Cases C-372/90 P, C-372/90 P-R and C-22/91 P

Samenwerkende Electriciteits-Produktiebedrijven NV

v

Commission of the European Communities

(Removal from register)

Order of the President of the Court of 3 May 1991 2043

Summary of the Order

Procedure — Withdrawal of an appeal — Order as to costs
(Rules of Procedure, Arts 69(3) and (4) and third paragraph of Art. 122)

ORDER OF THE PRESIDENT OF THE COURT OF JUSTICE
3 May 1991 *

In Cases C-372/90 P, C-372/90 P-R and C-22/91 P,

Samenwerkende Electriciteits-Produktiebedrijven NV, a company governed by Netherlands law, established at 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 Marc Loesch, 8 Rue Zithe,

applicant,

* Language of the case: Dutch.

APPEAL against the order made on an application for interim relief on 21 November 1990 by the President of the Court of First Instance in Case T-39/90 R *Samenwerkende Electriciteits-Produktiebedrijven NV* v *Commission of the European Communities* ([1990] ECR II-649),

the other party to the proceedings being:

Commission of the European Communities, represented by B. J. Drijber, a member of its Legal Department, acting as Agent, with an address for service in Luxembourg at the office of G. Berardis, also a member of the Commission's Legal Department, Wagner Centre, Kirchberg,

THE PRESIDENT OF THE COURT OF JUSTICE

makes the following

Order

1 By application lodged at the Registry of the Court of Justice on 14 December 1990, Samenwerkende Electriciteits-Produktiebedrijven NV ('SEP'), relying on Article 168 A of the EEC Treaty, appealed against the order made on 21 November 1990 by the President of the Court of First Instance [(1990] ECR II-649) dismissing an application for suspension of the operation of the Commission Decision of 2 August 1990 concerning a proceeding under Article 11(5) of Council Regulation No 17 of 16 February 1962, the first regulation implementing Articles 85 and 86 of the Treaty (Official Journal, English Special Edition 1959-1962, p. 87) (IV/33 539-SEP/Gasunie) (Case C-372/90 P).

2 That decision, which SEP seeks to have annulled in proceedings before the Court of First Instance, requires SEP to provide the Commission with, *inter alia*, the original contract for the supply of gas concluded between SEP and the Norwegian undertaking Statoil.

3 By a separate document lodged at the Registry of the Court of Justice on the same date, SEP also applied, under Article 185 of the EEC Treaty, for suspension of the operation of the abovementioned Commission decision until the Court of First Instance had given judgment on the application for annulment pending before it or, in the event of its giving judgment at an earlier stage, until the Court of Justice had delivered a final judgment on the appeal against the order made by way of interim measure by the President of the Court of First Instance (Case C-372/90 P-R).

4 Finally, by application lodged at the Registry of the Court of Justice on 23 January 1991, SEP lodged, as a precautionary measure, a second appeal against the said order of the President of the Court of First Instance. In addition to annulment of the contested order and the grant by the Court of the suspension of operation denied to it by that order, the applicant asks that the Court order the Commission to return to it the contract in question, which it had been required to forward to the Commission following the latter's decision of 26 November 1990, which also imposed a periodic penalty payment under Article 16 of Council Regulation No 17, or, in the alternative, that the Court order the Commission not to transmit any copy of that contract to the authorities of the Member States (Case C-22/91 P).

5 The Commission submitted written observations in Cases C-372/90 P and C-372/90 P-R on 8 January 1991 and the parties presented oral argument on 28 January 1991.

6 At the hearing on 28 January 1991, it was agreed that the parties would inform the President of the Court by 18 February 1991 at the latest whether a settlement between them, entailing discontinuance of the proceedings, had been reached.

7 By letter lodged at the Court Registry on 18 February 1991, SEP stated it that it was discontinuing the proceedings, the Commission having undertaken not to make any disclosure of the Statoil contract to the Member States before the Court of First Instance had given judgment on the action for annulment brought by SEP.

8 By letter lodged at the Court Registry on 1 March 1991, the Commission stated that it had no objection to the discontinuance of the proceedings and submitted that the costs should be borne by the applicant on the ground that the discontinuance was not justified by the conduct of the Commission and that the lodgment by SEP of the three abovementioned applications had unreasonably caused the Commission to incur costs.

9 It is appropriate to take note of the discontinuance of the proceedings by the applicant and to remove Cases C-372/90 P, C-372/90 P-R and C-22/91 P from the Register of the Court.

10 As regards costs, it must be pointed out that, pursuant to the third paragraph of Article 122 of the Rules of Procedure, Article 69(4) of those rules is to apply if an appeal is withdrawn and that, by virtue of that provision, a party who discontinues proceedings is to be ordered to pay the costs unless the discontinuance is justified by the conduct of the opposite party. Pursuant to the second subparagraph of Article 69(3) of the Rules of Procedure, which applies to appeals by virtue of Article 118 thereof, even a successful party may be ordered to reimburse the other party for the costs which it has caused that party to incur in a manner which the Court regards as unreasonable or vexatious.

11 It must be stated, as the Commission concedes, that in an action for annulment for which the Court of First Instance has jurisdiction, the Court of Justice can be called upon to hear an application for the suspension of the operation of the contested measure only by virtue of an appeal brought in accordance with the second paragraph of Article 50 of the Statute of the Court of Justice of the EEC against a decision of the Court of First Instance on that matter. Although the applications lodged by SEP appear rather inadequate in that regard, it cannot be concluded that they have unreasonably or vexatiously caused the Commission to incur costs. The Commission lodged, on the same day, two sets of observations of largely identical content and presented oral argument at the hearing. However, those submissions cannot have caused it to incur costs in excess of those which an ordinary appeal would have entailed.

12 It must also be stated that, according to the contested order, SEP had, following the Commission's adoption of the decision of 2 August 1990, drawn the Commission's attention to the confidential nature of the Statoil contract and had

in particular placed special emphasis on the damage which it might suffer through disclosure of that contract, under Article 10(1) of Regulation No 17, to the competent national authorities, which, in the Netherlands, are the authorities which are involved in the management of Nederlandse Gasunie NV, another supplier of the applicant and a competitor of Statoil. It is also apparent from the contested order that, in the proceedings before the Court of First Instance in which SEP applied for interim relief, it was to that damage that it referred as a circumstance justifying urgency; and, as a result of the compromise reached, it was precisely that damage that the Commission undertook not to cause to SEP.

13 In those circumstances, even if the appeal and its withdrawal cannot strictly be regarded as resulting from the Commission's conduct, the party who withdrew the appeal cannot be ordered to pay the costs. On the other hand, it is appropriate to order the parties to bear their own costs.

On those grounds,

THE PRESIDENT OF THE COURT

hereby

(1) Orders that Cases C-372/90 P, C-372/90 P-R and C-22/91 P be removed from the Register of the Court;

(2) Orders the parties to bear their own costs.

Luxembourg, 3 May 1991

J.-G. Giraud
Registrar

O. Due
President