JUDGMENT OF THE COURT
16 July 1992 *

In Case C-67/91,

REFERENCE to the Court under Article 177 of the EEC Treaty by the Tribunal de Defensa de la Competencia for a preliminary ruling in the proceedings pending before that court between

Dirección General de Defensa de la Competencia

and

Asociación Española de Banca Privada (AEB),

Banco Hispano Americano SA,

Banco Exterior de España SA,

Banco Popular Español SA,

Banco Bilbao Vizcaya SA,

Banco Central SA,

Banco Español de Crédito SA

Banco Santander-SA de Crédito

on the interpretation of Article 214 of the EEC Treaty and Regulation No 17 of the Council of 6 February 1962, First Regulation implementing Articles 85 and 86 of the Treaty (OJ, English Special Edition 1959-1962, p.87),

* Language of the case: Spanish.

THE COURT,

composed of: O. Due, President, R. Joliet, F. A. Schockweiler, F. Grévisse and P. J. G. Kapteyn (Presidents of Chambers), G. F. Mancini, C. N. Kakouris, J. C. Moitinho de Almeida, G. C. Rodríguez Iglesias, M. Diez de Velasco, M. Zuleeg, J. L. Murray and D. A. O. Edward, Judges,

Advocate General: F. G. Jacobs,
Registrar: D. Triantafyllou, Administrator,

after considering the written observations submitted on behalf of:

— the Spanish Government, by Alberto Navarro González, Director-General for Legal and Institutional Community Coordination, and Rosario Silva de Lapuerta, Abogado del Estado, Head of the Department for Community Litigation, acting as Agents,

— AEB, by Enrique Piñel López, of the Madrid Bar,

— Banco Hispano Americano SA, by Gerardo Codes Anguita, of the Madrid Bar,

— Banco Exterior de España SA, by Alvaro Merino Fuentes, Procurador de los Tribunales de Madrid, and José Ataz Hernández, of the Madrid Bar,

— Banco Popular Español SA, by Santiago Lizarraga Beloso, procuration holder, and Vicente Infante Pérez, of the Madrid Bar,

— Banco Bilbao Vizcaya SA, by José Luis Segimón Escobedo, of the Madrid Bar,

— Banco Central SA, by Juan Manuel Echevarría Hernández, Director, Secretary and General Manager, of the Madrid Bar,

— Banco Español de Crédito SA, by Mariano Gómez de Liaño y Botella, of the Madrid Bar, and Piero A. M. Ferrari, of the Rome Bar,

— Banco de Santander SA, by Alfredo Añoro Crespo, of the Madrid Bar

— the Commission of the European Communities, by Francisco E. González Díaz and Berend Jan Drijber, of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of AEB, Banco Central Hispanoamericano SA (resulting from the merger of Banco Hispano Americano SA, and Banco Central SA), represented by Juan Manuel Echevarría Hernández, Banco Exterior de España SA, represented by A. Echevarría Pérez, of the Madrid Bar, Banco Popular Español SA, represented by Pablo Isla Alvárez de Tejera and Juan Ignacio Martí Barceló, of the Madrid Bar, Banco Bilbao Vizcaya SA, Banco Español de Crédito SA, Banco de Santander SA, and the Commission of the European Communities, at the hearing on 12 May 1992,

after hearing the Opinion of the Advocate General at the sitting on 10 June 1992,

gives the following

Judgment

1 By order of 28 January 1991, received at the Court on 15 February 1991, the Tribunal de Defensa de la Competencia (Tribunal for the Defence of Competition) referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty a number of questions on the interpretation of Article 214 of the EEC Treaty and Regulation No 17 of the Council of 6 February 1962, First Regulation implementing Articles 85 and 86 of the Treaty (OJ, English Special Edition 1959-1962, p.87, hereinafter referred to as 'the regulation' or 'Regulation No 17').

2 The questions were raised in proceedings between, on the one hand, Dirección General de Defensa de la Competencia ('DGDC') and, on the other, Asociación Española de Banca Privada ('AEB'), Banco Hispano Americano SA, Banco Exterior de España SA, Banco Popular Español SA, Banco Bilbao Vizcaya SA, Banco Central SA, Banco Español de Crédito SA and Banco Santander-SA de Crédito.

3 An action was brought by DGDC before the Tribunal de la Defensa de la Competencia against AEB and the abovementioned banks. The defendants are accused of infringing, in relation to certain bank services and commissions, Spanish Law No 110 of 20 July 1963 prohibiting practices restricting competition.

4 The banks contend that the national proceedings are in fact motivated not by the various requests for information submitted by DGDC at the beginning of 1987 but by subsequent measures taken by the national authorities on the basis of information obtained by the Commission under Regulation No 17.

5 That information is contained, according to the banks, in a 'Form A/B' submitted in March 1988 by AEB and the abovementioned banks with a view to obtaining from the Commission the negative clearance provided for in Article 2 of Regulation No 17 or the exemption provided for in Article 85(3) of the Treaty and in the answers to requests for information sent to the banks by the Commission in and after March 1987 on the basis of Article 11 of Regulation No 17.

6 AEB and the banks maintain that that information may not be used by the national authorities in the prosecution of actions to establish infringements of national competition law.

7 In those circumstances, the Tribunal de la Defensa de la Competencia decided to stay the proceedings pending a preliminary ruling by the Court of Justice on the following questions:

'1. May the national authority responsible for the application in a Member State of Articles 85 (1) and 86 of the Treaty establishing the EEC use the information obtained by the Commission of the EEC

(a) pursuant to Article 11 of Council Regulation No 17/62

(b) by voluntary notification by undertakings established in that Member State in accordance with Articles 2, 4 and 5 of Council Regulation No 17/62

in proceedings for the imposition of a penalty conducted solely under Articles 85 (1) and Article 86 of the Treaty establishing the EEC?

2. May the said authority use the information referred to in Question 1(a) and (b) in proceedings for the imposition of a penalty conducted under both Community competition law and national competition law?

3. May the said authority use the information referred to in Question 1(a) and (b) in proceedings for the imposition of a penalty conducted solely under national competition law?

4. May the said authority use the information in Question 1(a) and (b) in proceedings for the authorization of practices restrictive of competition conducted solely under its national law?'

8 In the order for reference, the national court indicates that, in its view, those questions should be answered in the affirmative.

9 Reference is made to the Report for the Hearing for a fuller account of the facts of the case, the procedure and the written observations submitted to the Court, which are mentioned or discussed below only in so far as is necessary for the reasoning of the Court.

10 Before a closer examination is made of the subject-matter of the questions referred to the Court and a decision is given on their admissibility, it is appropriate first to describe the legal background against which the questions were submitted and, more particularly, the respective fields of application of the national rules and the Community rules on competition, the scope of Regulation No 17 and the cooperation between the Commission and the Member States provided for by that regulation.

11 Restrictive practices are viewed differently by Community law and national law. Whilst Articles 85 and 86 of the Treaty view them in the light of the obstacles which may result for trade between the Member States, each body of national legislation proceeds on the basis of considerations peculiar to it and considers restrictive practices solely in that context. It follows that the national authorities may also take action regarding situations that are capable of forming the subject-matter of a decision by the Commission (see, to that effect, the judgments in Case 14/68 *Wilhelm* v *Bundeskartellamt* [1968] ECR 1 and Joined Cases 253/78 and 1 to 3/79 *Procureur de la République* v *Giry and Guerlain* [1980] ECR 2327, paragraphs 15 and 16).

12 In the judgments cited above, however, the Court emphasized that the parallel application of national competition law may be permitted only to the extent to which it does not undermine the uniform application, throughout the Common Market, of the Community competition rules and the full effect of the measures based on those rules.

13 Regulation No 17 applies to proceedings conducted by the Commission in order to implement Articles 85 and 86 of the Treaty. As indicated by the seventh recital in its preamble, it lays down the rules under which the Commission may take the requisite measures for applying those provisions.

14 It is against that background that Regulation No 17 governs the conditions under which, on the one hand, undertakings supply information to the Commission and, on the other, the Commission uses such information and passes it to the competent authorities in the Member States.

15 The Commission thus receives applications submitted by undertakings under Article 2 of Regulation No 17 for negative clearances in the form of a declaration that there is no need for it to take action under Articles 85(1) and 86 of the Treaty. It also receives notifications of agreements, decisions and practices of the kind provided for in Articles 4 and 5 of the regulation, with a view to its adopting, under Article 85(3) of the Treaty, a decision declaring Article 85(1) inapplicable to certain agreements or concerted practices.

16 Those applications and notifications are submitted on a common form known as 'Form A/B', the content of which is set out in Regulation No 27 of the Commission of 3 May 1962 (OJ, English Special Edition 1959-1962, p. 35), as amended by Commission Regulation (EEC) No 2526/85 of 5 August 1985 (OJ 1985 L 240, p. 1).

17 Regulation No 17 also conferred on the Commission a far-reaching power of investigation and verification, stating, in the eighth recital, that the Commission must be empowered, throughout the common market, to require such information to be supplied and to undertake such investigations as are necessary to bring to light any infringements of Articles 85 and 86 of the Treaty (Case 347/87 *Orkem* v *Commission* [1989] ECR 3283, paragraph 15).

18 In that way, a preliminary investigation procedure was set up, which is clearly separate from the procedure involving exchange of submissions provided for by Article 19 of the regulation and includes in particular requests for information (Article 11 of the regulation) and investigations by Commission officials (Article 14 of the regulation). The purpose of the preliminary investigation procedure is to enable the Commission to obtain the information and documentation necessary to check the actual existence and scope of a specific and factual legal situation (judgment in Case 374/87 *Orkem* v *Commission*, cited above, paragraph 21).

19 Regulation No 17 defines the conditions under which the Member States are to be associated with the proceedings conducted by the Commission. As is apparent from the seventh recital in the preamble to that regulation, the aim of those provisions is to ensure that the Commission, acting in close and constant liaison with the competent authorities of the Member States, may take the requisite measures for applying Articles 85 and 86.

20 Pursuant to Article 10(1) and (2) of the regulation, the Commission is to transmit forthwith to the competent authorities of the Member States a copy of the applications and notifications together with copies of the most important documents lodged with the Commission for the purpose of establishing the existence of infringements of Article 85 or Article 86 of the Treaty or of obtaining negative clearance or a decision in application of Article 85(3). The competent authorities of the Member States have the right to express their views on those procedures. The information which may be disclosed to the Member States on the basis of those provisions includes in particular that contained in the answers to the requests for information made by the Commission under Article 11 of that regulation. Pursuant to Article 11(2) and (6), a copy of such requests for information or decisions taken by the Commission following a lack of response to those requests is to be sent to the authorities of the Member State concerned.

21 Finally, Article 20(1) of the regulation provides:

'Information acquired as a result of the application of Articles 11, 12, 13 and 14 shall be used only for the purpose of the relevant request or investigation.'

By virtue of Article 20(2), which gives effect to Article 214 of the Treaty concerning professional secrecy (see, to that effect, the judgment in Case 53/85 *AKZO Chemie* v *Commission* [1986] ECR 1965, paragraph 26), the competent authorities of the Member States, their officials and other servants must not disclose information acquired by them as a result of the application of the regulation and information of the kind covered by the obligation of professional secrecy.

The subject-matter and the admissibility of the questions referred to the Court for a preliminary ruling

22 The questions submitted relate solely to the use, by the authorities of the Member States, of the information obtained by the Commission in applying Regulation No 17. In those questions, the national court seeks, essentially, to determine whether the national authorities may, for the purpose of applying Community law or national law on competition matters, use the information sent to them by the Commission, as contained in:

answers to requests for information addressed to undertakings on the basis of Article 11 of the regulation;

applications for negative clearance and notifications of agreements, decisions and practices of the kind provided for in Articles 2, 4 and 5 of the regulation.

23 Those questions relate to the use by the national authorities of information obtained by the Commission which has not been published under Article 19(3) of the Regulation and has not been mentioned in a Commission decision published under the conditions laid down in Article 21 of the regulation.

24 The AEB and a number of the banks contest the relevance of some of the questions submitted, in that they relate *inter alia* to the use of such information by the national authorities for the purposes of applying Community competition law. They maintain that only the use of the information obtained under Regulation No 17, and more particularly that contained in Form A/B, by the national authorities in connection with national criminal proceedings under provisions of domestic competition law is at issue in the main proceedings.

25 It must be borne in mind that the Court has consistently held that Article 177 of the Treaty lays down the framework for close cooperation between the national courts and the Court of Justice, based on a division of functions between them. Accordingly, it is for the national courts alone, before which the proceedings are pending and which must assume responsibility for the judgment to be given, to decide, having regard to the particular features of each case, as to both the need for a preliminary ruling to enable them to give judgment and the relevance of the questions which they refer to the Court of Justice.

26 A request for a preliminary ruling from a national court may be rejected only if it is quite obvious that the interpretation of Community law or the examination of the validity of a rule of Community law sought by that court bears no relation to the actual nature of the case or to the subject-matter of the main action (see, among others, the judgment in Case C-186/90 *Durighello* [1991] ECR I-5773, paragraph 9). However, that is not the position in this case.

The use by the authorities of the Member States of information contained in the answers to the requests for information sent to undertakings under Article 11 of Regulation No 17

27 The Commission, AEB and the banks concerned consider that Article 20(1) of Regulation No 17 prohibits the authorities of the Member States from using such information as evidence in proceedings applying national competition rules. The Commission recognizes, on the other hand, that such information may be used by the national authorities in order to apply, within the limits of their powers, Articles 85(1) and 86 of the Treaty.

28 The Spanish Government maintains that such information may be used by the authorities of the Member States both for the application of Community competition rules and for the application of national competition law, the objectives and purpose of which are the same.

29 The reply to be given to the national court calls for an interpretation of Article 20(1) of Regulation No 17, which it is appropriate to read in conjunction with Article 11(3) of the regulation, according to which requests for information sent to the undertaking must state their legal basis and purpose.

30 In order to interpret those provisions, it is necessary to take account of the general scheme of Regulation No 17, the purpose of the provisions laying down the procedure for requests for information and the requirements inherent in observance of the general principles of Community law, in particular fundamental rights (to that effect, see the judgment in Joined Cases 46/87 and 227/88 *Hoechst* v *Commission* [1989] ECR 2859, paragraph 12).

31 As indicated earlier, Regulation No 17 does not govern proceedings conducted by the competent authorities in the Member States, even where such proceedings are for the implementation of Articles 85(1) and 86 of the Treaty. The purpose of Article 9(3) of the regulation, which defines and circumscribes the powers of the national authorities to apply those provisions, Article 20(2) concerning professional secrecy and Article 10, which provides for the involvement of the Member States in the proceedings, is to lay down 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.

32 The distinction drawn by the Commission, in its observations on the question submitted, between a case where those use authorities use the information concerned for the purpose of applying Community law and cases where those authorities are taking action to apply national competition law is not, in the circumstances, relevant. In both cases, the proceedings conducted by the authorities in the Member States are distinct from those conducted by the Commission and the gathering of evidence by those authorities is in conformity with the provisions of national law, provided that Community law is complied with. Even in cases where they apply the substantive provisions of Articles 85(1) and 86 of the Treaty, it is incumbent upon the national authorities to implement them in accordance with national rules.

33 In that general context, the purpose of a request for information addressed to an undertaking on the basis of Article 11 of Regulation No 17 is to provide the Commission with the factual or legal information needed to enable it to exercise its powers. The probative value of the information thus communicated and the conditions under which such information may be relied on against undertakings are, consequently, defined by Community law and confined exclusively to proceedings governed by Regulation No 17. The purpose of the request for information is not to furnish evidence to be used by the Member States in proceedings governed by national law.

34 The information thus obtained by the Commission is transmitted to the competent authorities of the Member States, on the basis of Article 10(1) of Regulation

No 17, in order to meet two concerns. One is the concern to inform Member States of Community proceedings relating to undertakings situated within their territories and the other is to enhance the provision of information to the Commission by enabling it to compare the particulars given by the undertakings with such indications and observations as may be made to it by the Member State concerned. The mere disclosure of such information to the Member States does not, of itself, mean that they may use it under conditions which would undermine the application of Regulation No 17 and the fundamental rights of undertakings.

35 By prohibiting the use of the information obtained under Article 11 of Regulation No 17 for purposes other than that for which it was requested and by requiring both the Commission and the competent authorities of the Member States and their officials and other servants to observe professional secrecy, Article 20 of the regulation is designed to protect the rights of undertakings (see, to that effect, the judgment in Case 85/87 *Dow Benelux* v *Commission* [1989] ECR 3137, paragraphs 17 and 18).

36 The rights of defence, which must be respected in the preliminary investigation procedure, require, on the one hand, that, when the request for information is made, undertakings be informed, in accordance with Article 11(3) of the regulation, of the purposes pursued by the Commission and of the legal basis of the request and, on the other, that the information thus obtained should not subsequently be used outside the legal context in which the request was made.

37 Professional secrecy entails not only establishing rules prohibiting disclosure of confidential information but also making it impossible for the authorities legally in possession of such information to use it, in the absence of an express provision allowing them to do so, for a reason other than that for which it was obtained.

38 Those safeguards would be violated if an authority other than the Commission were able to use, as evidence in procedures not governed by Regulation No 17, information obtained pursuant to Article 11 of that regulation.

39 Such an interpretation does not in any way run counter to the requirements of the principle of cooperation between the Community institutions and the Member States. The Member States are not required to ignore the information disclosed to them and thereby undergo — to echo the expression used by the Commission and the national court — 'acute amnesia'. That information provides circumstantial evidence which may, if necessary, be taken into account to justify initiation of a national procedure (see, to that effect, the judgment in Case 85/87 *Dow Benelux* v *Commission*, cited above, paragraphs 18 and 19).

40 It is appropriate to specify the conditions under which the competent national authorities are entitled to use such information.

41 In accordance with Article 214 of the Treaty and Article 20(2) of Regulation No 17, those authoritties must take care not to disclose to other national authorities or third parties information covered by professional secrecy.

42 Such information cannot be relied on by the authorities of the Member States either in a preliminary investigation procedure or to justify a decision based on provisions of competition law, be it national law or Community law. Such information must remain internal to those authorities and may be used only to decide whether or not it is appropriate to initiate a national procedure.

43 In reply to the arguments put forward by the Spanish Government at the hearing to the effect that such an interpretation would mean that mere mention of a fact in a document sent to the Commission would be sufficient to bar its use in any national procedure, it must be stated that such facts may validly be the subject of a national procedure provided that they are proved not by the documents and information obtained by the Commission but by forms of evidence available under national law and in observance of the guarantees provided for by national law.

The use by the authorities of the Member States of the information contained in the requests and notifications provided for in Articles 2, 4 and 5 of Regulation No 17

44 The Commission maintains that such information may not be used by the authorities of the Member States in application of national competition law. It relies more particularly on Article 15(5) of Regulation No 17, concerning exemption from fines of undertakings which have notified agreements, decisions and concerted practices to the Commission. It maintains that the balance and the general scheme of those provisions would be upset if the national authorities were allowed to use against undertakings the information contained in the forms used for notification. It concedes, on the other hand, that such information may be used by the national authorities, provided that they observe the rules limiting their powers in this area, for the purposes of the application of Article 85(1) and Article 86 of the Treaty.

45 AEB and the banks concerned rely, for their part, more particularly on the rules of professional secrecy and the general principles of law, which prohibit the use against any person, in proceedings of a criminal nature, of information which that person took the initiative to disclose in support of an application addressed to the competent authority.

46 According to the Spanish Government, the national authorities may, in the absence of express provisions to the contrary, use that information for the application of Community and national competition law without infringing Regulation No 17.

47 Unlike the information contained in replies to requests for information, the information contained in the applications and notifications provided for by Articles 2, 4 and 5 of Regulation No 17 is not covered by any provision analogous to Article 20(1) of Regulation No 17 limiting the conditions under which the information may be used.

48 However, even in the absence of such an express rule, the use made of information disclosed by undertakings to the Commission must remain within the legal scope of the procedure under which such information has been obtained.

49 It is apparent from the wording of Article 85(3) of the Treaty and of the provisions of Regulation No 17 that notification of agreements, decisions and concerted practices to the Commission falls within the scope of specifically Community procedures. Moreover, both Form A/B and the complementary note accompanying it by way of information for the undertakings refer solely to those procedures and give no indication that it is possible for any authority other than the Commission to use the information contained in the form.

50 Under those circumstances and having regard to the requirements deriving from observance of the rights of the defence and of professional secrecy, referred to above, the fact that the text is silent on the matter cannot be interpreted as a refusal on the part of the Community legislature to accord to undertakings rights identical to those accorded to them for the protection of the information contained in their answers to requests for information based on Article 11 of the regulation.

51 That interpretation is further supported by the fact, to which the Commission has drawn attention, that, if the Member States were permitted to use the information contained in Form A/B, Article 15(5) of Regulation No 17 would, in part, be deprived of its effectiveness.

52 It must be borne in mind, in that connection, that the notification concerned is not a formality imposed on undertakings but is an essential precondition for the obtaining of certain advantages. Under Article 15(5)(a) of Regulation No 17, no fine may be imposed for actions subsequent to the notification, provided that they remain within the limits of the activity described in the notification. That benefit for undertakings which have notified an agreement or a concerted practice constitutes the *quid pro quo* for the risk run by the undertaking in taking the initiative to give notice of the agreement or concerted practice. The undertaking risks not only a finding that the agreement of practice is in breach of Article 85(1), refusal of the application of Article 85(3) and the obligation to bring to an end the agreement or practice notified (see, to that effect, the judgment in Joined Cases 261, 262, 268 and 269/82 *Stichting Sigarettenindustrie* v *Commission* [1985] ECR 3831, paragraph 76) but also the imposition of a fine for its actions prior to the notification (see, to that effect, the judgment in Joined Cases 100 to 103/80 *Musique Diffusion Française* v *Commission* [1983] ECR 1825, paragraph 93). Moreover, as the Court held in its judgment in *Stichting Sigarettenindustrie*, those provisions, by encouraging undertakings to make notifications, reduce the investigation workload of the Commission.

53 The general scheme of those provisions thus implies that undertakings which have made notifications under the conditions laid down in Regulation No 17 may, in consideration of that fact, benefit from certain advantages. An interpretation of that regulation to the effect that the Member States can use, as evidence, the information contained in those notifications in order to justify national penalties would substantially curtail the scope of the advantage granted to undertakings by Article 15(5) of Regulation No 17.

54 It follows that, as in the case of information contained in replies to requests for information submitted on the basis of Article 11 of Regulation No 17, the Member States are not entitled to use as evidence the information contained in the applications and notifications provided for in Articles 2, 4 and 5 of that regulation.

55 For all the foregoing reasons, it must be stated that Article 214 of the Treaty and the provisions of Regulation No 17 are to be interpreted as meaning that, in the exercise of their power to apply national and Community rules on competition, the Member States may not use as evidence unpublished information contained in replies to requests for information addressed to undertakings pursuant to Article 11 of Regulation No 17 or information contained in the applications and notifications provided for in Articles 2, 4 and 5 of Regulation No 17.

Costs

56 The costs incurred by the Spanish Government and the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT,

in answer to the questions referred to it by the Tribunal de Defensa de la Competencia by order of 28 January 1991, hereby rules:

Article 214 of the EEC Treaty and the provisions of Regulation No 17 of the Council of 6 February 1962, First Regulation implementing Articles 85 and 86 of the Treaty, are to be interpreted as meaning that, in the exercise of their power to apply national and Community rules on competition, the Member States may not use as evidence unpublished information contained in replies to

requests for information addressed to undertakings pursuant to Article 11 of Regulation No 17 or information contained in the applications and notifications provided for in Articles 2, 4 and 5 of Regulation No 17.

Due Joliet Schockweiler Grévisse

Kapteyn Mancini Kakouris Moitinho de Almeida

Rodríguez Iglesias Diez de Velasco Zuleeg Murray Edward

Delivered in open court in Luxembourg on 16 July 1992.

J.-G. Giraud
Registrar

O. Due
President