OPINION OF ADVOCATE GENERAL JACOBS
delivered on 15 December 1993 *

My Lords,

1. In this case a Dutch producer of electricity is appealing against a judgment whereby the Court of First Instance dismissed its application for the annulment of a Commission decision requiring it to disclose certain documents to the Commission. The case raises an important issue. The issue itself is straightforward, but has been greatly complicated by the course of the proceedings.

The background to the case

2. The appellant is NV Samenwerkende Elektriciteits-produktiebedrijven (hereafter 'SEP'). As its name implies, SEP takes the form of a *naamloze vennootschap* (a public limited company governed by Dutch law). According to the judgment appealed against, SEP groups together the four 'public utility' undertakings which produce electricity in the Netherlands. The parties disagree on whether SEP is privately owned or is a State enterprise; but the argument has proceeded, in part, on the basis that it is private. It is not disputed that SEP is under a statutory duty to endeavour to produce electricity at the lowest possible price to the consumer, having regard to the security of supplies.

3. In the Netherlands 50% of electricity is generated with natural gas. SEP's principal supplier of natural gas is NV Nederlandse Gasunie (hereafter 'Gasunie'), which enjoys a *de facto* monopoly in the supply of natural gas in the Netherlands. It appears that all natural gas extracted from Netherlands territory must be offered to Gasunie for sale. Gasunie is a mixed company, in the sense that 50% of its share capital is owned by the Dutch State and 50% by the Shell and Esso petroleum companies. Its major decisions of commercial policy are subject to the approval of the Dutch Ministry of Economic Affairs.

4. On 16 June 1989 SEP entered into a contract for the supply of gas with a Norwegian undertaking called Statoil. I shall refer to that contract as the 'Statoil contract'. Statoil had never previously gained access to the Dutch gas market and SEP had never previously concluded such a contract with anyone other than Gasunie, which none the less remains SEP's principal supplier.

* Original language: English.

5. The conclusion of the Statoil contract led Gasunie to negotiate a 'cooperation code' with SEP. The negotiations began in the second quarter of 1989 and the final version of the code was concluded on 9 April 1990. Towards the end of 1989 the Commission learned of the Statoil contract and of the negotiations between SEP and Gasunie. The Commission opened an investigation with a view to determining whether the dealings between SEP and Gasunie were compatible with the competition rules of the EEC Treaty.

6. On 6 March 1990 the Commission requested SEP to disclose certain documents to it, including the cooperation code and the Statoil contract. The request was made pursuant to Article 11(1) of Council Regulation (EEC) No 17, [1] which authorizes the Commission to 'obtain all necessary information from the Governments and competent authorities of the Member States and from undertakings and associations of undertakings'. In response, on 9 April 1990, SEP sent the Commission the final version of the cooperation code concluded between itself and Gasunie, together with an earlier draft version of the code, but it refused to send the Statoil contract. It contended that the contract had nothing to do with the cooperation code, but it did not rely at this stage on confidentiality.

7. After a further exchange of correspondence between SEP and the Commission, the latter adopted the contested decision on 2 August 1990 pursuant to Article 11(5) of Regulation No 17. The decision required SEP to send to the Commission, within 10 days, the Statoil contract and the correspondence relating to it. In a letter dated 16 August 1990 SEP persisted in its refusal to produce the Statoil contract, invoking for the first time the confidential nature of the contract. It also offered to explain its attitude in a personal meeting with the Commission's Director General for Competition. By letter of 30 August 1990 the Commission declined that offer and stated that the confidential nature of the Statoil contract could not justify SEP's refusal to hand it over to the Commission, which was under an obligation to respect business secrets by virtue of Article 20 of Regulation No 17. Paragraphs (1) and (2) of Article 20 have played a key role in this dispute and it is convenient to set them out in full at this point. They provide as follows:

'1. 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.

2. Without prejudice to the provisions of Articles 19 and 21, the Commission and the competent authorities of the Member States, their officials and other servants shall not disclose information acquired by them as a result of the application of this Regulation and of the kind covered by the obligation of professional secrecy.'

8. In a letter of 12 September 1990 SEP made it clear that it was raising the issue of confidentiality because it was anxious that

1 — OJ, English Special Edition 1962, p. 87.

the terms of the Statoil contract should not be made known to the Dutch Government, which was Gasunie's largest shareholder. That, however, was likely to happen if the contract was sent to the Commission since the Commission would be required to send a copy of it to the Dutch competition authorities in accordance with Article 10(1) of Regulation No 17, which requires the Commission to 'transmit to the competent authorities of the Member States a copy of ... the most important documents lodged with the Commission for the purpose of establishing the existence of infringements of Articles 85 or 86 of the Treaty'. In the same letter SEP offered to show the Statoil contract to the Commission, on condition that no copy should be made of it; the Commission would then realize that it was not necessary for it to examine the Statoil contract in order to appraise the cooperation code agreed upon between SEP and Gasunie.

9. In a letter dated 24 September 1990 the Commission rejected that offer on the ground that it did not satisfy the requirements of Article 11 of Regulation No 17. The Commission also stated in that letter that Article 10 of the same regulation left it a sufficient margin of appraisal as regards the transmission of documents to the Member States and that it would have no reason to send them the Statoil contract if, as SEP maintained, the application of the contract could not be influenced by the cooperation code.

The procedural history of the case

10. On 26 September 1990 SEP commenced proceedings in the Court of First Instance for the annulment of the Commission's decision of 2 August 1990. That action was registered as Case T-39/90. On the same date it also applied for an interim order suspending the operation of the decision. The application for interim measures was dismissed by the President of the Court of First Instance on 21 November 1990. By a decision dated 26 November 1990 the Commission, acting under Articles 11(5) and 16(1)(c) of Regulation No 17, imposed a periodic penalty payment of ECU 1 000 for each day of delay in complying with the decision of 2 August 1990. SEP thereupon sent the Statoil contract to the Commission, expressly reserving all its rights.

11. On 14 December 1990 SEP appealed to the Court of Justice against the order of the President of the Court of First Instance. On the same date SEP also applied to the Court for an order suspending the operation of the Commission's decision of 2 August 1990. In the alternative, it asked the Court to order the Commission not to send a copy of the Statoil contract to the Member States until the Court of First Instance had ruled on SEP's action for the annulment of the contested decision or until the Court of Justice had given judgment on SEP's appeal against the order made by the President of the Court of First Instance. Finally, on 23 January 1991 SEP lodged a second appeal against the order of the President of the Court of First Instance; in this appeal it sought an order requiring the Commission to return the Statoil contract to it.

12. By order of 3 May 1991 the President of the Court took note of SEP's discontinuance of its claims for interim measures, as a result of the Commission's undertaking not to disclose the contents of the Statoil contract to the authorities of the Member States until the Court of First Instance had ruled on SEP's action for the annulment of the contested decision. The Court of First Instance dismissed that action by judgment of 12 December 1991. [2] That judgment forms the subject-matter of the present appeal.

The judgment appealed against

13. Before the Court of First Instance SEP pleaded three submissions: (a) the contested decision infringed Article 11 of Regulation No 17, (b) the contested decision did not contain a sufficient statement of the reasons on which it was based and (c) the contested decision infringed the principle of proportionality.

14. As regards the first submission, SEP argued that the Statoil contract was not necessary — within the meaning of Article 11 of Regulation No 17 — to the Commission's inquiry, the object of which was to assess whether the cooperation code concluded by SEP and Gasunie was compatible with Article 85 of the Treaty. By demanding disclosure of the Statoil contract, the Commission had modified the object of its enquiry. According to SEP, the Commission was carrying out a sectoral inquiry into the Dutch gas market; such an inquiry was governed by Article 12 of Regulation No 17.

15. By its second submission SEP argued that the contested decision was insufficiently reasoned because the reasons relied on by the Commission could not justify the demand for disclosure of the Statoil contract in so far as they modified the object of the inquiry.

16. By its third submission SEP argued that the request for disclosure of the Statoil contract infringed the principle of proportionality on account of the confidential nature of the contract. Under Article 10(1) of Regulation No 17 the Commission would be required to send a copy of the contract to the competent authorities of the Member States. In the Netherlands the competent authority was the Directorate General for Competition in the Ministry of Economic Affairs. Another department of the same ministry — the Directorate General for Energy — was responsible for determining the commercial policy of Gasunie. SEP argued that its negotiating position as a purchaser of natural gas would be impaired if the persons responsible for determining the commercial policy of its main supplier (Gasunie) knew of the terms of business offered by its alternative supplier (Statoil).

17. In its judgment of 12 December 1991 the Court of First Instance held that SEP's three submissions were all unfounded. As regards the first submission, the Court held that the subject-matter of the Commission's investi-

2 — [1991] ECR II-1497.

gation had at all times been the relations between SEP and Gasunie, which had culminated in an agreement (the cooperation code) suspected of infringing Article 85 of the Treaty. The Commission was entitled to demand any document that could legitimately be regarded as presenting a relationship with the alleged infringement. There was a sufficient relationship between the Statoil contract and the cooperation code because the two agreements had been concluded by SEP with two of its suppliers of natural gas. Moreover, in addition to the proximity in time between the two agreements, SEP had admitted that the Statoil contract had induced Gasunie to negotiate the cooperation code. The Statoil contract constituted 'necessary information', within the meaning of Article 11(1) of Regulation No 17, since it formed part of the economic context of the cooperation code.

18. As regards the second submission, the Court of First Instance noted that in the contested decision the Commission had expressly referred to the need to know the economic context of the cooperation code and had mentioned that an earlier draft of the code had envisaged the possibility that supplies by Statoil to SEP might be subject to the approval of Gasunie. The Court held that that was a sufficient statement of reasons for considering there to be a link between the Statoil contract and the cooperation contract.

19. As regards the third submission, the Court observed that the application of Article 11 of Regulation No 17 was indeed subject to compliance with the principle of proportionality; the obligation to supply information must not therefore impose on the undertaking concerned a disproportionate burden, having regard to the needs of the investigation. The Court held, however, that the disclosure of the Statoil contract did not impose a disproportionate burden on SEP. Even if the Commission sent the contract to the Dutch authorities under Article 10(1) of Regulation No 17, the confidentiality of that document would be guaranteed by Article 20 of the regulation, which required the Commission and the competent authorities of the Member States to respect the confidentiality of documents containing business secrets.

SEP's appeal

20. In its appeal SEP pleads eight separate grounds of appeal arranged in three groups corresponding to the three submissions pleaded before the Court of First Instance. SEP's eight grounds of appeal are advanced in support of two essential contentions: first, that the disclosure of the Statoil contract was not necessary for the purposes of the Commission's investigation into the relations between SEP and Gasunie (grounds of appeal 1 to 5); secondly, that the disclosure of the Statoil contract would impose a disproportionate burden on SEP in view of the confidential nature of the contract and the obvious risk that it would find its way into the hands of those who determine Gasunie's commercial policy (grounds of appeal 6 to 8).

The first ground of appeal: the Court of First Instance misinterpreted Article 11 of Regulation No 17 by considering that the requirement of 'necessity' merely implies a 'correlation between the request for information and the alleged infringement'

21. I do not think that this ground of appeal can succeed. It is true that there are certain passages in the Court of First Instance's judgment that suggest too wide a definition of the term 'necessary' in Article 11(1) of Regulation No 17. Thus, for example, in the last sentence of paragraph 29 the Court refers to the 'requirement of a correlation between the request for information and the alleged infringement' and says that that requirement is satisfied if the request 'may legitimately be regarded as displaying a relationship with the alleged infringement'. A mere relationship between a document and the alleged infringement is not sufficient to justify a request for disclosure of the document; the relationship must be such that the Commission could reasonably suppose, at the time of the request, that the document would help it to determine whether the alleged infringement had taken place.

22. However, in the present case it cannot be doubted that the relationship between the Statoil contract and the cooperation code is sufficiently close to justify the Commission's request. On that point the reasons given by the Court of First Instance in paragraph 31 of its judgment are convincing. There the Court observed that SEP was a party to both the Statoil contract and the cooperation code and that in each case the other party was one of its suppliers of natural gas. The Court also noted the proximity in time between the contract and the code, the latter having been concluded shortly after the former. The Court held that the contract was therefore necessary in order to enable the Commission to appraise the economic context in which the code was situated.

23. But the decisive point is the one noted by the Court of First Instance in the third subparagraph of paragraph 31: namely, that — as SEP had itself recognized — the conclusion of the Statoil contract led Gasunie to negotiate the cooperation code with SEP. In view of that direct causal connection between the contract and the code I do not see how it can be seriously argued that the one was not relevant to an investigation into the alleged illegality of the other.

Second ground of appeal: the reasons given by the Court of First Instance for its finding that Article 11 of Regulation No 17 had not been infringed are inadequate and incorrect

24. SEP criticizes the Court of First Instance for finding that the Commission had not extended the subject-matter of its investigation in the contested decision. According to SEP, the Court's reasoning is defective in several respects.

25. In particular, SEP contends that the Court disregarded its argument to the effect that in the contested decision the Commission treated the cooperation code and the

Statoil contract as together forming the subject-matter of its investigation. According to SEP, the Commission had recognized that in certain passages of its pleadings before the Court of First Instance.

26. SEP refers to paragraph 27 of the Court's judgment in which the Court observed that the disclosure of the Statoil contract was requested by the Commission because it was needed in order to appraise the legality of the cooperation code in view of the possible effect of the code on the contract. The Court referred in that regard to point 6 of the preamble to the contested decision. According to SEP, point 6 of the preamble does not support that finding. SEP complains in particular that in point 6 the Commission stated that the Statoil contract might be an agreement capable of affecting competition within the common market.

27. SEP also contends that the Court of First Instance's judgment was insufficiently reasoned in so far as the Court failed to appreciate that the Commission should have demonstrated necessity at the time when it requested disclosure of the contract. SEP refers to paragraph 28 of the judgment, in which the Court held that the supplementary reference, in the contested decision, to the possible illegality of the Statoil contract cannot have had the effect of modifying the subject-matter of the investigation in view of the clear terms of the initial request for documents and of the contested decision 'in the light of the clarification provided by the Commission at the hearing'. According to SEP, the clarification provided by the Commission at the hearing came too late to be of any relevance for the purpose of justifying the request for disclosure of the Statoil contract.

28. According to the Commission, this ground of appeal is doomed to failure, since it concerns an appraisal of the facts, for which moreover the Court of First Instance gave adequate reasons.

29. This ground of appeal is complex and raises several issues, but all are essentially concerned with the definition of the subject-matter of the Commission's investigation. SEP's basic argument is that the Commission has created confusion about the subject-matter of its investigation as a result of ambiguous statements in its original request for documents (the letter of 6 March 1990) and in the contested decision.

30. According to SEP, it is not clear whether the subject-matter of the investigation is the cooperation code alone, or both the code and the Statoil contract, or whether the Commission is carrying out a sectoral investigation into the Dutch gas market. The relevance of this point is that when the Commission requests information under Article 11 of Regulation No 17 it is required by Article 11(3) to state 'the purpose of the request', meaning of course that it must identify the suspected infringement of the competition rules. The necessity of the information must be judged in relation to the purpose stated in the request for information. The purpose must be indicated with reasonable precision, otherwise it will be impossible to determine whether the information is necessary and the Court will be prevented from exercising judicial review. As regards SEP's claim that the Commission is in reality carrying out a sectoral inquiry into the Dutch gas market under Article 12 of Regulation No 17, the relevance of that is that the Commission does not, in the context of such an inquiry,

have to confine its attention to a specific alleged infringement.

31. Although the Commission now insists that the subject-matter of its investigation was the cooperation code between SEP and Gasunie and that disclosure of the Statoil contract was required solely because of the light that it threw on the economic context of the cooperation code, it has occasionally given the impression that the Statoil contract, instead of being purely of ancillary interest, might itself constitute an infringement of Article 85.

32. Thus in the letter of 6 March 1990, the subject-matter of which is described as being the 'agreement between SEP and Gasunie', the Commission referred to that agreement (the cooperation code) and to the Statoil contract and then stated that it wished to receive information about both agreements and that the information requested should enable it to appraise the compatibility, of 'that agreement (those agreements)' [3] with the competition rules of the Treaty. Further confusion was caused by point 6 in the preamble to the contested decision, which expressly stated that the Statoil contract might be an agreement capable of affecting competition within the common market.

3 — In paragraph 27 of its judgment the Court of First Instance cites this part of the letter of 6 March 1990 and indicates that it construes the words 'those agreements' as referring exclusively to agreements between SEP and Gasunie. It seems clear, however, that the Commission was referring to the cooperation code and to the Statoil contract.

33. In paragraphs 27 and 28 of the judgment under appeal the Court of First Instance recognized that the Commission had created a certain amount of confusion about the subject-matter of its enquiry and recorded that the Commission had acknowledged at the hearing the potential for misunderstanding caused by point 6 in the preamble to the contested decision. The Court found none the less that the Commission had made it sufficiently clear, both in its letter of 6 March 1990 and in the contested decision, that the main object of its enquiry was the cooperation code between SEP and Gasunie and that the Statoil contract was of ancillary interest inasmuch as it formed part of the economic context and might enable the Commission to assess the effects of the cooperation code on competition.

34. I do not think that it can be said that that finding by the Court of First Instance was erroneous or that it was not supported by an adequate statement of reasons. Admittedly, it is questionable whether the Court was right to suggest (in the third subparagraph of paragraph 28) that clarification about the subject-matter of the enquiry could usefully be provided by the Commission at the hearing before the Court. The Commission must make the subject-matter of its enquiry clear in its initial request for documents and in the formal decision (if there is one) requiring disclosure of documents under Article 11(5) of Regulation No 17. If the subject-matter of the enquiry is not clear at those stages, the undertaking concerned will be unable to determine whether there are grounds for refusing to comply with the initial request and for challenging the formal decision before the Court of First Instance. It is not sufficient to provide clarification at the hearing.

35. But I do not think that that weakness in the Court of First Instance's reasoning is serious enough to justify quashing the judgment under appeal. Even without the clarification provided by the Commission in the course of the proceedings before the Court of First Instance, that Court was justified in taking the view that it was clear from the terms of the letter of 6 March 1990 and of the contested decision that the Commission's enquiry was concerned principally with the cooperation code between SEP and Gasunie and that the Statoil contract was of purely ancillary interest.

The third ground of appeal: the Court of First Instance wrongly failed to pay heed to SEP's argument to the effect that, since the Commission had admitted that it was carrying out an enquiry into the Dutch gas market, that enquiry should have been based on Article 12 — rather than Article 11 — of Regulation No 17

36. SEP's contention is that the Commission is in reality investigating the Dutch gas market in general, rather than the relations between SEP and Gasunie. It should therefore proceed under Article 12 of Regulation No 17, rather than Article 11. Article 12(1) empowers the Commission to request 'undertakings in the sector concerned to supply the information necessary for giving effect to the principles formulated in Articles 85 and 86 of the Treaty and for carrying out the duties entrusted to the Commission'. When acting under Article 12 the Commission is still required to state 'the legal basis and the purpose' of a request for information because Article 11(3) is rendered applicable by virtue of Article 12(4). It would not, however, have to refer to a specific alleged infringement but would simply have to indicate that certain circumstances suggest that in the economic sector concerned competition is being restricted or distorted (see Article 12(1)). By purporting to act under Article 11 when it is really acting under Article 12, the Commission is — if I understand SEP's argument correctly — acting unlawfully.

37. The weakness in this argument is that it is difficult to see what advantage the Commission might gain by disguising the true nature of its investigation in the manner alleged. On the contrary, its powers of investigation under Article 12 of Regulation No 17 are, if anything, wider and less fettered than under Article 11.

38. It is of course possible that the Commission might wish to investigate a specific alleged infringement in the gas industry and at the same time carry out a general inquiry into the gas market. If the Commission is able to establish that it is entitled to have access to a document for the purpose of investigating the specific infringement, I do not see how it can lose the right to see the document on the ground that the document is also relevant to the general inquiry. I would therefore dismiss this ground of appeal.

The fourth ground of appeal: the Court of First Instance wrongly applied Article 190 of the Treaty by declaring that the contested decision was sufficiently reasoned

39. This ground of appeal need not detain us for long, since it seems to raise no argument that was not pleaded under the second ground of appeal.

40. SEP complains that the contested decision was based on an ambiguous statement of reasons in so far as the Commission failed to make it clear whether the Statoil contract was itself the subject-matter of the investigation or whether it was of purely ancillary interest in the context of an investigation into the legality of the cooperation code. Hence, the contested decision is contrary to Article 190 of the Treaty, according to SEP, since it does not contain an adequate statement of the reasons on which it is based.

41. It will be clear from what I have said with regard to the second ground of appeal that, while I accept that the Commission created a certain amount of confusion about the subject-matter of its investigation, it was clear from the letter of 6 March 1990 and from the contested decision that the principal subject-matter of the Commission's investigation was the cooperation code and that the Statoil contract was of ancillary interest. It follows that the contested decision cannot be insufficiently reasoned in the manner alleged by SEP.

The fifth ground of appeal: the Court of First Instance did not give sufficient reasons for dismissing SEP's submission that the contested decision was not sufficiently reasoned

42. This ground of appeal simply repeats arguments pleaded under the fourth ground of appeal, which — as I have already observed — repeated arguments pleaded under the second ground of appeal. I do not think it necessary to state for a third time why I am not persuaded by those arguments.

The sixth, seventh and eighth grounds of appeal: the Court of First Instance infringed or misinterpreted Article 20 of Regulation No 17 and gave an incorrect statement of reasons for the finding that the contested decision did not breach the principle of proportionality

43. The final three grounds of appeal overlap considerably and I shall deal with them jointly. Their common theme is that the contested decision breached the principle of proportionality by requiring SEP to disclose to the Commission a confidential document which would then be transmitted to the competent national authorities, including the Directorate General for Competition at the Netherlands Ministry of Economic Affairs; the document was thus likely to find its way into the hands of the officials in the Directorate General for Energy at the same ministry who have responsibility for determining

Gasunie's commercial policy. SEP maintains that it has a legitimate interest in not allowing the persons who determine the commercial policy of its main supplier (Gasunie) to become acquainted with the terms of a contract which SEP concluded with an alternative supplier (Statoil).

44. The Court of First Instance held that the risk of such a breach of confidentiality could be excluded because the Dutch authorities would, like the Commission, be subject to Article 20 of Regulation No 17. According to the Court of First Instance, Article 20 prohibits the Dutch authorities not only from disclosing confidential documents to persons outside the sector of the administration in question but also from circulating such documents within the sector concerned. Thus officials in the Directorate General for Competition would be prohibited from divulging the terms of the Statoil contract to officials in the Directorate General for Energy. The Court also observed that Article 20 of Regulation No 17 prohibited the national authorities to which the Statoil contract might be sent from using information contained in it for the purpose of establishing the commercial policy of Gasunie.

45. As regards the emphasis placed by SEP on the special nature of the present dispute, the Court stated (in paragraph 57) that the same issue was likely to arise whenever an inquiry by the Commission involved the commercial relationship between a private undertaking and a public undertaking or a private company with government participation; such situations, which arose very frequently in practice, did not bestow upon the Commission's inquiry any specific characteristic and could not therefore result in any special factors being taken into account in the application of Regulation No 17.

46. As regards the alleged absence of administrative rules ensuring that confidential information would not circulate between the various directorates of the Netherlands Ministry of Economic Affairs, the Court held that that did not justify the assumption that the Netherlands authorities would fail to comply with their obligations under Article 20 of Regulation No 17.

47. The Court concluded that the restrictions imposed on Member States by Article 20, as regards both the disclosure and the use of information sent to them pursuant to Article 10(1) of Regulation No 17, constituted an adequate safeguard for SEP. It followed that the contested decision did not involve the excessive risk alleged by SEP and did not therefore infringe the principle of proportionality (paragraph 60).

48. SEP directs a number of criticisms against that part of the Court's judgment. First, it contends that Article 20(2) of Regulation No 17 does not contain the prohibition read into by the Court, regarding the circulation of documents within a national authority.

49. Secondly, SEP suggests that Article 20(1) of Regulation No 17, according to which information received as a result of the application of Articles 11 to 14 may be used only for the purpose of the relevant request or investigation, simply means that the national authorities may not commence proceedings against the undertaking concerned on the basis of the information acquired. That limitation cannot help SEP, whose concern is not that the Dutch authorities will use the information for that purpose but simply that they will have access to it and inevitably take it into account when determining the commercial policy of Gasunie.

50. Thirdly, SEP argues that there is a contradiction in the reasoning of the Court of First Instance. In the first part of paragraph 56 of the judgment the Court interprets Article 20 of Regulation No 17 as prohibiting one section of an administrative authority from sending a document to another; in the second part of the same paragraph the Court assumes that the document may properly come to the notice of that other section but that that does not pose any problem since the section in question would be prohibited from making use of the document.

51. Fourthly, SEP contends that the Court was wrong to state that the same problem will arise whenever the Commission's investigation concerns the commercial relations between a private undertaking and a public undertaking. According to SEP, the problem will only arise when the competent authority within the meaning of Regulation No 17 is the same as the authority which determines the policy of the public undertaking.

52. Fifthly, the Court's judgment is insufficiently reasoned because it took no account of SEP's argument to the effect that the Commission infringed the principle of proportionality by immediately demanding disclosure of the Statoil contract instead of first addressing questions to SEP.

53. Sixthly, SEP argues that the Court's judgment was insufficiently reasoned in so far as the Court wrongly considered SEP's argument to be founded on a risk that the Dutch authorities would commit a breach of confidence. SEP insists that its argument was that the Statoil contract might find its way legitimately into the hands of officials of the Directorate General for Energy. In Dutch law there is nothing to prevent officials who work for the same minister from communicating freely with each other if the minister so desires.

54. On the issue of confidentiality, which emerges as the central issue in this case, a difficulty arises which is fundamental to the entire argument, but which it is convenient to mention at this point. In my view, it might have been questioned whether SEP could rely on the issue of confidentiality at all in challenging the Commission's decision, since, as I observed earlier, [4] SEP did not raise the issue with the Commission until after that decision was taken. Consequently, the Commission had no opportunity to deal with the issue in setting out the reasons for

4 — See paragraphs 6 and 7.

its decision. However, the Commission did not object to the issue being raised before the Court of First Instance, nor has it objected to the issue being raised in this appeal. In those circumstances I think that it is appropriate to deal with it.

55. It cannot be doubted that SEP has a legitimate interest in ensuring that the Statoil contract is not seen by the officials within the Dutch Ministry of Economic Affairs who are responsible for determining Gasunie's commercial policy. Gasunie is SEP's main supplier. Statoil is its leading alternative supplier. SEP's negotiating position vis-à-vis Gasunie would obviously be compromised if those who determine Gasunie's commercial policy were familiar with the precise terms of business offered to SEP by Statoil.

56. The factual situation in the present case is atypical in so far as the two principal suppliers of the undertaking which has been asked to disclose documents by the Commission are both State enterprises, one of them being controlled by the government of a Member State. The authors of Regulation No 17 do not appear to have had in mind that type of situation when they drafted the regulation, the terms of which assume that the national authorities are entitled to receive any information disclosed to the Commission by undertakings whose affairs are being investigated.

57. In my view, the regulation should not be construed so as to have the effect of granting a particular national authority access to confidential information which, for imperative reasons of business secrecy, should not be divulged to that authority. Any other interpretation of Regulation No 17 would be incompatible with Article 214 of the Treaty, which requires the institutions and their servants 'not to disclose information of the kind covered by the obligation of professional secrecy, in particular information about undertakings, their business relations or their cost components'.

58. The Court of First Instance took the view that Article 20(2) of Regulation No 17 provides a satisfactory solution to the problem alluded to above. That provision, which implements Article 214 of the Treaty, [5] requires the Commission and the competent authorities of the Member States 'not to disclose information acquired by them as a result of the application of the regulation and of the kind covered by the obligation of professional secrecy'. The Court of First Instance did not construe that provision as prohibiting the Commission from disclosing confidential documents to national authorities; instead it considered that, since Article 20(2) imposed an obligation to respect professional secrecy not only on the Commission but also on the 'competent authorities of the Member States', that provision prevented one branch of the Dutch Ministry of Economic Affairs from disclosing the Statoil contract to another branch of the same ministry.

5 — Case C-67/91 *Asociación Española de Banca Privada* [1992] ECR I-4785.

59. What this means in practice is as follows: The Directorate General for Competition in the Ministry of Economic Affairs is the competent Dutch authority for the purposes of Regulation No 17 and is therefore entitled, under Article 10(1), to receive documents lodged with the Commission for the purpose of establishing infringements of the competition rules of the Treaty. The Directorate General for Energy in the same ministry is not the competent Dutch authority for the purposes of Regulation No 17 and so is not entitled to receive such documents. The Directorate General for Competition would be prohibited by Article 20(2) of Regulation No 17 from disclosing the Statoil contract to the Directorate General for Energy in view of its confidential nature.

60. I do not find the reasoning followed by the Court of First Instance on this point wholly convincing. In the first place, it is not clear that the Directorate General for Energy is not part of the competent authority in the Netherlands for the purposes of Article 10(1) of Regulation No 17. It is for the national law of each Member State to determine which of its authorities is entitled to receive information from the Commission under Article 10(1). SEP asserts in its reply that in the Netherlands the competent authority for competition matters is the Ministry of Economic Affairs acting in conjunction with whatever other ministry is concerned by the case in question. SEP also asserts in its reply that in the event of an investigation into competition in the energy sector the Directorate General for Energy at the Ministry of Economic Affairs would be involved. Those assertions, for which there is some support in an article by Professor K. J. M. Mortelmans, [6] were not challenged by the Commission in its rejoinder.

61. But let us suppose, for the sake of argument, that the somewhat technical argument about the meaning of the term 'competent authorities' in Article 10(1) of Regulation No 17 is resolved in the sense contrary to SEP's assertion (i.e. in the sense that, in the Netherlands Ministry, only the Directorate General for Competition is entitled, as 'competent authority', to receive documents from the Commission under Article 10(1)). It still remains difficult to see how Article 20(2) of Regulation No 17 can guarantee *de facto* that the terms of the Statoil contract will not be disclosed to officials of the Directorate General for Energy. Professor Mortelmans remarks that there are no 'Chinese walls' in the Dutch Ministry of Economic Affairs. [7] Internal rotation of staff takes place and it is therefore possible for an official who had access to confidential documents while assigned to the Directorate General for Competition to be posted to the Directorate General for Energy, where he might find himself helping to determine the commercial policy of Gasunie. Thus even if we assume that the utmost propriety is observed by the officials concerned and that no breach of confidence takes place, it is possible for the Statoil contract to come into the wrong hands through perfectly legitimate channels.

6 — K. J. M. Mortelmans, *Het Ministerie van Economische Zaken: gasbeleid en EEG-mededingingsrecht*, Ars Aequi 1992, p. 277, at pp. 281 and 282.

7 — Op. cit. (note 6), at p. 281.

62. The Court of First Instance sees a solution to that problem in Article 20(1) of Regulation No 17, which provides that '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'. But I do not see how that provision can confer on SEP the protection to which it is entitled in the present case. To say that the officials in the Directorate General for Energy would be precluded by Article 20(1) from 'using' information contained in the Statoil contract for the purpose of formulating the commercial policy of Gasunie is futile; it presupposes that those officials can simply erase the information from their minds. But Article 20(1) does not, and could not, require officials to engage in self-induced amnesia. The Court of Justice recognized that in its judgment in *Asociación Española de Banca Privada*. [8]

63. In that case the Court recognized that the national authorities may take into account information acquired by them under Article 10(1) of Regulation No 17 for the purpose of deciding whether to initiate a procedure under national law, but that those authorities may not rely on such information in the context of a preliminary investigation or to justify a decision taken on the basis of provisions of competition law. It is clear from that judgment that the prohibition contained in Article 20(1) is aimed primarily at reliance on the information in question for evidential purposes in administrative or judicial proceedings; Article 20(1) does not prohibit national authorities from having regard to information when deciding whether to adopt a particular course of action. Thus, if officials in the Directorate General for Energy became acquainted with the terms of the Statoil contract, Article 20(1) could not prevent them from taking such information into account when determining the policy of Gasunie.

64. It follows that the judgment of the Court of First Instance must, in my view, be quashed on the ground that that Court committed an error of law by holding that, in the circumstances of the present case, Article 20(1) and (2) provided a sufficient guarantee that the confidentiality of the Statoil contract would be respected.

65. In view of that finding I shall not examine in detail all the remaining arguments pleaded by SEP. I shall however consider the argument, advanced by SEP as part of its eighth and final ground of appeal, that the Commission infringed the principle of proportionality by immediately demanding disclosure of the Statoil contract instead of first taking steps less detrimental to SEP's interests, such as asking questions.

66. The Commission contends that that argument is inadmissible, in accordance with Article 113(2) of the Rules of Procedure,

8 — Cited in note 5 above, paragraph 39 of the judgment; see also paragraph 26 of my Opinion in that case.

since it modifies, at the appeal stage, the subject-matter of the proceedings before the Court of First Instance. According to the Commission, the argument was not raised by SEP before the Court of First Instance, which explains why the Court did not refer to it in its judgment. In SEP's view, the argument is simply an amplification of the submission alleging an infringement of the principle of proportionality, which was pleaded in its application to the Court of First Instance. SEP contends that such an amplification in the course of the proceedings is permissible according to the case-law of the Court of Justice. [9]

67. The argument does not seem to have been raised expressly in SEP's written pleadings before the Court of First Instance. In its appeal SEP states that it made the point at the hearing before the Court of First Instance, at which stage a new issue could not of course be raised. [10] In my view, the argument that the Commission could have attained the desired aim by less drastic means than those employed may legitimately be regarded as amplification of the argument based on an infringement of the principle of proportionality, rather than as a new issue. Since the argument about the confidentiality of the Statoil contract was presented as an issue of proportionality, it was implicit in that argument that the result pursued by the Commission could be obtained by other means less likely to lead to a breach of confidentiality. The Court's failure to consider the issue of alternative means can perhaps be explained by its conviction that the danger of a breach of confidentiality was in any event minimal on account of the terms of Article 20 of Regulation No 17.

68. In my view, there is much merit in the substance of SEP's complaint. By reason of the confidential nature of the Statoil contract and having regard to the unusually delicate situation that arose in this case, the Commission should — once the issue of confidentiality had been brought to its notice — have shown a greater willingness to allay SEP's fears and to consider means of preventing confidential information from reaching officials in the Directorate General for Energy of the Dutch Ministry of Economic Affairs. Once SEP had made clear its legitimate concern about the confidentiality of the contract, the Commission should have made it clear that it would apply Article 10(1) of Regulation No 17 in such a way as to meet that concern. It was not sufficient to suggest that the contract might prove not to be among 'the most important documents' which are, under that provision, to be transmitted to the national authorities, or that the Commission had a margin of appraisal in the matter.

69. However I do not think that SEP can be right in suggesting that the Commission should have refrained from requiring production of the contract and instead should, for example, have asked questions about it.

9 — Case 306/81 *Verros* v *Parliament* [1983] ECR 1755.

10 — Article 48(2) of the Rules of Procedure of the Court of First Instance.

That suggestion seems to be based on an incorrect view of the effect of Article 10(1) of Regulation No 17. In my view, in cases (which will probably be rare) where the need for commercial confidentiality is established vis-à-vis the national authorities, then the protection of that confidentiality must be regarded not as a limitation on the Commission's power to require the production of documents under Article 11 of Regulation No 17, but as a limitation on the Commission's obligation, under Article 10(1) of the regulation, to transmit documents to the national authorities. Article 10(1) does not impose an absolute obligation to send 'the most important documents' to the national authorities. It must be interpreted in the light of the duty of confidentiality laid down in Article 214 of the Treaty. It cannot therefore be interpreted as imposing on the Commission a duty to commit a breach of confidentiality.

70. Nor does the purpose of Article 10(1) require that it should be so interpreted. The purpose of that provision is explained in the seventh recital in the preamble to the regulation, according to which the Commission, in applying Articles 85 and 86 of the Treaty, is to act in close liaison with the competent authorities of the Member States. In *Asociación Española de Banca Privada* the Court noted (in paragraph 34) that the twin concerns of Article 10(1) are to inform Member States of Community procedures concerning undertakings situated within their territory and to ensure that the Commission is better informed by enabling it to compare the information given by undertakings with information and comments supplied by the Member State concerned. There is no reason to believe that the pursuit of those aims cannot be reconciled with the protection of confidentiality.

71. In my view, in the rare cases where the problem of confidentiality vis-à-vis the national authorities arises, the Commission is entitled to require production of the document but must then consider whether on grounds of confidentiality it would be appropriate to refrain from transmitting the document to the national authorities or to transmit to them an edited version of the document from which the confidential information is deleted. If all other means fail, and if transmission of the entire document seems essential, then the Commission could take a decision setting out the reasons why, notwithstanding the alleged confidentiality, the document should be sent to the national authorities; such a decision would enable the parties affected to challenge the decision and if necessary seek interim measures. But protection of the type of confidentiality claimed in this case cannot in principle be invoked as a limitation on the Commission's power to require production of documents. That would be to protect such confidentiality at the wrong point. An undertaking could perhaps justify refusing to produce a document to the Commission on the ground that it contains information which is confidential vis-à-vis the national authorities if the Commission had made it clear in advance that it would transmit the document regardless: that would show that the Commission intended to act unlawfully by failing to apply the principle of proportionality. That principle requires that the undertaking's interest in confidentiality must be given due weight against the public interest in the documents being seen in their entirety by the national authorities.

72. It is not contended by SEP that the Commission acted unlawfully in the way which, I have suggested, might have entitled SEP to refuse to produce the contract. Nor has the case been argued on the basis of Article 10(1) of Regulation No 17, which seems to me to provide the solution to the problem raised. Since, on the view I take, the judgment of the Court of First Instance must be quashed, and since the approach which I advocate is different from the approach taken by the parties throughout the course of the dispute, it seems formally inescapable that the case should be referred back to the Court of First Instance for judgment under Article 54 of the Statute. From a practical point of view, however, any further proceedings may be unnecessary: on the view I take, the Commission will have established its right to require production of the document in question, while SEP will have established its right to protection, as against the national authorities, of commercially confidential information the disclosure of which could be damaging to it. Any further proceedings, therefore, might be a waste of time and resources, both for the parties and for the Courts.

Costs

73. Since the case must be referred back to the Court of First Instance, costs must be reserved. If a decision on costs were to be taken at this stage, I would consider it appropriate in all the circumstances to order the parties to bear their own costs, in accordance with Articles 69(3) and 122 of the Rules of Procedure.

Conclusion

74. Accordingly, I am of the opinion that the Court should:

1. quash the judgment of the Court of First Instance of 12 December 1991 in Case T-39/90;

2. refer the case back to the Court of First Instance;

3. reserve the costs.