JUDGMENT OF THE COURT OF FIRST INSTANCE (First Chamber)
18 November 1992 *

In Case T-16/91,

Rendo NV and Others, a company incorporated under Netherlands law, whose registered office is in Hoogeveen (Netherlands),

Centraal Overijsselse Nutsbedrijven NV, a company incorporated under Netherlands law, whose registered office is in Almelo (Netherlands),

Regionaal Energiebedrijf Salland NV, a company incorporated under Netherlands law, whose registered office is in Deventer (Netherlands),

represented initially by M. A. Poelman, of the Eindhoven Bar, subsequently by T. R. Ottervanger, of the Rotterdam Bar, with an address for service in Luxembourg at the Chambers of S. Oostvogels, 8 Boulevard Pierre Dupong,

applicants,

v

Commission of the European Communities, represented by B. J. Drijber, of its Legal Service, acting as Agent, with an address for service in Luxembourg at the office of R. Hayder, representing the Legal Service, Wagner Centre, Kirchberg,

defendant,

supported by

Samenwerkende Electriciteitsproduktiebedrijven NV, a company incorporated under Netherlands law, whose registered office is in Arnhem (Netherlands), represented by M. van Empel and O. W. Brouwer, of the Amsterdam Bar, with an address for service in Luxembourg at the Chambers of M. Loesch, 8 Rue Sainte-Zithe,

intervener,

* Language of the case: Dutch.

APPLICATION for the partial annulment of the Commission decision of 16 January 1991 relating to a proceeding under Article 85 of the EEC Treaty (IV/32.732 — IJsselcentrale and Others) (OJ 1991 L 28, p. 32), and for an order requiring the Commission to find that Article 85 has been infringed and the undertakings concerned to terminate the infringement found,

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

composed of: H. Kirschner, President, B. Vesterdorf, R. García-Valdecasas, K. Lenaerts and R. Schintgen, Judges,

Registrar: H. Jung,

having regard to the written procedure and further to the hearing on 5 June 1992,

gives the following

Judgment

Facts

1 This case is concerned with restrictions in force in the Netherlands on the importation and exportation of electricity which arise in part from agreements concluded between electricity supply undertakings and in part from the national legislation governing that sector.

1. *The undertakings concerned*

2 The applicants are local electricity distribution companies in the Netherlands. Their electricity is supplied to them by a regional distribution undertaking, known as IJsselcentrale (or IJsselmij, hereinafter 'IJC').

3 In May 1988, the applicants (or their predecessors in title) made an application to the Commission under Article 3(2) of Council Regulation No 17 of 6 February 1962, First regulation implementing Articles 85 and 86 of the EEC Treaty (OJ, English Special Edition 1959-1962, p. 87, hereinafter 'Regulation No 17'), against, among others, IJC and Samenwerkende Electriciteitsproduktiebedrijven NV (hereinafter 'SEP'), which is intervening in these proceedings. They alleged that various infringements of Articles 85 and 86 of the Treaty had been committed by SEP and the Netherlands electricity generating companies.

4 SEP is a company which was set up in 1949 by the Netherlands electricity generating companies to serve as a vehicle for cooperation. Its tasks under its statutes include operating the high-voltage grid and concluding agreements with foreign electricity undertakings on imports and exports of electricity and the use of international interconnections.

5 As a result of the applicants' complaint, the Commission adopted the contested decision relating to a cooperation agreement (Overeenkomst van Samenwerking, hereinafter 'the OVS') concluded between the electricity generating companies, on the one hand, and SEP, on the other.

2. *The OVS Agreement*

6 The OVS Agreement was concluded on 22 May 1986 between SEP and its shareholders (the predecessors in title of the four present electricity generators in the Netherlands). The agreement was not notified to the Commission.

7 Article 21 of the OVS Agreement restricts imports and exports of electricity to SEP alone and requires the parties to the agreement to stipulate in supply contracts concluded with the undertakings distributing electric power that those undertakings will not import or export electricity. It is that provision which is the subject of the contested decision and of these proceedings.

3. *Relevant national legislation*

8 In the grounds of the contested decision, the Commission observes that the Netherlands legislation in force when the OVS was concluded did not prohibit undertakings other than suppliers from importing electricity themselves but made such imports subject to authorization, which in principle could be obtained by anyone. The contested decision does not indicate whether there was any legislation on exports of electricity.

9 On 8 December 1989, most of the provisions of the new Netherlands Electricity Law (Elektriciteitswet 1989) entered into force. According to Article 2 of that Law, the licensees (that is to say, the four electricity generating undertakings) and the 'designated company' (a company designated by the Minister of Economic Affairs under Article 8 of the Law in order to carry out certain tasks laid down by the Law) are jointly to ensure the reliable and efficient operation of the national public electricity supply. By Ministerial Order of 20 March 1990, SEP was appointed as the designated company.

10 Article 34 of the Electricity Law, which entered into force on 1 July 1990, provides that the 'designated company' has the sole right to import electric power with a view to public supply (with the exception of electricity of under 500 volts). The Law therefore prohibits the distribution companies from importing electricity with a view to public supply. According to the contested decision, however, it follows from Article 34 that certain final consumers may import electric power for their own consumption and no longer need authorization to do so. Under Article 47, undertakings operating supply lines are obliged to make them available to anyone who applies to transmit electricity imported in this way.

11 The 1989 Electricity Law does not govern exports of electricity. The Commission assumes as a result — in accordance with the information provided by the Netherlands Government — that both distributors and final consumers are free to export. However, unlike in the case of imports, the Law does not impose any obligation to transmit electricity for export.

4. *The administrative procedure*

12 The origin of the complaint lodged with the Commission by the applicants in May 1988 lies in civil proceedings concerning the imposition by IJC of an import and export ban coupled with an exclusive purchasing obligation, and the imposition of a charge, known as the extra cost equalization charge (egalisatiekostentoeslag). The complaint was directed against the following:

1. the import ban expressly laid down both in the 1971 General SEP Agreement (Article 2) and in the 1986 Cooperation Agreement ('the OVS') (Article 21);

2. the exclusive purchasing obligation deriving from the agreements between the complainants and IJC, which, according to the complainants, is a consequence of, *inter alia*, the relevant provisions of the OVS;

3. IJC's power to determine prices unilaterally and the equalization charge imposed unilaterally on the complainants.

13 By letter dated 14 June 1989, signed by a head of division in the Directorate-General for Competition ('DG IV'), the Commission informed the applicants that it had sent a statement of objections to SEP and the other parties to the OVS on 8 June 1989. The letter made it clear that the procedure did not deal with the extra cost equalization charge, since the charge did not have an appreciable effect on trade between Member States.

5. *The contested decision*

14 The subject of the contested decision is Article 21 of the OVS in so far as it relates to imports by private consumers, or is applied by SEP to such imports, and combined with SEP's control of the interconnections has the effect of restricting imports and exports by those consumers and exports by distributors (last

paragraph of section 20). It therefore deals with the first two allegations made by the applicants in their complaint to the Commission. On the other hand, the decision is not concerned with the third allegation made in the complaint, relating to the extra cost equalization charge imposed by IJC (penultimate paragraph of section 1).

15 In the contested decision, the Commission finds, in the first place, that the OVS is an agreement between undertakings within the meaning of Article 85(1) of the Treaty and that the prohibition of imports and exports of electricity by undertakings other than SEP restricts competition.

16 Secondly, as regards the effects of the 1989 Electricity Law on the OVS, the Commission notes that SEP takes the view that the new law has not altered the scope of Article 21 of the OVS in any way. As for imports of electricity, it observes that whereas the Law prohibits anyone other than SEP from importing electric power with a view to public supply, imports by final consumers for their own consumption are unrestricted. It infers from this that Article 21 of the OVS applies in that respect to an area not covered by the Law. As for exports, the Commission notes that the Netherlands Government has informed it that they are completely unrestricted in the case of both the distribution companies and private consumers and that this applies whether the electricity is supplied from the public grid or autogenerated. Unlike in the case of imports, to the extent to which they are permitted, the Electricity Law does not impose an obligation to transmit power for export. The Commission emphasizes that a potential exporter must therefore reach agreement with SEP on the use of the high-voltage grid for that purpose and the way in which SEP plays that role will depend on the way in which it applies Article 21 of the OVS. The Commission concludes from this set of findings that the application of Article 21 of the OVS under the rules of the new law continues to infringe Article 85.

17 Thirdly, the Commission examines the question whether Article 90(2) of the Treaty precludes the application of Article 85(1) in this case.

18 In that connection, it finds that both SEP and the generating companies participating therein are undertakings entrusted with the operation of services of general economic interest. Nevertheless, it considers, as regards imports and exports by private final consumers, that the application of Article 85 to the OVS would not obstruct those undertakings in the performance of the tasks assigned to them. It takes the view that the absolute control over imports and exports given to SEP by Article 21 of the OVS is not indispensable to the performance of its general tasks.

19 In contrast, as far as concerns imports for public supply, the Commission finds that the ban on imports by the generating and distribution companies otherwise than through SEP is now laid down by Article 34 of the 1989 Electricity Law.

20 It draws the following conclusion:

'The present proceeding is a proceeding under Regulation No 17, and the Commission will not pass judgment here on the question whether such restriction of imports is justified for the purposes of Article 90(2) of the Treaty. To do so would be to anticipate the question whether the new law is itself compatible with the Treaty, and that is outside the scope of this proceeding' (section 50 of the decision).

21 For the same reason, the Commission states that it can make no judgment on the export ban imposed on the generating companies in the field of public supply. Such a ban can be inferred from the supply obligation imposed on them by Article 11 of the 1989 Electricity Law. That provision obliges those companies to supply their electricity only to SEP and to supply exclusively to the distribution companies the electricity supplied to them by SEP (first paragraph of section 51 of the decision).

22 Lastly, as for the ban on exports imposed on the distribution companies by Article 21 of the OVS both in and outside the field of public supply, the Commission considers that it conflicts with the scheme of the new law, under which exports are unrestricted, and that it is therefore doubtful whether the parties to the OVS can retain it and continue to apply it. The Commission takes the view that if the ban should nevertheless continue to be imposed, it cannot be justified by Article 90(2) (sections 51, second and third paragraphs, and 52 of the decision).

23 After finding that exemption under Article 85(3) could not be envisaged, the Commission adopted the contested decision, the operative part of which provides, *inter alia*, as follows:

'*Article 1*

Article 21 of the Cooperation Agreement concluded on 22 May 1986 by the predecessors of the present four electricity generating companies on the one hand and by NV Samenwerkende Elektriciteitsproduktiebedrijven on the other, as applied in conjunction with the control and influence in fact exercised over the international supply of electricity, constitutes an infringement of Article 85(1) of the Treaty in so far as it has as its object or effect the restriction of imports by private industrial consumers and of exports of production outside the field of public supply, by distributors and private industrial consumers, including autogenerators.

Article 2

The companies referred to in Article 3 shall take all necessary steps to bring the infringement referred to in Article 1 to an end. Within three months of reception of this decision they shall submit to the Commission proposals for the ending of the infringement.'

According to Article 3 of the decision, SEP and the four Netherlands electricity generators constitute the addressees of the decision, which was also notified to the applicants.

Procedure

24 On 14 March 1991, the applicants brought these proceedings for the partial annulment of the Commission's decision. In contrast, the parties to the OVS did not challenge the decision.

25 The written procedure followed the normal course. At its request, received at the Registry on 16 July 1991, SEP was given leave to intervene in support of the form of order sought by the defendant by order of the President of the First Chamber of 8 October 1991.

26 On 20 March 1991, the Commission decided to bring infringement proceedings under Article 169 of the Treaty against nine Member States, including the Netherlands, relating to public monopolies in the sector of trade in electricity. The aim of the proceedings is in particular to examine those monopolies in the light of Article 37 of the Treaty. On 9 August 1991, formal notice was given to the Netherlands Government in this connection.

27 On 20 November 1991, the Commission sent the applicants a letter signed by a director in DG IV stating that 'no action can at present be taken on your complaint ...'. In that letter, the Commission informed the applicants that the equalization charge, against which the original complaint was essentially directed, could not be the subject of a procedure based on Article 85 or Article 86 of the Treaty, or both, on the ground that it did not have a significant effect on trade between Member States. As for the prohibition on imports and exports of electricity in the field of public supply, the Commission referred to the contested decision in order to justify its having refrained from giving a ruling and informed the applicants of the stage reached by the proceedings brought under Article 169 of the Treaty. According to that letter, the contested decision can be construed as a partial rejection of

the applicants' complaint as regards the restrictions on the importation of electricity in the field of public supply during the period before the 1989 Electricity Law entered into force. As for the period after the Law entered into force, the Commission stated that the complaint was still being considered on the basis of Article 37 of the Treaty, but the provisions of Regulation No 17 were not being applied. It stated that it was not possible as matters stood to anticipate the outcome of that examination. On 17 January 1992, the applicants brought an action against that letter (Case T-2/92 *Rendo II*).

28 Upon hearing the report of the Judge-Rapporteur, the Court decided to open the oral procedure without any preparatory inquiry. However, it asked the Commission to produce a copy of the complaint and of its correspondence with the applicants on this subject; it also asked the two parties to give their views on certain questions at the hearing.

29 At the hearing on 5 June 1992, the parties were heard in oral argument and answered questions put by the Court. At the end of the hearing, the President brought the oral procedure to a close.

30 The applicants claim that the Court should:

— annul the Commission's decision of 16 January 1991 in so far as it does not rule on the application of Article 21 of the OVS to imports and exports by the distribution companies, including the applicants, in the field of the public supply of electricity;

— order the Commission to declare at this stage, in a decision pursuant to Article 3(1) of Regulation No 17, that Article 21 of the agreement referred to in Article 1 of the contested decision, as applied in conjunction with the control and influence exercised in practice over the international supply of electricity, also constitutes an infringement of Article 85(l) of the Treaty in so far as it has as its object or effect the restriction of imports and exports by distribution compa-

nies in the field of public supply, and to order the companies listed in Article 3 of the contested decision to put an end to the infringements found;

— make such other dispositions as the Court may deem appropriate;

— order the Commission to pay the costs.

31 The Commission contends that the Court should:

— dismiss the application;

— order the applicants jointly and severally to pay the costs.

32 The intervener claims that the Court should:

— dismiss the application;

— order the applicants to pay the costs, including those of the intervener.

Admissibility

1. *The first head of claim*

33 In the first head of the form of order sought, the applicants ask that the Commission decision be annulled in so far as it does not rule on the prohibition by Article

21 of the OVS on imports and exports by distribution companies, including the applicants, in the field of the public supply of electricity. Since the facts of the case are not the same as regards imports and exports, the admissibility of the application should be considered first with regard to imports and then with regard to exports of electricity.

(a) No ruling on the prohibition of imports of electricity by the distribution companies

Arguments of the parties

34 The Commission considers that the contested decision contains a partial, implied rejection of the applicants' complaint, in particular in so far as, contrary to that which the applicants had sought in their complaint, it did not make a finding under Article 3 of Regulation No 17 against the prohibition on distributors' importing electricity as laid down in Article 21 of the OVS before the Netherlands Electricity Law entered into effect. On the other hand, it stated in answer to questions put by the Court at the hearing that it considered itself to have reserved its position with regard to the period subsequent to the entry into force of that Law, with the result that the file was still open in that regard.

35 The intervener considers that the Commission reserved its position in the contested decision both on the period prior to the entry into force of the Electricity Law and on the subsequent period. In its view, even a decision finding that Article 21 of the OVS infringed competition law prior to the entry into force of the Electricity Law would have entailed an assessment of the compatibility of that Law with Community law. It is opposed to drawing a distinction between those two periods and points out that the decision itself does not do so. In addition, SEP takes the view that a decision imposing a prohibition, such as the contested decision, cannot be interpreted as embodying an implied rejection of a complaint.

36 In the reply, the applicants stress the interest they have in establishing complete clarity as to the legal situation prior to the entry into force of the Electricity Law. In that connection, they refer to the proceedings pending before the national courts.

37 In answer to questions from the Court, the applicants stated that the contested decision has to be interpreted as an implied rejection of their complaint as regards both the period before and the period after the Electricity Law entered into force. They deny that the Commission reserved its decision and rely on the aforementioned letter of 20 November 1991 in arguing that the file opened pursuant to Regulation No 17 has been closed.

38 In order to show that the contested decision is of direct and individual concern to them, they argue that their legal position is different in relation to proceedings under Articles 169 and 37 of the Treaty than it is in a procedure pursuant to Regulation No 17.

Findings of the Court

39 The Court observes that, under Article 113 of its Rules of Procedure, it may at any time of its own motion consider whether there exists a complete bar to proceeding with a case. The existence of the measure whose annulment is sought under Article 173 of the Treaty is an essential requirement for admissibility, the absence of which has been considered by the Court of Justice and the Court of First Instance of their own motion on a number of occasions (order of the Court of Justice in Case 248/86 *Brüggemann* v *Economic and Social Committee* [1987] ECR 3963, and judgment of the Court of Justice in Case 78/85 *Group of the European Right* v *Parliament* [1986] ECR 1753, at 1757; judgment of the Court of First Instance in Case T-64/89 *Automec* v *Commission* [1990] ECR II-367, at II-381, '*Automec I*').

40 It should therefore be considered whether the contested decision is a measure against which an action for annulment will lie in so far as the Commission refrained from ruling on the prohibition on importing electricity in the field of public supply. As the Court of Justice and the Court of First Instance have consistently held,

it is necessary to that end to establish whether that omission had binding legal effects capable of affecting the interests of the applicants by bringing about a distinct change in their legal position (see, for example, the judgments of the Court of First Instance in *Automec I*, cited above, and in Case T-116/89 *Prodifarma* v *Commission* [1990] ECR II-843, at II-860).

41 The Court notes that the operative part of the contested decision finds that there has been an infringement of Article 85 of the Treaty by SEP and the four electricity generators and orders them to bring that infringement to an end. In contrast, neither the operative part nor the grounds of the contested decision expressly and definitively reject the applicants' complaint as regards the import restrictions imposed on the distribution companies.

42 It should, however, be considered whether a decision on the applicants' complaint is implicit in the statement in section 50 of the decision that the Commission would not pass judgment in the procedure under Regulation No 17 on the application of Article 90(2) of the Treaty to those restrictions.

43 In order to determine the meaning and scope of that statement, account must be taken, on the one hand, of the reasons given by the Commission and, on the other, of its factual context. Since the statement refers only to the period subsequent to the entry into force of the 1989 Electricity Law, it should be examined first whether a decision exists in relation to that period and next whether a decision exists for the preceding period.

44 As regards the period after the Law entered into force, the Commission states, as the reason for its not giving a ruling, that the ban on imports of electricity in the field of public supply otherwise than through SEP is now laid down in Article 34 of the Electricity Law and that it does not wish to anticipate the question whether the new law is compatible with the Treaty, since that would be outside the scope of the procedure initiated under Regulation No 17, which is still in progress.

45 The meaning of that reason is brought into closer focus by the fact that, some two months after the date of the contested decision, the Commission initiated proceedings under Article 169 of the Treaty against the Kingdom of the Netherlands and other Member States relating to public monopolies in the sector of trade in electricity. Consequently, the contested decision was adopted at a time when the Commission already envisaged initiating proceedings against certain Member States for failure to fulfil their obligations.

46 The Court considers that in those circumstances section 50 of the contested decision must be interpreted as referring by implication to proceedings under Article 169 of the Treaty with a view, *inter alia*, to assessing the compatibility of the 1989 Electricity Law, in particular the import restrictions laid down therein, with the provisions of the Treaty.

47 The Commission is thus expressing the view that consideration of that question ought to be left to proceedings for failure by Member States to fulfil their obligations, the outcome of which will determine the assessment to be made, in the light of Article 90(2) of the Treaty, of the corresponding restrictions embodied in the OVS.

48 Consequently, in its decision the Commission evinces the intention not to pursue the procedure initiated under Regulation No 17 as regards the prohibition on the importation of electricity in the field of public supply inasmuch as that prohibition is covered by the new law, and to defer consideration of that issue until the proceedings which are to be brought against the Kingdom of the Netherlands under Article 169 of the Treaty.

49 That deferral is not tantamount to a decision definitively rejecting a complaint and closing the file of the sort which has been taken on many occasions in practice by the Commission and is recognized in the case-law (see, for example, the judgments of the Court of Justice in Case 210/81 *Demo-Studio Schmidt* v *Commission* [1983] ECR 3045, in Case 298/83 *CICCE* v *Commission* [1985] ECR 1105, and in Joined Cases 142/84 and 156/84 *BAT* v *Commission* [1987] ECR 4487). Such decisions

closing the file are characterized by the fact that they close the investigation, (may) contain an assessment of the agreements in question, and prevent the complainants from requiring the reopening of the investigation unless they put forward new evidence (see the judgment in *BAT* v *Commission*, cited above, in particular at 4571).

50 In this case, there is nothing to prevent the Commission from continuing the procedure initiated under Regulation No 17 and Commission Regulation No 99/63/EEC of 25 July 1963 on the hearings provided for in Article 19(1) and (2) of Council Regulation No 17 (OJ, English Special Edition 1963-1964, p. 47) once the proceedings brought under Article 169 of the Treaty have come to an end. What is more, the Commission has not yet decided what action it intends to take on the complaint at that time.

51 However, even though the applicants' complaint is thus pending before the Commission, deferral of consideration of the Electricity Law until proceedings are brought under Article 169 of the Treaty is definitive in that respect and is therefore capable of affecting the applicants' legal position from the procedural point of view.

52 The procedural position of parties who have submitted a complaint to the Commission is fundamentally different in the context of proceedings under Article 169 of the Treaty than it is in the context of a procedure under Regulation No 17. In the case of a procedure initiated under that regulation, the complainants have procedural rights which are clearly defined by Regulation No 99/63, notably the right to be informed of the reasons for which the Commission intends not to uphold their complaint and the right to submit observations in that connection. It addition, they are entitled to judicial review of the decision adopted by the Commission at the end of that procedure (see the judgment of the Court of Justice in Case 26/76 *Metro* v *Commission* [1977] ECR 1875, at 1901). In contrast, in the case of proceedings under Article 169 of the Treaty, persons who have lodged a complaint do not have procedural rights enabling them to require the Commission to inform them and give them a hearing, nor are they necessarily entitled to bring an action before the Community judicature against the Commission's decision closing the file on their complaint (see, for example, the judgment of the Court of Justice in Case C-87/89 *Sonito* v *Commission* [1990] ECR I-1981).

53 Since the Commission's deferral has the effect of interrupting the procedure initiated under Regulation No 17 for a considerable period, it must be stated that consideration of some of the issues raised by the applicants in their complaint, concerning imports of electricity, has been taken out of that procedure, in which the applicants have specific procedural rights, and left to proceedings under Article 169 of the Treaty in which the applicants have no such rights.

54 Whilst the procedure under Regulation No 17 is held over, the complainants will be deprived of the effective exercise of their procedural rights. The Commission has clearly intimated that, in its view, until such time as the proceedings brought under Article 169 have been concluded, it will not have at its disposal information which it considers to be necessary in order to determine whether or not to uphold the complaint in so far as it relates to the restrictions on imports provided for in Article 21 of the OVS, which are identical to those laid down by the Electricity Law.

55 Consequently, the statement in section 50 of the decision adopted by the Commission, according to which it intends to refrain from considering the import restrictions in so far as they ensue at present from Article 34 of the Electricity Law, has had legal effects in that it affects the applicants' procedural rights and therefore constitutes a decision in that respect.

56 It follows from the foregoing that the contested decision, which, according to Article 3 thereof, was not addressed to the applicants, is of direct and individual concern to them within the meaning of the second paragraph of Article 173 of the Treaty in so far as their procedural rights have been affected.

57 Consequently, the application is admissible in so far as it seeks the annulment of the Commission's decision to refrain from ruling on the import restrictions imposed on the distribution undertakings by Article 21 of the OVS as regards the period subsequent to the entry into force of the Electricity Law.

58 As regards the period prior to the entry into force of the Electricity Law, the contested decision contains no indication as to what action the Commission intends to take on the complaint in so far as it relates to the import restrictions arising under Article 21 of the OVS alone. It neither definitively rejects the allegations relating thereto nor in any way defers consideration of those restrictions for other proceedings.

59 Moreover, although the contested decision was adopted as a result of the applicants' complaint, the subject-matter overlaps only to some extent. On the one hand, the Commission has considered allegations which were not raised by the applicants; on the other, it has dealt with only some of the allegations actually raised. Thus, neither the equalization charge nor the allegations that Article 86 of the Treaty has been infringed are subjected to legal appraisal in the decision.

60 Accordingly, the contested decision cannot be construed as a response to aspects of the complaint which are not mentioned either in the statement of reasons or in the operative part of the decision as approved by the Commission.

61 Consequently, the Court finds that the contested decision does not rule at all on the import restrictions which were applicable in the period before the Electricity Law came into force. It therefore had no legal effects in that respect and to that extent there is no decision of the Commission.

62 The application must therefore be dismissed as inadmissible in so far as it seeks the annulment of an alleged Commission decision refraining from ruling on the import restrictions applicable during that period.

(b) No ruling on the prohibition of exports of electricity by the distribution companies

Arguments of the parties

63 Although the Commission did not make any submissions during the written procedure on the admissibility of this aspect of the application, it stated at the hearing, in answer to questions which the Court had put to it beforehand, that it considered it to be inadmissible. In the Commission's view, the admissibility of the application depends on the subject-matter of the applicants' complaint. Since the complaint did not relate to export restrictions, the Commission considers that either the applicants are not directly and individually concerned by that aspect of the contested decision or they have no *locus standi*. In answer to questions put by the Court at the hearing, the Commission added that in its decision it reserved its position on the question of exports by distribution companies in the field of public supply. It further claimed that the fact that it had refrained from ruling on this issue did not affect the applicants' legal position in any way.

64 In answer to the Court's questions, the intervener stated that, in its view, the Commission had reserved its position on the question of exports and the fact that it had refrained from giving a ruling on that matter could not therefore be regarded as a decision. In the alternative, it argued that any such decision would not be of direct and individual concern to the applicants, since they did not mention exports in their complaint.

65 According to the applicants, the contested decision embodies a refusal to take a decision on the ban imposed on their exporting electricity. They concede that their complaint did not expressly mention exports, but nevertheless consider that the decision, taken as a whole, has its origin in their complaint and that this fact is such as to distinguish them from the other distribution companies. They further point out that they are mentioned by name in the body of the decision.

Findings of the Court

66 The Court observes that, in section 51 of the contested decision, the Commission states that 'again' no judgment will be made on the export ban imposed on generating companies in the field of public supply. That form of words might herald recourse to proceedings under Article 169 of the Treaty, as in the case of the import restrictions (see paragraph 46 et seq. above).

67 However, as far as the ban on exports by distribution companies — and thus on the applicants — is concerned, the decision finds in sections 51, 52 and 54 that that prohibition is contrary to Article 85(1) of the Treaty and cannot be justified under Article 90(2) of the Treaty. Consequently, in this area the decision cannot be construed as heralding recourse to proceedings under Article 169 of the Treaty.

68 However, Article 1 of the operative part of the contested decision merely finds that there has been an infringement only as regards exports of production outside the field of public supply. It is only that infringement which the parties to the OVS must bring to an end in accordance with Article 2 of the decision.

69 Accordingly, it is necessary to consider whether it can be inferred from the discrepancy between the operative part of the contested decision, on the one hand, and the statement of reasons, on the other, that the Commission adopted a decision relating to the ban on exports imposed on distribution companies in the field of public supply. From this point of view, it is sufficient to observe that, even though the contested decision contains, in its statement of reasons, the outcome of a legal assessment, that outcome is not reiterated in the operative part. It must therefore be held that the Commission did not draw any conclusions from its legal analysis and hence did not take any decision on that point.

70 Consequently, the application must be dismissed as inadmissible in so far as it seeks the annulment of an alleged decision on the part of the Commission to refrain from ruling on exports made by distribution companies in the field of public supply.

71 In any event, moreover, if the operative part of the decision had to be construed as a decision to refrain from finding an infringement with regard to the exports in question, it would have to be considered whether such a decision could be of direct and individual concern to the applicants. The applicants' complaint was not directed against the export restrictions resulting from the OVS. Consequently, in that context, the applicants did not have the procedural rights laid down for complainants by Regulations Nos 17 and 99/63. Accordingly, they cannot be considered to be directly and individually concerned, by reason of certain procedural rights specific to them, by any decision concerning the restrictions on electricity exports.

72 In arguing that they are mentioned by name in the contested decision, the applicants relied on case-law of the Court of Justice according to which undertakings which were identified in the measure which they seek to contest or concerned by the preliminary investigations may be directly and individually concerned by that measure (see the judgment in Joined Cases 239/82 and 275/82 *Allied Corporation* v *Commission* [1984] ECR 1005, at 1030). That case-law relates above all to actions brought against measures introducing anti-dumping duties by producers or exporters whose individual conduct is addressed by the contested measure.

73 However, the fact that an undertaking is identified in such a measure does not necessarily authorize it to apply for the annulment of that measure in its entirety. Thus, a regulation imposing different anti-dumping duties on a series of traders is of individual concern to any one of them only in respect of those provisions which impose on that trader a specific anti-dumping duty and not in respect of those provisions which impose anti-dumping duties on other undertakings (see, for example, the judgments of the Court of Justice in Case C-174/87 *Ricoh* v *Council* [1992] ECR I-1335 and in Case C-156/87 *Gestetner Holdings* v *Council and Commission* [1990] ECR I-781, paragraph 12).

74 In this case, the applicants were identified in the contested decision in their capacity as complainants. Yet that is not sufficient for them to be regarded as being individually concerned by those parts of the contested decision which do not deal with the allegations made in their complaint.

75 Consequently, it must be held that the applicants could be affected by a decision on the export restrictions only in their capacity as electricity distribution undertakings in the Netherlands. Accordingly, such a decision would only be of concern to them on the same footing as any other economic operator carrying on that activity. As a result, a Commission decision not requiring the parties to the OVS to bring to an end the export restrictions which ensue from that agreement for distribution undertakings in the field of public supply would not be of individual concern to the applicants. Their application must therefore be dismissed as inadmissible in any case, even if the contested measure could be construed as a Commission decision on the restrictions in question.

2. *The second head of claim*

Arguments of the parties

76 The Commission and the intervener consider that the second head of the form of order sought by the applicants — namely that the Court should order the Commission to find that Article 85(1) of the Treaty has been infringed and the parties to the agreement to bring that infringement to an end — is inadmissible, since the Court has no power to issue orders to the Commission.

Findings of the Court

77 The Court has no power to issue orders in the context of judicial review proceedings pursuant to Article 173 of the Treaty. Consequently, this head of claim must be rejected as inadmissible.

78 It follows from the whole of the foregoing that the application is admissible only in so far as it seeks the annulment of the decision to suspend the procedure initiated under Regulation No 17 as regards the import restrictions imposed on electricity distributors following the entry into force of the Electricity Law. The remainder of the application must be dismissed as inadmissible.

Substance

79 In their application, the applicants set out their allegations in two parts. In the first part, they relied on infringement of the obligation to provide a statement of reasons prescribed by Article 190 of the Treaty and infringement of essential procedural requirements. In the second, they alleged infringement of Article 85(1) and Article 155 of the Treaty, and of Article 1 and Article 3(1) of Regulation No 17, and breach of general principles of Community law, in particular the principle of legal certainty and the principle that due care must be shown and that measures must be carefully prepared (zorgvuldigheidsbeginsel). In their response to the observations submitted by the intervener, the applicants argued that they had accordingly raised seven pleas alleging:

(1) infringement of Article 190 of the Treaty;

(2) infringement of essential procedural requirements — Article 90(2) was mentioned in connection with this plea;

(3) infringement of Article 85(1) in conjunction with Article 90(2);

(4) infringement of Article 1 and Article 3(1) of Regulation No 17;

(5) infringement of Article 155 of the Treaty;

(6) breach of general principles of Community law in general and,

(7) in particular, breach of the principles of legal certainty and due care (zorgvuldigheidsbeginsel).

80 The Court considers that in fact there are three distinct pleas. The first alleges infringement of Community competition law and of certain general legal principles. There is, in the Court's opinion, no need for the subdivision into five pleas put forward by the applicants in their response to the intervener's observations, since separate consideration of the various allegations listed by the applicants as items 3 to 7 would result in artificially divided and fragmented assessments being made. As for the second plea, it alleges infringement of Article 190 of the Treaty, whereas the third is based on infringement of essential procedural requirements, more particularly infringement of Article 6 of Regulation No 99/63, as alleged in the reply.

1. *Plea alleging infringement of Community competition law and of general principles of law*

Arguments of the parties

81 In this plea, the applicants argue essentially that the Commission was obliged to find that the import restrictions resulting from the OVS agreement infringe Article 85(1) of the Treaty and to take a decision prohibiting them. They maintain that the Commission failed to fulfil that obligation.

82 In the application, the applicants state that the fact that the Commission refrained from giving a ruling on Article 21 of the OVS as regards the field of public supply is contrary to the spirit of the case-law of the Court of Justice, according to which Article 5 of the Treaty requires the Member States not to adopt measures liable to deprive the rules on competition of their effectiveness. In their view, it follows from that case-law that the fact that Article 34 of the Electricity Law now prohibits imports of electricity for public supply otherwise than through SEP does not preclude the applicability of Article 85.

83 In the reply, the applicants amplified that plea by stating that once the Commission had found an infringement of Article 85(1), it was obliged to take a 'negative decision' unless it decided — giving proper reasons for its assessment — that the conduct in question was justified under Article 85(3) or Article 90(2).

84 In the alternative, they submit that the conditions for the application of Article 90(2) of the Treaty are not fulfilled in this case. They argue that the fact that a Member State has adopted legislative provisions more or less identical to anti-competitive provisions embodied in an agreement is not sufficient to justify the application of Article 90(2). They are surprised that the Commission should 'seem to back down' when a Member State confirms, as it were, by legislation an agreement which moreover continues to exist. They add that an absolute ban on imports is not essential in order to guarantee that SEP will be able properly to perform the specific task assigned to it.

85 The applicants accuse the Commission of lacking the courage to act on the consequences of its finding that Article 85(1) had been infringed. They refer to the approach which they maintain the Commission adopted in the Guidelines on the application of EEC competition rules in the telecommunications sector (OJ 1991 C 233, p. 2, section 23), according to which the Commission has exclusive competence to determine whether Article 90(2) applies, in order to argue that Article 21 of the OVS is null and void in so far as it gives rise to the import restrictions imposed on the distribution companies.

86 Lastly, the applicants argue that the Commission employed a legal construct which is contrary to the Treaty by taking the view that the import restrictions entailed by Article 21 of the OVS are 'provisionally justified' and hence (provisionally) valid.

87 The Commission explains, by way of a preliminary remark, that what had made it possible for the restrictions on imports and exports of electricity to be examined in a procedure under Regulation No 17 was that the OVS was an agreement between undertakings within the meaning of Article 85(1). It points out, however, that restrictions of this type exist in most Member States and that, in parallel to the appraisal which it carried out under Article 85 of the Treaty, it examined the situation in each Member State, and this included the Netherlands Electricity Law. The Commission states that, in its view, the procedure initiated against the SEP and the generating companies did not constitute an appropriate frame for it to give a ruling on one or more of the provisions of that new law. It was for that reason that it had not sought to anticipate in the contested decision the question whether the Law, in particular Article 34 thereof, was compatible with Community law.

88 Next, the Commission points to the discretion which it enjoys in the performance of its tasks and argues that it is obliged neither to bring an action before the Court under Article 169 of the Treaty where it considers that a Member State has failed to fulfil its obligations under the Treaty nor to make a finding that the competition rules have been infringed and to order the infringement to be brought to an end when so requested by a complainant.

89 The Commission argues that the Court's case-law on national measures depriving Articles 85 and 86 of the Treaty of their effectiveness is not relevant to this case, since the procedure based on Regulation No 17, under which the contested measure was taken, covers undertakings only and not Member States. The Commission therefore considers that it was not entitled in the procedure in question to find that Article 34 of the Electricity Law was contrary to Articles 5 and 85 of the Treaty. It adds that the applicants have not lodged a complaint against the Netherlands alleging that Article 34 of the Electricity Law is incompatible with Community law and have not claimed that the Netherlands Government encouraged the generating undertakings to adopt Article 21 of the OVS.

90 The Commission rejects the charge that it merely adopts a passive role when a Member State endorses a restrictive agreement by means of a law, pointing out that it has initiated proceedings under Article 169 of the Treaty against several Member States, including the Netherlands. In addition, it maintains that the case-law on

Articles 3(f), 5 and 85 of the Treaty is not applicable in this case on the ground that Article 90 constitutes a *lex specialis* in relation to Article 5 of the Treaty.

91 The Commission goes on to argue that the allegation that it was bound to take a decision imposing a prohibition, given that it had found an infringement of Article 85(1), was out of time. In its view, this is also true of the allegation that it failed to find that the requirements of Article 90(2) of the Treaty had not been satisfied.

92 In response to that allegation, the Commission further argues that it was not bound to make a definitive assessment on the basis of Article 90(2), but has a discretion which it exercised in this case by initiating proceedings under Article 169 of the Treaty.

93 The intervener relies on the discretion of the Commission, whose competence in the sphere of competition policy means that it is entitled to, and must have, complete freedom to decide whether it is appropriate to make a finding that the competition rules have been infringed.

94 It considers that any assessment by the Commission of the prohibition imposed by the OVS on distribution undertakings' importing and exporting electricity would necessarily involve an assessment of the Electricity Law. Consequently, in its view, it makes sense first to wait until an assessment has been made with regard to Article 34 of that Law. It argues that the Commission cannot in any case order it to bring to an end the restrictions embodied in the OVS which correspond to the prohibition laid down in Article 34 of the Law because it cannot require it to contravene a national law.

95 The intervener interprets the decision as meaning that the Commission has not ruled in the procedure initiated under Regulation No 17 on the question whether the prohibition imposed on the distribution undertakings' importing electricity in

the field of public supply was justified under Article 90(2) of the Treaty. It takes the view that, until such time as the question whether Article 34 of the Electricity Law is compatible with the Treaty has been answered, it is not for the Commission to rule on the applicability of Article 90(2) of the Treaty and on whether Article 85(1) has been infringed.

Findings of the Court

96 As far as the admissibility of this plea is concerned, the Court observes that the applicants had already argued in the application that the Commission's refraining from ruling on Article 21 of the OVS as regards the field of public supply was unjustified and that, as a result, the Commission infringed, *inter alia*, Article 3(1) of Regulation No 17 and Article 155 of the Treaty. By invoking those two provisions the applicants accused the Commission by implication of failing to fulfil its obligations under Regulation No 17 in connection with the application of competition law. Accordingly, the allegations raised in the reply to the effect that the Commission infringed an alleged obligation to take a decision imposing a prohibition do not constitute new pleas, but supplementary arguments supporting the plea raised in the application alleging that competition law has been infringed.

97 As to whether this plea is well founded, it should be recalled that the Commission refrained from ruling on whether the import restrictions at issue are justified under Article 90(2) of the Treaty on the ground that this would anticipate the question whether the new law was compatible with the Treaty, which is not the object of the procedure in question. The Commission therefore evinced its intention to defer consideration of this issue pending the initiation of proceedings under Article 169 of the Treaty, which, admittedly, were not commenced until after the contested decision was adopted. In the applicants' view, that decision constitutes a failure on the part of the Commission to fulfil its obligations in this area.

98 In that regard, the first point to note is that the argument that once the Commission has found that there is an infringement it is bound to adopt a decision requiring the undertakings concerned to bring it to an end is contrary to the actual word-

ing of Article 3(1) of Regulation No 17, according to which the Commission may take such a decision. Likewise, Article 3(2) of Regulation No 17 does not give a person who makes an application under that article the right to obtain a decision from the Commission as to whether or not the alleged infringement exists (see the judgment of the Court of Justice in Case 125/78 *GEMA* v *Commission* [1979] ECR 3173, at 3189).

99 The position might be different only if the subject-matter of the complaint fell within the exclusive competence of the Commission. As far as the application of Article 90(2) is concerned, the Court of Justice held in Case C-260/89 *ERT* [1991] ECR I-2925, at I-2962, that it is for the national court to verify whether practices contrary to Article 86 of an undertaking entrusted with the operation of a service of general economic interest may be justified by needs arising from the particular tasks entrusted to that undertaking. It appears from that case-law that the Commission does not have exclusive competence to apply the first sentence of Article 90(2) of the Treaty (see also the judgment of the Court of Justice in Case 66/86 *Ahmed Saeed* [1989] ECR 803, at 853). It follows that in this case the Netherlands courts also have jurisdiction to consider the question raised in the applicants' complaint.

100 Furthermore, the Commission cannot be unconditionally obliged to intervene, at the request of an individual, with regard to undertakings entrusted with the operation of services of general economic interest, in particular where that intervention would entail assessment of the compatibility of national legislation with Community law. On the contrary, the Commission has a discretion with regard to the organization of procedures relating to complaints lodged by individuals under Article 3 of Regulation No 17.

101 Accordingly, it is for the Court to review, in connection with this plea, whether in this case the Commission exercised its discretion without committing an error of law or of fact or a manifest error of assessment. In order to carry out that review, it is also necessary to consider the context of the contested decision.

102 In that regard, the Court finds that both Article 21 of the OVS and Article 34 of the Electricity Law contain restrictions on distribution undertakings' importing electricity. Article 21 of the OVS seeks to ensure, by means of supply contracts concluded with distributors by parties to the agreement, that the distributors do not import electricity, except possibly for some minor supplies in border areas. As for Article 34 of the Electricity Law, it prohibits distributors from importing electricity, with the exception of electricity of under 500 V, by restricting the importation of electricity for public supply to SEP alone. Consequently, the scope of the prohibition embodied in the OVS differs slightly from that of the prohibition laid down in the Electricity Law.

103 Likewise, the method used to implement the prohibition differs. Whereas the OVS seeks to attain the desired result by means of a contractual obligation imposed on distributors by the parties to the agreement, the Law does so by means of the monopoly conferred on SEP.

104 The Court finds that the import prohibitions arising under Article 21 of the OVS and Article 34 of the Law respectively are, despite the minor differences described above, virtually identical and likely to have essentially the same effects, that is to say, they make it virtually impossible for distributors to import electricity.

105 Accordingly, examination of the compatibility of the national Law with Community law took precedence over examining the OVS. Indeed, so long as it has not been established that that Law is incompatible with the Treaty, a finding that the OVS constitutes an infringement cannot have any practical effect except in so far as the restrictions which it lays down exceed those arising under the Law.

106 That is the outcome in particular of the fact that the Commission cannot, with a view to terminating an infringement of Article 85, require undertakings to adopt conduct which is contrary to a national law without assessing that law in the light of Community law.

107 However, the question of the compatibility of Article 34 of the Electricity Law with the Treaty is likely to be the subject of political and institutional debate. The proper procedure available to the Commission to deal with questions involving national public policy interests is that provided for in Article 169 of the Treaty, in which the Member States are directly involved and in which it is for the Court of Justice to find, if that is the case, that a national law constitutes an infringement of the Treaty.

108 Furthermore, contrary to the observations made by the applicants in the reply, the Commission did not consider that the import restrictions in question were provisionally justified and hence provisionally valid. In view of the fact that the decision has not determined whether Article 90(2) of the Treaty is applicable, it must be observed that — according to section 38 of the decision — those restrictions constitute an infringement of Article 85 of the Treaty.

109 Since the Commission has not adopted any decision on the application of Article 90(2) of the Treaty, the applicants' argument that the conditions for that provision to apply are not satisfied in this case is inoperative. It can therefore be rejected, without there being any need to consider whether it was raised in time.

110 In addition, the argument raised by the applicants in connection with the plea concerning the statement of reasons in the decision, according to which the Electricity Law could be repealed by the Netherlands legislature, is also irrelevant in this context. Article 3 of Regulation No 17 empowers the Commission to find existing infringements; it does not by any means give it the task of ruling on hypothetical situations.

111 It follows that the contested Commission decision appears to be justified. Moreover, this outcome does not detract from the judicial redress to which individuals who make a complaint to the Commission pursuant to Article 3 of Regulation No 17 are entitled. Admittedly it is possible that the complainants will regard the

outcome of the proceedings under Article 169 of the Treaty as unsatisfactory. However, it should be borne in mind that the applicants' complaint has not been rejected but is still pending before the Commission. Consequently, if need be, the applicants can apply for the procedure initiated under Regulations Nos 17 and 99/63 to be continued and in that procedure they will be able to assert their procedural rights in full. The Court is conscious of the fact that in that event the exercise of those procedural rights will be subject to a considerable delay, yet that is inevitable in view of the fact that the proceedings under Article 169 of the Treaty take precedence in this case over the procedure under Article 3 of Regulation No 17.

112 Accordingly, the Court's consideration of the contested decision has not disclosed an error of law or of fact or a manifest error of assessment on the part of the Commission in so far as it refrained from ruling on the question whether the import restrictions at issue were justified under Article 90(2) of the Treaty. Consequently, the plea alleging infringement of Community competition law and of certain general principles of law is unfounded.

2. *The statement of reasons for the contested decision*

Arguments of the parties

113 In their application, the applicants claim that the duty to state reasons, laid down in Article 190 of the Treaty, has been infringed. They argue that the considerations set out in sections 50 and 51 of the contested decision do not constitute a statement of reasons sufficient to justify the Commission's refraining from ruling on whether the import and export restrictions in the field of public supply are capable of falling within Article 90(2) of the Treaty. In their view, in finding that those restrictions are not justified, the Commission did not rule — or at least not expressly — on the compatibility of the Electricity Law with the Treaty. In the reply, the applicants add that sufficient reasons have not been given for the implied rejection of their complaint which, in their view, is embodied in the contested decision, in so far as the Commission omitted to specify the reasons for which it considered that there was no infringement.

114 They further argue in the reply that the contested decision is flawed by internal inconsistencies. They maintain in the first place that there are inconsistencies in the parts of the decision dealing with the import and export restrictions established by the electricity generators. They argue that even if some of those inconsistencies might be attributable to a drafting error, the reasoning would still be inconsistent and imprecise, and that the operative part does not follow logically from the preamble to the decision.

115 As far as distribution undertakings such as the applicants are concerned, they maintain that there is an inconsistency between section 54 of the decision, entitled 'Conclusion', according to which the export, but not the import, restrictions constitute an infringement of Article 85(1), and section 38, where the Commission states that the application of Article 21 of the OVS continues to infringe Article 85(1), without drawing any distinction between imports and exports.

116 In other respects, they consider that the operative part of the decision conflicts with sections 38, 52 and 54, in so far as it does not reiterate in full the conclusion that the export restrictions imposed on the distributors constitute an infringement of Article 85(1) and are not justified under Article 90(2).

117 The Commission takes the view that the statement of reasons for the decision is logical and consistent and is therefore not in breach of Article 190 of the Treaty. In its contention, any appraisal made of Article 21 of the OVS inevitably implies an appraisal of Article 34 of the Electricity Law, inasmuch as the two articles contain identical provisions. The Commission maintains that the reasons set out in sections 50 and 51 of the contested decision are sufficient. It points out that, even if it also constitutes an implied rejection of the applicants' complaint, the decision is addressed to SEP and the four electricity generators.

118 The Commission considers that the allegations made by the applicants in the reply with regard to internal inconsistencies in the decision are out of time. It argues that the applicants have no *locus standi* to raise the allegations that the decision is inconsistent in so far as the import and export restrictions imposed on the generating companies are concerned.

119 It denies that there is any inconsistency between sections 38 and 54 of the decision as regards imports by distributors. In its view, section 38 is simply an intermediate conclusion. It argues that, in the context of this case, the application of Articles 85 and 90(2) of the Treaty is the subject of one and the same assessment conducted in several stages. It is sound logic to consider first whether there has been an infringement of Article 85(1), before determining whether the exception provided for in Article 90(2) applies.

120 The intervener submits that the contested decision is adequately reasoned. In its opinion, the inconsistencies between section 54 of the decision and the preceding part of the statement of reasons stem from a drafting error which does not justify annulling the decision on account of a defective statement of reasons. It further considers that the applicants have failed to appreciate that in section 54 of the decision the Commission reaches its conclusion from its examination of Article 21 of the OVS by listing the restrictions which, in its view, amount to an infringement of Article 85(1) and, at the same time, fail to satisfy the conditions set out in Article 90(2). In SEP's view, it therefore makes sense for the import ban mentioned in section 38 of the decision not to be referred to in section 54, since the Commission had no intention of ruling on the compatibility of that ban with Article 90(2).

121 In the intervener's estimation, the contested decision does not constitute an implied rejection of the applicants' complaint. It considers therefore that the Commission was not under a duty to set out in its decision the detailed reasons for which it was unable to find that the competition rules had been infringed.

Findings of the Court

122 The Court observes *in limine* that the fact that the contested decision was not addressed to the applicants is not a bar to their pleading that Article 190 has been infringed. The interest which persons, other than addressees of a measure, to whom the measure is nevertheless of direct and individual concern may have in obtaining explanations must be taken into account when determining the extent of the obligation to state reasons for the measure (see, for example, the judgments of the Court of Justice in Case 41/83 *Italy* v *Commission* [1985] ECR 873, at 891, and in Case 294/81 *Control Data* v *Commission* [1983] ECR 911, at 928).

123 Next, the Court finds that the applicants amplified part of their allegations concerning the statement of reasons only in the reply. However, since those allegations constitute additional arguments in support of a plea which had already been raised in the application, they are admissible having regard to Article 48(2) of the Rules of Procedure of the Court of First Instance.

124 As the Court of Justice and the Court of First Instance have consistently held (judgments of the Court of Justice in Case 24/62 *Germany* v *Commission* [1963] ECR 63, in Case 110/81 *Roquette Frères* v *Council* [1982] ECR 3159, and in Joined Cases 43/82 and 63/82 *VBVB and VBBB* v *Commission* [1984] ECR 19; judgment of the Court of First Instance in Case T-44/90 *La Cinq* v *Commission* [1992] ECR II-1), the statement of reasons of a decision having adverse effect must be such as to enable the Community judicature to exercise its power of review, and those concerned to ascertain the reasons for the measure adopted, in order to protect their rights and establish whether or not the decision is well founded.

125 In that regard, this Court considers that section 50 of the contested decision clearly sets out the reason for which the Commission decided, as regards the period subsequent to the entry into force of the Electricity Law, to suspend the procedure initiated under Regulation No 17 in respect of the import restrictions imposed on the distribution undertakings. The concern to avoid prejudging, in the context of that procedure, the compatibility of that Law with the Treaty is unequivocally apparent from that section.

126 That reasoning provided the applicants with the information which they needed in order to contest in these proceedings the validity of the reason put forward by the Commission, as is clear, moreover, from the arguments which they propounded in the written procedure. It is also sufficient in order for the Court to exercise its power to review the legality of the decision.

127 The applicants' contention that that reasoning is insufficient to justify the contested decision relates in fact to the validity of the reasons given by the Commission and not to the question whether the contested decision sets out those reasons in sufficient detail. It must therefore be rejected so far as this plea is concerned.

128 As for the alleged inconsistency between sections 38 and 54 of the decision with regard to the import restrictions, the Court finds that the discrepancy between the two sections is attributable to their respective locations within the scheme of the decision. Section 38 sums up the outcome of the assessment of Article 21 of the OVS in the light of Article 85(1) of the Treaty alone, whereas section 54 also takes account of the possibility that certain restrictions of competition may be justified under Article 90(2) of the Treaty. Given that the Commission partly reserved its examination of Article 90(2), it is consistent with the structure of the decision as a whole that the infringements which it found in section 54 constitute only part of the infringements which it had established earlier without considering the possibility of their being justified.

129 It follows from the whole of the foregoing considerations that the plea alleging that the statement of the reasons for the decision is insufficient is unfounded.

3. *The plea alleging infringement of essential procedural requirements, in particular Article 6 of Regulation No 99/63*

130 The Court observes that, according to the first paragraph of Article 19 of the Protocol on the Statute of the Court of Justice of the EEC, which is applicable to the

Court of First Instance by virtue of the first paragraph of Article 46 of that Statute, Article 38(1) of the Rules of Procedure of the Court of Justice, which was applicable to proceedings before the Court of First Instance at the time when the application was brought, and Article 44(1) of the Rules of Procedure of this Court, the application must contain a brief statement of the grounds on which it is based. This means that the application must specify the grounds on which the action is based, with the result that a mere abstract statement of the grounds does not satisfy the requirements of the Statute or the Rules of Procedure (see the judgments of the Court of Justice in Joined Cases 19/60, 21/60, 2/61 and 3/61 *Fives Lille Cail and Others* v *High Authority* [1961] ECR 281, at 295, and in Case C-330/88 *Grifoni* v *EAEC* [1991] ECR I-1045, at I-1067). Consequently, a mere reference to an infringement of essential procedural requirements of the kind contained in the application cannot, in the absence of specific allegations relating to the procedural requirement which has purportedly been disregarded, be considered sufficient.

131 Admittedly, in the reply the applicants accuse the Commission of failing to inform them in accordance with Article 6 of Regulation No 99/63. However, it appears from Article 42(2) of the Rules of Procedure of the Court of Justice and Article 48(2) of the Rules of Procedure of the Court of First Instance that no fresh issue may be raised in the course of proceedings. Since the applicants only stated in the reply that the plea in question was based on the Commission's failure to inform them in accordance with Article 6 of Regulation No 99/63, the plea must be rejected as being out of time.

132 It follows from the foregoing considerations that the action against the Commission's decision to refrain from ruling on whether the import restrictions imposed on the distribution undertakings may be justified by Article 90(2) of the Treaty is unfounded. The action must therefore be dismissed in its entirety.

Costs

133 In their response to SEP's observations as intervener, the applicants claimed that in any event an order for costs should not be made against them, not even in respect of the intervener's costs, in view of the lack of preciseness of and inconsistencies in the contested decision.

134 The intervener maintains that the applicants should be ordered to pay its costs. It considers that it is not the Rules of Procedure of the Court of First Instance, which, in its view, came into force on 1 August 1991, that apply to its intervention, but the Rules of Procedure of the Court of Justice. It takes the view that even under Article 87(2) of the Rules of Procedure of the Court of First Instance the applicants should be ordered to pay the costs if they are unsuccessful as regards the final outcome of the proceedings.

135 The Court observes *in limine* that, as a result of Article 130 of its Rules of Procedure, those rules entered into force on the first day of the second month following their publication, which took place on 30 May 1991. Consequently, they entered into force on 1 July 1991.

136 Under Article 87(2) of the Rules of Procedure of the Court of First Instance, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the applicants have been unsuccessful, they must be ordered jointly and severally to pay the costs. Contrary to the applicants' contention, the Commission did not contribute towards bringing about this dispute owing to the imprecise wording of section 50 of the contested decision. It is therefore not appropriate to apply Article 87(3) of the Rules of Procedure of this Court.

137 As for the intervener's costs, it should be noted that since the application for leave to intervene was received at the Registry of the Court of First Instance on 16 July 1991, it is governed by this Court's Rules of Procedure. Having regard to the circumstances of the case, the Court considers that it is not appropriate to apply Article 87(4) of its Rules of Procedure and order the intervener to bear its own costs. Consequently, the applicants must also be ordered to pay the intervener's costs.

On those grounds,

THE COURT OF FIRST INSTANCE (First Chamber)

hereby:

1. Dismisses the application;

2. Orders the applicants jointly and severally to pay the costs, including those of the intervener.

Kirschner Vesterdorf

García-Valdecasas Lenaerts Schintgen

Delivered in open court in Luxembourg on 18 November 1992.

H. Jung H. Kirschner

Registrar President