ORDER OF THE PRESIDENT OF THE COURT OF FIRST INSTANCE
1 December 1994 *

In Case T-353/94 R,

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

applicant,

v

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

defendant,

APPLICATION, first, for suspension of the operation of the Commission decision allegedly contained in the Commission's letter of 23 September 1994, authorizing the companies NUON Veluwse Nutsbedrijven and Maatschappij Elektric-

* Language of the case: Dutch.

iteit en Gas Limburg to produce and use in national legal proceedings the statement of objections and the minutes of the hearing relating to procedures applying competition law pending before the Commission and, secondly, for an order addressed to the Commission that it maintain the prohibition it placed on those companies by letter of 4 October 1993 against using the statement of objections, which it had sent to them, in national legal proceedings, and that it order those companies to recover, from national courts or third parties having received copies of those documents, the statement of objections and the minutes of the hearing before the Commission,

THE PRESIDENT OF THE COURT OF FIRST INSTANCE OF THE EUROPEAN COMMUNITIES

makes the following

Order

Facts and Procedure

1 By an application lodged at the Court Registry on 22 October 1994, the applicant brought an action under Article 173 of the EC Treaty for the annulment of the decision allegedly contained in the Commission's letter of 23 September 1994, whereby NV NUON Veluwse Nutsbedrijven ('NUON') and NV Maatschappij Elektriciteit en Gas Limburg ('Mega Limburg') were authorized to produce and use in national legal proceedings the statement of objections and the minutes of the hearing relating to proceedings under Article 85 of the EC Treaty (IV/34.010/33.793/34.243) pending before the Commission.

2 By a separate document lodged at the Registry on the same day, the applicant also applied under Articles 185 and 186 of the EC Treaty for suspension of the operation of the contested measure and for the Commission to be directed to maintain the prohibition which it had attached to the transmission of the statement of objections to NUON and Mega Limburg concerning the use of that document in national legal proceedings and, consequently, that it order those companies to recover the documents in question from the national courts or third parties which had received copies.

3 The Commission submitted its written observations on the present application for interim measures on 8 November 1994. The parties presented oral argument on 22 November 1994.

4 Before examining whether the present application for interim measures is well founded, it will be helpful to set out briefly the facts which gave rise to the dispute, as they emerge from the pleadings and other documents lodged by the parties and from the oral argument presented at the hearing on 22 November.

5 The applicant is a party to the Agreement on the Joint Procedure for Processing Payment and Transfer Slips (the 'GSA Agreement'). That agreement was notified to the Commission by the Netherlands Banks Association (Nederlandse Vereniging van Banken, hereinafter 'NVB') on 10 July 1991 in order to obtain negative clearance or, in the alternative, a decision applying Article 85(3) of the Treaty.

6 In the meantime, the Commission received from several users of the form of transfer in question complaints directed against a number of Netherlands banks, including the applicant. In addition, NUON brought proceedings against the applicant before a Netherlands court. Mega Limburg, for its part, brought legal proceedings against ABN-AMRO, which is also a party to the GSA Agreement.

7 On 14 June 1993 the Commission addressed a statement of objections to NVB concerning a particular aspect of the GSA Agreement. In the course of its preparatory inquiry, the Commission had previously asked the applicant, and received from it, a certain amount of information under Article 11 of Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles 85 and 86 of the Treaty (OJ, English Special Edition 1959-62, p. 87, hereinafter 'Regulation No 17'). Subsequently, NVB submitted its observations on the statement of objections to the Commission and asked to be heard in order to be able to state its point of view. The hearing took place on 28 October 1993.

8 Although they were not formally complainants, NUON and Mega Limburg were permitted to be present at the hearing. To enable them to prepare themselves, the Commission sent them, by letter of 4 October 1993, a version of the statement of objections addressed to NVB, with the annexes removed. In its letter, the Commission stated that that information could be used only in preparation for the hearing and 'not for any other purpose, especially in legal proceedings. Furthermore, it is forbidden to allow third parties direct or indirect access to this information'.

9 At the hearing, the applicant objected to the fact that the Commission had brought the statement of objections to the knowledge of third parties without first giving the banks concerned the opportunity to express their views on such an initiative. The applicant did not, however, bring an action before the Court of First Instance against the Commission decision of 4 October 1993.

10 After the Arrondissementsrechtbank (District Court) of Amsterdam had dismissed the actions brought before it by NUON and Mega Limburg, the latter appealed to the Gerechtshof (Regional Court of Appeal), Amsterdam. It is in the context of those proceedings that NUON and Mega Limburg notified the Commission, by letter of 30 August 1994, that they wished to produce before the Gerechtshof, Amsterdam the version which they had received of the statement of objections and

the minutes of the hearing of 28 October 1993. They argued that the Commission was not competent to oppose such action and that, in any event, all interested parties already had those documents.

11 In a letter of 23 September 1994 addressed to NUON and Mega Limburg, a director in the Commission's Directorate-General for Competition (DG IV) took the view that 'the previous restriction which my predecessor notified to you in his letter of 4 October 1993 concerning the use in national legal proceedings of the version of the statement of objections sent to you appears to be unfounded and therefore inoperative'.

12 On the same day, NUON and Mega Limburg sent a copy of the statement of objections to the Gerechtshof, Amsterdam, stating that the document would be formally cited at the hearing fixed for 6 December 1994.

13 By letter of 30 September 1994, the applicant asked the Commission to retract its decision contained in the letter of 23 September 1994.

14 In a letter of 3/4 October 1994, the same director of DG IV replied that he saw no reason to depart from the position adopted in the letter of 23 September 1994, in which, moreover, he had 'merely wished to indicate that parties who are already in possession of certain documents, in this case the statement of objections (except for the annexes) and the minutes of the hearing, cannot be prevented from producing those documents before a national court. They do not have to request authorization to do so.'

15 By letter of 18 November 1994, the applicant asked the Court of First Instance for authorization to place on the court file for the interim proceedings a letter from ABN AMRO bank, explaining why the latter did not consider it necessary,

following the applicant's example, to bring an action for annulment and make an application for interim measures.

Law

16 Under the combined provisions of Articles 185 and 186 of the Treaty and Article 4 of Council Decision 88/591/ECSC, EEC, Euratom of 24 October 1988 establishing a Court of First Instance of the European Communities (OJ 1988 L 319, p. 1), as amended by Council Decision 93/350/Euratom, ECSC, EEC of 8 June 1993 (OJ 1993 L 144, p. 21), the Court of First Instance may, if it considers that circumstances so require, order that application of contested acts be suspended or prescribe any necessary interim measures.

17 Article 104(2) of the Rules of Procedure provides that applications for interim measures as envisaged under Articles 185 and 186 of the Treaty must state the circumstances giving rise to urgency and the pleas of fact and law establishing a prima facie case for the interim measures applied for. Such measures must be provisional in the sense that they do not prejudge the decision on the substance of the case (see, most recently, the order of the President of the Court of First Instance in Joined Cases T-231/94 R, T-232/94 R and T-234/94 R *Transacciones Maritimas a. O.* v *Commission* [1994] ECR II-885 paragraph 20).

Arguments of the parties

18 In order to demonstrate that its claims are well founded, the applicant puts forward five pleas in law. First, the authorization granted by the Commission in its letter of 23 September 1994 constituted a breach of Article 214 of the EC Treaty and Article 20(1) and (2) of Regulation No 17, in that it permitted NUON and Mega Lim-

burg to use information contained in the statement of objections and the minutes of the hearing for purposes other than those for which it was requested and given. Secondly, such authorization constituted a misuse of the Commission's powers to deliver a statement of objections and to hear the parties, in that it permitted use of those documents outside the procedures applying competition law pending before the Commission. Thirdly, the Commission had breached the principle of the protection of legitimate expectations by retracting the strict prohibition it had attached to the transmission of the statement of objections to NUON and Mega Limburg, since it was that prohibition which had led the applicant not to contest such transmission before the Court of First Instance. Fourthly, the Commission had infringed Article 190 of the EC Treaty, in that it had not stated the reasons on which the authorization granted in its letter of 23 September 1994 was based. Fifthly, that letter was in breach of the combined provisions of Article 185 of the Treaty and Article 20(2) of Regulation No 17, in that the Commission, contrary to the obligation imposed upon it by the judgment of the Court of Justice in Case 53/85 *Akzo Chemie* v *Commission* [1986] ECR 1985, at paragraph 29, did not first give the applicant the opportunity to state its views on the transmission of the statement of objections to NUON and Mega Limburg and to bring an action before the Court of First Instance if appropriate.

19 As for the serious and irreparable damage which it would suffer if the interim measures requested were not granted, the applicant makes the preliminary point that, so long as the documents in question have not been formally placed on the file in the cases pending before the national court, which is not due to happen until the hearing fixed for 6 December 1994, the measures applied for can still be effectively adopted. The applicant then argues that the Commission sent to NUON and Mega Limburg a version of the statement of objections which contained not only information taken out of context and often accompanied by suppositions and inaccurate and deceptive arguments, but also contained 'absolute business secrets' and confidential information. That version could not therefore be produced or used in national legal proceedings without causing the applicant to suffer irreparable damage. The applicant adds, finally, that such damage could not be avoided even if the Gerechtshof, Amsterdam were to decide to stay the proceedings pending a decision by the Court of First Instance on the merits, since, in order to do that, the national court could not fail to take cognizance of the statement of objections in question. The applicant added at the hearing that, since the proceedings before the

national court were in public, there was a risk that wide disclosure would ensue, and would, moreover, give rise to similar requests from other potentially interested parties wishing to obtain those documents.

20 As regards, finally, the balancing of the interests of the parties involved, the applicant considers that the granting of its application for interim measures would not cause problems of any kind whatsoever for the Commission. As for the interests of NUON and Mega Limburg, the applicant considers that the Commission's letter to them of 23 September 1994 infringes Community law so flagrantly that any interests they might have cannot stand in the way of the grant of the interim measures applied for. By contrast, the applicant's interest in re-establishing the status quo ante with the help of those measures is obvious, since the protection of its business secrets is at stake.

21 For its part, the Commission considers that the main action is inadmissible 'because there is no decision against which an action can be brought, and also because the action was brought out of time'. In that respect it argues, first, that the letter of 23 September 1994 contains only an interpretation of the Commission's decision of 4 October 1993. In the Commission's opinion, the director in DG IV was essentially replying in the letter in question that he agreed with the interpretation by NUON and Mega Limburg of the factual and legal situation arising from the transmission of the documents in question and, in particular, agreed with their opinion that the Commission could not prevent parties who already had certain documents from producing them before a national court. The letter of 23 September 1994 therefore did not produce any binding effect or alter the applicant's legal situation in relation to the circumstances defined by the letter of 4 October 1993, which was not challenged within the prescribed period.

22 As for the existence of a prima facie case, the Commission considers that the applicant's pleas are devoid of all foundation. As regards, first, infringement of Article 214 of the Treaty and Article 20(1) and (2) of Regulation No 17, the Commission

essentially takes the view that production before a national court of a statement of objections and the minutes of a hearing, in a dispute between parties who already have those documents, does not come within the scope of the prohibitions laid down by those provisions. In particular, the Commission argues, the prohibition in Article 20(1) against using certain information applies to the Commission and to the administrative authorities of Member States but not to national courts. Moreover, all the information contained in the version of the statement of objections with the annexes removed was already known not only to the Netherlands banks but also to NUON and Mega Limburg in their capacity as users of the transfer forms in question. The Commission therefore considers that it could send that statement to NUON and Mega Limburg without following the procedure laid down by the judgment in *Akzo Chemie* v *Commission* cited above, the sole purpose of which is to prevent business secrets from being divulged to third parties. In any event, even if the document in question did contain business secrets, it was only the possibility of NUON and Mega Limburg taking cognizance of it which was problematic and not the potential production of that document before a national court at a later stage.

23 As for the urgency of adopting the interim measures applied for, the Commission argues essentially that, since NUON and Mega Limburg and also the judges of the Gerechtshof, Amsterdam already hold a version of the statement of objections, those measures can no longer prevent the damage alleged by the applicant. Moreover, even if the national court were to take the contents of the statement of objections into account, the applicant would have the possibility of explaining to that court why it considered that that statement contained inaccurate or deceptive information. As a result, the applicant could not suffer any irreparable damage arising out of that fact. In any event, adoption of the measures applied for would exceed the jurisdiction of the Court of First Instance, since the contested measure is not one adversely affecting the applicant but an interpretative measure against which no suspension of operation can be ordered. Moreover, even supposing that the letter of 23 September 1994 contains an authorization, no suspension of operation can be ordered for that very reason, since an authorization 'is a measure which does not involve execution'.

24 Finally, as regards the balancing of the parties' interests, the Commission considers it would be superfluous to examine the question, since the essential conditions justifying the grant of the measures applied for are in no way satisfied. Emphasizing the interest attached to compliance with procedures before national courts, the Commission argues that, if the applicant objects to the statement of objections being formally placed on file in the case pending before the Gerechtshof, Amsterdam, it should make its objections in the first instance before that court. In the Commission's opinion, it is for that court to decide whether the document can be filed for the hearing and to rule on the use that can be made of it and the probative value that may be attached to its contents.

Findings of the President of the Court hearing the application for interim measures

Admissibility

25 The President of the Court must first take a position on the admissibility of the present application for interim measures, having regard to the Commission's arguments that the main action is inadmissible. In that regard, it is enough to hold that the letter of 23 September 1994 is sufficiently akin to a decision producing legal effects to allow the President of the Court to exclude any finding at this stage that the main action is manifestly inadmissible. It should be noted, moreover, that the Commission limits itself to alleging simple inadmissibility of the action without describing it as manifest.

26 That prima facie finding is based on the following considerations. First, it should be noted that the previous letter of 4 October 1993, which was sent by the Commission's officers to counsel for NUON and Mega Limburg did, at first sight, have a decision-making content. On the one hand, the Commission admitted at the hearing on 22 November 1994 that, implicitly at least, the letter contains a double deci-

sion, namely the transmission of the statement of objections to the letter's addressees and the finding that that statement did not contain any business secrets. Furthermore, in order to arrive at a prima facie conclusion on this point, the President of the Court cannot ignore the very precise wording of that letter, which reads: 'I should make it quite clear that this information is placed at your disposal on condition that is used exclusively by yourself in preparing for the hearing for your clients' purposes ... Any other use of this information, in connection with legal proceedings for example, is not authorized.' Secondly, the President of the Court has to bear in mind that the letter of 23 September 1994 was sent in response to the request from counsel for NUON and Mega Limburg, in their letter to the Commission of 30 August 1994, for authorization to transmit the statement of objections and the minutes of the hearing to the judges of the Gerechtshof, Amsterdam. Thirdly, it was following the Commission's dispatch of that very letter on 23 September 1994 that, on the same day, NUON and Mega Limburg sent a copy of the statement of objections which had been addressed to NVB to the national court.

The existence of a prima facie case

27 It is settled case-law that, in order to establish the existence of a prima facie case, the judge hearing the application for interim measures must examine whether, having regard to the factual and legal circumstances of the case, the pleas in law and supporting arguments adduced by the applicant in support of his action for annulment before the Court of First Instance are of a serious nature (see the order of the President of the Court of First Instance in Case T-549/93 R *D* v *Commission* [1993] ECR II-1347, paragraph 34).

28 The question whether and to what extent the provisions of Article 20 of Regulation No 17 apply in a situation such as the present one, and in particular whether, in transmitting a statement of objections, which was addressed to a number of undertakings, to third parties, the Commission is bound to ensure that such a document is used only in connection with the administrative procedure pending before it, is, in the President's view, an extremely delicate question which will require close

examination in the main proceedings. In that context, there can, at first sight, be no denying the importance and scope which the Court of Justice attached in its judgment in Case C-67/91 *Asociación Española de Banca Privada a. O.* [1992] ECR I-4785 to the various obligations designed to ensure the protection of the rights of undertakings concerning the use of information communicated by them to the Commission, especially as regards the requirements that rights of the defence and business confidentiality be respected (see, in particular, paragraphs 47 to 55). Nor may all significance be denied to the fact that the letter of 23 September 1994 was intended to comply with a request made by individual parties for the purpose of using certain documents in a dispute concerning essentially private interests, and not with a request for information or cooperation from a court or tribunal of a Member State.

29 Moreover, the argument as to whether the Commission's sending of the letter of 23 September 1994 may have breached obligations which might follow for the Commission from the judgment in *Akzo Chemie* v *Commission*, cited above (see paragraphs 28, 29 and 30 in particular), also requires detailed examination, which can only take place in the context of the main proceedings. For his part, the President of the Court cannot consider the arguments adduced by the applicant in that respect as being prima facie manifestly devoid of all foundation. In that context, particular note should be taken of the principle enunciated by the Court of Justice at paragraph 28 of the judgment in *Akzo Chemie* v *Commission*, whereby the provisions of Regulation No 17, which require the Commission to have regard to the legitimate interest of undertakings in the non-disclosure of their business secrets, 'must be regarded as the expression of a general principle which applies during the course of the administrative procedure'.

The risk of serious and irreparable damage

30 As for the urgency of adopting interim measures and the existence of a risk of serious and irreparable damage in their absence, it is settled case-law that those matters must be appraised in relation to the necessity for an interim order to prevent serious and irreparable damage to the party applying for the interim measures. It is

for the applicant to prove that it cannot wait for the outcome of the main proceedings without suffering damage that would entail serious and irreparable consequences (see the order in *Transacciones Maritimas a. O.* v *Commission*, cited above, paragraph 41).

31 In that respect, the following points should be considered. It is first necessary to bear in mind the very nature of a statement of objections, which is a preparatory document in proceedings to establish an infringement and a document in which a number of allegations of unlawful conduct are made against certain undertakings without a proper hearing having yet taken place. Secondly, the applicant put forward at the hearing considerations from which it does at least appear plausible that the statement of objections in question contains references to data and documents which it sent to the Commission, whose confidentiality and whose status as business secrets cannot be excluded at this stage. Thirdly, it is undisputed that the document sent by the Commission is intended to be used in national legal proceedings, the procedural course of which is outside the control of the President of the Court hearing the application for interim measures. The latter cannot therefore exclude the possibility that, as the applicant maintains, other third parties may have access to the information which it contains. Finally, it is not permissible to dismiss out of hand the risks, mentioned by the applicant, to which use of a document such as the present may give rise as regards compliance with the principle of equality of the parties before the national court.

32 In those circumstances, the President of the Court considers that the applicant has sufficiently proved the existence of a risk of serious and irreparable damage, should he decide not to grant the interim measures applied for. The urgency of those measures is attested by the fact that the document in dispute is to be formally included in the proceedings before the Gerechtshof, Amsterdam at the hearing fixed for 6 December 1994.

33 In the light of the above, measures must be taken to prevent an irreversible situation from arising which would be likely to entail a risk of serious and irreparable

damage for the applicant. In the present case, since the President of the Court hearing the application for interim measures cannot issue directions to individuals who are not parties to the dispute, and still less to national courts, an order must be made, in accordance with the terms of the measures requested by the applicant at the hearing on 22 November 1994, first, for the suspension of the decision contained, prima facie, in the disputed letter of 23 September 1994 and, secondly, directing the Commission to send a copy of this order immediately to the addressees of that letter, namely NUON and Mega Limburg.

34 Such measures do not seem to constitute a serious or disproportionate hindrance to the exercise of the rights of NUON and Mega Limburg. It has not been demonstrated before the President of the Court that those companies would be prevented, should the case arise, from using the information contained in the documents sent to them as evidence after the conclusion of the main proceedings and in the event of a judgment dismissing the action brought by Postbank NV. It should be noted, in that respect, that the parties agreed before the President of the Court that the national court has jurisdiction to stay, if need be, the proceedings pending before it in order to await the judgment of the Court of First Instance.

On those grounds,

THE PRESIDENT OF THE COURT OF FIRST INSTANCE

hereby orders:

1. Operation is suspended of the Commission decision contained, prima facie, in its letter of 23 September 1994, authorizing NV NUON Veluwse Nutsbedrijven and NV Maatschappij Elektriciteit en Gas Limburg to produce and

use before national courts the statement of objections and the minutes of the hearing relating to procedures applying competition law pending before the Commission.

2. The Commission shall forthwith send copies of this order to the addressees of the letter of 23 September 1994, namely NV NUON Veluwse Nutsbedrijven and NV Maatschappij Elektriciteit en Gas Limburg.

3. Costs are reserved.

Luxembourg, 1 December 1994.

H. Jung
Registrar

J. L. Cruz Vilaça
President