JUDGMENT OF THE COURT OF FIRST INSTANCE (Fourth Chamber)
8 March 1995 *

In Case T-34/93,

Société Générale, a company governed by French law, established in Paris, represented by Robert Saint-Esteben, of the Paris Bar, with an address for service in Luxembourg at the Chambers of Aloyse May, 31 Grand-Rue,

applicant,

v

Commission of the European Communities, represented by Enrico Traversa, of its Legal Service, acting as Agent, assisted by Hervé Lehman, of the Paris Bar, with an address for service in Luxembourg at the office of Georgios Kremlis, of the Legal Service, Wagner Centre, Kirchberg,

defendant,

APPLICATION for (i) the annulment of the Commission's decision of 1 April 1993 relating to a proceeding pursuant to Article 11(5) of Regulation No 17 of the

* Language of the case: French.

Council of 6 February 1962, first regulation implementing Articles 85 and 86 of the Treaty (OJ, English Special Edition 1959-1962, p. 87) and (ii) compensation for the loss which the applicant claims to have suffered as a result of that decision,

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

composed of: K. Lenaerts, President, R. Schintgen and R. García-Valdecasas, Judges,

Registrar: H. Jung,

having regard to the written procedure and further to the hearing on 9 November 1994,

gives the following

Judgment

Facts

1 By letter of 12 September 1992, the Commission, referring to 'Cases IV/30.717-A — Eurocheque: Helsinki Agreement and IV/30.717-B — Eurocheque: Package Deal Agreement' sent Société Générale a request for information pursuant to Article 11 of Regulation No 17 of the Council of 6 February 1962, first regulation

implementing Articles 85 and 86 of the Treaty (OJ, English Special Edition 1959-1962, p. 87).

2 That request was made against the following background:

The Package Deal Agreement on commissions, value dates and central clearing of uniform Eurocheques made out in local currency and the opening-up of the non-banking sector was concluded on 31 October 1980 by the national groups representing the financial institutions of each of the countries taking part in the Eurocheque system. The agreement, concluded for a five-year period from 1 May 1981, forms part of the Eurocheque agreements and lays down, in substance, the following principles:

— the trading sector (shops, large stores, service stations, hotels and restaurants) must be officially prepared to accept uniform Eurocheques and must be informed of the guarantee terms;

— uniform Eurocheques must be made out in the currency of the foreign country visited;

— a commission of 1.25% of the amount of the cheque, with no minimum, is applied to all uniform Eurocheques made out abroad in local currency. That commission is no longer charged by the cashier at the time of encashment or by the trader when accepting the cheque, but is paid when the cheque is reimbursed by the clearing house.

3 At the meeting of the Eurocheque Assembly held in Helsinki on 19 and 20 May 1983, an 'agreement on the acceptance by traders in France of Eurocheques drawn on foreign financial institutions' ('the Helsinki Agreement') was concluded between the French banks and financial institutions, on the one hand, and the Eurocheque Assembly, on the other hand. Under that agreement, the French banks and financial institutions agreed with the Eurocheque International Community

that traders affiliated to Groupement Carte Bleue and/or to Eurocard France SA would, as from 1 December 1983, accept foreign Eurocheques made out in French francs for the payment of goods and services, on the same terms as those of the said organizations. Groupement Carte Bleue, on the one hand, and Crédit Agricole and Crédit Mutuel, on the other hand, accordingly gave, *inter alia*, the following undertaking: 'In respect of purchases paid for by Eurocheques, the members of Groupement Carte Bleue and of Eurocard will charge their affiliated traders a commission no greater than that applicable to Carte Bleue and Eurocard payments.'

4 On 10 December 1984 the Commission adopted Decision 85/77/EEC relating to a proceeding pursuant to Article 85 of the EEC Treaty (IV/30.717 — Uniform Eurocheques, OJ 1985 L 35, p. 43) declaring the provisions of Article 85(1) inapplicable to the Package Deal Agreement for the period from 7 July 1982 to 30 April 1986.

5 On 5 May 1986 Eurocheque International requested the Commission to renew the exemption of the Package Deal Agreement.

6 On 16 December 1987 Eurocheque International notified the new Package Deal Agreement, concluded on 5 June 1987 for an indefinite period from 1 January 1988, to the Commission.

7 On 31 July 1990 the Commission sent Eurocheque International a statement of objections relating both to the new Package Deal Agreement and to the Helsinki Agreement. At the same time, it sent Groupement des Cartes Bancaires CB ('the CB group') a statement of objections limited to the Helsinki Agreement.

8 On 22 May 1991 the CB group informed the Commission of the decision of the Eurocheque Assembly to terminate the Helsinki Agreements having regard to the Commission's opposition.

9 On 5 June 1991 Eurocheque International informed the Commission that it was willing to abolish the Helsinki Agreement.

10 On 25 March 1992 the Commission adopted Decision 92/212/EEC relating to a proceeding pursuant to Article 85 of the EEC Treaty (IV/30.717-A — Eurocheque: Helsinki Agreement, OJ 1992 L 95, p. 50). On 25 May 1992 the CB group and Eurocheque International (subsequently Europay International) each brought an action against that decision. In its judgment of 23 February 1994 this Court annulled Articles 1 and 3 of the Commission's decision in so far as they referred to Eurocheque International and set the amount of the fine imposed on the CB group at ECU 2 000 000 (Joined Cases T-39/92 and T-40/92 *CB and Europay* v *Commission* [1994] ECR II-49).

11 In its request for information of 12 September 1992, headed 'Cases IV/30.717-A — Eurocheque: Helsinki Agreement and IV/30.717-B — Eurocheque: Package Deal Agreement', the Commission pointed out that the Helsinki Agreement, in respect of which it had adopted on 25 March 1992 a decision imposing a prohibition and fines, drew a distinction, in principle, between three kinds of foreign Eurocheques made out in France — those made out for cash at a French bank counter, those made out to French traders affiliated to the CB group and those made out in France to traders not affiliated to the CB group or to private individuals — whereas the Package Deal Agreement, concluded in 1980 and exempted by the Commission Decision of 10 December 1984, makes no such differentiation. The Commission noted that the French banks, when they abandoned the Helsinki Agreement in 1991, had put an end to that unjustified differentiation between three categories of Eurocheques which, in its view, was in no way envisaged in the Package Deal Agreement and concluded that all foreign Eurocheques made out in France should

from then on be dealt with only under the rules laid down in the Package Deal Agreement, provided that they were for an amount below the maximum clearing limit above which Eurocheques are no longer dealt with under the Eurocheque system but are treated as foreign bank transfers. But the French payee of a foreign Eurocheque, drawn on a German bank, had complained to the Commission on being charged a commission of FF 92.50 by Société Générale when, under the Package Deal Agreement, there should have been no charge to her. The Commission asked Société Générale for an explanation, specifying that the purpose of that request for information was 'to enable the Commission to supplement the information provided by the complainant, in order to be in a position to assess, in the full light of the facts and their true economic context, whether the agreements or conduct in question were compatible with EEC competition rules.' The information requested was indicated in a list of questions appended to the letter.

12 In its reply dated 12 October 1992, Société Générale stated that the reasons given in the request were insufficient to enable it to assess the scope of its duty to cooperate. Since the inquiry was said to be for the purpose of supplementing the information in the Commission's possession concerning the circumstances in which Société Générale had charged a commission of FF 92.50 to a customer with a private account who had deposited for encashment a Eurocheque for FF 4 710 drawn on a German bank, Société Générale considered that it was 'difficult to see what the legal basis for [that] inquiry might be, inasmuch as it appears to bear no relation to the two matters referred to in the heading to the request'. The applicant stressed, first, that the cheque in question was made out to a private individual whereas the Helsinki Agreement concerned the acceptance by traders in France of Eurocheques drawn on foreign financial institutions. Secondly, it pointed out that the Package Deal Agreement concerns only Eurocheques used in the banking and trading sectors. Société Générale concluded that the tenor of the questions in fact suggested that their real aim was to buttress the Commission's defence in the proceedings already brought against its decision of 25 March 1992 by the CB group and Eurocheque International.

13 By letter of 23 October 1992, the Commission pointed out that, in the context of the procedure which it had opened on 19 July 1990 following the request submitted by Eurocheque International for a renewal of the exemption for the Package Deal Agreement, it was important for Société Générale to answer the questions put to it so that the Commission could have a clear view of the current situation following the abandonment of the Helsinki Agreement, which should have put an end to the distinction between three categories of Eurocheques, on which Société Générale continued to rely. The Commission concluded by requesting Société Générale to answer the questions put to it within three weeks from receipt of the letter.

14 On 16 November 1992 Société Générale wrote to the Commission asserting that its inquiry was based on a misinterpretation of the scope of the Package Deal and Helsinki Agreements. That misinterpretation was the subject of proceedings brought before the Court of First Instance by the CB group and Europay International and the outcome of those proceedings should be awaited. As regards the facts relating to the complaint lodged with the Commission, Société Générale confirmed that on all Eurocheques deposited by non-traders it charged the same commission as on other foreign cheques and that it did not receive on such transactions the interbank commission provided for in the Package Deal Agreement, since Eurocheques made out to private individuals were settled via direct transmission to the bank's foreign correspondents and not through the Eurocheque processing and clearance system.

15 In its reply dated 1 December 1992, the Commission stated that it was not for Société Générale to judge whether it was preferable to await the outcome of the proceedings brought before the Community courts before continuing with the procedure opened with regard to the Package Deal Agreement. The vague and very succinct particulars given by Société Générale could not, in the Commission's view, be regarded as the answers which it was entitled to expect to its request for information of 12 September 1992. The Commission stated that its letter was the last reminder which it would send to the applicant.

16 On 1 April 1993 the Commission adopted Decision C(93) 746 final, according to the operative part of which:

Article 1

Société Générale must, within two weeks from the date of notification of this decision, supply the information detailed in the annex hereto.

Article 2

In the event of a failure to supply the information requested in accordance with Article 1 above, a periodic penalty payment of ECU 1 000 is imposed upon Société Générale for each day of delay over and above the time-limit of two weeks from the notification of this decision.

Article 3

(Not relevant)

17 Following the notification of that decision and under the threat of the periodic penalty payment, Société Générale replied to the questions by letter of 19 April 1993. It none the less maintained that it was not obliged to respond to the request for information because the scope of those questions was so excessively wide as to be out of proportion to the complaint lodged with the Commission, because some of them related to the application by Société Générale of the Helsinki Agreement before it was abandoned in 1991 and because if, against all possibility, the decision of 25 March 1992 were to be upheld by the Court, general procedural principles,

in particular the rules governing the burden of proof, would preclude the Commission from compelling an undertaking to reveal an infringement.

Procedure and forms of order sought

18 Those were the circumstances in which, by application lodged at the Registry of the Court of First Instance on 1 June 1993, the applicant brought the present action.

19 By decision of the Court of 6 October 1994, after hearing the views of the parties, the case was assigned to the Fourth Chamber, sitting as a chamber of three judges.

20 Upon hearing the report of the Judge-Rapporteur, the Court (Fourth Chamber) decided to open the oral procedure without any preparatory inquiry. The Court nevertheless put a question to the applicant, which replied by letter of 19 October 1994. The parties presented oral argument and answered the Court's questions at the hearing on 9 November 1994.

21 The applicant claims that the Court should:

(i) declare Société Générale's action for annulment admissible and well-founded;

accordingly,

(ii) annul the Commission's decision of 1 April 1993;

(iii) order that Société Générale's answering letter of 19 April 1993, together with all the Commission's requests (the letters of 12 September 1992, 23 October 1992 and 1 December 1992), be therefore withdrawn from the proceedings;

(iv) declare Société Générale's action for damages admissible and well founded;

(v) accordingly, order the Commission to pay Société Générale one French franc in compensation for the material and non-material damage suffered; and

(vi) order the Commission to pay all the costs.

22 The defendant contends that the Court should:

(i) dismiss Société Générale's application for the annulment of the Commission's decision of 1 April 1993;

(ii) dismiss the application for an order against the Commission to pay the sum of one French franc; and

(iii) order Société Générale to pay the costs of the case.

The claim for the annulment of the decision of 1 April 1993

23 In support of its claim for annulment, the applicant puts forward, in substance, three pleas in law. The first plea alleges a breach of Article 11 of Regulation No 17,

the second a breach of the obligation to state reasons laid down in Article 190 of the EEC Treaty (now the EC Treaty, hereinafter referred to as 'the Treaty') and the third an infringement of the rights of the defence.

The plea alleging a breach of Article 11 of Regulation No 17

Summary of the parties' arguments

24 The applicant complains that the Commission infringed Article 11 of Regulation No 17 by failing to give a clear and precise indication of the legal basis and purpose of its request for information and by failing to establish the link between the questions asked and the supposed infringement.

25 With regard to the legal basis for the request for information, the applicant points out that the Commission, after mentioning Articles 85 and 86 of the Treaty in the citations in the preamble to its contested decision, goes on in the recitals merely to raise the question whether Société Générale's conduct complies with 'the Community rules on competition', without specifying whether that relates to Article 85 and/or to Article 86.

26 The applicant then charges the Commission with failing to indicate clearly whether the purpose of the request for information was to inquire into infringements that might have been committed by Société Générale or to obtain insight into the 'current situation' in order to assess the legality of the Package Deal Agreement in the context of a specific procedure involving entities other than Société Générale or even to reopen the procedure relating to the Helsinki Agreement.

27 The applicant maintains that, in the light of the Commission's letter of 12 September 1992, it could consider that it was being questioned, following a complaint from one of its clients, as to the possibility that it might have committed an infringement itself. It does not understand, however, how the charging of a commission, allegedly in breach of an agreement between undertakings or associations of undertakings, could constitute a breach of the competition rules in the Treaty.

28 The reference in the letter to 'Cases IV/30.717-A — Eurocheque: Helsinki Agreement and IV/30.717-B — Eurocheque: Package Deal Agreement' suggested that the request for information was made in the context of earlier procedures concerning not Société Générale but the unrelated entities, the CB group and Europay International.

29 The Commission's second letter, sent to Société Générale on 23 October 1992 following its reply of 12 October 1992, did admittedly specify the purpose of the request for information, stressing that it was in the context of 'the procedure opened by the Commission on 19 July 1990 following the request submitted by Eurocheque for a renewal of the exemption granted for the Package Deal Agreement'. However, it still referred not only to 'Case IV/30.717-A — Eurocheque: Helsinki Agreement', even though the procedure relating to the Helsinki Agreement had been brought to an end by a final decision of the Commission, but also, by mentioning the complaint made against it, to an infringement attributable to Société Générale. Nor does the decision itself provide any clarification in that regard.

30 The applicant further claims that the Commission did not establish a link between the questions asked and the supposed infringement. The facts to which the Commission refers, as they appear from the complaint lodged, namely the charging of a commission on a foreign Eurocheque presented to Société Générale by a private individual, disclose no link with the Helsinki Agreement, whose very title indicates that it concerns only the acceptance by traders in France of Eurocheques drawn on foreign financial institutions.

31 Similarly, the applicant maintains, the questions relating to the Package Deal Agreement are unrelated either to the conduct ascribed to Société Générale or to the purpose of the inquiry inasmuch as, in its view, that agreement concerns only Eurocheques used in the banking and — subject to certain conditions — commercial sectors. It is clear from the Decision of 10 December 1984 exempting the Package Deal Agreement that the — experimental — opening-up to Eurocheques in the non-banking sector concerned only traders and not private individuals.

32 The applicant concludes that, given the ambiguity in the request for information as to its precise purpose, it was entitled not to reply to that request and that the contested decision should be annulled.

33 The Commission maintains that the request for information sent to Société Générale on 12 September 1992 meets the requirements of Article 11(3) of Regulation No 17, as interpreted by the Court of Justice and the Court of First Instance.

34 First, it considers that it gave a clear indication of the legal basis when it specified that the letter constituted a formal request for information pursuant to Article 11 of Regulation No 17 and that its intention was to assess whether the agreements or conduct in question were compatible with EEC competition rules.

35 Secondly, the Commission considers that, by its reference to the decision relating to the Helsinki Agreement and to the principle, which it considers to be contained in the Package Deal Agreement, that the payee must receive the full value of a Eurocheque, it clearly showed in its letter of 12 September 1992 that the purpose of the request for information was to investigate, following the complaint lodged with it by the payee of a foreign Eurocheque who had been charged a commission by Société Générale, whether there was an agreement concerning commissions charged to customers on the encashment of foreign Eurocheques.

36 Finally, it states that the legal basis and purpose of the request for information are clear from points 1 to 5 and 7 to 12 of the contested decision, read together.

Findings of the Court

37 It must be borne in mind that Article 11(1) of Regulation No 17 empowers the Commission, in carrying out the duties assigned to it by Article 89 of the Treaty and by provisions adopted under Article 87 of the Treaty, to send requests for information to undertakings, in order to obtain from them all necessary information.

38 It must further be borne in mind that under Article 11 of Regulation No 17, the Commission's exercise of its power to request information is subject to a two-stage procedure, the second stage of which, involving the adoption by the Commission of a decision which is to 'specify what information is required' may only be initiated if the first stage, in which a request for information is sent, has been carried out without success (Case 136/79 *National Panasonic* v *Commission* [1980] ECR 2033, paragraph 10).

39 Article 11(3) further provides that in its request for information, the Commission 'shall state the legal basis and the purpose of the request'.

40 Just as the Court of Justice held in a sphere comparable to that of Article 11, in paragraph 29 of its judgment in Joined Cases 46/87 and 227/88 *Hoechst* v *Commission* [1989] ECR 2859, relating to the Commission's powers of investigation under Article 14 of Regulation No 17, the Commission's obligation to specify the

subject-matter and purpose of a request for information is a fundamental requirement both in order to show that the information requested of the undertakings concerned is justified and also to enable those undertakings to assess the scope of their duty to cooperate while at the same time safeguarding their rights of defence. It follows that the Commission is entitled to require the disclosure only of information which may enable it to investigate putative infringements which justify the conduct of the inquiry and are set out in the request for information (Case T-39/90 *SEP* v *Commission* [1991] ECR II-1497, paragraph 25).

41 It is therefore necessary to determine, in the present case, whether the Commission, in exercising its right to request information from the applicant, acted within the limits set on the performance of the tasks incumbent upon it under Regulation No 17 and whether the two-stage procedure laid down in Article 11 of Regulation No 17 was followed.

42 In its letter of 12 September 1992, the Commission criticized what it regarded as unjustified differences in the way in which a foreign Eurocheque drawn in France is dealt with as regards the commission charged to the payee, depending on whether it is cashed at a bank, made out to a trader or made out to a private individual and then asserted that the effect of the French banks' revocation of the Helsinki Agreement in 1991 was that all foreign Eurocheques drawn in France were again governed by the Package Deal Agreement rules alone. Citing the case of a French national who had complained to the Commission because Société Générale had charged her a commission not provided for under the Package Deal Agreement when she presented for payment a Eurocheque drawn on a German bank, the Commission asked the applicant to provide explanatory details to 'supplement the information provided by the complainant, in order to be in a position to assess, in the full light of the facts and their true economic context, whether the agreements or conduct in question were compatible with EEC competition rules.'

43 In its letter of 23 October 1992 following the applicant's refusal to comply with the request for information, the Commission specified that its request was made 'in the context of the procedure opened by the Commission on 19 July 1990 following the request submitted by Eurocheque for a renewal of the exemption granted for the Package Deal Agreement' and that the purpose of the desired information was to provide the Commission with 'a clear view of the current situation following the abandonment of the Helsinki Agreement, which should have put an end to the distinction between three categories of Eurocheques, on which you continue to rely.'

44 The Court considers that in providing those further details the Commission, without altering the scope of its initial request of 12 September 1992, removed any ambiguity which might have arisen in the mind of the addressee of the request for information from the fact that neither the Package Deal Agreement, concluded on 31 October 1981, nor the Helsinki Agreement, concluded on 19 and 20 May 1983, was still in force at the time of that request.

45 It is thus clear from the original letter of 12 September 1992, read together with the letter of 23 October 1992, that it was purely in the context of the administrative procedure relating to the notification and request for exemption of the new Package Deal Agreement that the Commission, in the light of a complaint made to it, wished to verify the actual details and implications of the legal and factual situation with regard to the remuneration for the service of encashment of a Eurocheque drawn on a foreign bank and presented to the applicant by a private individual for encashment.

46 In the contested decision of 1 April 1993, taken following Société Générale's refusal to supply the information requested, the Commission again stressed the purpose of the request for information, repeating verbatim the terms of the previous letters and indicating its desire to supplement its information concerning the terms on which Société Générale dealt with foreign Eurocheques, in order to be able to assess whether or not the conduct referred to by the complainant and the terms on

which Société Générale encashed or had encashed foreign Eurocheques were compatible with the Community rules on competition.

47 The Court therefore considers that the Commission, acting in the context of its inquiry into the application for an exemption for the new Package Deal Agreement concluded on 5 June 1987 and notified on 16 December 1987, was properly entitled to ask the applicant to provide information on the manner in which it dealt with Eurocheques drawn on a foreign bank with regard to the remuneration it derived from the encashment service provided, on the one hand, to payees, whether traders or private individuals, and, on the other hand, to the banks on which such cheques are drawn.

48 It is common ground that, both in its letter of 12 September 1992 and in that of 23 October 1992, the Commission clearly questioned the legality, in the light of the Package Deal Agreement, of a differentiation in the remuneration of the service of encashing a foreign Eurocheque on the basis of the status of the payee.

49 It is also undisputed that in the statement of objections sent to Eurocheque International on 31 July 1990, to which the applicant refers in paragraph 10 of its application, the Commission implied that an exemption for the new Package Deal Agreement would be subject to the condition that the payee of a Eurocheque must receive on encashment the full amount for which it is made out.

50 In those circumstances, the Court considers that the Commission was, without infringing Article 11 of Regulation No 17, entitled to define the scope of its investigations in such a way as to elicit, through the information requested, details of

the legal and factual situation relating to the remuneration for the service of encashing a foreign Eurocheque in the light of any developments which may have determined that remuneration under the Helsinki Agreement and following its revocation.

51 The Court therefore considers that the references both to the Package Deal Agreement, concluded on 31 October 1981 and exempted on 10 December 1984, and to the Helsinki Agreement, concluded on 19 and 20 May 1983 and revoked in 1991, are to be regarded as merely setting out the historical background against which the new Package Deal Agreement is to be seen and were not intended to indicate that the Helsinki Agreement itself was the target of the request for information.

52 Furthermore, the Court considers that the applicant was not justified in relying, as it did in its answer of 12 October 1992, on the alleged inapplicability of the Package Deal Agreement to foreign Eurocheques presented for encashment by a private individual other than the drawer, in order to evade its obligation to respond to the request for information of 12 September 1993, since it was for the Commission alone to determine whether such an argument was well-founded.

53 It follows from all the foregoing that the applicant could not have mistaken the legal basis and the purpose of the request for information sent to it and that the Commission, acting in the context of its inquiry into the application for an exemption for the new Package Deal Agreement, did not go beyond the bounds of its powers under Article 11 of Regulation No 17 when it asked the applicant to supply factual information relating to the remuneration which it received from the service of encashment provided both to payees of Eurocheques drawn on a foreign bank and to the drawer's bank itself.

54 The plea alleging a breach of Article 11 of Regulation No 17 must therefore be dismissed.

The plea alleging a breach of Article 190 of the Treaty

Summary of the parties' arguments

55 The plea alleging a breach of Article 190 of the Treaty comprises two limbs, one alleging that the statement of reasons was inadequate, the other that it was contradictory.

56 First, the applicant points to the serious uncertainties which in its view vitiate the request for information as formulated in the various letters sent to it by the Commission. Those letters, incorporated either in substance or verbatim in the statement of the reasons on which the decision is based, form an integral part of that decision and therefore vitiate it in turn.

57 Secondly, the applicant considers that the Commission's statement in point 12 of the decision, that the information requested was necessary in order to enable it to assess whether or not the terms on which Société Générale encashed or had encashed foreign Eurocheques were compatible with the Community rules on competition, is contradicted by the decision itself when it concludes, referring to the decision adopted on 25 March 1992, that the terms on which the French banks handle such Eurocheques are illegal.

58 The applicant sees a further contradiction in the fact that the Commission mentions that it is carrying out an investigation into whether the Package Deal Agreement complies with Article 85(1) and yet at the same time states in the contested decision that all foreign Eurocheques issued in France should be governed by the Package Deal Agreement rules alone.

59 The Commission maintains, first, that the decision gives a full statement of the reasons on which it is based inasmuch as, having referred to the background to the case, the context of the procedure in question and the specific case of the complaint against Société Générale, it goes on to express the Commission's position on commissions charged on the encashment of foreign Eurocheques and cites its obligation to assess the terms on which foreign Eurocheques are handled in the light of the Community rules on competition.

60 It considers that there is no contradiction between stating that the terms applied by the French banks until May 1991 were illegal, as it had found in its decision of 25 March 1992, and questioning the terms applied since the formal abandonment of the Helsinki Agreement in May 1991.

61 Nor, the Commission submits, is there any contradiction between asserting that the handling of Eurocheques should be governed by the Package Deal Agreement rules alone and issuing a statement of objections relating to that agreement. The statement of objections sent to Eurocheque International related to the new Package Deal Agreement notified to the Commission in 1987, whereas the reference in point 4 of the contested decision was to the Package Deal Agreement notified in 1980 and exempted by the decision of 10 December 1984.

Findings of the Court

62 Just as the Court of Justice held in *National Panasonic*, paragraph 25, in relation to Article 14(3), a comparable provision relating to investigations, Article 11(3) of Regulation No 17 itself lays down the essential constituents of the statement of reasons for a request for information by providing that it must state the legal basis and the purpose of the request and also the penalties provided for in Article 15(1)(b) for supplying incorrect information.

63 In that regard, the Commission is not required to communicate to the addressee of a decision requiring information to be supplied all the information at its disposal concerning presumed infringements or to make a precise legal analysis of those infringements, although it must clearly indicate the presumed facts which it intends to investigate (see *Hoechst*, paragraph 41).

64 In the present case, the Court finds that, by stating in its decision that the information was requested in order to enable it to assess the extent to which the terms on which a French bank handles foreign Eurocheques might infringe Community rules on competition and that the request was made in the context of the application for an exemption for the new Package Deal Agreement concluded on 5 June 1987 and notified on 16 December 1987, the Commission clearly identified the legal basis and the purpose of the request for information. The decision therefore contains the essential constituents required by Article 11(3) of Regulation No 17.

65 The Court further considers that, in so far as the reference to the Helsinki Agreement must be regarded as merely setting out the historical background to the new Package Deal Agreement and was not intended to indicate that the Helsinki Agreement itself was the target of the request for information, the Commission could properly and without contradicting itself refer, in point 4 of the contested decision, to the decision imposing a prohibition and fines which it had adopted on 25 March 1992 in respect of the Helsinki Agreement, before going on to point out that it considers that the Package Deal Agreement concluded in 1980 and exempted by it on 10 December 1984 precludes a differentiation in the treatment of the service of encashment of foreign Eurocheques on the basis of the status of the payee.

66 Likewise, the Court considers that since, both in its letters of 12 September and 23 October 1992 and in the contested decision, the Commission questioned whether differentiation in the treatment of the service of encashing Eurocheques was justified in the light of the Package Deal Agreement concluded in 1980 and exempted in 1984, the Commission could properly and without contradicting itself, in the

context of its inquiry into the application for an exemption for the new Package Deal Agreement and in the light of the revocation of the Helsinki Agreement, request the applicant to provide information on the manner in which it deals with Eurocheques drawn on a foreign bank with regard to the remuneration it derives from the encashment service provided, on the one hand, to payees, whether traders or private individuals, and, on the other hand, to the banks on which such cheques are drawn.

67 It follows that the plea alleging a breach of Article 190 of the Treaty is unfounded.

The plea alleging an infringement of the rights of the defence

Summary of the parties' arguments

68 The applicant points out, first, that the requirement that the legal basis and purpose of the inquiry should be clearly, accurately and definitively identified forms one of the essential foundations of the rights of the defence. In the present case, however, it was not able to apprehend the extent of its duty to cooperate or the scope of the questions put to it.

69 The applicant goes on to claim that the Commission went beyond its powers, in breach of Article 189 of the Treaty, of Article 11 of Regulation No 17 and of general procedural principles, when by its questions it asked Société Générale to admit to applying, in the context of the Helsinki Agreement, an allegedly unlawful dif-

ferentiation in the way in which it treated payees of Eurocheques drawn on a foreign bank. The Commission had, however, already adopted a decision concerning the Helsinki Agreement, against which the CB group, to which Société Générale belongs, had brought an action which was pending before this Court when the request for information was sent to Société Générale.

70 The Commission considers that the applicant was in a position to understand from the request for information that, in the context of its inquiry following the notification of the new Package Deal Agreement, the Commission had received a complaint against Société Générale and that the specific case involving the applicant was subsumed into the general procedure relating to the Package Deal Agreement. The applicant was thus perfectly able to assess the scope of its duty to cooperate in the light of the information given to it.

Findings of the Court

71 It must first of all be borne in mind that only certain specific safeguards are expressly offered by Regulation No 17 to an undertaking under investigation during the preliminary procedure. A decision requiring information to be supplied may be taken only after a prior request has been unsuccessful and a decision fixing the definitive amount of any fine or periodic penalty payment in the event of a failure to supply the information required by the decision may be taken only after the undertaking in question has been allowed to put its point of view (Case 374/87 *Orkem* v *Commission* [1989] ECR 3283, paragraph 26).

72 Regulation No 17 does not, however, give an undertaking under investigation any right to refuse to comply with an investigative measure on the ground that evidence that it had infringed the rules on competition might thereby be obtained. On the contrary, it places the undertaking under a duty of active cooperation, which means that it must be prepared to make any information relating to the object of the inquiry available to the Commission.

73 Respect for the rights of the defence, which the Court of Justice has considered to be a fundamental principle of the Community legal order requires, however, that certain of those rights be respected as soon as the preliminary investigation has begun. As the Court observed in *Hoechst*, paragraph 15, and in *Orkem*, paragraph 33, not only must the rights of the defence be observed in procedures which may lead to the imposition of penalties but it is also necessary to prevent those rights from being irremediably impaired during preliminary inquiry procedures which may be decisive in establishing the unlawful nature of conduct engaged in by undertakings.

74 Accordingly, whilst the Commission is entitled, in order to preserve the effectiveness of Article 11(2) and (5) of Regulation No 17, to compel an undertaking to provide all necessary information, even if that information may be used to establish, against it or another undertaking, the existence of anti-competitive conduct, it may not, by means of a request for information, undermine the rights of defence of the undertaking concerned and compel it 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 (*Orkem*, paragraphs 34 and 35, and Case 27/88 *Solvay* v *Commission* [1989] ECR 3355, summary publication).

75 The Court considers that the applicant's rights of defence have not been infringed in the present case. Even though the answers to the questions put by the Commission might, as counsel for the applicant submitted at the hearing, require Société Générale to interpret the Package Deal Agreement, the answers requested are none the less purely factual and cannot be regarded as capable of requiring the applicant to admit the existence of an infringement of the rules on competition.

76 That finding is corroborated by the answers provided by Société Générale to the questions appended to the request for information, inasmuch as they contain only factual information and are in no way self-incriminating.

77 As regards the questions relating to the Helsinki Agreement, it must be borne in mind that the Commission Decision of 25 March 1992 declaring that the Helsinki Agreement constituted an infringement of Article 85(1) of the Treaty and rejecting the request for its exemption was, at the time of the request for information, the subject of proceedings before this Court. That circumstance is not, however, sufficient to take away the Commission's right to obtain information relating to the Helsinki Agreement, merely on the ground that the information requested would be likely to indicate to the Commission how the situation with regard to the remuneration for the service of encashing foreign Eurocheques had developed under the Helsinki Agreement and following its abandonment. The Commission cannot be deprived of its powers of investigation into facts subsequent to those penalized in a decision, even if such facts are identical to those on which that decision is based.

78 In any event, Joined Cases T-39/92 and T-40/90, brought against the Decision of 25 March 1992, would have been the proper context for the Court to exclude any evidence obtained unlawfully by the Commission.

79 The plea alleging an infringement of the rights of the defence must therefore be dismissed.

The claim for damages

Summary of the parties' arguments

80 The applicant claims that by its breach of Article 11 of Regulation No 17 and of Article 190 of the Treaty and its infringement of the rights of the defence, the Commission manifestly and gravely disregarded the limits imposed on the exercise of its powers and committed a wrongful act or omission of such a kind as to give rise to non-contractual liability.

81 The Commission denies any breach of Community principles and rules of such a kind as to give rise to the annulment of the contested decision and thus to cause it to incur non-contractual liability in any way. Even if the decision were to be annulled, the Commission adds, it would not incur liability unless it had committed a sufficiently serious breach of a superior rule of law for the protection of the individual or had manifestly and gravely disregarded the limits imposed on its powers (Case T-120/89 *Stahlwerke Peine-Salzgitter* v *Commission* [1991] ECR II-279, paragraph 74).

Findings of the Court

82 It follows from the Court's previous findings in this case that the contested measure is not unlawful. Accordingly, the Commission cannot be found to have committed any wrongful act or omission of such a kind as to give rise to the Community's liability and the claim for damages must be dismissed (Case C-63/89 *Assurances du Crédit* v *Council and Commission* [1991] ECR I-1799, paragraph 28).

83 It follows from all of the foregoing that the application must be dismissed in its entirety.

Costs

84 Under Article 87 (2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the applicant has been unsuccessful, it must be ordered to pay the costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Fourth Chamber)

hereby:

1. Dismisses the application;

2. Orders the applicant to bear the costs.

Lenaerts Schintgen García-Valdecasas

Delivered in open court in Luxembourg on 8 March 1995.

H. Jung

Registrar

K. Lenaerts

President