(18 September 1996 *

In Case T-353/94,

Postbank NV, a company incorporated under Netherlands law, established in Amsterdam, represented by O. W. Brouwer and F. P. Louis, of the Brussels Bar, with an address for service in Luxembourg at the Chambers of M. Loesch, 11 Rue Goethe,

applicant,

v

Commission of the European Communities, represented by B. J. Drijber and W. Wils, of its Legal Service, acting as Agents, with an address for service in Luxembourg at the office of Carlos Gómez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

defendant,

APPLICATION for annulment of the Commission decision, contained in its letters of 23 September 1994 and 3/4 October 1994, conceding that third parties may, in national legal proceedings, produce the statement of objections and the minutes of the hearing which the Commission forwarded to them in the course of an administrative procedure,

* Language of the case: Dutch.

THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES
(First Chamber, Extended Composition),

composed of: A. Saggio, President, C. W. Bellamy, A. Kalogeropoulos, V. Tiili and R. M. Moura Ramos, Judges,

Registrar: J. Palacio González, Administrator,

having regard to the written procedure and further to the hearing on 14 December 1995,

gives the following

Judgment

Facts and procedure

— The procedure before the Commission

1 Postbank NV (hereinafter 'Postbank'), a company established in the Netherlands, is a party to the 'Gemeenschappelijke Stortings — en Acceptgiro Procedure' (Convention on a common procedure for the processing of payment and transfer orders, hereinafter 'the GSA agreement'). The GSA agreement was concluded by a number of Netherlands banks and establishes a common procedure for processing payment and transfer orders on the basis of pre-printed forms which can be read by an optical reader.

2 On 10 July 1991 the GSA agreement was notified to the Commission by the Nederlandse Vereniging van Banken (Netherlands Association of Banks, hereinafter 'the NVB') under Article 4 of Regulation No 17 of the Council of 6 February 1962, First regulation implementing Articles 85 and 86 of the Treaty (OJ, English Special Edition 1959-62, p. 87, hereinafter 'Regulation No 17'). During the administrative procedure it was amended, in particular as regards its scale of charges.

3 Following the notification, the Commission received several complaints from users of the transfer form concerned. They were directed against certain banks, one of which was the applicant.

4 The Commission sent requests for information to the NVB and other Netherlands banks under Article 11 of Regulation No 17. In particular, in 1991 and 1992 it sought and obtained information and documents from the applicant on three occasions.

5 On 14 June 1993 it sent the NVB a statement of objections concerning the GSA agreement and arranged for a hearing of the parties concerned to be held on 28 October 1993.

6 The NVB responded to the statement of objections by letter of 17 September 1993.

7 The hearing of the parties concerned was held before the Commission on 28 October 1993.

— The proceedings before the national courts and the request for authorization to produce before those courts documents from the administrative procedure before the Commission

8 In 1992, NUON Veluwse Nutsbedrijven NV (hereinafter 'NUON') and Maatschappij Elektriciteit en Gas Limburg NV (hereinafter 'Mega Limburg'), public utilities which use the transfer form provided for by the GSA agreement, brought two actions before the Arrondissementsrechtbank te Amsterdam (District Court, Amsterdam), one against Postbank and the other against ABN Amro Bank NV (hereinafter 'ABN'), challenging the legality of the new scale of charges for the use of those forms.

9 The Arrondissementsrechtbank dismissed the actions by judgments of 20 January and 7 April 1993. NUON and Mega Limburg brought an appeal against these judgments before the Gerechtshof te Amsterdam (Regional Court of Appeal, Amsterdam).

10 At the same time, the Commission authorized the two undertakings to attend the hearing of 28 October 1993 even though they were not, formally, complainants in the administrative procedure pending before it. To enable them to prepare for the hearing, the Commission forwarded to them, by letter of 4 October 1993, the complete version of the statement of objections of 14 June 1993, but without its annexes. Its letter made it clear that the information contained in the statement of objections could be used only in preparation for the hearing and certainly 'not for any other purpose, especially in legal proceedings' and that it was 'forbidden to allow third parties ... access to it' in any way whatsoever.

11 By letter of 27 October 1993 and at the hearing of 28 October 1993, NVB objected to the fact that the Commission had disclosed the statement of objections, in its complete version, to third parties without first giving the association of banks an

opportunity to gives its views on the matter. In its letter of 27 October 1993, it stated *inter alia* that the Commission 'should have given [it] notice of its intention to forward the complete version of the statement of objections and should have given [it] an opportunity to oppose its being sent or to indicate the passages of the statement of objections that should be regarded as constituting business secrets'. It emphasized, at the hearing before the Commission, that the latter's Directorate General for Competition (hereinafter 'DG IV') had waited until 8 October 1993 before informing the NVB of the request made by NUON and Mega Limburg on 6 September 1993. Consequently, the 'NVB (had) been unable to react to that letter when responding to the statement of objections on 17 September 1993'.

12 By letter of 30 August 1994, NUON and Mega Limburg asked the Commission to 'authorize them' to produce to the Gerechtshof te Amsterdam the version of the statement of objections which the Commission had forwarded to them and the minutes of the hearing of 28 October 1993. In support of their request, they contended that the Commission had no power to prohibit them from producing those documents in national legal proceedings. They considered that it was 'unfortunate and undesirable that, although all the parties to the proceedings (were) apprised of the statement of objections and the minutes of the hearing, the judges of the Gerechtshof who (were to) ... give judgment on the compatibility (of those agreements) with Community competition law were not (apprised) of those documents'. In their view, the documents provided 'the truest and most independent view of the course of the procedure (pending before) the Commission' and they could 'provide the Gerechtshof with a means of asking the Commission for more detailed information'. Moreover, they considered that a Commission decision allowing such disclosure could not 'harm the rights of the defence of the Netherlands banks since it (was) possible for them at any time also to lodge in the national proceedings the defence which they (had) prepared in response to the statement of objections'.

13 By fax of 23 September 1994, DG IV informed NUON and Mega Limburg that the earlier restriction contained in the letter of 4 October 1993 concerning the 'use in national legal proceedings of the version of the statement of objections that

(had) been forwarded (to them) appeared unfounded and (was) therefore inoperative'. A copy of that letter was sent by ordinary mail to Postbank, which acknowledged receipt of it on 27 September 1994.

14 On 23 September 1994, NUON and Mega Limburg forwarded a copy of the statement of objections (without the minutes of the hearing) to the Gerechtshof te Amsterdam and informed the applicant that they had done so.

15 By letter of 30 September 1994, Postbank asked the Commission to reverse its decision contained in its letter of 23 September 1994. It contended in particular that that decision 'was contrary to Community law, in particular Article 214 of the EC Treaty and Regulation No 17'. According to the applicant, the statement of objections was based directly or indirectly on information which the Commission had obtained in the administrative procedure and which both the NVB and Postbank had 'expressly described as constituting business secrets'. It was therefore based on information which, according to the applicant, could be disclosed to third parties only if it was found to be necessary for the conduct of the procedure initiated by the Commission (Article 20 of Regulation No 17) and only if the parties concerned had been informed of that decision and given an opportunity to oppose it or ensure that no business secrets were divulged.

16 By letter of 3/4 October 1994, DG IV replied that it saw no reason to depart from the position which it had taken in its letter of 23 September 1994. In that letter, it stated, it had merely sought to indicate that the parties already in possession of certain documents, namely the statement of objections (without its annexes) and the minutes of the hearing, '(could) not be prevented from producing those documents to the national court' since they were under no obligation to 'seek authorization for that purpose'.

— The proceedings before the Court of First Instance

17 By application lodged at the Registry of the Court of First Instance on 22 October 1994, the applicant brought the present action for annulment of the Commission decision contained in its letter of 23 September 1994 (hereinafter 'the decision') and the decision of 3/4 October 1994 confirming it.

18 By a separate document, also lodged at the Registry of the Court on 22 October 1994, it applied pursuant to Articles 185 and 186 of the Treaty for suspension of the operation of the contested decision and for an order requiring the Commission to maintain the prohibition which it had attached to the transmission of the statement of objections to NUON and Mega Limburg concerning use of that document in national legal proceedings and, consequently, to order those companies to recover the documents in question from the national courts or third parties who had received copies.

19 By order of 1 December 1994 in Case T-353/94 R *Postbank* v *Commission* [1994] ECR II-1141, the President of the Court of First Instance partially granted that application. He suspended operation of the decision and ordered the Commission 'forthwith [to] send copies of this order' to the addressees of the letter of 23 September 1994.

20 The Commission sent a copy of the order to NUON and Mega Limburg on 2 December 1994.

— *The course of the national proceedings*

21 By fax of 5 December 1994 the applicant informed the Commission that NUON and Mega Limburg intended producing the documents at issue at a hearing before the Gerechtshof te Amsterdam. To prevent them from doing so, the defendant sent them by fax, on the same day, a copy of the order of the President of the Court of First Instance in order to bring to their notice the suspension of the operation of the decision contained in the letter of 23 September 1994.

22 Nevertheless, at that hearing NUON and Mega Limburg produced the statement of objections notwithstanding the opposition of Postbank and ABN.

23 By judgments of 16 February 1995, the Gerechtshof dismissed the appeals by NUON (in *NUON* v *Postbank*) and by Mega Limburg (in *Mega Limburg* v *ABN*). It decided not to have regard to the statement of objections for the purposes of its judgment.

— *The course of the proceedings before the Court of First Instance*

24 In the meantime the written procedure in this case followed the normal course. The Court decided to open the oral procedure without any preparatory inquiries.

25 The parties presented oral argument and answered the questions put to them by the Court at the hearing on 14 December 1995.

Forms of order sought

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

— annul the Commission decision contained in the letters of 23 September 1994 and 3/4 October 1994;

— order the Commission to pay the costs.

27 The defendant contends that the Court of First Instance should:

— declare the application inadmissible;

— in the alternative, dismiss the application as unfounded;

— in any event, order the applicant to pay the costs.

Admissibility

28 The Commission considers the application inadmissible on four grounds, which are (i) that the application is out of time, (ii) that there is no act adversely affecting the applicant, (iii) that the applicant has no interest in bringing an action and (iv) that the proceedings have become devoid of purpose.

The first and second pleas of inadmissibility: the application is out of time and there is no act adversely affecting the applicant

— Summary of the parties' arguments

29 In maintaining that the application was lodged out of time and that no measure has adversely affected the applicant, the Commission argues that the contested measures are decisions interpreting, first, the decision by which it authorized NUON and Mega Limburg to take part in the hearing of 28 October 1993 and, secondly, the decision of 4 October 1993 by which it sent them a copy of the statement of objections, implicitly indicating that that statement, without its annexes, contained no business secrets. It contends that if, as the applicant claims, those documents had in fact contained business secrets, then it would have been the possibility that third parties might have examined them that would have been injurious to the applicant's interests, not their subsequent production in the national court. In its view, even if it should be conceded that the applicant's legal position might be affected by production of the statement of objections in the national court, such production would not be a consequence of the letter of 23 September 1994 since the lawyer acting for NUON and Mega Limburg could also quite well have produced them without first satisfying himself that the Commission shared his interpretation of the existing factual and legal situation. The Commission submits that it is not competent to prohibit or authorize such use.

30 It follows, according to the Commission, that, since the contested measures are merely interpretative decisions not apt to amend earlier decisions, the application is inadmissible in that it is directed against measures which merely confirmed two earlier decisions not contested within the prescribed period (judgment in Joined Cases 166/86 and 220/86 *Irish Cement* v *Commission* [1988] ECR 6473 and order in Case C-12/90 *Infortec* v *Commission* [1990] ECR I-4265, paragraph 10). Moreover, the decision cannot be the subject of an action for annulment within the meaning of Article 173 of the Treaty since it in no way affects the applicant's interests (Joined Cases T-10/92, T-11/92, T-12/92 and T-15/92 *Cimenteries CBR and Others* v *Commission* [1992] ECR II-2667, paragraph 28).

31 The applicant disputes the Commission's reasoning in its entirety. The contested decision has legal effects directly affecting its interests, for several reasons. First, the decision led to the disclosure of its business secrets, since the statement of objections, of which the Commission allowed production in the Netherlands court, reproduced information which Postbank had expressly described as constituting business secrets when forwarding it to the Commission. Secondly, according to the judgment in Case 53/85 *Akzo Chemie* v *Commission* [1986] ECR 1965, a measure produces legal effects and must be regarded as a decision within the meaning of Article 173 of the Treaty where it withholds the protection provided for by Community law. The contested decision is thus actionable since, by authorizing NUON and Mega Limburg to use the statement of objections and the minutes of the hearing in national legal proceedings, it undermines the protection which the applicant is entitled to claim under Article 214 of the Treaty and Article 20 of Regulation No 17. The fact that, by that decision, the Commission withdrew the prohibition which it had imposed in its letter of 4 October 1993, on the view that it had no legal basis, does not mean that the decision has no legal effects. Thirdly, the decision at issue cannot be regarded as being purely interpretative. It constitutes a response to the request which NUON and Mega Limburg made to the Commission by letter of 30 August 1994, expressly seeking authorization to use the statement of objections of 14 June 1993 and the minutes of the hearing of 28 October 1993 in national proceedings.

32 Moreover, Postbank draws attention to the fact that, contrary to the Commission's assertion, the decision at issue in this case is not the decision to forward the statement of objections and the minutes of the hearing to NUON and Mega Limburg but the decision to authorize third parties to produce those documents in national legal proceedings. Postbank points out that when it learned that the Commission had forwarded the complete version of the statement of objections to the two abovementioned undertakings, 20 days after they had received them, it also learned that the Commission had, when forwarding the documents, expressly prohibited those undertakings from using the information contained in the document in question for any purpose other than preparation for the hearing and from directly or

indirectly disclosing them to third parties. The applicant had thus decided not to bring an action against that measure because it considered that a legal action 'would have been fruitless'.

— Findings of the Court

33 In assessing the merits of the first two pleas of inadmissibility, it must first be borne in mind that only measures producing binding legal effects are measures against which an action for annulment may be brought under Article 173 of the Treaty. An action by a natural or legal person is admissible only if the contested measure is capable of affecting the interests of the applicant by having a significant effect on his legal position (see in particular *Cimenteries CBR*, cited above, paragraph 28).

34 According to the defendant, this action is inadmissible essentially for two reasons. First, the contested decision is merely an interpretative decision without any binding legal effect. Secondly, it does not in any way affect Postbank's legal position since it does not detract from the protection of the business secrets and confidential information allegedly contained in the statement of objections.

35 Contrary to the defendant's contention, the letter of 23 September 1994 contains a decision and directly affects Postbank's interests. First, it partially withdrew the Commission's decision contained in its letter of 4 October 1993 since it removed the latter's prohibition of using the statement of objections in national legal proceedings. Secondly, in response to a request from NUON and Mega Limburg

for 'authorization' to produce the statement of objections and the minutes of the hearing to the Gerechtshof te Amsterdam, it indicated that the Commission saw no obstacle thereto.

36 Moreover, as regards the Commission's contention that the interests of the applicant, and in particular its business secrets, have not been affected, that is a question not of the admissibility of this action but of substance. It concerns the existence and the scope of the Commission's obligation to observe professional secrecy with respect to the information forwarded by the applicant and other banks participating in the GSA agreement, contained in particular in the statement of objections. It thus involves an analysis of the compatibility with Article 214 of the Treaty and Article 20 of Regulation No 17 of the decision to 'authorize' NUON and Mega Limburg to produce to the national authorities documents containing information classified by the applicant as confidential. Consideration of that issue constitutes the very subject-matter of this dispute.

37 In view of the foregoing, the Court considers that the decision produces binding legal effects capable of affecting the applicant's legal position and may therefore be the subject of an action for annulment under Article 173 of the Treaty.

38 Having been brought on 22 October 1994, that is to say less than one month after notification of the decision to the applicant, these proceedings were instituted within the time-limit laid down by the Treaty.

39 It follows that the first and second pleas of inadmissibility must be rejected.

The third plea of inadmissibility: the applicant has no interest in bringing an action

— Summary of the parties' arguments

40 The Commission contends, in the alternative, that the applicant has 'no valid interest' in having the decision annulled since it concerns production of the documents at issue in two national actions and Postbank is a defendant in only one of them. The present action is therefore inadmissible in so far as it is directed against the decision which the Commission addressed to Mega Limburg, which took proceedings only against ABN.

41 The applicant contests that plea. Following the decision, disclosure of the business secrets and confidential information concerning Postbank would be the same through production of the statement of objections in the action by Mega Limburg against ABN as through production thereof in the action brought by NUON against Postbank or in other cases. The fact that it is not a party to one of those actions is therefore irrelevant.

— Findings of the Court

42 The third plea of inadmissibility, alleging that the applicant has no interest in bringing proceedings, is manifestly unfounded. Production of the statement of objections in national proceedings to which Postbank is not a party involves the transmission of information, which may be confidential, in the same way as production of the same document in national proceedings to which the applicant is a party. Therefore, the fact that Postbank is not a party to one of the abovementioned actions before the national courts is irrelevant as regards its interest in bringing an action.

43 It follows that the third plea of inadmissibility must be rejected.

The fourth plea of inadmissibility: the dispute has become devoid of purpose

— Summary of the parties' arguments

44 In its rejoinder, the defendant contends that the present application has become entirely devoid of purpose since on 16 February 1995 the Gerechtshof te Amsterdam delivered two final judgments in the two cases mentioned above, *Mega Limburg* v *ABN* and *NUON* v *Postbank*. The proceedings in which the documents in question were produced having been disposed of, the action for annulment has now, it says, become devoid of purpose.

45 In its answers to the questions put to it by the Court, the applicant stated that it still has an interest in having the decision annulled since several undertakings which complained or intervened in the administrative procedure are in possession of the statement of objections. Those undertakings could at any time decide to use that document in a Netherlands court in support of their arguments. Two of them have already instituted proceedings against Postbank which are now pending before the Gerechtshof te Amsterdam. They have put forward the same arguments as NUON and Mega Limburg in the cases which have just been concluded and have raised the possibility of producing the statement of objections at issue. Annulment of the contested decision would therefore prevent transmission of that document to the national judicial authorities and any subsequent disclosure of the confidential information which they contain.

46 The applicant also points out that, as the Court of Justice has held, an applicant has a sufficient interest in contesting a decision if he fears repetition of the alleged irregularity (Case C-92/78 *Simmenthal* v *Commission* [1979] ECR 777, Case C-207/86 *Apesco* v *Commission* [1988] ECR 2151, and *Akzo Chemie* v *Commission*, cited above).

— Findings of the Court

47 In this case, the national proceedings in which NUON and Mega Limburg produced the statement of objections following the contested decision were brought to an end by the judgments of the Gerechtshof te Amsterdam of 16 February 1995. Those judgments are final since none of the parties brought an appeal before the Hoge Raad der Nederlanden (Supreme Court of the Netherlands). Furthermore, it is apparent from the documents before the Court that the Gerechtshof took no account of the statement of objections in giving judgment. Postbank's legal position has thus not been affected in any way by the transmission of the documents in question. Therefore, the applicant no longer has any present or potential interest in relation to the national proceedings in which NUON and Mega Limburg produced that document following the Commission decision.

48 However, the Court considers that, as the applicant suggested on several occasions in writing and at the hearing, its interest in having the decision annulled must be examined in relation to the general scope of the measure in question. It must be pointed out that, in its decision of 23 September 1994, the Commission expressly removed the prohibition, contained in its letter of 4 October 1993, of producing the statement of objections to the national judicial authorities, although in any event the prohibition of transmitting the same document to third parties was left unchanged. The removal of that prohibition was based on the view that the Commission was under no obligation to prohibit transmission of that document and the minutes of the hearing to the national judicial authorities. It thus produces specific effects consisting in the removal of any obstacle to such transmission. The contested decision must therefore be interpreted as relating not to the transmission of those documents from the administrative procedure for the purposes of a specific national action but rather to their production in any national court.

49 Therefore, in view of the scope of that decision and the fact that several undertakings are in possession of, in particular, the statement of objections, it is quite possible that they may use them in other national proceedings. Against that background, the applicant retains a present interest in pursuing the present action. Consequently, the action has not become devoid of purpose.

50 It follows that the fourth plea of inadmissibility must be rejected.

Substance

51 The applicant bases its action on five pleas in law: (i) infringement of Article 214 of the Treaty and Article 20 of Regulation No 17, (ii) misuse of powers, (iii) breach of the principle of the protection of legitimate expectations, (iv) infringement of Article 190 of the Treaty and, finally, (v) infringement of Article 185 of the Treaty and Article 20(2) of Regulation No 17.

The first plea in law: infringement of Article 214 of the Treaty and Article 20 of Regulation No 17

52 The first plea comprises two parts. In the first, the applicant alleges that in authorizing, by letter of 23 September 1994, NUON and Mega Limburg to produce to the national courts the complete version of the statement of objections and the minutes of the hearing of 28 October 1993, the Commission infringed Article 20(1) of Regulation No 17. In the second part, the applicant claims that, by allowing transmission of the documents in question to the Gerechtshof te Amsterdam, the Commission infringed Article 214 of the Treaty and Article 20(2) of Regulation No 17 since those documents contained passages which were regarded as constituting business secrets by both the applicant and the Commission.

The first part of the first plea in law: infringement of Article 20(1) of Regulation No 17

— Summary of the parties' arguments

53 In the first part of the first plea, the applicant claims that in authorizing, by letter of 23 September 1994, two third parties to produce to the national courts the

complete version of the statement of objections and the minutes of the hearing of 28 October 1993, the Commission infringed Article 20(1) of Regulation No 17, pursuant to which information acquired in the administrative procedure 'shall be used only for the purpose of the relevant request or investigation'.

54 In support of that claim it makes the preliminary point that the statement of objections and the minutes of the hearing contain information lifted from the notified GSA agreement or forwarded to the Commission in response to requests for information. However, according to a decision of the Court of Justice (Case C-67/91 *Asociación Española de Banca Privada and Others* [1992] ECR 4785, hereinafter '*AEB*'), Article 20(1) of Regulation No 17 applies not only to information acquired pursuant to Articles 11, 12, 13 and 14 of that regulation but also to that taken from notifications. Article 20(1) therefore applies to this case.

55 It then observes, first of all, that the information at issue was used in national proceedings, that is to say otherwise than in the procedure before the Commission. Such use is therefore contrary to Article 20(1) of Regulation No 17 (*AEB*, paragraph 38, and Case C-36/92 P *SEP* v *Commission* [1994] ECR I-1911, paragraph 25 et seq.)

56 Secondly, Postbank claims that even if the prohibition laid down in Article 20(1) is not addressed directly to the courts of the Member States, they should nevertheless respect it. The use before or by them of information acquired by the Commission would undermine its rights of defence and contravene the principle of the protection of legitimate expectations which governs cooperation between the Commission and undertakings (judgment in *AEB*).

57 Finally, the applicant claims that, in this case, the Commission has several times infringed the principles which it defined in 1993 in its Notice on cooperation between national courts and the Commission in applying Articles 85 and 86 of the

EEC Treaty (OJ 1993 C 39, p. 6, hereinafter 'the Notice on cooperation between national courts and the Commission' or 'the Notice'). More specifically, it claims, the Commission infringed the principles of neutrality and objectivity which govern judicial proceedings by, in particular, failing in its obligation not to respond favourably to requests for information not made directly or indirectly by a national court.

58 The Commission contests all these arguments.

59 It contends, first of all, that the applicant's reference to Article 20(1) is incorrect because Postbank is criticizing it not for making improper use of the information acquired but for having disclosed it. And yet, according to the Opinion of Advocate General Lenz in *Akzo*, cited above, such disclosure is covered solely by paragraph 2 of that article.

60 Furthermore, Regulation No 17 is not applicable to this case since it relates only to procedures for the application of Articles 85 and 86 of the Treaty before the Commission and the authorities of the Member States. It contains no rules on relations between the Commission and the national authorities (judgment in *AEB*). It thus does not concern national courts which, in a dispute between individuals, may apply Articles 85 and 86 by virtue of their direct effect (Case 127/73 *BRT* v *Sabam* [1974] ECR 51). Moreover, use of the statement of objections by a national court is compatible both with its duty to protect the rights of individuals in legal relations governed by Articles 85 and 86 and with the general principle of cooperation between the national courts and the Commission. Similarly, it in no ways undermines the protection of undertakings' rights of defence.

61 As regards the alleged failure to observe the Notice on cooperation between the national courts and the Commission, the defendant contends that that notice is not applicable to this case. It is concerned rather with cases where a national court

seeks information from the Commission. In this case, a third party, unconnected with the administrative procedure and in possession of a document relating thereto, produced that document in the national court. Such a case is covered by the rules of procedure of the Member States, not by Community law.

— Findings of the Court

62 In the first part of its first plea, the applicant alleges infringement of Article 20(1) of Regulation No 17, which prohibits the use of information acquired under Articles 11, 12, 13 and 14 for a purpose other than that for which it was sought. That prohibition renders it impossible for the Commission and the national authorities lawfully in possession of such information to use it for a reason other than that for which it was obtained (see the judgments, both cited above, in *AEB*, paragraph 37, and *SEP*, paragraph 28).

63 To determine whether, in a case such as this, Article 20(1) of Regulation No 17 imposes an obligation on the Commission to prohibit any undertakings to which it has transmitted certain documents relating to the administrative procedure from producing them in national legal proceedings, it is necessary to interpret that article in the light of the principle of sincere cooperation which, by virtue of Article 5 of the Treaty, governs relations between the Member States and the institutions. The present case is concerned with an instance of cooperation between the Commission and the national courts, in so far as those courts, through the production of the documents by one of the parties to the proceedings, will be able to use them when deciding whether or not there has been any infringement of Articles 85 and 86 of the Treaty.

64 The principle of sincere cooperation inherent in Article 5 of the Treaty requires the Community institutions, and above all the Commission, which is entrusted with the task of ensuring application of the provisions of the Treaty, to give active

assistance to any national judicial authority dealing with an infringement of Community rules. That assistance, which takes various forms, may, where appropriate, consist in disclosing to the national courts documents acquired by the institutions in the discharge of their duties (see the order of the Court of Justice of 13 July 1990 in Case C-2/88 Imm. *Zwartveld and Others* [1990] ECR I-3365, paragraphs 16 to 22).

65 In proceedings for the application of the Community competition rules, this principle implies in particular, as held by the Court of Justice, that the national court is entitled to seek information from the Commission on the state of any procedure which the Commission may have set in motion and to obtain from that institution such economic and legal information as it may be able to supply to it (Case C-234/89 *Delimitis* [1991] ECR I-935, paragraph 53, and Joined Cases C-319/93, C-40/94 and C-224/94 *Dijkstra and Others* [1995] ECR I-4471, paragraph 36).

66 Contrary to the applicant's assertion, such cooperation between the Commission and the national courts falls outside the scope of Regulation No 17. That regulation governs only relations between the Commission and the authorities of the Member States referred to in Article 88 of the Treaty, which exercise powers in parallel with those of the Commission. According to settled case-law, the national authorities referred to in that regulation certainly do not include national courts applying Articles 85 and 86 of the Treaty by virtue of their direct effect (see *BRT*, cited above, paragraphs 15 to 20, Case 37/79 *Marty* [1980] ECR 2481, paragraph 13, and Joined Cases 209/84, 210/84, 211/84, 212/84 and 213/84 *Asjes and Others* [1986] ECR 1425, paragraphs 55 and 56). Consequently, Article 20(1) of Regulation No 17 cannot be interpreted as imposing on the Commission an obligation to prohibit undertakings from producing documents from the administrative procedure in national legal proceedings.

67 In any event, if that provision, which requires the Commission and the authorities of the Member States to use the information acquired in the administrative procedure 'only for the purpose of the relevant request or investigation', were to be

interpreted in the manner contended for by the applicant as prohibiting any use by a national court of information obtained, that interpretation would not only be irreconcilable with the principle of sincere cooperation but would also undermine the rights of litigants deriving from the direct effect of Articles 85(1) and 86 of the Treaty in relations between individuals which the national courts must safeguard (*BRT*, cited above, paragraph 16).

68 The abovementioned prohibition may indeed serve the purpose of providing protection for undertakings having an interest in non-disclosure of confidential information, in particular business secrets, forwarded to the Commission during the administrative procedure concerned. However, the need for such protection cannot override the right of undertakings in possession of such information to argue their case in national legal proceedings.

69 Moreover, that prohibition is not necessary to protect confidential information and business secrets. Once such documents from the administrative procedure are produced in national legal proceedings, there is a presumption that the national courts will guarantee the protection of confidential information, in particular business secrets, since, in order to ensure the full effectiveness of the provisions of Community law in accordance with the principle of cooperation laid down in Article 5 of the Treaty, these authorities are required to uphold the rights which those provisions confer on individuals (see, in particular, Case C-213/89 *Factortame and Others* [1990] ECR I-2433, paragraphs 18 to 21).

70 This conclusion does not conflict with the judgment in *AEB* relied on by the applicant. In that judgment the Court of Justice started from the premiss that Regulation No 17 is concerned in particular with 'the conditions under which the national authorities can act in such a way as not to hamper the proceedings conducted by the Commission and ensure, on the contrary, that such proceedings are conducted effectively and in observance of the rights of the persons concerned' (paragraph 31). Going on to apply that general rule, it held (in paragraph 37) that the authorities of the Member States are required, as 'authorities legally in possession' of such information obtained by the Commission in the administrative

procedure, to observe professional secrecy in accordance with Article 20 of Regulation No 17. It made it clear (in paragraphs 42 and 43) that those authorities may not use such information as evidence but only in order to decide whether or not it is appropriate to initiate a national procedure. However, even though in the operative part of that judgment and in several paragraphs of the grounds concerning the obligation of the national authorities to observe professional secrecy, the Court of Justice refers to 'the Member States', that reference cannot be interpreted as meaning that the Court of Justice wished to impose on the national courts the same limitations as those applicable to the administrative authorities. Such an extensive interpretation would go beyond the scope of the judgment which, as made clear above, is concerned only with relations between the Commission and the authorities of the Member States discharging functions corresponding to those of the Commission in competition matters.

71 Furthermore, as regards the applicant's argument that the contested decision, by authorizing undertakings to use before national courts the information obtained in the administrative procedure, undermined the rights of the defence and infringed the principle of the protection of legitimate expectations that governs cooperation between the Commission and undertakings (see the final part of paragraph 56), it too is unfounded.

72 As far as the rights of the defence of Postbank in the national proceedings are concerned, it must be pointed out that even if production by one of the parties to those proceedings of documents containing the abovementioned information is capable of weakening the position of the undertakings to which the information relates, it is nevertheless for the national court to guarantee, on the basis of national rules of procedure, that the rights of defence of such undertakings are protected. In that connection, in a case, for example, like this one, the national court may *inter alia* take account of the provisional nature of the opinion expressed by the Commission in the statement of objections and of the possibility of suspending the national proceedings pending adoption by the Commission of a final position. The allegedly harmful effect of transmitting certain documents to the national courts certainly cannot therefore justify an outright prohibition by the Commission of such transmission.

73 Similarly, production of the documents at issue would not undermine the applicant's rights of defence in the administrative procedure. The 'legitimate expectations' to which Postbank refers concern, in particular according to the *AEB* judgment relied on by the applicant, both the right of undertakings to be informed and heard in competition investigations as to the purposes pursued by the Commission and the right that 'the information ... obtained should not be subsequently used outside the legal context in which the request was made' (*AEB*, paragraph 36). This Court considers that the transmission of the documents concerned, in particular the statement of objections, to the national judicial authorities has no impact on the administrative procedure since the undertakings concerned are not thereby deprived of the right to be informed and heard by the Commission regarding all the matters of fact and law contained in those documents. Moreover, as made clear above, because Regulation No 17 is not applicable to cooperation between the Commission and the national courts, the limitations it imposes on the use of the information obtained by the Commission certainly cannot be imposed on those courts.

74 Finally, the applicant's allegation of a conflict between the decision and the Notice on cooperation between national courts and the Commission, with a view to demonstrating, from another standpoint, an infringement of Article 20(1) of Regulation No 17, is likewise unfounded.

75 In that Notice, and in particular in the chapter entitled 'Cooperation between national courts and the Commission', the Commission recognized, as a preliminary point, that 'under Article 5 of the EEC Treaty [as interpreted by the order in *Zwartveld* and the judgment in *Delimitis*, both cited above] , [it] has a duty of sincere cooperation vis-à-vis judicial authorities of the Member States, who are responsible for ensuring that Community law is applied and respected in the national legal system' (see point 33). It thus gave general indications concerning the discharge of its duty of cooperation and, more particularly, the information which it considers should be supplied to the national courts. In point 42 of the Notice, to which the applicant refers, the Commission stated in particular that, in

accordance with the principles of neutrality and objectivity inherent in national legal proceedings, it 'will not accede to requests for information unless they come from a national court, either directly, or indirectly ...'.

76 It is thus apparent from the very terms of the Notice that the Commission did not assume any obligation to prohibit undertakings taking part in the administrative procedure from producing to national courts any documents received during that procedure, but that it merely sought to clarify the conditions under which it would deal with any requests for information made by such courts or by a party to national proceedings.

77 It follows that the first part of the first plea in unfounded.

The second part of the first plea: alleged infringement of Article 214 of the Treaty and Article 20(2) of Regulation No 17

— Summary of the parties' arguments

78 In the second part of the first plea, the applicant asserts that, by allowing transmission of the statement of objections to the Gerechtshof te Amsterdam, the Commission infringed Article 214 of the Treaty and Article 20(2) of Regulation No 17 since the document in question contains passages which were regarded as constituting business secrets by both the applicant and the Commission.

79 According to the applicant, the prohibition laid down in Article 214 of the Treaty and Article 20(2) of Regulation No 17 extends to any disclosure outside the procedure for the application of competition law initiated by the Commission and, consequently, to the transmission to national courts of information covered by professional secrecy (*Delimitis*, paragraph 53, and the Notice on cooperation between national courts and the Commission). It follows that the defendant was under an obligation to make forwarding of the statement of objections and the minutes of the hearing to NUON and Mega Limburg subject to the condition (in fact indicated in its letter of 4 October 1993) that those documents were not to be used in national legal proceedings and that third parties were not to be allowed direct or indirect access to them. In default of that obligation, in accordance with *Akzo*, it should have consulted all the banks which had indicated that the information supplied by them contained business secrets before transmitting the documents.

80 The Commission replies that Articles 214 of the Treaty and 20(2) of Regulation No 17 are concerned only with information which is by its nature covered by professional secrecy. As stated in the Opinion of the Advocate General in *Akzo*, that information must be of some importance and must be such that it cannot be disclosed to third parties alien to the company without the latter thereby being exposed to difficulties.

81 In this case, it contends, there was no disclosure giving rise to such problems. It submits that the obligation to observe professional secrecy is attenuated in this case since it involves not the production of a document in national proceedings but the transmission of certain information to third parties to which Article 19 of Regulation No 17 grants the right to be heard. In such a case, as has been held by the Court (*Akzo*, paragraph 27), 'the Commission may communicate to such a party certain information covered by the obligation of professional secrecy in so far as it is necessary to do so for the proper conduct of the investigation'.

Therefore, there was no infringement of Article 20(2) of Regulation No 17 or Article 214 of the Treaty. The subsequent production of the statement of objections by NUON and Mega Limburg before the national courts is a matter for the national court and not the Commission, the latter being entitled neither to prevent nor to authorize it. The question of the permissibility of such production is therefore a matter of national law alone. In any event, since in this case that document had been produced in the course of legal proceedings between parties who all possessed that document, there was no disclosure within the meaning of Article 20(2) of Regulation No 17.

82 The Commission also contends that the applicant is criticizing it not only for breach of the duty to maintain professional secrecy, as provided for in the provisions referred to, but also for breach of the general principle of protection of business secrets. The defendant asserts, primarily, that the business secrets appearing in the statement of objections, assuming they exist, lost their protection when they were made public by transmission of that document to NUON and Mega Limburg. In the alternative, it contends that the version of the statement of objections transmitted to NUON and Mega Limburg contained no business secrets in so far as the annexes to it were not included.

83 The applicant replies, first, that in this case it need not invoke breach of the general principle of the protection of business secrets. The Commission itself acknowledged the presence in the statement of objections of confidential information covered by the requirement of professional secrecy on its part. Secondly, it states that the transmission of the statement of objections to the undertakings concerned, in 1993, which involved limited rather than general disclosure of the information contained in it, did not definitively deprive that information of the protection available by virtue of the requirement of professional secrecy. Therefore, the transmission of that same information to the national courts in 1994 constituted a breach of professional secrecy.

— Findings of the Court

84 In the second part of the first plea in law, the applicant claims that, by not prohibiting NUON and Mega Limburg from producing to the Gerechtshof te Amsterdam the statement of objections of 14 June 1993 and the minutes of the hearing of 28 October 1993, the Commission infringed both Article 214 of the Treaty and Article 20(2) of Regulation No 17. For its part, the Commission contends that it in no way breached the requirement of professional secrecy or disclosed any of Postbank's business secrets since, first, the provisions relied on by Postbank are not applicable to this case and, secondly, the documents in question contain no business secrets of any commercial importance.

85 Before giving a decision on this second part of the plea, it is appropriate first to review the relevant provisions concerning the professional secrecy by which the Commission is bound in the procedure for the application of the Community competition rules. Article 214 of the Treaty provides: 'The members of the institutions of the Community, the members of committees, and the officials and other servants of the Community shall be required, even after their duties have ceased, not to disclose information of the kind covered by professional secrecy, in particular information about undertakings, their business relations or their cost components'. Article 20(2) of Regulation No 17 provides: 'Without prejudice to the provisions of Articles 19 and 21 [which are concerned, respectively, with the hearing of parties and the publication of decisions] , 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 professional secrecy'.

86 The information covered by professional secrecy may be both confidential information and business secrets. Article 214 of the Treaty applies to 'information of the kind covered by professional secrecy'. It applies in particular to 'information about undertakings, their business relations or their cost components'. It thus

expressly refers to information which, in principle, falls, by reason of its content, within the category of business secrets, as defined by the Court of Justice (*Akzo*, cited above).

87 Business secrets are information of which not only disclosure to the public but also mere transmission to a person other than the one that provided the information may seriously harm the latter's interests. It is settled case-law that, by virtue of a general principle which inspires the procedural rules in competition matters, 'very special protection' must be provided for the business secrets referred to by Articles 19(3) and 21(2) of Regulation No 17 (see, in particular, *Akzo*, paragraphs 28 and 29). Also, where in specific cases the Commission is called upon to determine that documents whose transmission to third parties is being considered contain business secrets, it must make such transmission subject to an appropriate procedure intended to safeguard the legitimate interests of the undertakings concerned in not having their business secrets disclosed.

88 In this case, the applicant and the other banks concerned indicated on several occasions that the statement of objections contained confidential information and business secrets. In particular, by letter of 27 October 1993 addressed to the Commission and at the hearing of 28 October 1993, the NVB, the Netherlands Association of Banks, protested about the sending of the statement of objections to NUON and Mega Limburg, claiming *inter alia* that it contained business secrets and could not therefore be forwarded, in its complete version, to third parties. Moreover, after the Commission, by letter of 23 September 1994, expressly removed any obstacle to the production of that document in legal proceedings by NUON and Mega Limburg, Postbank called on it to reverse that decision, repeating that the statement of objections was based on information which the NVB and it itself had 'expressly described as constituting business secrets'. The Commission, for its part, considers that the version of the statement of objections which it sent to NUON and Mega Limburg contained no business secrets since its annexes were not included. Moreover, despite the protests of the applicant and the NVB, the Commission sent that document to NUON and Mega Limburg. It then failed to inform the banks concerned of the fact that those two undertakings had asked to

be able to produce the document in national legal proceedings and, finally, it informed them of its grant of that request only after communicating the contested decision to NUON and Mega Limburg.

89 In order to decide whether, in those circumstances, the Commission's conduct involves any breach of professional secrecy, as alleged by Postbank, it must be observed that Article 214 of the Treaty and Article 20(2) of Regulation No 17 do not require the Commission to prohibit third parties from producing, in national legal proceedings, documents received in the procedure before the Commission which contain confidential information and business secrets. These provisions, even if they prevent undertakings from transmitting such documents to third parties, do not in any way prevent their disclosure to the national courts. First, Article 20(2) is inapplicable to this case since, as has already been emphasized, all direct and indirect cooperation between the Commission and the national judicial authorities falls outside the scope of that regulation. Secondly, Article 214 of the Treaty, which prohibits all officials and employees of the institutions from disclosing confidential information and business secrets to third parties, cannot be interpreted as meaning that, by virtue of its obligation to observe professional secrecy, the Commission is required to prohibit undertakings from producing to national courts any documents received in the course of the administrative procedure. Such an interpretation might compromise cooperation between the national judicial authorities and the Community institutions, as provided for by Article 5 of the Treaty, and above all detract from the right of economic agents to effective judicial protection. More specifically, in a case like this one, it would deprive certain undertakings of the protection, afforded by national courts, of the rights conferred on them by virtue of the direct effect of Articles 85 and 86 of the Treaty.

90 However, in offering its cooperation to the national courts, the Commission may not in any circumstances undermine the guarantees given to individuals by the Community provisions concerning professional secrecy (see *Delimitis*, paragraph 53). The upholding of such guarantees requires the Commission, faced with a request from an undertaking for authority to produce to those courts documents containing confidential information and business secrets, to take all necessary precautions to ensure that the entitlement of the undertakings concerned to protection

of that information is not undermined by or during the transmission of the documents to the national courts. Such precautions may include, in particular, informing the latter of the documents or passages of documents which contain confidential information or business secrets. As already pointed out, it is then the responsibility of the national court to guarantee protection of the confidentiality of such information or business secrets.

91 In particular, in a case like this one where, during the administrative procedure, the undertakings concerned gave notice of the existence of business secrets, the Commission must, in accordance with the general rule laid down in *Akzo*, give those undertakings an opportunity to state their views. It must in particular give them an opportunity both to point out the passages in the documents of which the transmission to the national court might cause it damage if no precautions were taken, and to indicate the nature and scope of that damage.

92 It follows from all the foregoing considerations that, contrary to the applicant's allegations, in a procedure for the application of Community competition rules, the Commission does not, in principle, infringe Article 214 of the Treaty by failing to prohibit the disclosure to the national courts of documents containing confidential information and business secrets. The Commission contravenes its obligation to observe professional secrecy only if it allows such documents to be transmitted to the national judicial authorities without taking the necessary precautions, including where appropriate those of a procedural nature, to protect any confidential information or business secrets.

93 However, in certain cases, it might not be possible, even if the Commission takes all the abovementioned precautions, for the protection of third parties and of the Communities to be fully ensured. In those exceptional cases, the Court of Justice has held that the Commission may refuse to disclose documents to national judicial authorities. Such a refusal is justified only where it is the only way of ensuring 'protection of the rights of third parties', which in principle is a matter for the

national courts, or 'where the disclosure of that information would be capable of interfering with the functioning and independence of the Community', which, in contrast, is a matter exclusively for the Community institutions concerned (see the order of the Court of Justice of 6 December 1990 in Case C-2/88 *Zwartveld and Others* [1990] ECR I-4405, paragraphs 10 and 11, and Case 145/83 *Adams* v *Commission* [1985] ECR 3539, paragraphs 43 to 44).

94 In the present case, in which the banks taking part in the administrative procedure repeatedly voiced their opposition to any disclosure of information contained in particular in the statement of objections, it must be held that the Commission, even if it considered that the documents in question did not contain business secrets, should have closely examined the views of those undertakings concerning the production of those documents in court and should have taken all the necessary precautions to ensure that those undertakings' interest in not having any disclosure of the information they contained was protected. More specifically, in the light of the fact that, in the administrative procedure, the Commission had sent the statement of objections to NUON and Mega Limburg without giving the undertakings affected, in particular Postbank, an opportunity to state their views concerning the presence of business secrets in that document (contrary to paragraph 29 of the *Akzo* judgment) and, furthermore, that NVB had indicated the presence of such secrets after learning of the transmission of the statement of objections to those undertakings, the Commission should have informed the banks concerned by that document of the request from NUON and Mega Limburg regarding production of the statement of objections and the minutes of the hearing in national legal proceedings. Moreover, having regard to any observations by the banks concerning the presence of business secrets in those documents, it should immediately have notified a duly reasoned decision to those banks.

95 Since in the context of transmitting the statement of objections and the minutes of the hearing to third parties, the Commission was supposed to have followed the procedure indicated by the Court of Justice in *Akzo Chemie* v *Commission* and failed to do so, after receiving a subsequent request from certain of those undertakings for 'authority' to produce those documents in national legal proceedings, it was, *a fortiori*, required to take the necessary measures to obviate any risk of disclosure of any business secrets which might be contained in those documents.

However, it is clear from the documents before the Court that the Commission did not inform the applicant of that request from NUON and Mega Limburg and that it did not give notice to NVB of its positive response to that request until four days after sending it to those undertakings.

96 It follows that, in this case, the Commission failed in its obligation of professional secrecy by not giving Postbank an opportunity to state its view on the production in legal proceedings of the documents in question and by failing to take any measure designed to protect the confidentiality of the information or business secrets of which, for their part, the banks concerned requested protection.

97 The second part of the first plea in law is therefore well founded.

98 In those circumstances, the Commission decision contained in its letter of 23 September 1994 and confirmed by its letter of 3/4 October 1994 must be annulled and it is unnecessary to give a decision on the other pleas in law put forward by the applicant.

Costs

99 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for by the successful party. Since the Commission has been unsuccessful and the applicant has applied for costs, the defendant must be ordered to pay the costs.

On those grounds,

THE COURT OF FIRST INSTANCE (First Chamber, Extended Composition)

hereby:

1. **Annuls the Commission decision contained in its letters of 23 September 1994 addressed to NUON Veluwse Nutsbedrijven NV and Maatschappij Elektriciteit en Gas Limburg NV and of 3/4 October 1994 addressed to the board of Postbank NV;**

2. **Orders the Commission to pay the costs.**

Saggio Bellamy Kalogeropoulos

Tiili Moura Ramos

Delivered in open court in Luxembourg on 18 September 1996.

H. Jung A. Saggio

Registrar President