JUDGMENT OF THE COURT OF FIRST INSTANCE (First Chamber, Extended Composition)

20 February 2001 *

In Case T-112/98,

Mannesmannröhren-Werke AG, established in Mülheim an der Ruhr (Germany), represented by M. Klusmann and K. Moosecker, lawyers, with an address for service in Luxembourg,

applicant,

v

Commission of the European Communities, represented by K. Wiedner, acting as Agent, assisted by M. Hilf, Professor, with an address for service in Luxembourg,

defendant,

APPLICATION for annulment of Commission Decision C(98) 1204 of 15 May 1998 relating to a procedure under Article 11(5) of Council Regulation No 17,

* Language of the case: German.

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

composed of: B. Vesterdorf, President, A. Potocki, A.W.H. Meij, M. Vilaras and N.J. Forwood, Judges,
Registrar: H. Jung,

having regard to the written procedure and further to the hearing on 23 May 2000,

gives the following

Judgment

Relevant legislation

1 Paragraphs 1, 4 and 5 of Article 11, headed 'Requests for information', of Council Regulation No 17 of 6 February 1962: First regulation implementing Articles 85 and 86 of the Treaty (OJ, English Special Edition 1959-1962, p. 87) provide as follows:

'1. In carrying out the duties assigned to it by Article 89 and by provisions adopted under Article 87 of the Treaty, the Commission may obtain all necessary information from the governments and competent authorities of the Member States and from undertakings and associations of undertakings.

...

4. The owners of the undertakings or their representatives and, in the case of legal persons, companies or firms, or of associations having no legal personality, the persons authorised to represent them by law or by their constitution shall supply the information requested.

5. Where an undertaking or association of undertakings does not supply the information requested within the time-limit fixed by the Commission, or supplies incomplete information, the Commission shall by decision require the information to be supplied. The decision shall specify what information is required, fix an appropriate time-limit within which it is to be supplied and indicate the penalties provided for in Article 15(1)(b) and Article 16(1)(c) and the right to have the decision reviewed by the Court of Justice.'

2 Article 16 of Regulation No 17, entitled 'Periodic penalty payments', provides:

'1. The Commission may by decision impose on undertakings or associations of undertakings periodic penalty payments of from 50 to 1 000 units of account per day, calculated from the date appointed by the decision, in order to compel them:

...

(c) to supply complete and correct information which it has requested by decision taken pursuant to Article 11(5);

...'.

3 Furthermore, Article 6(1) and (2) of the Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 ('the Convention') provides:

'1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law ....

2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.'

Background

4 The Commission initiated an investigation procedure with respect to the applicant and other producers of steel tubes in the course of which, on a number of occasions, it carried out inspections at the premises of the applicant, amongst others.

5 On 13 August 1997, following those inspections, the Commission sent the applicant a request for information in which it asked questions regarding presumed infringements of the competition rules in which the applicant was thought to have taken part.

6 That request for information contained, *inter alia*, the following four questions:

'1.6 Meetings between European and Japanese producers

According to the Commission's information, your firm participated in meetings between European and Japanese producers of seamless tubes. The meetings took place within the framework of what the trade calls the "Europe-Japan Club". Meetings were held at president level ("Presidents Meetings" or "P-Meetings"), at manager level ("Managers Committee" or "Managers Meetings" or "M-Meetings"), at expert level ("Experts Meetings" or "E-Meetings") and at working group level ("Working Group").

Please provide, for the period from 1984 to the present day:

— the dates, places and names of the firms participating in each of the meetings between European and Japanese seamless tube producers at president, manager, expert and working group level;

— the names of the persons who represented your firm at the abovementioned meetings and the travel documents (breakdown of travel costs, air tickets, etc.) of such persons;

— copies of all the invitations, agendas, minutes, internal memoranda, records and any other document in the possession of your firm and/or its employees concerning the abovementioned meetings;

— in the case of meetings for which you are unable to find the relevant documents, please describe the purpose of the meeting, the decisions adopted and the type of documents received before and after the meeting.

1.7 "Special Circle" meetings

According to the Commission's information, your firm participated in meetings between European seamless tube producers within what is called the "Special Circle".

Please provide, for the period from 1984 to the present day:

— the dates, places and names of the firms participating in each of the meetings between European and Japanese seamless tube producers at president, manager, expert and working group level;

— the names of the persons who represented your firm at the abovementioned meetings and the travel documents (breakdown of travel costs, air tickets, etc.) of such persons;

— copies of all the invitations, agendas, minutes, internal memoranda, records and any other document in the possession of your firm and/or its employees concerning the abovementioned meetings;

— in the case of meetings for which you are unable to find the relevant documents, please describe the purpose of the meeting, the decisions adopted and the type of documents received before and after the meeting.

1.8 1962 agreement

Between 1 January 1962 and July 1996, your firm was party to four agreements concerning OCTG and linepipe (Quota agreement for OCTG [stainless steel extraction and transport tubes], Price agreement for OCTG, Price agreement for Linepipe, Supplementary agreement). What is the relationship between these agreements and the Europe-Japan Club mentioned above and the "Special Circle"?

To what extent did the existence and implementation of these agreements influence the decisions adopted within the Europe-Japan Club and/or within the Special Circle?

To what extent did the decisions adopted within the Europe-Japan Club and/or within the Special Circle influence the implementation of the abovementioned agreements?

...

2.3 Meetings between European and Japanese producers

According to the Commission's information, your firm participated in meetings between European and Japanese producers of large-diameter welded tubes.

Please provide, for the period from 1984 to the present day:

— the dates, places and names of the firms participating in each of the meetings between European and Japanese large-diameter welded tube producers at president, manager, expert and working group level;

— the names of the persons who represented your firm at the abovementioned meetings and the travel documents (breakdown of travel costs, air tickets, etc.) of such persons;

— copies of all the invitations, agendas, minutes, internal memoranda, records and any other document in the possession of your firm and/or its employees concerning the abovementioned meetings;

— in the case of meetings for which you are unable to find the relevant documents, please describe the purpose of the meeting, the decisions adopted and the type of documents received before and after the meeting.'

7 By letter of 14 October 1997, the applicant's lawyers replied to certain of the questions in the request for information and declined to reply to the four questions set out above. By letter of 23 October 1997, the applicant confirmed the content of the reply given by its lawyers.

8 In its reply of 10 November 1997, the Commission rejected the applicant's argument that it was not obliged to answer the said four questions and, on the basis of Article 11(4) of Regulation No 17, set a time-limit of 10 days from the date of receipt of its letter for answers to be given to the four questions. It added that, should the applicant fail to answer the questions within the given time, a periodic penalty payment could be imposed on it.

9 In a letter dated 27 November 1997 from its lawyers, the applicant reiterated its refusal to provide the information requested.

10 On 15 May 1998 the Commission adopted a decision pursuant to Article 11(5) of Regulation No 17 (hereinafter 'the contested decision'), Article 1 of which provided that the applicant must, within 30 days of notification of the contested decision, reply to the four questions at issue, which were set out in an annex to the decision. Article 2 provided that 'should [the applicant] fail to provide the information requested in the manner specified in Article 1, a fine of ECU 1 000 per day of delay [would] be imposed on it as from the end of the period laid down in Article 1'.

Procedure

11 By application lodged at the Registry of the Court of First Instance on 23 July 1998 the applicant brought the present action.

12 Pursuant to Article 14 of the Rules of Procedure of the Court of First Instance, and on the proposal of the First Chamber, the Court decided, after hearing the parties in accordance with Article 51 of those Rules, to refer the case to a Chamber sitting in extended composition.

13 Upon hearing the report of the Judge-Rapporteur, the Court (First Chamber, Extended Composition) decided to open the oral procedure.

14 The parties presented oral argument and their replies to the Court's questions at the hearing on 23 May 2000.

15 By facsimile letter received at the Registry of the Court of First Instance on 18 December 2000 the applicant asked the Court to have regard to the Charter of fundamental rights of the European Union (OJ 2000 C 364, p. 1) proclaimed in Nice on 7 December 2000 (hereinafter 'the Charter') in determining the present case, on the ground that the Charter constituted a new point of law concerning the applicability of Article 6(1) of the Convention to the facts of the case. In the alternative, the applicant asked for the oral procedure to be re-opened.

16 On being invited to submit its observations on that request, the Commission rejected the applicant's arguments by letter of 15 January 2001, contending that the Charter is of no consequence for the purpose of the determination of the present case.

Forms of order sought by the parties

17 The applicant claims that the Court should:

— annul the contested decision;

— in the alternative, annul Article 2 of the contested decision;

— order the Commission to pay the costs.

18 The Commission contends that the Court should:

— dismiss the action as manifestly inadmissible in so far as it seeks the annulment of Article 2 of the contested decision;

— dismiss the action as unfounded in so far as it seeks the annulment of Article 1 of the contested decision;

— order the applicant to pay the costs.

19 At the hearing, the Commission confirmed that it had 'neither the intention nor the power to enforce Article 2 of the contested decision', whereupon the applicant withdrew its claim for annulment of that article and, consequently, its pleas in relation thereto, of which formal note was taken.

Substance

20 In support of its claim for annulment of Article 1 of the contested decision, the applicant puts forward four pleas in law. It is appropriate to begin by considering together the first three of those pleas, all of which concern an alleged infringement of the rights of defence.

Arguments of the parties

The first plea

21 The applicant's first plea is based on the judgment of the Court of Justice in Case 374/87 *Orkem* v *Commission* [1989] ECR 3283.

22 The applicant argues that, whilst an undertaking is indeed required to provide the Commission with all necessary information concerning such facts as may be known to it and to disclose to the Commission, if necessary, such documents relating thereto as are in its possession, even if those documents may be used to establish, against it or another undertaking, the existence of anti-competitive conduct, that obligation, and the corresponding right of the Commission, have been made conditional by the Court of Justice on the rights of defence of the

undertaking concerned not being undermined by a decision requiring the provision of information (the judgments in *Orkem*, paragraph 34, and in Case T-34/93 *Société Générale* v *Commission* [1995] ECR II-545, paragraph 73 et seq.). Those principles, according to the applicant, have been extended to the preliminary-investigation stage. The applicant adds that, in *Orkem*, the Court of Justice held that the rights of defence were undermined where the Commission not only requested factual information, but also asked questions about the purpose of a given action or the object of meetings. Thus the Court of Justice has held to be unlawful a question that might force the applicant to admit its participation in an agreement liable to prevent or restrict competition. The applicant maintains that, in the present case, the questions at issue in the contested decision have that same unlawful purpose.

23 The applicant submits that the unlawful nature of question 1.6 is evident, first of all, from its wording, which shows that the Commission was already in possession of factual information regarding the meetings it mentions. The unlawfulness of the question is also evident from the request made in the fourth indent thereof, which asks the applicant to describe, in the event that it does not have the 'relevant' documents, the purpose of the meetings and the decisions adopted at them. That requirement necessarily relates to the objective of the meetings and to any unlawful content and/or purpose they may have had. Had any anti-competitive agreement or concerted practice been discussed or decided upon during the meetings, the applicant would necessarily have been led, by answering this part of the question, to make a direct admission that those participating in the meetings were pursuing an anti-competitive objective. The information furnished in response to the fourth indent of question 1.6 would also enable the Commission to interpret the answers given to the questions asked in the first three indents as confirmation of an admission of unlawful conduct. Therefore, an obligation to reply to those requests would also, in respect of each of them, lead to an infringement of the applicant's rights of defence.

24 The applicant submits that the same is true as regards question 1.7, which in similar terms calls for information on the aim pursued by the participants at the European seamless tube producers' meetings within the 'Special Circle', and on the matters discussed and decisions adopted at certain of those meetings.

25 Question 1.8 does not deal with fact and, given the nature of the powers conferred by Article 11(1) and (5) of Regulation No 17, this renders it unlawful. The Commission is permitted only to demand information relating to factual situations. It is not entitled to ask for opinions or value judgments, or to invite the applicant to make assumptions or draw conclusions. In the present case, the question relating to the 'relationship' between certain legal agreements of which the Commission has copies and certain presumed infringements is concerned exclusively with appraisal of a factual situation. Furthermore, if the meetings within the 'Europe-Japan Club' and 'Special Circle' had an anti-competitive purpose and if there were a relationship between those meetings and the agreements known to the Commission, the Commission could be informed in regard to this only through an admission of anti-competitive conduct, which, in accordance with the principles laid down in *Orkem*, no-one may be compelled to make.

26 As regards question 2.3, which is worded in the same way as the first two questions, the same arguments apply, *mutatis mutandis*, as were put forward in relation to the first two.

27 Furthermore, the applicant states that in *Société Générale* (at paragraph 75) the Court of First Instance did no more than observe that a question which is in principle factual does not become unlawful simply because, in order to answer it, it is necessary also to consider the interpretation of agreements that are presumed to be anti-competitive. However, it may not in any circumstances be inferred from that observation that questions designed to obtain interpretations or appraisals are always lawful and must therefore be answered. The Court of First Instance specifically stated in *Société Générale* that, under Article 11(5) of Regulation No 17, undertakings are only required to give 'purely factual' answers.

28 The Commission contends that, during the preliminary-investigation procedure, undertakings are required to communicate to it all facts of which they are aware and about which the Commission has questioned them in a request for information. Undertakings are also under an obligation to send the Commission all documents relating to those facts. The purpose of that obligation is to guarantee both the effectiveness of Community law relating to restrictive

agreements and practices and the maintenance of the system of competition intended by the EC Treaty, which undertakings have an absolute duty to comply with. The applicant cannot successfully set up against that obligation the rights of defence. Regulation No 17 offers undertakings certain procedural safeguards during the course of the preliminary-investigation procedure, but it does not authorise them to refrain from answering certain questions on the ground that their answers might be used to establish that they have infringed the competition rules and so constitute self-incrimination. The Commission nevertheless accepts that it cannot compel an undertaking to provide answers which might involve an admission on its part of the existence of an infringement which it is incumbent on the Commission to prove.

29 Thus, according to the Commission, all undertakings are required, on receiving a request for information, to communicate all facts which may be relevant in the light of the law relating to restrictive agreements and practices. On the other hand, they may not be questioned on the intention, aim or purpose of particular practices or measures, given that such questions might constrain them to admit infringements.

30 The Commission states that questions 1.6, 1.7 and 2.3 correspond, in large measure, to the questions which it asked in the case which gave rise to the judgment in *Orkem*, and which the Court held to be unobjectionable. Those questions are directed at obtaining information concerning meetings that were held, the capacity in which the participants attended them, and the disclosure of documents relating to them. Thus, all the information requested concerns objective facts and none of it implies an admission of unlawful conduct. The questions are therefore not open to criticism.

31 Question 1.8 relates to four agreements concluded by the applicant in 1962 and notified to the Bundeskartellamt (Federal Cartel Office). According to the Commission, the question is purely factual and thus lawful. It would remain so even if it also called for an interpretation of those agreements (*Société Générale*, paragraph 75).

32 Lastly, the Commission contends that the Court of Justice has manifestly not acknowledged the existence of any right to abstain from incriminating oneself (*Orkem*, paragraph 27).

The second plea, alleging infringement of Article 6(1) of the Convention

33 The applicant submits that, in procedures before it, the Commission is required to comply with Article 6 of the Convention (Case T-213/95 and T-18/96 *SCK and FNK* v *Commission* [1997] ECR II-1739, paragraphs 41, 42 and 53). The fundamental rights guaranteed by the Convention, as general principles of Community law, take precedence over the ordinary rules of law laid down by Regulation No 17. Furthermore, it is clear from the 11th recital in the preamble to the contested decision that the Commission regards itself as being obliged to comply with the Convention.

34 On the conditions governing the application of Article 6(1) of the Convention, the applicant states that the provision confers a right upon, *inter alios*, anyone against whom a criminal charge has been brought. 'Anyone' should be understood as meaning both natural and legal persons (the opinion of the European Commission of Human Rights annexed to Eur. Court H. R., *Stenuit* judgment of 27 February 1992, Series A, no. 232-A). The applicant adds that the Court of Justice had ruled to this effect in *Orkem* where it expressly acknowledged that not only natural persons, but also undertakings under investigation in a competition-law matter may invoke the fundamental rights guaranteed by Article 6(1) of the Convention. The Court of Justice also implicitly acknowledged that the fact that the Commission is not a court does not constitute a valid ground for disapplying that provision.

35 An investigation procedure conducted with a view to imposing a penalty also constitutes a 'criminal charge' within the meaning of Article 6 of the Convention (Eur. Court H. R. *Öztürk* judgment of 21 February 1984, Series A, no. 73, § 56).

The European Commission of Human Rights, in its opinion mentioned above, adopted that approach with regard to a procedure under the law on restrictive agreements and practices, which resulted in the imposition of a fine.

36 According to the applicant, the protection afforded by Article 6 of the Convention goes appreciably beyond the principles recognised in *Orkem*. Article 6 not only enables persons who are the subject of a procedure that might lead to the imposition of a fine to refuse to answer questions or to provide documents containing information on the objective of anti-competitive practices, but also establishes a right not to incriminate oneself by positive action.

37 Thus, in its judgment of 25 February 1993 in *Funke* (Series A, no. 256-A), the European Court of Human Rights (hereinafter 'the ECHR') held that any measure intended to compel a natural or legal person who is the subject of an investigation procedure to incriminate himself or itself by positive action infringes Article 6(1) of the Convention, regardless of what is laid down by the provision of national law relied upon by the administrative authority conducting the investigation.

38 Accordingly, not only demanding admissions as such, or disclosure of the anti-competitive purpose of certain meetings, but also applying pressure, with the threat of penalties, with a view to enabling the Commission to obtain incriminating evidence against the applicant, must be regarded as an unlawful measure. To demand, with the threat of penalties, the search for and the production of documents relating to meetings which the Commission suspects the applicant attended and which, in the Commission's view, involved illegality possibly warranting the imposition of penalties under Article 15 of Regulation No 17, has the effect of forcing the applicant to incriminate itself. The minutes, notes and documents relating to travel costs or to other aspects of the meetings whose object was, according to the Commission, contrary to Article 85 of the EC Treaty (now Article 81 EC), must be regarded as not having to be sought for or produced by the applicant.

39 The applicant claims that, on the basis of Article 6(1) of the Convention, it may lawfully refrain from any positive action that would compel it to give evidence directly against itself in an investigation procedure, quite independently of whether or not, in the light of the principles recognised in *Orkem* (which are now partially superseded), such action would lead it to supply incriminating evidence, or to admit unlawful objectives or anti-competitive designs. For this reason too, the contested decision should therefore not have been adopted.

40 The applicant makes seven additional points in order to demonstrate the applicability of the Convention to the present case.

41 Firstly, it maintains that it is clear from the judgments of the Court of Justice in Case C-299/95 *Kremzow* [1997] ECR I-2629, at paragraph 14, and Case C-185/95 P *Baustahlgewebe* v *Commission* [1998] ECR I-8417 that measures are not acceptable in the European Community which are incompatible with observance of the human rights recognised and guaranteed by the Convention.

42 Secondly, it points out that the ECHR recognised, in *Funke* and *Öztürk*, cited above, as did the European Commission of Human Rights in its opinion, mentioned above, the right not to incriminate oneself in national proceedings or in proceedings governed by Community law. The applicant adds that, in *Baustahlgewebe* v *Commission*, the Court of Justice accepted that Article 6 of the Convention is applicable in proceedings which may lead to the imposition of a fine pursuant to Regulation No 17.

43 Thirdly, the applicant maintains that the principles laid down in *Orkem* were not confirmed either in the judgment of the Court of Justice in Case C-60/92 *Otto* [1993] ECR I-5683 or in the judgment in *Société Générale*.

44 Fourthly, there is no foundation for the Commission's assertion that its ability to perform its role and the implementation of Community law on restrictive agreements and practices in its entirety are partly dependent upon whether or not the Commission can compel undertakings to incriminate themselves.

45 Fifthly, the applicant maintains that, as the Court of Justice held in *Orkem*, at paragraph 30, and in *Baustahlgewebe* v *Commission*, at paragraph 21, whether or not the rights guaranteed by the Convention apply is in no way dependent upon any distinction between natural and legal persons.

46 Sixthly, the applicant contends that, within Community law, contrary to the position taken by the Commission, the field of 'criminal law in the strict sense', with special rights and obligations, is not a 'very limited' one. For the purposes of the Convention, the determination of the question whether the concept 'criminal charge' also encompasses fines and administrative sanctions depends solely upon whether or not they are punitive in nature. That concept is taken and construed independently by the ECHR and the European Commission of Human Rights (Eur. Court H. R. *Neumeister* judgment of 27 June 1968, Series A, no. 8, § 18, and *Öztürk*, cited above, § 50). The Commission's submission that it has no criminal jurisdiction is, therefore, irrelevant to the interpretation of Article 6(1) of the Convention. According to the applicant, it follows from the foregoing that European law on restrictive agreements and practices, and its application, also come within 'criminal' law within the meaning of the Convention.

47 Lastly, the applicant argues that the Commission must be regarded as a 'court' within the meaning of Article 6(1) of the Convention.

48 The Commission argues, first of all, that, whilst the rights guaranteed by the Convention are a source of inspiration for the general principles of Community law and, in particular, for fundamental rights, in so far as all the Member States acceded to the Convention, and thus the Convention reflects the standard, in the

matter of fundamental rights, which is common to all the Member States, the legality of acts of the Community institutions can nevertheless not be appraised by direct reference to the Convention. The contested decision cannot, therefore, have been adopted in breach of Article 6 of the Convention.

49 Furthermore, the Commission acknowledges that the ECHR has held that, pursuant to Article 6 of the Convention, anyone who is examined, within the meaning of the Convention, is entitled to maintain silence or to decline to give evidence against himself. Notwithstanding this, the Commission puts forward five arguments in order to show that Article 6(1) of the Convention is not applicable in the circumstances of the present case.

50 First of all, the Commission points out that hitherto the ECHR has never ruled that the right not to incriminate oneself must be recognised in national or Community procedures concerning restrictive agreements or practices.

51 As far as the Community procedures are concerned, the Commission draws attention, in particular, to the features that are peculiar to them, namely the fact that they are concerned only with legal persons and that in no case can they lead to a criminal charge or to the imposition of criminal penalties in the true sense.

52 Secondly, it claims that the ECHR has not yet ruled that the right not to incriminate oneself can apply with regard to legal persons.

53 Thirdly, the Commission claims that the right for a person to refuse to provide information exposing him to the risk of incriminating himself has been

acknowledged by the ECHR only in the very limited field of criminal law in the strict, traditional sense, that is to say in the context of proceedings in which a sentence entailing loss of liberty could be imposed and which, in view of the particular nature of the penalty incurred, could plainly be characterised as criminal proceedings within the meaning of Article 6(1) of the Convention.

54 Fourthly, the Commission contends that it is not a 'court' and that, consequently, the principles deriving from Article 6(1) of the Convention do not apply in this case (see, *inter alia*, Case T-348/94 *Enso Española* v *Commission* [1998] ECR II-1875, paragraph 56). The fact that the Commission does not have the jurisdiction of a court means that a procedure concerning restrictive agreements or practices is not a criminal procedure. The principles deriving from Article 6 of the Convention are therefore not applicable to the preliminary-investigation procedure conducted by the Commission.

55 Lastly, the Commission states that it would in practice be impossible to apply Community law on restrictive agreements and practices if undertakings were not under an obligation to cooperate actively in the investigation of the facts. It is therefore necessary for it to be able, in preliminary-investigation proceedings, to require undertakings to furnish information that may incriminate them. That necessity has been recognised by the Court of Justice and the Court of First Instance (*Société Générale*, paragraph 71 et seq., and the Opinion of Advocate General Warner in Case 155/79 *AM & SL* v *Commission* [1982] ECR 1575). According to the Commission, the procedure laid down by Article 11 of Regulation No 17 could no longer achieve its purpose if the undertaking concerned were accorded the right to refuse to make statements or produce documents where it is possible that they could be used to prove the unlawfulness of its conduct.

56 Nor, finally, according to the Commission, do the applicant's other arguments provide any basis for concluding that Article 1 of the contested decision is inconsistent with the principles flowing from Article 6(1) of the Convention.

The third plea, alleging infringement of Articles 6(2) and 10 of the Convention

57 The applicant contends that the right not to give evidence against oneself is protected by the presumption of innocence as laid down in Article 6(2) of the Convention and by the right to freedom of expression provided for in Article 10 (opinion of the European Commission of Human Rights annexed to Eur. Court H. R., *K.* v *Austria* judgment of 2 June 1993, Series A, no. 255-B). The applicant indicates in its application that it limits itself to that statement because the ECHR held, in *Funke*, that infringement of Article 6(1) of the Convention relieved it of the need to consider the alleged infringement of another principle of the Convention.

58 The Commission accepts that, because of the close relationship between the presumption of innocence and the right not to incriminate oneself, that right is based, in the case-law of the ECHR, on the provisions of Article 6(1) of the Convention, read in conjunction with Article 6(2). Nevertheless, Article 6(2) of the Convention does not give the right in question any different tenor or broader scope than that resulting from Article 6(1) in so far as concerns any entitlement to refuse to provide information.

Findings of the Court

59 It must be emphasised at the outset that the Court of First Instance has no jurisdiction to apply the Convention when reviewing an investigation under

competition law, inasmuch as the Convention as such is not part of Community law (Case T-347/94 *Mayr-Melnhof* v *Commission* [1998] ECR II-1751, paragraph 311).

60 However, it is settled case-law that fundamental rights form an integral part of the general principles of Community law whose observance is ensured by the Community judicature (see, in particular, Opinion 2/94 the Court of Justice of 28 March 1996 [1996] ECR I-1759, paragraph 33, and the judgment in *Kremzow*, cited above, paragraph 14). For that purpose, the Court of Justice and the Court of First Instance draw inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international treaties for the protection of human rights on which the Member States have collaborated and to which they are signatories. The Convention has special significance in that respect (Case 222/84 *Johnston* [1986] ECR 1651, paragraph 18, and *Kremzow*, cited above, paragraph 14). Furthermore, paragraph 2 of Article F of the Treaty on European Union (now Article 6(2) EU) provides that 'the Union shall respect fundamental rights, as guaranteed by the [Convention] and as they result from the constitutional traditions common to the Member States, as general principles of Community law'.

61 Next, it must be borne in mind that the purpose of the powers conferred on the Commission by Regulation No 17 is to enable that institution to fulfil its duty under the Treaty to ensure that the rules on competition within the common market are observed.

62 During the preliminary-investigation procedure, Regulation No 17 does not give an undertaking that is subjected to an investigative measure any right to avoid the application of that measure on the ground that the results thereof might provide evidence of an infringement by it of the competition rules. On the contrary, it places the undertaking under a duty of active cooperation, which means that it must be prepared to make available to the Commission any information relating

to the subject-matter of the investigation (*Orkem*, paragraph 27, and *Société Générale*, paragraph 72).

63 In the absence of any right to silence expressly provided for in Regulation No 17, it is necessary to consider whether certain limitations on the Commission's powers of investigation during a preliminary investigation are, however, implied by the need to safeguard the rights of defence (*Orkem*, paragraph 32).

64 In this respect, it is necessary to prevent the rights of defence from being irremediably impaired during preliminary-investigation procedures which may be decisive in providing evidence of the unlawful nature of conduct engaged in by undertakings (*Orkem*, paragraph 33, and *Société Générale*, paragraph 73).

65 However, it is settled case-law that, in order to ensure the effectiveness of Article 11(2) and (5) of Regulation No 17, the Commission is entitled to compel an undertaking to provide all necessary information concerning such facts as may be known to it and to disclose to the Commission, if necessary, such documents relating thereto as are in its possession, even if the latter may be used to establish, against it or another undertaking, the existence of anti-competitive conduct (*Orkem*, paragraph 34, and Case 27/88 *Solvay* v *Commission* [1989] ECR 3355, summary publication, and *Société Générale*, paragraph 74).

66 To acknowledge the existence of an absolute right to silence, as claimed by the applicant, would go beyond what is necessary in order to preserve the rights of defence of undertakings, and would constitute an unjustified hindrance to the Commission's performance of its duty under Article 89 of the EC Treaty (now, after amendment, Article 85 EC) to ensure that the rules on competition within the common market are observed.

67 It follows that an undertaking in receipt of a request for information pursuant to Article 11(5) of Regulation No 17 can be recognised as having a right to silence only to the extent that it would be compelled to provide answers which might involve an admission on its part of the existence of an infringement which it is incumbent upon the Commission to prove (*Orkem*, paragraph 35).

68 Those are the limits within which the arguments raised by the applicant must be assessed.

69 It is appropriate in this case to review first of all the legality of questions 1.6, 1.7 and 2.3, which are almost identical, and then that of question 1.8.

70 In their first three indents, questions 1.6, 1.7 and 2.3 contain requests for purely factual information and the production of documents already in existence. Comparable questions were not held to be unlawful by the Court of Justice in its judgment in *Orkem*. The applicant was therefore under an obligation to provide answers in response to those requests.

71 By contrast, the last indent of each of those three questions does not concern exclusively factual information. In the last indent, the Commission calls upon the applicant, in identical terms, to describe in particular the 'purpose' of the meetings it attended and the 'decisions adopted' during them, even though it is clear that the Commission suspected that their purpose was to arrive at agreements, in respect of selling prices, of a nature such as to prevent or restrict competition. It follows that requests of this kind are such that they may compel

the applicant to admit its participation in an unlawful agreement contrary to the Community rules on competition.

72 On this point, it must be observed that the Commission expressly indicated in the last indent of the three questions at issue that the applicant was to provide it with the information in question only in the event that it was unable to find the relevant documents requested in the preceding indent. The applicant was therefore required to reply to the last indent of the questions only in so far as it was unable to produce the documents requested. Nevertheless, because of the order and content of the first three indents of the questions, it cannot be excluded that the applicant would have been obliged to reply to the last indent.

73 Consequently, it must be held that the last indent of each of questions 1.6, 1.7 and 2.3 infringes the applicant's rights of defence.

74 As far as question 1.8 is concerned, it should be observed that the Commission is requiring the applicant to comment, first, on the relationship between, on the one hand, the four OCTG and linepipe agreements concluded in 1962 and notified to the Bundeskartellamt and, on the other hand, the 'Europe-Japan Club' and 'Special Circle', and, second, on the decisions adopted within the 'Europe-Japan Club' and the 'Special Circle', that is to say, decisions which the Commission regards as possibly constituting infringements of the rules laid down by the Treaty. Answering this question would require the applicant to give its assessment of the nature of those decisions. It must be held that, in accordance with the judgment in *Orkem*, question 1.8 also constitutes an infringement of the applicant's rights of defence.

75 As regards the arguments to the effect that Article 6(1) and (2) of the Convention enables a person in receipt of a request for information to refrain from answering the questions asked, even if they are purely factual in nature, and to refuse to

produce documents to the Commission, suffice it to repeat that the applicant cannot directly invoke the Convention before the Community courts.

76 As regards the potential impact of the Charter, to which the applicant refers (see paragraph 15 above), upon the assessment of this case, it must be borne in mind that that Charter was proclaimed by the European Parliament, the Council and the Commission on 7 December 2000. It can therefore be of no consequence for the purposes of review of the contested measure, which was adopted prior to that date. That being so, there is no reason to accede to the applicant's request for the oral procedure to be re-opened.

77 However, it must be emphasised that Community law does recognise as fundamental principles both the rights of defence and the right to fair legal process (see *Baustahlgewebe* v *Commission*, cited above, paragraph 21, and Case C-7/98 *Krombach* [2000] ECR I-1935, paragraph 26). It is in application of those principles, which offer, in the specific field of competition law, at issue in the present case, protection equivalent to that guaranteed by Article 6 of the Convention, that the Court of Justice and the Court of First Instance have consistently held that the recipient of requests sent by the Commission pursuant to Article 11(5) of Regulation No 17 is entitled to confine himself to answering questions of a purely factual nature and to producing only the pre-existing documents and materials sought and, moreover, is so entitled as from the very first stage of an investigation initiated by the Commission.

78 The mere fact of being obliged to answer purely factual questions put by the Commission and to comply with its requests for the production of documents already in existence cannot constitute a breach of the principle of respect for the rights of defence or impair the right to fair legal process. There is nothing to prevent the addressee of such questions or requests from showing, whether later during the administrative procedure or in proceedings before the Community courts, when exercising his rights of defence, that the facts set out in his replies or the documents produced by him have a different meaning from that ascribed to them by the Commission.

79 It follows that the contested decision must be annulled in so far as it obliges the applicant to answer the last indent of each of questions 1.6, 1.7 and 2.3 and all of question 1.8, which may involve the applicant in admitting that it was party to an agreement liable to prevent or restrict competition.

The fourth plea, alleging disregard for the applicability of national procedural safeguards

Arguments of the parties

80 The applicant argues that its right not to be required to incriminate itself by positive action is derived not only from Community law, but also from German law, which, it maintains, must not be disregarded in the present case. In German law, the principle that no natural or legal person may be required to incriminate himself or itself before an investigating authority is applicable. The applicant states that, in accordance with that principle, it is entitled to refuse to provide any information and cannot be required to produce any documentary evidence adverse to itself. According to the applicant, in criminal or administrative investigation proceedings anyone who is charged with an offence or is otherwise concerned by those proceedings may, pursuant to Paragraph 136(1) of the Strafprozeßordnung (the German code of criminal procedure), adopt a purely passive stance, because no-one may be forced to contribute actively to his own punishment.

81 According to the applicant, that safeguard afforded by German law is significant in the present case in that the imposition of a fine on it in the investigation

procedure conducted under Community law may have consequences under national law. Other investigation procedures, in particular, might follow, because the imposition of a fine under Article 15 of Regulation No 17 does not preclude new or complementary procedures from being initiated under national law (Case 14/68 *Walt Wilhelm and Others* v *Bundeskartellamt* [1969] ECR 1, 16). In this connection, it is appropriate to bear in mind that, where it imposes a fine, the Commission closes the procedure by drawing up a reasoned decision which is subsequently published in the *Official Journal of the European Communities*, setting out all the factual circumstances relied upon in establishing the infringement. The applicant adds that the publication of such material may also lead the competent national authority to initiate, in respect of the same facts, other investigation procedures of a criminal or administrative nature.

82 The Commission argues that the requirements of German law are relevant to the legality of the contested decision only to the extent that there can be identified within the national laws of the Member States a common principle that one may refuse to incriminate oneself. That is precisely what the Court of Justice rejected in *Orkem*, at paragraph 29, where it observed that the laws of the majority of the Member States recognise the right not to give evidence against oneself only to natural persons charged with an offence in criminal proceedings.

83 Moreover, the Commission states that, according to the case-law of the Court of Justice, it alone is empowered to use information obtained in a procedure under Article 11 of Regulation No 17 (Case C-67/91 *AEB and Others* [1992] ECR I-4785, paragraph 38). Such information cannot be relied on by the authorities of the Member States either in a preliminary-investigation procedure or to justify a decision based on provisions of competition law, be it national law or Community law. It must remain internal to those authorities and may be used only to decide whether or not it is appropriate to initiate a national procedure (*AEB and Others*, paragraph 42).

Findings of the Court

84 In the field of competition law, the national laws of the Member States do not, in general, recognise a right not to incriminate oneself. It is, therefore, immaterial to the result of the present case whether or not, as the applicant claims, there is such a principle in German law.

85 As regards the applicant's argument that there is a risk that information obtained by the Commission and communicated to the national authorities may be used by those authorities against it, it is sufficient to refer to the judgment in *AEB and Others*, where, at paragraph 42, the Court of Justice, after pointing out that information obtained by the Commission must be communicated to the national authorities, gave the following clear statement of the law in this respect:

'Such information cannot be relied on by the authorities of the Member States either in a preliminary investigation procedure or to justify a decision based on provisions of competition law, be it national law or Community law. Such information must remain internal to those authorities and may be used only to decide whether or not it is appropriate to initiate a national procedure.'

86 It follows that the German authorities cannot rely on information obtained by the Commission by means of its request for information pursuant to Article 11 of Regulation No 17 in order to justify a decision taken against the applicant on the basis of the provisions of competition law.

87 Consequently, should the German authorities take the view that the information thus obtained by the Commission is relevant for the purpose of initiating a procedure in respect of the same facts, they must make their own request for information regarding those facts.

88 The fact that information obtained by the Commission may alert the German authorities to the possibility of an infringement of German law and that the German authorities might use that information for the purpose of determining whether or not it is appropriate to initiate national procedures, does not alter the conclusion that, as is clear from paragraph 42 of the judgment in *AEB and Others*, the plea now under consideration cannot be upheld.

89 That plea must therefore be rejected.

90 Having regard to all the foregoing considerations, the contested decision must be annulled in so far as it relates to the last indent of each of questions 1.6, 1.7 and 2.3 and to question 1.8 of the request for information sent to the applicant on 13 August 1997, and the remainder of the application must be dismissed.

Costs

91 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. However, under the first subparagraph of

Article 87(3), where each party succeeds on some and fails on other heads, or where the circumstances are exceptional, the Court of First Instance may order that the costs be shared or that each party bear its own costs.

92 In the present case, account should be taken, firstly, of the fact that both the applicant and the defendant have been partly unsuccessful. Secondly, it should be borne in mind that, by requiring it to reply to the requests made in the last indent of each of questions 1.6, 1.7 and 2.3 and in question 1.8, the Commission infringed the applicant's rights of defence, contrary to the judgment in *Orkem*, and constrained the applicant to bring the present action. That being so, the Court takes the view that the Commission must pay two thirds of the applicant's costs.

On those grounds,

THE COURT OF FIRST INSTANCE (First Chamber, Extended Composition)

hereby:

1. Annuls Commission Decision C(98) 1204 of 15 May 1998 relating to a procedure under Article 11(5) of Council Regulation No 17, in so far as it relates to the last indent of each of questions 1.6, 1.7 and 2.3 and to question 1.8 of the request for information sent to the applicant on 13 August 1997;

2. Dismisses the remainder of the application;

3. **Orders the defendant to bear its own costs and to pay two thirds of the costs of the applicant, which shall bear the remaining third.**

Vesterdorf Potocki Meij

Vilaras Forwood

Delivered in open court in Luxembourg on 20 February 2001.

H. Jung B. Vesterdorf

Registrar President