

**A national court which, in a case provided for by law, determines an appeal against an arbitration award must be regarded as a court or tribunal within the meaning of Article 177 of the Treaty, even if under the terms of the arbitration agreement made between the parties that court must give judgment according to what appears fair and reasonable.**

**JUDGMENT OF THE COURT**

**27 April 1994**

In Case C-393/92,

REFERENCE to the Court under Article 177 of the EEC Treaty by the Gerechtshof te Arnhem (Netherlands) for a preliminary ruling in the proceedings pending before that court between

Gemeente Almelo and Others

and

Energiebedrijf IJsselmij NV

on the interpretation of Articles 37, 85, 86, 90 and 177 of the EEC Treaty,

THE COURT,

composed of: O. Due, President, G.F. Mancini, J.C. Moitinho de Almeida and M. Díez de Velasco (Presidents of Chambers), C.N. Kakouris,

R. Joliet, F.A. Schockweiler (Rapporteur), G.C. Rodríguez Iglesias, M. Zuleeg, P.J.G. Kapteyn and J.L. Murray, Judges,

Advocate General: M. Darmon,

Registrar: H. von Holstein, Deputy Registrar,

after considering the written observations submitted on behalf of:

- the Municipality of Almelo and Others, by C.M. Vinken-Geijselaers, of the 's-Hertogenbosch Bar,

- Energiebedrijf IJsselmij NV, by B.H. ter Kuile, of the Hague Bar, and E.H. Pijnacker Hordijk, of the Amsterdam Bar,

- the Greek Government, by V. Kotalimos, a member of the State Legal Service, acting as Agent,

- the French Government, by P. Pouzoulet, Deputy Director in the Directorate for Legal Affairs of the Ministry of Foreign Affairs, acting as Agent,

- the Netherlands Government, by A. Bos, Legal Adviser in the Ministry of Foreign Affairs, acting as Agent,

- the Commission of the European Communities, by B.J. Drijber, a member of its Legal Service, acting as Agent,

having regard to the Report for the Hearing,

after hearing the oral observations of the Municipality of Almelo and Others, Energiebedrijf IJsselmij NV, the Greek Government, the Netherlands Government, represented by J.W. de Zwaan, Deputy Legal Adviser in the Ministry of Foreign Affairs, acting as Agent, and the Commission, at the hearing on 23 November 1993,

after hearing the Opinion of the Advocate General at the sitting on 8 February 1994,

gives the following

### **Judgment**

1. By an arbitration decision of 3 November 1992, received at the Court on 10 November 1992, the Gerechtshof te Arnhem (Regional Court of Appeal, Arnhem) referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty two questions concerning the interpretation of Articles 37, 85, 86, 90 and 177 of the Treaty.

2. Those questions arose in proceedings between the Municipality of Almelo and other local distributors of electric power and Energiebedrijf IJsselmij NV (hereinafter "IJM"), an undertaking engaged in the regional distribution of electric power, in relation to an equalization supplement charged by the latter to the local distributors.

3. Electric power is produced in the Netherlands by four undertakings holding shares in a jointly owned undertaking, NV Samenwerkende Elektriciteits-Productiebedrijven (hereinafter "SEP"),

which is intended to serve as a vehicle for cooperation between the generators.

4. The distribution of electricity is organized at regional and local level. Within the territory granted to them, the regional distribution undertakings supply the local distribution undertakings owned by the municipalities and, in some cases, the end-users. The local distribution undertakings handle supplies to customers within the municipalities. The production and distribution undertakings are owned, directly or indirectly, by the provinces and municipalities.

5. By Royal Order of 1918 IJM was granted a non-exclusive concession to distribute electricity within the territory covered by that concession. IJM supplies electricity to local distributors, in particular the Municipality of Almelo and the other plaintiffs in the main proceedings, and also makes direct supplies to consumers in rural areas.

6. From 1985 to 1988, local distributors were prohibited from importing electricity by virtue of an exclusive purchasing clause contained in the general conditions for the supply of electric power to municipalities having their own distribution undertaking within the territory covered by NV Electriciteits-Maatschappij IJsselcentrale (as IJM was formerly known, hereinafter "IJC"). Under Article 2(2) of those general conditions, the municipality undertakes

"to obtain electric power for supply in its territory exclusively from IJC, and to use that power only for its own consumption or for supply to third parties for consumption in the territory of the Municipality".

7. The general conditions imposed by IJM are in the form of the model general conditions of supply drawn up by the Association of Operators of Electricity Undertakings in the Netherlands.

8. That exclusive purchasing clause is coupled with an exclusive sales undertaking on the part of the regional distributor.

9. For its part the local distributor requires the end-user to enter into an exclusive purchasing obligation.

10. As between the producers and the regional distributors, there is also a prohibition against imports of electric power (Article 21 of the Overeenkomst van Samenwerking - cooperation agreement - between the electricity generating companies and SEP of 22 March 1986, which replaced the General SEP Agreement of 1971, hereinafter "the OVS").

11. With effect from 1 January 1985, IJC charged the local distributors an equalization supplement, that is to say, a surcharge intended to offset the difference between the higher cost incurred by it in distributing electricity to consumers in rural areas and the lower cost incurred by the local distributors in distributing electricity to consumers in urban areas.

12. In 1988 certain local distribution undertakings lodged with the Commission a complaint against IJC, relating to three matters:

- the import ban explicitly laid down in the 1971 General SEP Agreement and in the OVS;

- the exclusive purchasing obligation deriving from the agreements concluded with IJC;

- IJC' s power to determine prices unilaterally and to impose the equalization supplement.

13. The Law of 16 November 1989 laying down rules on the generation, import, transmission and sale of electricity (Staatsblad 535) altered the electricity distribution system in the Netherlands. Pursuant to

Article 34 of that Law and a Ministerial Order of 20 March 1990 (Staatscourant of 22 March 1990), SEP has the sole right to import electricity for public supply purposes, with the exception of electricity with a voltage below 500 volts.

14. Following the lodging of the complaint in 1988, the Commission adopted a decision of 16 January 1991 relating to a proceeding under Article 85 of the EEC Treaty (IV/37.732 - IJsselcentrale (IJC) and others, OJ 1991 L 28, p. 32, hereinafter "the 1991 Decision"). The Commission states in Article 1 of that decision that Article 21 of the OVS

"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".

15. The Commission observes that the ban on imports at the level of non-public distribution, that is to say, the ban imposed on consumers in their contracts with local distributors, cannot be justified under Article 90(2) of the Treaty.

16. Although the Commission did not express a view in the 1991 Decision on the ban on imports resulting from Article 2(2) of the general conditions, it notes that

"these provisions of the General Terms and Conditions together with Article 21 form a whole, operating both among generators and ultimately between them and their industrial consumers".

17. The Commission refrained from passing judgment on the question whether Article 90(2) of the Treaty applies to the ban on imports imposed by Article 21 of the OVS on the public supply of electricity; according to the Commission, the ban on imports by generators and

distributors otherwise than through SEP in the context of public supply is now to be found in Article 34 of the 1989 Law, and to take a view on the matter would be to anticipate the question whether that Law is compatible with the Treaty. Nor did the Commission make any finding as to the lawfulness of the equalization supplement.

18. The action brought by the complainants against the 1991 Decision was dismissed by judgment of the Court of First Instance in Case T-16/91 Rendo and Others v Commission [1992] ECR II-2417. The appeal lodged by the complainants against that judgment is pending before the Court of Justice (Case C-19/93 P Rendo and Others v Commission).

19. Before they brought the matter before the Commission, the local distributors had initiated arbitration proceedings pursuant to the general conditions, with a view to obtaining a decision on the legality of the equalization supplement imposed by IJM.

20. When the arbitrators rejected their claim the local distributors appealed to the Gerechtshof te Arnhem, which must determine the appeal according to what appears fair and reasonable (als goede mannen naar billijkheid). The national court, considering that without the import ban IJM could probably not have imposed the equalization supplement, has asked the Court for a preliminary ruling on the following questions:

"1. Is a national court or tribunal which determines an appeal against an arbitration award to be regarded as a 'national court or tribunal' for the purposes of Article 177 of the EEC Treaty if under the arbitration agreement made between the parties it must give judgment according to what appears fair and reasonable?

and, in the event that the answer to the first question is in the affirmative,

2. How are Articles 37 and/or 85 and/or 86 and/or 90 of the EEC Treaty to be interpreted with reference to a ban on the import of electricity for public supply purposes contained in the general conditions of a regional electricity distributor from 1985 to 1988 inclusive, possibly in conjunction with an import ban contained in an agreement made between the electricity generation undertakings in the Member State concerned?"

The first question

21. In order to answer the first question, it should be noted that, as the Court held in its judgment in Case 61/65 *Vaassen-Goebbels* [1966] ECR 377, the concept of a court or tribunal within the meaning of Article 177 of the Treaty necessarily implies that such a forum should satisfy a number of criteria; it must be established by law, have a permanent existence, exercise binding jurisdiction, be bound by rules of adversary procedure and apply the rule of law. The Court has extended those criteria, pointing out in particular the need for the court or tribunal in question to be independent (judgments in Case 14/86 *Pretore di Salò* [1987] ECR 2545, paragraph 7, Case 338/85 *Pardini* [1988] ECR 2041, paragraph 9 and Case C-24/92 *Corbiau* [1993] ECR I-1278).

22. With regard to arbitration, the Court held in its judgment in Case 102/81 *Nordsee* [1982] ECR 1095, paragraph 14, that the concept of a court or tribunal within the meaning of Article 177 of the Treaty covers an ordinary court reviewing an arbitration award in the case of an appeal or objection, in proceedings for leave to issue execution or by any other method of recourse available under the relevant national legislation.

23. That interpretation by the Court is not affected by the fact that, by virtue of the arbitration agreement made between the parties, a court such as the *Gerechtshof* gives judgment according to what appears fair and reasonable. It follows from the principles of the primacy of Community law and of its uniform application, in conjunction with Article 5

of the Treaty, that a court of a Member State to which an appeal against an arbitration award is made pursuant to national law must, even where it gives judgment having regard to fairness, observe the rules of Community law, in particular those relating to competition.

24. The answer to the first question must therefore be that a national court which, in a case provided for by law, determines an appeal against an arbitration award must be regarded as a court or tribunal within the meaning of Article 177 of the EEC Treaty, even if under the terms of the arbitration agreement made between the parties that court must give judgment according to what appears fair and reasonable.

The second question

25. By its second question the national court is essentially asking whether Articles 37 and/or 85 and/or 86 and/or 90 of the Treaty preclude the application, by a regional electricity distributor, of an exclusive purchasing clause contained in the general conditions of sale which prohibits a local distributor from importing electricity for public supply purposes.

26. In order to answer that question, it is necessary to consider whether a ban on imports imposed on a local electricity distributor under a contract concluded with the regional distributor is contrary to Articles 37, 85 or 86 of the Treaty, and the extent to which derogations from the prohibitions laid down by those provisions may be made under Article 90(2) of the Treaty.

Article 37 of the Treaty

27. First of all, as far as the scope of Article 37 is concerned, it is to be recalled that it follows both from the position which that article occupies in the chapter on the elimination of quantitative restrictions and from the use of the words "imports" and "exports" in the second indent of

paragraph (1) and the word "products" in paragraphs (3) and (4) that it covers trade in goods (see the judgments in Case 155/73 Sacchi [1974] ECR 409, paragraph 10, and Joined Cases C-46/90 and C-93/91 Lagauche and Evrard [1993] ECR I-5267, paragraph 33).

28. In Community law, and indeed in the national laws of the Member States, it is accepted that electricity constitutes a good within the meaning of Article 30 of the Treaty. Electricity is thus regarded as a good under the Community's tariff nomenclature (code CN 27.16). Furthermore, in its judgment in Case 6/64 Costa v ENEL [1964] ECR 1141 the Court accepted that electricity may fall within the scope of Article 37 of the Treaty.

29. As regards the situations covered by Article 37, it is to be recalled that the provision relates to State monopolies of a commercial character. In its judgment in Case 30/87 Bodson [1988] ECR 2479, at paragraph 13, the Court held that Article 37 applies to situations in which the national authorities are in a position to control, direct or appreciably influence trade between Member States through a body established for that purpose or a delegated monopoly.

30. Where contracts are concluded in such circumstances, the Court has held that no agreement exists for the purposes of Article 85 if the effect on trade flows from concession contracts concluded between public authorities and undertakings entrusted with the operation of a public service (judgment in Bodson, cited above, paragraph 18).

31. As far as that issue is concerned, IJM has not been granted an exclusive concession giving it a monopoly in the supply of electricity within the territory covered by the concession. Secondly, the contracts giving rise to the dispute before the national court were concluded not between the public authorities and IJM but between a regional distributor and local distributors. Moreover, those contracts determine the conditions under

which IJM supplies electric power to the local distributors, and do not have the effect of transferring to those distributors the public service concession granted to the regional undertaking. The conditions of supply, in particular the exclusive purchasing clause, stem from the agreement between the parties and are not inherent in the territorial concession granted to IJM by the public authorities.

32. It follows that the situation with which the main proceedings are concerned is not covered by Article 37 of the Treaty.

#### Articles 85, 86 and 90(2) of the Treaty

33. The Court has consistently held that the conduct of an undertaking referred to in Article 90(1) of the Treaty must be assessed with regard to the provisions of Articles 85, 86 and 90(2) (see the judgment in Case C-260/89 ERT [1991] ECR I-2925).

#### Article 85 of the Treaty

34. Article 85 of the Treaty applies, in its own terms, to agreements between undertakings which restrict competition and affect trade between Member States.

35. As regards the existence of an agreement between undertakings, it is to be observed, as the Commission found in the 1991 Decision, that the electricity distribution system in the Netherlands is based on a network of contractual legal relationships between generators, between generators and regional distributors, between regional distributors and local distributors and, finally, between local distributors and end-users. The exclusive purchasing clause in issue before the national court is contained in the general conditions for the supply of electric power by a regional distributor to local distributors and therefore constitutes a clause contained in an agreement as referred to in Article 85 of the Treaty.

36. An agreement containing such a clause has a restrictive effect on competition, inasmuch as the clause prohibits the local distributors from obtaining electricity supplies from other suppliers.

37. In order to determine whether such an agreement has an appreciable effect on trade between Member States, it is necessary, as the Court observed in its judgments in Case 23/67 Brasserie de Haecht [1967] ECR 525 and Case C-234/89 Delimitis [1991] ECR I-935, to assess it in its economic and legal context and to take account of any cumulative effect resulting from the existence of other exclusivity agreements.

38. In that regard, it appears from the documents before the Court that the general conditions governing the relations between the parties to the main proceedings, which contain the exclusivity clause, follow the model General Terms and Conditions for the supply of electricity drawn up by the Association of Operators of Electricity Undertakings in the Netherlands.

39. Those contractual relationships have the cumulative effect of compartmentalizing the national market, inasmuch as they have the effect of prohibiting local distributors established in the Netherlands from obtaining supplies of electricity from distributors or producers in other Member States.

#### Article 86 of the Treaty

40. Article 86 of the Treaty prohibits abusive practices resulting from the exploitation by one or more undertakings of a dominant position on the common market or in a substantial part of it in so far as those practices may affect trade between Member States (judgment in Bodson, cited above, paragraph 22).

41. Although the conclusion cannot automatically be drawn that a dominant position is held in a substantial part of the common market by

an undertaking which, like IJM, has a non-exclusive concession covering only part of the territory of a Member State, a different assessment must apply where that undertaking belongs to a group of undertakings which collectively occupy a dominant position.

42. However, in order for such a collective dominant position to exist, the undertakings in the group must be linked in such a way that they adopt the same conduct on the market (see the judgment in *Bodson*, cited above).

43. It is for the national court to consider whether there exist between the regional electricity distributors in the Netherlands links which are sufficiently strong for there to be a collective dominant position in a substantial part of the common market.

44. On the question of abuse, the Court has held that where an undertaking having a dominant position on the market ties buyers - even if at their request - by an obligation or promise on their part to obtain all or most of their requirements exclusively from that undertaking, this constitutes an abuse of the dominant position (see the judgments in Case 85/76 *Hoffmann-La Roche v Commission* [1979] ECR 461, paragraph 89, and Case C-62/86 *AKZO v Commission* [1991] ECR I-3359, paragraph 149).

45. As explained in paragraphs 38 and 39 above, the exclusive purchasing clause contained in the agreements between the regional distributors and the local distributors may affect trade between Member States.

#### Article 90(2) of the Treaty

46. Article 90(2) of the Treaty provides that undertakings entrusted with the operation of services of general economic interest may be exempted from the application of the competition rules contained in the

Treaty in so far as it is necessary to impose restrictions on competition, or even to exclude all competition, from other economic operators in order to ensure the performance of the particular tasks assigned to them (see the judgment in Case C-320/91 Corbeau [1993] ECR I-2533, paragraph 14).

47. As regards the question whether an undertaking such as IJM has been entrusted with the operation of services of general interest, it should be borne in mind that it has been given the task, through the grant of a non-exclusive concession governed by public law, of ensuring the supply of electricity in part of the national territory.

48. Such an undertaking must ensure that throughout the territory in respect of which the concession is granted, all consumers, whether local distributors or end-users, receive uninterrupted supplies of electricity in sufficient quantities to meet demand at any given time, at uniform tariff rates and on terms which may not vary save in accordance with objective criteria applicable to all customers.

49. Restrictions on competition from other economic operators must be allowed in so far as they are necessary in order to enable the undertaking entrusted with such a task of general interest to perform it. In that regard, it is necessary to take into consideration the economic conditions in which the undertaking operates, in particular the costs which it has to bear and the legislation, particularly concerning the environment, to which it is subject.

50. It is for the national court to consider whether an exclusive purchasing clause prohibiting local distributors from importing electricity is necessary in order to enable the regional distributor to perform its task of general interest.

51. The answer to the second question submitted by the *Gerechtshof te Arnhem* must therefore be that:

(a) Article 85 of the Treaty precludes the application, by a regional electricity distributor, of an exclusive purchasing clause contained in the general conditions of sale which prohibits a local distributor from importing electricity for public supply purposes and which, having regard to its economic and legal context, affects trade between Member States;

(b) Article 86 of the Treaty precludes the application, by a regional electricity distributor where it belongs to a group of undertakings occupying a collective dominant position in a substantial part of the common market, of an exclusive purchasing clause contained in the general conditions of sale which prohibits a local distributor from importing electricity for public supply purposes and which, in view of its economic and legal context, affects trade between Member States;

(c) Article 90(2) of the Treaty is to be interpreted as meaning that the application by a regional electricity distributor of such an exclusive purchasing clause is not caught by the prohibitions contained in Articles 85 and 86 of the Treaty in so far as that restriction of competition is necessary in order to enable that undertaking to perform its task of general interest. It is for the national court to consider whether that condition is fulfilled.

### **Costs**

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

**On those grounds, THE COURT,**

in answer to the questions referred to it by the Gerechtshof te Arnhem by an arbitration decision of 3 November 1992, hereby rules:

1. A national court which, in a case provided for by law, determines an appeal against an arbitration award must be regarded as a court or tribunal within the meaning of Article 177 of the Treaty, even if under the terms of the arbitration agreement made between the parties that court must give judgment according to what appears fair and reasonable.

2. (a) Article 85 of the Treaty precludes the application, by a regional electricity distributor, of an exclusive purchasing clause contained in the general conditions of sale which prohibits a local distributor from importing electricity for public supply purposes and which, having regard to its economic and legal context, affects trade between Member States;

(b) Article 86 of the Treaty precludes the application, by a regional electricity distributor where it belongs to a group of undertakings occupying a collective dominant position in a substantial part of the common market, of an exclusive purchasing clause contained in the general conditions of sale which prohibits a local distributor from importing electricity for public supply purposes and which, in view of its economic and legal context, affects trade between Member States;

(c) Article 90(2) of the Treaty is to be interpreted as meaning that the application by a regional electricity distributor of such an exclusive purchasing clause is not caught by the prohibitions contained in Articles 85 and 86 of the Treaty in so far as that restriction of competition is necessary in order to enable that undertaking to perform its task of general interest. It is for the national court to consider whether that condition is fulfilled.

[Signatures]

Language of the case: Dutch

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