OPINION OF MR ADVOCATE GENERAL DARMON
delivered on 18 May 1989 *

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Mr President,
Members of the Court,

1. CdF Chimie SA has brought an action under Article 173 of the EEC Treaty for the annulment of a Commission decision of 9 November 1987 in which the Commission requested certain information pursuant to Article 11(5) of Regulation No 17 of the Council of 6 February 1962 (hereinafter referred to as 'Regulation No 17').[1] That decision related to an investigation being carried out by the Commission into the alleged existence of agreements, decisions or concerted practices contrary to Article 85(1) of the EEC Treaty in the thermoplastics industry, particularly in the case of low density polyethylene ('LDPE'), a product manufactured and distributed in the EEC by, among others, CdF Chimie SA.

2. For its part, Solvay et Cie., likewise under Article 173 of the EEC Treaty, seeks the annulment of a Commission decision dated 24 November 1987 requiring it, by virtue of the same provision of Regulation No 17, to provide information. That decision also related to the Commission's investigation into the thermoplastics industry, but in this case in relation to polyvinyl chloride ('PVC'), which Solvay, in particular, manufactures and distributes in the EEC.

* Original language: French.

1 — First Regulation implementing Articles 85 and 86 of the EEC Treaty (OJ, English Special Edition 1959-62, p. 87).

3. The two Commission decisions do not concern CdF Chimie SA and Solvay with respect to the same product or, therefore, with respect to the same alleged agreement, decision or concerted practice prohibited by Article 85(1) of the EEC Treaty. It is the similarity of the grounds on which annulment is sought by the two companies which led the Court to consider the two applications at the same hearing and prompted me to treat the two cases together in my opinion today.

4. By way of background, it should be noted that the wide-ranging investigation conducted by the Commission into the thermoplastics industry, concentrating on LDPE and PVC, continued after the decisions were adopted in November 1987. It should also be borne in mind that decisions similar to those addressed to CdF Chimie SA and Solvay were addressed to other producers and distributors. As a result of the investigation, two proceedings were initiated on 24 March 1988 concerning infringements of Article 85(1), one relating to LDPE [2] and the other to PVC. [3] As those proceedings progressed, the Commission adopted two decisions on 21 December 1988 relating to infringements of Article 85 of the Treaty by certain producers of LDPE and PVC and imposing fines on those producers. Those undertakings included CdF Chimie SA, under its new name Orkem SA, in the case of LDPE and Solvay in the case of PVC. [4] The Court will be aware that, like other undertakings, Orkem SA brought an action before it on 14 April of this year for the annulment of the decision adopted on 21 December 1988.

2 — Proceeding IV/31.866 — LDPE.

3 — Proceeding IV/31.865 — PVC.

4 — Decision 89/191/EEC (OJ L 74, 17.3.1989, p. 21) and Decision 89/190/EEC (OJ L 74, 17.3.1989, p. 1).

5. The contested decision of 9 November 1987 concerning CdF Chimie was preceded on 20 August 1987 by a *request* for information under Article 11(2) and (3) of Regulation No 17. It was because of CdF Chimie's — in its view unjustified — refusal to provide 'most of the information requested' [5] that the Commission addressed to it, pursuant to paragraph (5) of the same article, the *decision* requesting information. Similarly, it was because the Commission considered that it could not accept the fact that in response to its *request* for information of 20 August 1987 Solvay supplied 'none of the information requested ... concerning producers' meetings and the alleged agreements, decisions and concerted practices on sales prices and quotas' [6] that it addressed to it the decision requiring information.

I — The absence of a prior request for information from CdF Chimie SA

6. CdF Chimie makes a specific submission of its own regarding the two phases of the procedure whereby information was requested under Article 11 of Regulation No 17, namely the ordinary *request* and then the *decision* calling for information. Drawing particular attention to the fact that, although the contested decision seeking information was addressed to it, the 'ordinary' request for information preceding it was sent not to it but to its subsidiary, CdF Chimie EP, CdF Chimie SA takes the

5 — The contested decision concerning CdF Chimie SA, p. 2.

6 — The contested decision concerning Solvay, p. 2.

view that the Commission infringed the EEC Treaty and Article 11 of Regulation No 17 — in particular paragraph (5) of that article.

7. Under Article 11(1) of Regulation No 17, the Commission may, in performing the task entrusted to it by Article 89 of the EEC Treaty, namely ensuring 'the application of the principles laid down in Articles 85 and 86', 'obtain all necessary information from the governments and competent authorities of the Member States and from undertakings and associations of undertakings.' Article 11(2) to (4) of Regulation No 17 concern the formal requirements applicable to requests for information. Article 11(5) states that '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'.

8. In its judgment of 26 June 1980 in *National Panasonic* the Court expressly observed that it was apparent from the wording of Article 11 that it in fact provides for:

'a two-stage procedure, the second stage of which, involving the adoption by the Commission of a decision which specifies what information is required, may only be initiated if the first stage, in which a request for information is sent to the undertakings or associations of undertakings, has been carried out without success'.[7]

9. Relying on that judgment, CdF Chimie SA considers the contested decision to be improper, contending that the first phase was not carried out as far as it was concerned since, as mentioned, the prior request for information was addressed not to it but to CdF Chimie EP.

10. In response to that submission, the Commission observed that CdF Chimie EP is a wholly owned subsidiary of CdF Chimie SA, that those two undertakings, although two separate legal entities, are nevertheless part of the same group and that, according to previous decisions of the Court, in particular its judgment of 14 July 1972 in *ICI* v *Commission*,

'the formal separation between these companies, resulting from their separate legal personality, cannot outweigh the unity of their conduct on the market for the purpose of applying the rules on competition'.[8]

According to the Commission, a particularly clear illustration of that unity of conduct on the market in question was the fact that, from the commencement of the LDPE investigation, CdF Chimie SA and CdF Chimie EP had manifestly been familiar with the communications addressed to each of them by the Commission, whichever was the formal addressee. Therefore, the Commission, which also recalls the dictum of the Court that a decision is notified as soon as it has arrived in due course within the control of the addressee, considers that the two-stage procedure under Article 11 was not infringed.

7 — Case 136/79 *National Panasonic* v *Commission* [1980] ECR 2033, paragraph 5.

8 — Case 48/69 *ICI* v *Commission* [1972] ECR 619, paragraph 140.

11. In response to those arguments, CdF Chimie SA contests the relevance of the concept of unity of undertakings developed by the Court concerning the extent to which the conduct of a subsidiary can be attributed to the parent company, since the issue in the present case is one of procedure and not of substance. It considers, in essence, that the legal identity of an undertaking cannot be decisive with regard to substantive issues but must be strictly respected from the procedural point of view, particularly where the contested measure is adopted at a stage of the procedure at which there can be absolutely no prejudging of the merits of the case, that is to say the question whether there was any unity of conduct on the part of undertakings which are legally separate. The applicant adds that the term 'within the control of the addressee' used by the Court cannot be extended from the addressee of a measure to all the companies belonging to the same group without encroaching upon the principle of the individuality and independence of natural and legal persons which is upheld both in national laws and in international conventions.

12. It is beyond dispute that, from the formal point of view, CdF Chimie EP was the addressee of the request for information dated 20 August 1987, whilst the decision of 9 November 1987 was addressed to CdF Chimie SA. From a strictly procedural standpoint, that is at first sight rather unsatisfactory, having regard to Article 11(5) of Regulation No 17. However, it is not inappropriate to recall the background to the steps taken by the Commission with respect to CdF Chimie SA and CdF Chimie EP in its investigations into agreements, decisions and concerted practices concerning LDPE.

13. On 15 January 1978 the Commission adopted a decision to carry out an investigation under Article 14(3) of Regulation No 17, the addressee of which was 'CdF Chimie, Tour Aurore . . . Paris La Défense'. It will be noted that at that stage the Commission's communication to the addressee undertaking concerned two products, LDPE and PVC. That decision was notified on 20 January 1987 to Mr Henwood in his capacity as secretary of CdF Chimie EP.

14. On 9 April 1987 the Commission sent a request for information under Article 11(2) to (4) of Regulation No 17 relating only to LDPE, the addressee of which was 'CdF Chimie SA, Tour Aurore . . . Paris Défense'. On 6 May 1987 it was CdF Chimie EP, whose postal address is 'Tour Aurore . . . Paris-Défense' which replied to that request. The letter begins thus: 'Please find enclosed our replies to the request for information dated 9 April which arrived at our offices on 15 April 1987'.

15. On 2 July 1987 the Commission adopted, pursuant to Article 11(5) of Regulation No 17, a decision requesting information from CdF Chimie SA, Tour Aurore (etc.). On 28 July 1987 CdF Chimie EP sent the Commission a letter starting as follows: 'We reply to the Commission decision of 2 July 1987, notified to CdF Chimie on 9 July 1987, requesting certain information within a period of three weeks'.

16. On 20 August 1987 the Commission sent a further request for information, but this time to CdF Chimie EP. That company replied on 1 October 1987 and on 9 November 1987 the Commission adopted, with respect to CdF Chimie SA, the decision now contested before the Court.

17. That sequence of events shows that, even disregarding the Commission's first approach of 15 January 1987 which formally concerned 'CdF Chimie' without indicating 'SA' or 'EP', a request for information dated 9 April 1987 and then a decision requesting information dated 2 July 1987, both expressly addressed to 'CdF Chimie SA', gave rise to two replies dated 6 May and 28 July 1987 from CdF Chimie EP. I think it important that those two replies make no comment, and express no reservation, regarding the distinction to be drawn between CdF Chimie SA and CdF Chimie EP. Furthermore, contrary to whatever may have been said to the Court at the hearing on this point, no comments were made to the Commission before the adoption of the contested decision as to the need to distinguish between the two companies. In the correspondence between the Commission and the two companies, the first reservations were not expressed until CdF Chimie SA's reply of 26 November 1987 to the contested decision of 9 November 1987.

18. The sequence of events which I have just described and the arguments put forward by the parties seem to me to call for the following remarks.

19. In the first place, I consider that CdF Chimie SA cannot be contradicted in its assertion that there can be no presumption, at the investigation stage, of unity of conduct in a particular market between a parent company and its subsidiary, even a wholly owned subsidiary. It should be recalled that although the Court takes that view that

'... The circumstance that this subsidiary company has its own legal personality does not suffice to exclude the possibility that its conduct might be attributed to the parent company', [9]

it stated elsewhere, in a case in which BMW Belgium, a wholly owned subsidiary of BMW Munich, contended that it could not pursue an aim different from that prescribed by the parent company, that

'The bond of economic dependence ... between the parent company and the subsidiary does not preclude a divergence in conduct or even a divergence in interests between the two companies'. [10]

This, it seems to me, clearly indicates that the legal status of a wholly owned subsidiary does not of itself justify a presumption of unity of conduct in a market or disregard of the legal identity of each undertaking from the procedural standpoint. In principle it is only when the Commission has established such unity of conduct that it can take account of it.

20. However, it also seems to me that, in view of the attitude taken by the two undertakings which evinces, with some consistency, a degree of interchangeability as regards procedural documents emanating from the Commission, neither of those two undertakings is entitled, with a belated display of concern for strict adherence to formal requirements, to rely on a separate legal identity which it had previously made singular efforts to blur. Before the adoption of the contested decision of 9 November

9 — Judgment of 21 February 1973 in Case 6/72 *Europemballage and Continental Can* v *Commission* [1973] ECR 215, paragraph 15.

10 — Judgment of 12 July 1979 in Joined Cases 32 and 36 to 82/78 *BMW* v *Commission* [1979] ECR 2435, paragraph 24.

1987, CdF Chimie SA and CdF Chimie EP indisputably maintained the confusion, or at least permitted it, since on two occasions, without comment, CdF Chimie EP replied to a measure addressed to CdF Chimie SA. In the absence of any observation whatsoever from CdF Chimie EP, the Commission — which in any event was aware that the latter company was a wholly owned subsidiary of CdF Chimie SA and that the two companies had the same address — had grounds for considering that CdF Chimie EP normally had authority to speak on behalf of CdF Chimie SA on questions affecting the LDPE market and that no distinction was to be drawn between the two undertakings. It should also be noted that the letter from CdF Chimie EP of 28 July 1987, replying to the Commission's decision addressed to CdF Chimie SA on 2 July 1987, indicates that it was in response to 'the decision . . . of 2 July 1987, notified to CdF Chimie'. Such a reference to 'CdF Chimie' could not fail, in that context, to give credence to the view that in some way CdF Chimie SA and CdF Chimie EP formed a single whole.

21. On the basis of the concept of 'within the control of the addressee company' defined in the Court's judgment of 10 December 1957 in *ALMA*, [11] I consider that the conduct of the two companies concerned whereby one, CdF Chimie SA, the addressee of documents to which the other, CdF Chimie EP, replied in an apparently normal, one might even say routine, way, provides due grounds for the view that the 'control' referred to is the same in both cases. Accordingly, it may be stated that a document addressed to one arrives within the control of the other, and vice versa.

22. This relaxation of procedural requirements seems to me to be in harmony with the previous judgments of the Court which, as far as the notification of decisions is concerned, to some degree attach more importance to actual knowledge of a decision than to strict compliance with formalities in its notification. Thus, in *ICI* v *Commission, supra*, the Court noted that since the applicant had full knowledge of the text of a decision and had exercised its right to institute proceedings within the prescribed period

'the question of possible irregularities concerning notification ceases to be relevant'. [12]

The fact that actual knowledge takes precedence over strict adherence to formalities is also apparent from *Continental Can, supra*, in which the Court emphasized that

'a decision is properly notified within the meaning of the Treaty if it reaches the addressee and the latter is in a position to take cognizance of it . . .'

and pointed out that

'this was so in the present case, because the contested decision actually reached Continental and the latter cannot make use of its own refusal to take cognizance of the decision'. [13]

23. In my opinion the Court would remain faithful to its previous decisions if it took the view that a subsidiary company which appeared, in exchanges of correspondence

11 — Case 8/56 *ALMA* v *High Authority* [1957 and 1958] ECR 95.

12 — Case 48/69, *supra*, paragraph 43.

13 — Case 6/72, *supra*, paragraph 10.

relating to a specific investigation under Regulation No 17, to be authorized to reply to communications sent by the Commission to the parent company, was within the same sphere of control as the latter, as defined in previous judgments of the Court, and that therefore the parent company was deemed, in subsequent stages of the procedure in question, to have had knowledge of documents addressed, on the face of them, to the subsidiary.

24. Moreover — and this argument is secondary to the matter of internal control — it seems to me that by virtue of the common-law concept of estoppel no person who has created confusion or allowed confusion to arise concerning a factual situation may subsequently take advantage of any procedural irregularities which that confusion has engendered.

25. Finally, it is not without importance for the Court to note, as the Commission has done, that the confusion between CdF Chimie SA and CdF Chimie EP continued even after the matter came before the Court since the reply to a question which the Court put in writing to CdF Chimie SA, which lodged the originating application, contains *inter alia* the statement 'Before replying to the question put to it by the Court, Norsolor would point out . . . '. However, Norsolor is the new name of CdF Chimie EP, but the Court's question was addressed to CdF Chimie SA which has now become Orkem . . . The Court will doubtless find it difficult, as I do, to require the Commission to have a clearer idea of the distinction between CdF Chimie SA Orkem and CdF Chimie EP Norsolor than those two companies themselves have.

26. That is why I invite the Court to conclude that CdF Chimie SA had knowledge of the request for information of 20 August 1987 addressed to CdF Chimie EP, since the latter company had appeared, at earlier stages of the procedure, to come within its sphere of control. If the Court follows that suggestion, it will then deem the requirement of the prior despatch of a request for information laid down by Article 11(5) to have been satisfied and consider that CdF Chimie SA's main submission in that regard is without foundation.

27. This leads on to consideration of the submissions which, in essence, are similar in the applications of Solvay and CdF Chimie SA (hereinafter referred to as 'CdF Chimie'). Behind their superficial diversity lies the fact that those submissions are in fact inspired by the concern to ensure the rights of a party to defend itself at the stage of the Commission investigation in which it seeks to compile information as to the possible existence of agreements, decisions or concerted practices contrary to the Treaty competition rules. Perhaps in fact the way in which that concern is expressed has sometimes appeared to the Court — as it has appeared to me — to be uncertain, in view of the contradictions which appear to exist between the applicants' complaints or to be inherent in the manner in which a particular complaint is described. Thus, the claim that the information requested was unnecessary since the Commission already had sufficient evidence against the 'questioned' undertakings does not at first sight appear very consistent with the allegation that the Commission, by asking comprehensive and very general questions, sought to reverse the onus of proof and cause the undertakings themselves, in their replies to the wide-ranging questions, to provide the evidence against them which the Commission had been unable to gather. Similarly, the substance of a right to silence or a right not to incriminate oneself which would disappear as soon as the Commission

obtained precise evidence might seem remote from what lawyers in general perceive such a right to be.

28. But behind those apparent contradictions a logical aim is being pursued, which became quite apparent at the hearing, in so far as the applicant undertakings claim that the party questioned should know how much the questioner already knows. I do not think that it betrays anyone's thinking to say that the aim is therefore to allow the undertakings to find out, for the purposes of the Commission's investigation under the competition rules, what they can still conceal. And let me say straight away that there is nothing shocking about that. Exploitation to the full of any latitude allowed by the legal rules and efforts to ensure that the broadest interpretation of that latitude is acknowledged to constitute a positive right are the very essence of defence. The applicant undertakings are thus perfectly true to their role in arguing that their 'right to know' at the investigation stage should be upheld. But it is the role of the Court to define the scope of the legal rules applicable to that stage and to decide finally whether in fact any such right exists.

29. The applicants' various submissions must therefore be examined with the general aim in mind of providing an answer to that question.

II — Whether or not the contested decisions in fact constituted a 'Statement of objections'

30. I propose to examine first the main ground on which Solvay seeks annulment, which is virtually identical to the second submission put forward by CdF Chimie in the alternative. The two companies claim that the contested decisions are in fact statements of objections purporting to be decisions calling for information and that, consequently, the Commission infringed not only Council Regulation No 17 but also its own Regulation No 99/63 [14] and the principle of the right to a fair hearing, described by Solvay as a 'general principle' and by CdF Chimie as a 'fundamental principle'. Briefly, the applicants argue that the contested decisions constitute a formal accusation against them of participation in concertation contrary to Article 85, of which the Commission claims, in the very text of the decisions, to have evidence. Since the Commission thus complained of an infringement of Article 85 it ought to have complied with the conditions laid down in Regulation No 17 and Regulation No 99/63 regarding the right to a fair hearing, in other words it should have disclosed to the undertakings concerned the information on which the objections were based and given them an opportunity to express their views on it, and there can be no question of those companies now being under any obligation to answer any question whatsoever. But in fact, they say, the contested decisions give no precise details of the information on which the objections are based and purport to compel the undertakings, under threat of a fine or periodic penalty payment, to respond to the requests for information.

31. In reply the Commission contends, essentially, that the investigation phase is distinct from the statement of objections

14 — Regulation No 99/63/EEC of the Commission of 25 July 1963 on the hearings provided for in Article 19(1) and (2) of Council Regulation No 17 (OJ, English Special Edition 1963-64, p. 47).

and precedes it, and that it was to comply with the requirements of Article 11(3) of Regulation No 17 concerning requests for information that it referred to evidence of the infringement with which the investigation was concerned. Reference to that evidence was not in any way characteristic of a statement of objections within the meaning of Article 19(1) of Regulation No 17 and the undertakings concerned have no grounds for alleging any breach of the right to a fair hearing associated with such a statement.

32. As is clear from the foregoing summary of the parties' main arguments, the submission that the contested decisions constitute disguised statements of objections is made because, under the legal conditions laid down by Regulations Nos 17 and 99/63, there is much greater protection of the right to a fair hearing in relation to statements of objections than in relation to the Commission's investigative measures in the strict sense.

33. According to Article 19(1) of Regulation No 17, 'Before taking decisions as provided for in Articles 2, 3, 6, 7, 8, 15 and 16, the Commission shall give the undertaking or association of undertakings concerned the opportunity of being heard on the matters to which the Commission has taken objection'. With regard more particularly to action by the Commission to eliminate or penalize infringements of Article 85(1), it should be noted that Article 19(1) applies before the adoption of a decision requiring 'the undertakings or associations of undertakings to bring such infringement to an end' [15] and before the adoption of a decision imposing fines on 'undertakings or associations of undertakings' which 'either intentionally or negligently . . . infringe Article 85(1)'. [16]

34. The first sentence of Article 2(1) of Regulation No 99/63 provides that 'the Commission shall inform undertakings and associations of undertakings in writing of the objections raised against them' and Article 3 provides that 'undertakings and associations of undertakings shall, within the appointed time-limit, make known in writing their views concerning the objections raised against them', being able 'in their written comments [to] set out all matters relevant to their defence' and 'propose that the Commission hear persons who may corroborate those facts'. Article 7(1) of that regulation provides that 'the Commission shall afford to persons who have so requested in their written comments the opportunity to put forward their arguments orally, if those persons show a sufficient interest or if the Commission proposes to impose on them a fine or periodic penalty payment'. Finally, Article 4 of the same regulation provides that in its decisions 'the Commission shall . . . deal only with those objections raised against undertakings and associations of undertakings in respect of which they have been afforded the opportunity of making known their views'.

35. The 'substance' of the statement of objections has been defined by the Court. In its judgment of 13 February 1979 in *Hoffmann-La Roche*, it inferred both from the abovementioned provisions of Regulations Nos 17 and 99/63 and from the general principles of the right to a fair

15 — Regulation No 17, Article 3(1).

16 — Ibid., Article 15(2).

hearing 'to which they give effect' that in order to observe those rights

'the undertakings concerned must have been afforded the opportunity during the administrative procedure to make known their views on the truth and relevance of the facts and circumstances alleged and on the documents used by the Commission to support its claim that there has been an infringement'. [17]

36. But, as is apparent from the terms of Article 19(1) of Regulation No 17, decisions adopted pursuant to Articles 11 or 14 thereof are not covered by the conditions which I have just outlined. The Court's judgment in *National Panasonic*, to which I referred earlier, is very clear on this point. In reply to the argument that an undertaking had been deprived of the right to a fair hearing before an investigation decision had been adopted under Article 14(3), the Court stated that

'such a right of defence is chiefly incorporated in legal or administrative procedures for the termination of an infringement or for a declaration that an agreement, decision or concerted practice is incompatible with Article 85, such as the procedures referred to by Regulation No 99/63 . . . On the other hand, the investigation procedure does not aim at terminating an infringement or declaring that an agreement, decision or concerted practice is incompatible with Article 85; its sole objective is to enable the Commission to gather the necessary information to check the actual existence and scope of a given factual and legal situation'.

The Court added that

'only if the Commission considers that the data for the appraisal thereof collected in this way justify the initiation of a procedure under Regulation No 99/63/EEC must the undertaking or association of undertakings concerned be heard before such a decision is taken'. [18]

37. This very clear difference between the conditions applicable to the inquiries associated with the Commission's powers of investigation and those applicable to the statement of objections, 'the first stage of the administrative procedure' properly so called, as pointed out in the Court's judgment in *Hoffmann-La Roche*, [19] is without doubt applicable to the other means of investigation available to the Commission, namely the request for information. In the same way as the investigation, the request for information is not intended to bring an infringement to an end or to establish an infringement; it is intended solely to enable the Commission to gather the information necessary to check the actual existence and scope of a given factual and legal situation. Therefore, it likewise does not render applicable the right to a fair hearing which arises in the event of the Commission's considering that the conditions for initiating a procedure are satisfied. In this respect I wholly endorse the analysis made by the Commission and the French Republic. Moreover, this view is not contested by legal writers, not even those referred to by the applicants in support of some of their arguments. In fact, Asteris Pliakos, in his recent work entitled *Les droits de la défense et le droit communautaire de la concurrence* states that 'it is only on

17 — Case 85/76 [1979] ECR 461, paragraph 11.

18 — Case 136/79, *supra*, paragraph 21.

19 — Case 85/76, *supra*, paragraph 10.

conclusion of the preliminary inquiries that undertakings are entitled to submit their observations on the objections which the Commission intends raising against them in its decisions'. [20]

38. I therefore consider that the submission under examination here could only be well founded if it emerged that the contested decisions were not intended to enable the Commission to gather the information needed to check the actual existence and scope of a given factual and legal situation but rather showed that the evidence available to it was such as to justify, almost beyond doubt, the initiation of an administrative procedure within the meaning of Regulation No 99/63 and of the case-law analysed earlier. What is the position?

39. The decision of 9 November 1987 in respect of CdF Chimie indicates that the Commission was investigating the 'presumed existence of agreements, decisions or concerted practices' [21] contrary to Article 85(1) in the thermoplastics industry, which includes LDPE, produced and distributed by CdF Chimie, and that, as a result of investigations and requests for information from the applicant and other undertakings it was in a position to 'presume that [CdF Chimie] had taken part' [22] in the fixing of target selling prices and the establishment of quotas or target volumes by producers supplying thermoplastics in the common market. The Commission then states that on 20 August 1987 it sent a request for information to the applicant and gives the reasons stated by the latter for failing to provide most of such information. Essentially, those reasons amount to a challenge of the Commission's right to ask for the information concerned. Then, referring to Articles 11(5), 15(1)(b) and 16(1)(c) of Regulation No 17, concerning the Commission's power to impose fines or periodic penalty payments on undertakings which furnish incorrect information or refuse to supply complete and correct information, the Commission adopted the decision calling on the applicant to provide, within a period of two weeks, the information set out in an annex.

40. The requested information is listed in the annex under four headings. Under the first, 'The meeting of LDPE producers', the following is stated: 'The evidence in the possession of the Commission indicates that your undertaking was among those which took part in such meetings' and that the applicant 'even organized some of them'. Then there are a number of questions which I shall not consider in detail. They concern the date, place and frequency of meetings, details of those at which CdF Chimie was represented, details of the other undertakings which took part, the regularity of such participation, and the identity and/or the capacity of the persons representing the various undertakings. The Commission asked for a copy of every document relating to such meetings, prepared before, during or after them.

41. Under the heading 'Target price or minimum price' the Commission states that, according to the documents obtained by it, one of the main topics dealt with at the meetings concerned measures intended to fix and maintain LDPE price levels satisfactory to all the participants. Then there

20 — Bruylant éditeur, Brussels, 1987, p. 242.

21 — Decision of 9 November 1987, p. 1, paragraph 2.

22 — Ibid., paragraph 3.

are questions on each of the initiatives which might have been discussed, proposed, envisaged or approved by the participants since 1 January 1976, with dates and tables of prices, then on the price instructions sent by the applicant's head office to its agents and on the reports sent by the latter to the company headquarters. I would mention in particular the request for a copy of every document 'whatsoever, in the possession of your company, which shows the selling prices aimed at or recommended for the main qualities in each country of the common market'.

42. Under the heading 'Quotas, targets and sharing among LDPC producers', the Commission indicates that, according to the documents obtained by it, at the meetings the producers finalized the determination of annual sales targets for each undertaking, an estimate relating to the whole European market being drawn up with subsequent apportionment between the producers. Then there are questions about the method of allocation, monitoring of compliance with quotas and the information communicated by the applicant to other producers concerning its own LDPE production and sales.

43. Under the heading 'Statements forwarded to, and statistics provided by, Fides', there are questions on exchanges of information with Fides on LDPE, in particular the information supplied to Fides by the applicant and received from Fides by the applicant each month.

44. Quite apart from the detailed nature of the information requested, it is interesting to note that although at the beginning of the decision, in particular on p. 1, the mood of the verbs used implies possibility, the indicative mood is generally used throughout the annex. Thus, the applicant is asked to state in which meeting or meetings it 'took part', the identity and capacity of the persons 'who represented it', to supply a copy of every document 'which shows the sales prices sought or recommended for the main qualities in each country of the common market', to say what information 'was communicated by it' to one or more other producers concerning the tonnage of its LDPE production or sales, and so forth.

45. As regards the contested decision of 24 November 1987 concerning Solvay, it need only be stated that, subject to certain differences regarding dates and the fact that the product at issue is not LDPE but PVC, the information required is along the same lines as that sought from CdF Chimie. It is to be noted, however, that less information is required than in the case of CdF Chimie even though the prior requests addressed to the two companies were almost identical. This is perhaps due to the fact that, by contrast with CdF Chimie, Solvay agreed to supply some of the information previously requested concerning meetings, prices, quotas and information furnished to Fides.

46. The first observation called for here, having regard to the wording of the two contested decisions, is that they indicate that the two addressee companies are suspected, on the basis of the evidence obtained by investigation or requests for information, of having been parties to agreements between producers prohibited by Article 85(1). That finding does not however prompt me to

conclude that the purpose of those decisions was to express the Commission's objection concerning an infringement of that provision. It seems to me that, by mentioning the suspicion of the existence of agreements contrary to Article 85(1) as justification for its requests for information, the Commission was doing no more than complying with Article 11(3) of Regulation No 17, which states that it must indicate the purpose of its request. As regards the investigation decision, which, pursuant to Article 14(3) of Regulation No 17, must indicate the purpose of the investigation, the Court stated in *National Panasonic* that by indicating that the investigation was concerned with

'facts which might show the existence of an export ban contrary to the Treaty' [23]

the Commission had given a statement of the reasons on which its decision was based which complied with the requirements of Regulation No 17. That dictum must be regarded as applicable to the purpose of the request for information. By mentioning the suspected infringement, the Commission merely complied with Article 11(3) of Regulation No 17 concerning the purpose of the request for information. Therefore, mention of the suspected existence of agreements between LDPE or PVC producers cannot automatically be regarded as indicating that the decisions at issue are not requests for information.

47. The fact that the suspected infringement of Article 85(1) is also 'personalized' by being attributed to the applicants, in that it is stated that they are suspected of having been involved, likewise does not persuade me, in the circumstances of this case, that the decisions in question are not requests for information but must be seen as statements of objections. In so far as the reference to a suspicion that Article 85(1) has been infringed by European LDPE and PVC producers is in conformity with the legal requirements, the fact of formally notifying a European LDPE or PVC producer to which a request for information is addressed that it is suspected of having participated in such infringement as may have occurred does not seem to me, in itself, to deprive the request for information of its status as such and convert it into a statement of objections. The expression of suspicions concerning an undertaking could only be seen as a statement of objections if the Commission appeared, in its decision, to be relying on those suspicions to found the view that the undertaking was guilty of an infringement, so that it did not genuinely need further information to support that conviction. However, that is not the case as far as the present decisions are concerned.

48. Admittedly, the use of the indicative in the very wording used to identify the information requested gives the impression that that information is not to constitute a means of determining whether or not the undertaking concerned actually committed an infringement but rather a means of defining the scope of an infringement which appears to have been established. In that respect, I consider the drafting regrettable. However, the assessment of its consequences should be tempered somewhat. It seems to me, having regard to the previous decisions of the Court, that charges against an undertaking which go into some detail at an early stage are not incompatible with a request for

23 — Case 136/79, *supra*, paragraph 26.

information and consequently the fact of mentioning those charges does not preclude such a request.

49. As I pointed out earlier, it may be inferred from the Court's judgment in *National Panasonic* that the essential distinction between investigative measures and the initiation of a proceeding in the strict sense, which then requires a statement of objections to be notified, lies in the fact that the purpose of investigative measures is to allow information to be obtained in order to check

'the actual existence and scope of a given factual and legal situation' [24]

whereas a proceeding is initiated only when the Commission has formed a firm conviction and considers that the evidence gathered justifies such a course. But the decisions at issue here, although charging the undertakings concerned with participation in an infringement, also indisputably ask them for a large amount of information. I think that by so doing the Commission is seeking information which will at least confirm the extent of the infringement of which it suspects the existence. Since those requests appear to be of some substance, rather than minor or artificial, the Commission cannot be regarded as having formed its definitive opinion. According to the Court, a statement of objections is issued only when the Commission considers that all the evidence gathered is sufficient to justify initiation of the proceeding *stricto sensu*. That means that at that stage it needs no further information in order to form its conviction. The fact of asking for information of tangible and indisputable substance is in itself an indication that the stage has not yet been reached at which the Commission considers that it has sufficient evidence — even relating to the scope rather than the actual existence — of an infringement. If we reverse the proposition, we could say that the substantial nature of the information requested precludes any presumption that the Commission is already convinced of the existence of a situation which, inescapably and with absolute certainty, justifies the initiation of a proceeding.

50. I do not need to remind the Court, after the summary that I have given, of the breadth of the requests for information contained in the contested decisions. Accordingly, I think that, whatever the charges expressly or implicitly formulated against the applicants in those decisions, the objective importance of the information requested of them precludes those decisions being regarded as statements of objections disguised as requests for information. Thus, the submissions on this point in the applications appear to me to be without foundation.

III — Unlawful use of the power to request information

51. I now propose to examine certain arguments advanced by CdF Chimie. In making its first alternative submission, based as a whole on an infringement of Regulation No 17 and of the fundamental principles of the right to a fair hearing, it contends that the Commission cannot seek information and the production of documents which, by their nature and

24 — Case 136/79, *supra*, paragraph 21.

scope, do not constitute information within the meaning of Article 11 of Regulation No 17. The applicant states that, in the contested decision, the Commission is not seeking information but documents and statements, thus reversing the normal order of the investigation. It states that although the Commission may, under Article 11, gather all the necessary information, it may not on the other hand — unless that provision is to be distorted — compel undertakings to perform that task themselves. CdF Chimie adds finally that where, as in the present case, the request for information follows an investigation under Article 14 of Regulation No 17, it must be designed to obtain clarifications on particular points which were not adequately explained and must not be so wide-ranging as to represent an endeavour to make the undertaking concerned, acting in the stead of the Commission, prepare an entire dossier setting out, with supporting documents, its own confessions and the results of inquiries which it has itself made of other producers.

52. I must confess that the legal significance of the grievances thus expressed did not immediately strike me with the full clarity which is to be desired. On reflection, however, it seems that the arguments advanced may be taken to be challenging the Commission's power under Article 11 to request:

(1) information which the undertaking concerned does not yet possess and would have to obtain from third parties;

(2) documents — which should be sought under Article 14;

(3) information other than clarifications of specific points not elucidated by a previous investigation, where such an investigation has taken place, thus excluding wide-ranging questions.

53. In reply to those various points the Commission stated that there is nothing in Regulation No 17 to support the view that the term information excludes documents containing the particulars in question and, moreover, that by using the expression 'all necessary information' Article 11 makes it clear that there is no suggestion of any quantitative limit.

54. It does not seem to me that the applicant's arguments need detain the Court for long.

55. In the first place it is clear that the Commission may only require an undertaking to produce information of which it is already in possession, even though, if necessary, it may have to marshal the information concerned. The request for information may not be designed to make an undertaking seek information held by third parties. Thus, a request for information which the Commission knows is not or cannot be in the possession of the undertaking concerned would certainly be improper. But that impropriety must be evidenced by objective factors, not merely by statements by the undertaking. In the present case it is not apparent either from the wording of the contested decision or from any other document before the Court that the Commission asked CdF Chimie for

information which it clearly did not or could not have in its possession. For example, even in the case of meetings which CdF Chimie did not attend, the decision asks for information concerning each 'known' meeting.[25] If no objective factor supports the view that the information is knowingly requested from an undertaking which does not or cannot have it in its possession then it is incumbent on the undertaking to prove the alleged impropriety, if need be in proceedings before this Court against a Commission decision imposing a fine for the provision of incorrect information or a periodic penalty payment imposed for the purpose of obtaining complete and correct information. But in the absence of any manifest evidence of such an irregularity the contested decision cannot be criticized on that count.

56. As regards the possibility — denied by the applicant — of obtaining documents by means of a request for information, it should be noted that there is nothing in Regulation No 17 to suggest that an investigation under Article 14 is the only way documents can be obtained. This Court has, as the Commission pointed out, stated the opposite view, since in its judgment of 18 May 1982 in *AM & S*,[26] after pointing out that Articles 11 and 14 of Regulation No 17 empower the Commission to obtain the information and undertake the investigations necessary for proceedings in respect of infringements of the competition rules, it stated that written communications between lawyer and client, in so far as they have a bearing on the 'client' undertaking's market activities, fall within the 'category of documents referred to in Articles 11 and 14'. Thus, indirectly, but expressly, the Court acknowledged that documents could be obtained on the basis of both Article 11 and Article 14. Furthermore, in his Opinion in an earlier case, Mr Advocate General Warner mentioned that possibility when he stated that

'Article 11 empowers the Commission to seek, and if necessary to compel, the cooperation of the undertaking concerned in providing information, which may or may not be contained in documents in the possession of the undertaking'.[27]

I see no reason to add anything on this point, which I think is now sufficiently clear.

57. Finally, I must confess that I have found nothing, either in Regulation No 17 or in the decisions of the Court, to indicate that the Commission's prior exercise of its investigative powers under Article 14 limits, in the same case, the scope of the power to request information under Article 11. I have re-read the judgments cited by counsel for CdF Chimie at the hearing but have not found the slightest support for the contention that, after an investigation, a request for information may only seek clarification of the information already obtained. It seems that CdF Chimie has somewhat misinterpreted the Court's judgment in *National Panasonic*.

58. In that judgment the Court stated that officials authorized by the Commission, in

25 — Annex to the decision, heading I, question 5.

26 — Case 155/79 [1982] ECR 1575, paragraph 16.

27 — Case 136/79 *National Panasonic*, *supra*, at p. 2066.

carrying out an investigation, have the power to request during that investigation

'information on specific questions arising from the books and business records which they examine', [28]

which means that in the course of an investigation Commission officials have authority to ask for a limited range of information. This is justified by the fact, emphasized in the judgment, that a decision requiring information must without fail be preceded by a straightforward request for information, whereas an investigation decision may be adopted without the Commission's having first endeavoured to have an investigation carried out by duly authorized officials. That is why the possibility of seeking information in the course of an investigation must be limited: so that the Commission is not tempted to obtain information routinely by that means, thus dispensing with the prior request for information. But I do not see how that could imply any limitation of the power to request information following an investigation, in accordance with the two-stage procedure under Article 11.

59. Like Mr Warner in the Opinion which I cited earlier, I think it is relevant to recall the terms of a judgment of this Court concerning the first paragraph of Article 47 of the ECSC Treaty. According to that provision, 'The High Authority may obtain the information it requires to carry out its tasks. It may have any necessary checks made'. In its judgment of 14 April 1960 in *Acciaieria di Brescia* the Court pointed out that that provision establishes

'first, the duties of undertakings to provide information and, secondly, the extent of the inquiries which may be made at the same time'. [29]

The Court then stated that the applicant in that case could not succeed in its claim that the information must be obtained and the check made

'in two distinct and successive stages according to an order of priority which is not laid down in the text'. [30]

60. Although the present case is concerned not with Article 47 of the ECSC Treaty but with Regulation No 17, I consider that, in the same way, there is nothing in the latter measure or in the previous decisions of the Court to indicate that there is any 'order of priority' or subordinacy as between the request for information and the investigation. On this point therefore I associate myself with the Commission's position, which is that the two types of investigation are independent of each other and that it may have recourse to either alone or to one after the other, according to the needs of the inquiries being conducted by it, and that recourse to one cannot restrict the possibility of later recourse to the other.

61. Thus, none of CdF Chimie's arguments as to the improper use of the power to request information appears well founded.

28 — Case 136/79, *supra*, paragraph 15

29 — Case 31/59 *Acciaieria di Brescia* v *High Authority* [1960] ECR 71, at p. 79.

30 — Ibid., at p. 80.

IV — The need for the information requested

62. It would now seem necessary to examine an argument which is, in a manner of speaking, common to CdF Chimie and Solvay, namely that the information required in the contested decisions is not necessary within the meaning of Article 11 of Regulation No 17. To that argument, which is contained in the second limb of Solvay's alternative submission and the first limb of CdF Chimie's alternative submission, may be added the third argument set out in the latter submission, based on infringement of the principle of proportionality.

63. According to the applicants, the Commission sought information which was unnecessary since it had indicated to them that it already had evidence to conclude that an infringement had been committed and that they had been parties to it. And Article 11 of Regulation No 17 empowers the Commission only to ask for information which is *necessary*. The applicants emphasize that it is not sufficient that the information should simply be useful. In addition, CdF Chimie considers that the decision concerning it breaches the principle of proportionality by requiring it to supply documents and information bearing no relation to those which the Commission claims to possess already and by not giving any precise details to enable it to determine whether or not the requested information is necessary.

64. The Commission replies that although Article 11 does lay down the criterion of necessity it is vested, according to previous decisions of the Court, with a wide discretion in appraising such necessity. It adds that, far from claiming possession of evidence such as to prove the applicants' guilt, it took care, in its requests for information, to pursue its inquiries in such a manner as not to accuse the undertaking in question lightly and to determine precisely the responsibility of each of them. It therefore declares itself surprised by the complaint directed against it, since any other approach in its proceedings in competition matters would lay it open to criticism by the Court for inadequate evidence.

65. It is true that the use of the investigative powers granted to the Commission by Article 11, and also Article 14, of Regulation No 17 must, according to the terms of those provisions, be justified by necessity. The Commission may obtain 'all necessary information from . . . undertakings and associations of undertakings' [31] and may 'undertake all necessary investigations into undertakings and associations of undertakings'. [32] It is also true that the Court has acknowledged that the Commission enjoys a wide discretion in appraising what is necessary. Thus, in *National Panasonic* the Court, in analysing Article 11, speaks of the 'information which the Commission considers necessary to know'. [33] More recently, in the *AM & S* judgment, the Court stated, with respect to Article 14(1), that since the Commission may demand the documents

'whose disclosure it considers "necessary" in order that it may bring to light an infringement of the Treaty rules on competition, it is in principle for the Commission itself, and not the undertaking itself or a third party, whether an expert or an arbitrator, to decide whether or not a document must be produced to it'. [34]

31 — Article 11(1).
32 — Article 14(1).
33 — Case 136/79, *supra*, paragraph 13.
34 — Case 155/79, *supra*, paragraph 7.

66. Appraisal of the need for information or checks cannot however be left wholly to the Commission's discretion. Academic legal writers have drawn attention to certain requirements inherent in the concept of necessity. Thus, Messrs Thiesing, Schröter and Hochbaum state that 'The Commission may use its rights under Article 11 only if and to the extent to which such use is indispensable to attainment of the aim in pursuit of which the information is requested'. They add that 'the right to request information cannot therefore be used in order to obtain details which are already known to the Commission or are generally available' and that 'requests for information designed solely to facilitate the administration's tasks are, moreover, inadmissible'. Finally, they emphasize that 'the way in which the information is requested must be proportionate to the aim pursued'.[35] However, it cannot be asserted that, according to its case-law, the Court's review must ensure compliance, to the letter, with the requirements laid down in those authoritative views. Indeed, having regard to the authority to appraise the question of necessity recognized by the Court as vested in the Commission, it seems that the Court is concerned to ensure that the investigative measures adopted by the Commission are not excessive or disproportionate.

67. In *Acciaieria di Brescia, supra*, the Court stated with regard to Article 47 of the ECSC Treaty that

'the need for the information required by the High Authority must emerge from the decision with certainty'

and that in that connection

'it is only the objective in view which must serve as the criterion'.[36]

In a later case the Court stated, again with respect to investigative measures adopted by the High Authority in relation to the same provision, that

'The limit of the High Authority's powers when applying Article 47 is determined by the requirements of the checks',[37]

and that it was for the Court to

'determine whether the measures of investigation taken by the High Authority were excessive'.[38]

In that regard, the Court considered that a demand for the production of electricity invoices

'was not excessive and disproportionate to the aim in view'.[39]

68. In a case concerned with the EEC Treaty and Regulation No 17, the Court held, with respect to an investigation decision not preceded by an investigation by authorization, which, it was contended, was in breach of the principle of proportionality,

35 — *Les ententes et les positions dominantes dans le droit de la CEE. Commentaire des articles 85 à 90 du traité CEE et de leurs textes d'application*, published by Jupiter, edited by Navarre, Paris, 1977, pp. 494 and 495.

36 — Case 31/59, *supra*, at p. 81.

37 — Judgment of 14 December 1962 in Joined Cases 5 to 11 and 13 to 15/62 *Acciaierie San Michele and Others* v *High Authority of the European Coal and Steel Community* [1962] ECR 449, at p. 460.

38 — Ibid., at p. 462.

39 — Ibid.

in so far as an investigation by authorization would have sufficed, that

'the contested decision aimed solely at enabling the Commission to collect the necessary information to appraise whether there was any infringement of the Treaty'

and that it did not therefore appear

'that the Commission's action in this instance was disproportionate to the objective pursued and therefore violated the principle of proportionality'. [40]

69. Endeavouring to take account both of the margin of discretion that the Commission should be allowed and of the spirit of the previous decisions of the Court which I have just cited, I take the view that the Court's review should consider the necessity of the request for information from two points of view, which in fact complement each other. The first is the extent to which the *subject-matter* of the requests is consonant with the aim pursued. Specifically, this means that the information requested by the Commission must *appear* to be connected with the infringement at issue. The second is the *extent* to which the breadth of the information requested is consonant with the aim pursued. It reflects the concern that, even if it is objectively justified by inquiries into a possible infringement, the information requested should not appear — and I stress this point — *manifestly* excessive or disproportionate to the pursuit of that aim.

70. It is from that standpoint that, in my opinion, the question whether the requests for information made in the contested decisions were necessary within the meaning of Article 11 of Regulation No 17 must be examined.

71. With respect, first, to the producers' meetings, the Commission told both CdF Chimie and Solvay that the evidence available to it showed that they had participated in such meetings, and alleged that CdF Chimie had even organized some of them. In my view, that fact does not prevent requests being made, as they are made in the two contested decisions, for information as to the times of the meetings, where they were held, the identity of the participating undertakings, the status of the persons representing the undertakings and the identity of the applicants' representatives at those meetings. On the contrary, such information would appear likely to facilitate precise identification of acts constituting an infringement of Article 85(1), and more particularly to determine whether 'agreements between undertakings' of the kind referred to in that article existed. It cannot automatically be regarded as unnecessary. As far as the applicants, in particular, are concerned, it would not appear unimportant to determine exactly to what extent they took part in the meetings. As regards the request for all documents relating to one of the meetings, which was addressed only to CdF Chimie, the fact that the documents sought are those relating to producers' meetings also seems to me to be conducive to precise identification of certain circumstances constituting an infringement.

40 — Case 136/79 *National Panasonic*, *supra*, paragraph 30.

Moreover, I cannot see anything excessive in any of the various requests.

72. On the question of prices, the Commission states that, according to the documents in its possession, the meetings were intended to fix and maintain the prices of LDPE (in the decision addressed to CdF Chimie) and of PVC (in the decision addressed to Solvay). It therefore seems to me that the various questions asked, which relate to organizational details of price initiatives, both in general terms and, in the decision in respect of CdF Chimie, in relation to the latter's internal procedures, are undeniably relevant to the identification of another component of an infringement of Article 85(1), in so far as that provision relates to agreements which 'directly or indirectly fix . . . prices'. In view of that relevance, those requests for information likewise do not seem to me to be in any way excessive.

73. On the question of quotas, the Commission states that, according to the documents in its possession, at their meetings the producers determined the sales targets for each undertaking, and it gives a general outline of the system. It does not seem to me to be in any way superfluous to ask the applicants, as the Commission does, to indicate the methods by which the quotas were determined and by which compliance with them was to be monitored or to ask CdF Chimie for details of the information concerning its LDPE production which it communicated to other manufacturers. Such requests do not appear at all unrelated to the precise characterization of agreements which, in terms of Article 85(1), 'share markets'. Moreover, I do not perceive anything in the formulation of those requests to indicate that they are excessive.

74. Finally, with regard to the statements forwarded to Fides, the questions, which are addressed only to CdF Chimie, appear to relate only to the organizational aspect of the exchange of information between producers of LDPE. Details of the manner in which information was exchanged by producers suspected of having entered into agreements on prices and market sharing may contribute to a clearer idea of whether a certain action constitutes conduct prohibited by Article 85(1). Therefore, questions on that organizational aspect cannot in my view be regarded as superfluous. Nor does it seem, from the terms in which the Commission expressed them, that they are excessively wide-ranging.

75. It is true that, in order to illustrate the lack of any need for the information requested by the Commission, the applicants draw attention to the fact that, at the same time as asking for the information, the Commission stated that it had evidence that the two companies had engaged in concerted practices prohibited by Article 85(1) of the Treaty. That fact must be, if not disregarded, at least put into perspective. It must be recalled that by stating that it was investigating a possible infringement of Article 85(1), the Commission is conforming with Article 11(3) of Regulation No 17, according to which the purpose pursued must be indicated. I said, when considering the submission concerning the 'disguised' statement of objections, that it was of scant importance if the Commission told the undertakings not only that it wished to verify the existence of an infringement but also that it suspected that they had been parties to it. It would be inconceivable to require the Commission not to undertake investigative measures in respect of under-

takings on the ground that it had evidence that they had participated in infringements of Article 85(1). On the contrary, the better view is, as expressed by Messrs Thiesing, Schröter and Hochbaum, that 'if the Commission undertakes investigations into breaches of the competition rules, there must be some indication that the law has been infringed' and that 'a request for information made merely by way of precaution is not permissible'.[41] Furthermore, the Commission stated at the hearing that it undertook investigations only on the basis of evidence, not as a means of 'probing'.

76. Therefore, the fact that the Commission informs an undertaking that it has evidence of its participation in an infringement of Article 85(1) is not sufficient to deprive it of the possibility of conducting investigations concerning that undertaking on the ground that such measures would be excessive and manifestly unnecessary. Such a conclusion could be envisaged only if the Commission sought to conduct investigations despite having sufficient evidence or if the investigations were manifestly intended to gather more evidence than was necessary to establish the existence and scope of the infringement.

77. The Court cannot, therefore, in analysing the propriety of the contested decisions, appraise, as an absolute value, the Commission's 'need for evidence'. We know, as a matter of physics, that water boils at 100 degrees centigrade but that it does not boil at 99 degrees, but in the matter before us we do not have such clearly defined points of reference. We cannot determine, a priori and with precision, beyond what threshold the Commission's request for evidence is unnecessary or excessive. For the most part, the 'need for evidence' can be assessed only in relative terms.

78. I think it is also important to remember that, according to previous decisions of the Court, the investigations conducted by the Commission under Articles 11 and 14 of Regulation No 17 are intended to enable it to 'gather the necessary information to check the actual existence and scope of a given factual and legal situation'.[42]

As I pointed out when examining the 'dissimulated' statement of objections, the Commission is thus justified in seeking any evidence likely to establish an infringement and to define its precise extent. Therefore, the 'necessity' or the 'need for evidence' must be appraised on that basis. That is why I consider that, even though it may possess evidence which proves beyond doubt that a particular undertaking has participated in acts constituting components of an infringement of Article 85(1), the Commission is right to pursue its investigations with respect to *all* such undertakings as it might suspect, in order to assess the full extent of the infringement. Specifically, the Commission may already be aware of certain producers' meetings, of the participation of certain undertakings in those meetings, and of agreements covering certain periods and certain geographical areas; it is nevertheless justified in seeking to determine whether the infringement became more serious as time passed and

41 — Op. cit., p. 493 — see footnote 35.

42 — Case 136/79 *National Panasonic*, *supra*, paragraph 21.

affected a wider area. I would even go so far as to say that it is the Commission's duty to do so, since otherwise it could not properly fulfil its wider task — wider than its specifically 'repressive' role — under the Treaty, namely ensuring that the competition rules are applied.

79. Furthermore, the Commission's pursuit of investigative measures, despite its possession of evidence of the existence of an infringement and certain information indicating that particular undertakings are involved, is also justified by the requirements associated with the review that the Court must carry out when an action is brought before it by undertakings which have been fined after a finding of an infringement. One need only read a few of the Court's judgments in such actions to see that it carries out a thorough examination of the evidence adduced in support of the Commission's decisions, in order to establish the existence of the infringement and the extent of the involvement of the undertakings on which a penalty was imposed.

80. It is therefore entirely normal for the Commission to consider itself obliged to conduct an investigation so as to gather enough evidence to ensure that any decision finding that an infringement has been committed and imposing a fine will meet the requirements of Community law, as defined in the decisions of the Court.

81. In view of all the conditions to which I have referred, there is nothing surprising in the fact that the Commission, although in possession of certain evidence, is entitled to undertake proper investigations and then consider that, despite an apparent lack of success in all or some of its investigations, it should initiate a proceeding and, for that purpose, issue a statement of objections. It will have identified an infringement of a lesser extent than it envisaged but may nevertheless consider that it has sufficient evidence to find that certain undertakings have been guilty of an infringement by virtue of particular conduct at particular times. That does not mean, however, that the investigations undertaken by it were not 'necessary' within the meaning of Regulation No 17.

82. The fact, referred to by the applicants, that the Commission could, even without any reply to most of the requests for information addressed to them, have initiated a proceeding against them and issued a statement of objections does not therefore, in my opinion, establish in any way that the information requested and not obtained was not 'necessary' within the meaning of Regulation No 17. Any immoderation in a request for information, in the terms in which I have defined that concept, would result not from the Commission's seeking more evidence but from its seeking too much. 'More' is not 'too much' and a finding of an infringement of Article 85(1) of the Treaty may be founded on more evidence or less evidence, and 'less evidence' does not mean that the Commission acted illegally by seeking, without unqualified success, to collect 'more evidence'. It also seems to me that the need for requests for evidence can be assessed only by reference to existing principles, not on the basis of the results obtained.

83. Consequently, I am of the opinion that consideration of the two contested decisions has not shown that the information sought from the applicants in each of them was unnecessary for the purpose of establishing an infringement of Article 85(1), so as to

secure the best possible appraisal of its extent, the *modus operandi* adopted and its effects. Accordingly, the applicants' allegations that the decisions at issue are illegal because the information requested is unnecessary must be considered unfounded. The same applies — and the matter need not be considered specifically — to CdF Chimie's allegation that the principle of proportionality was infringed.

V — The right not to give self-incriminating evidence

84. I must now consider another argument which, essentially, is relied on by both applicants. This argument, which appears to be embodied in both the first and fourth limbs of Solvay's alternative submission and in the second alternative submission made by CdF Chimie, is essentially based on the allegation that the contested decisions are in breach of the principle that no one can be compelled to give evidence against himself.

85. According to CdF Chimie, the right not to give evidence against oneself is a general legal principle embodied in Community law, upheld by international conventions which are binding on the Member States and by their legal traditions. In Solvay's view, it constitutes a fundamental human right included amongst the general principles of Community law of which the Court, inspired by the constitutional traditions common to the Member States and by international instruments, ensures observance. The applicants consider that the Council's refusal to incorporate the right to silence in Regulation No 17 is not binding on the Court.

86. The Commission objects that there is no general principle requiring observance of the right not to give evidence against oneself in proceedings of an administrative nature conducted exclusively against corporate entities. It adds that the applicant's view could only be upheld if the provisions of the regulation itself were contrary to the European Human Rights Convention, an issue which it regards as falling outside the scope of the present proceedings.

87. It seems to me that there is a point which must be clarified before the weighty debate prompted by the opposing theses is embarked upon. It must first be decided whether Regulation No 17 itself grants undertakings the right to refuse to reply to requests for information where the replies would, as far as they are concerned, be 'self-incriminating', in so far as it would involve the admission of an infringement of Article 85 and would expose them to the applicable penalties. There is no point in discussing the traditions common to the Member States or international instruments unless the right not to incriminate oneself is not already upheld by Regulation No 17.

88. There is no doubt as to the answer. It is absolutely certain that the Council, as originator of Regulation No 17, did not intend to give undertakings to which a request for information was addressed the right not to incriminate themselves. That conclusion seems to me to stem from the very conditions governing requests for information, as laid down in Article 11 of Regulation No 17. What explanation could be

given for the fact that, after requesting information from an undertaking under Article 11(2) to (4), the Commission should have the right, pursuant to Article 11(5), to require by means of a decision — even though the undertaking is entitled not to give evidence against itself — information which the undertaking has not supplied or has supplied only incompletely? And what explanation could be given for the fact that such a decision must also indicate the penalties provided for in Articles 15(1)(b) and 16(1)(c) of Regulation No 17? The first-mentioned provision, the Court will recall, allows the Commission to impose a fine on undertakings if, intentionally or negligently, they supply incorrect information or fail to supply information within the time-limit fixed, and the second provision allows it to impose on them periodic penalty payments 'to compel them . . . to supply complete and correct information which it has requested by decision'. Coercive machinery of that kind appears to me intellectually incompatible with the right to silence.

89. Mr Advocate General Warner's analysis in his Opinion in the *National Panasonic* case appears to me once again to be correct. He said

'Article 11 enables the Commission to seek, and if necessary to compel, the cooperation of the undertaking concerned in providing information'. [43]

90. The legislative history of Regulation No 17 gives some relevant insights concerning the question whether or not account should be taken of the right not to testify against oneself. When the European Parliament examined the proposal for a regulation, subsequently to become Regulation No 17, a report was prepared on behalf of the Internal Market Committee by Mr Deringer. Paragraph 121 of the 'Deringer Report' [44] recorded a number of observations, some of which should be cited here. With respect to the provision in the proposal concerning requests for information, it stated: 'The committee considers that those provisions do not reflect in a number of respects the general principles in force in a State founded on the rule of law, which means that the regulation is liable to be declared void by the Court of Justice'. [45] Accordingly, the report indicated that 'in any event, any person required to supply information must have the right to refuse to give evidence'. [46]

91. On the basis of that report, the Internal Market Committee presented a draft resolution to the Parliament amending on numerous points the proposal for a regulation which had been referred to it. With respect to the requests for information, provided for in Article 9, under the heading 'Right to information', the draft resolution proposed wording whereby 'any person required to supply the information may refuse to answer the questions where the reply is liable to expose them or to expose any person who might refuse to give evidence under his national code of procedure or the undertakings or associations of undertakings which they represent, to criminal penalties'. The resolution adopted by the Parliament on 19 October 1961 incorporated that wording. [47] But, as

43 — Case 136/79, *supra*, at p 2066.

44 — Doc. No 57 of 7 September 1961, European Parliament.

45 — Ibid, p. 30.

46 — Ibid.

47 — *Journal officiel*, 15.11.1961, p. 1406.

we know, the Council did not incorporate that wording in the final text.

92. Referring to that toing and froing, and after expressing his

'grave doubts whether it is permissible to interpret a Council regulation by reference to its "legislative history"', [48]

Mr Warner, delivering his Opinion on that occasion in the case of *AM & S*, stated:

'One can understand that the Council should have wished to exclude from what is now Article 11 of the regulation a rule that a person should not be required to answer incriminating questions, for that might have defeated the very purposes of the article or at least rendered it largely ineffective'. [49]

93. The legislative history of the provision and Mr Warner's unequivocal remark on this specific point seem to show fairly clearly that the Council did not wish to give undertakings, through Article 11 of Regulation No 17, the right not to give evidence against themselves. That wish to exclude such a right is not seriously disputed in general. Some academic writers contend that the Council was wrong to do so or that it had no power to do so, but not that it did not do so. For example, Asteris Pliakos states, with respect to the right not to incriminate oneself, 'the Community competition rules do not provide for such a right' in favour of persons required to supply information and he refers in that regard to the fact that the Council did not adopt the Parliament's proposal. [50]

94. It is now appropriate, therefore, to ask whether it follows from the fact that Regulation No 17 does not uphold the right not to give evidence against oneself that no such right exists in Community competition law. In other words, if the Community legislature intended to exclude such a right — and there is no doubt that it did — does that mean that Community law as a whole has excluded that right? Let me make it clear at this stage that, contrary to what the Commission suggests, it is not a question of examining a submission raised belatedly at the hearing to the effect that Regulation No 17 is invalid. Rather, it is a question of determining whether legal principles applicable in Community competition law, but excluded in formal terms from Regulation No 17, are in some way superimposed on that regulation. I would also add that the possible existence in Community law of a legal principle which takes precedence over Regulation No 17, enshrining the right not to give evidence against oneself, does not mean that that regulation must be declared formally invalid, in so far as the Council's wish to exclude such a right was not reflected in an express provision in it. In the circumstances, the matter at issue is more that of the interpretation of a regulation in conformity with a superior principle rather than a question of invalidity.

48 — Case 155/79, *supra*, at p. 1621.

49 — Ibid.

50 — Op. cit., p. 38 and pp. 287-293 — see footnote 20 above.

95. So is it possible, leaving aside Regulation No 17, to identify a principle, recognized in Community law, which upholds the right not to give evidence against oneself when requested to supply information under Article 11 of that regulation?

96. The applicants rely in that connection on a general principle common to the laws of the Member States and on international instruments, in particular the European Human Rights Convention and the International Covenant on Civil and Political Rights adopted by the General Assembly of the United Nations on 19 December 1966.

97. The law of the Member States concerning the right not to give evidence against oneself has been extensively described by the parties in their written submissions. However, those submissions give me the impression that in making that comparison of national laws each of them found not what it was looking for but rather what it had decided to find.

98. For my part, I would observe that an analysis of national laws has indeed shown that there is a common principle enshrining the right not to give evidence against oneself, but it has also shown that that principle becomes progressively less common as one moves away from the area of what I shall call classic criminal procedure.

99. The right not to incriminate oneself is very widely applied in Spain, where it is expressly upheld by Article 24 of the Constitution. It is considered that the general terms in which it is formulated render that fundamental principle applicable to both natural and legal persons. Since the Constitutional Court held in a 1981 judgment that the fundamental principles embodied in Article 24 also apply to administrative proceedings which may lead to the imposition of penalties, it must be agreed that the right not to give evidence against oneself applies to domestic administrative proceedings which may result in penalties being applied for infringements of the competition rules.

100. One may also speak of wide-ranging application of the principle in the Federal Republic of Germany. Admittedly, by contrast with Spain, the right not to give evidence against oneself is not formally enshrined in the Constitution, since it is not among the fundamental rights referred to in Articles 1 to 19 of the Basic Law or among the rights recognized by Articles 101 to 104 of the same law. With more particular reference to competition law, that principle may be relied on by natural persons in 'administrative' proceedings and in 'penalizing' proceedings and it seems that it may also be relied on by legal persons where they are liable to a fine in 'penalizing' proceedings. Apparently there is no doubt as to whether that right may be relied on in 'administrative' proceedings — the case-law appears to disallow it.

101. In the United Kingdom the right not to give evidence against oneself may certainly be regarded as fundamental as far as classic criminal procedure is concerned, including

the stage of preliminary inquiries. Moreover, reference is readily made to common-law tradition when speaking of the right not to give evidence against oneself. That right is also generally applicable in civil proceedings. It benefits both natural and legal persons. However, it seems that a number of laws derogate from the general principle in so far as they require questions to be answered even though the reply might lead to the persons concerned being incriminated. In those cases where the legislature does not at the same time prescribe that the answers may not be used in evidence against the persons who gave them in subsequent criminal proceedings, it seems that the replies may be admissible as evidence. In competition law where, it must be pointed out, the competent authorities are vested with investigative powers but not the power to impose fines, the legislation is not entirely consistent: the Competition Act 1980 and the Fair Trading Act 1973 provide for investigative powers which do not override the right not to give evidence against oneself, whereas the Restrictive Trade Practices Act 1976 does not provide that that right may be effectively invoked.

102. In Ireland, all public penalties are criminal-law penalties. Criminal law guarantees the right not to give evidence against oneself, both during the trial and at the investigation stage. In competition law, the Examiner for Restrictive Practices Orders is, by the Restrictive Practices Act 1972, given powers of investigation which enable him to require an undertaking to produce any information which he may reasonably require for the discharge of his duties. On completion of the investigation, if criminal proceedings are appropriate, the question arises whether, at the trial, the prosecutor may use information collected during the investigation. It is generally accepted that that is not the case.

103. In the Netherlands, the right not to give evidence against oneself is upheld in the criminal code. It applies generally in criminal matters and in administrative proceedings in which a fine may be imposed. Both natural and legal persons may invoke that right. In competition law, infringements are criminal offences. The law on economic competition imposes the obligation to supply information to the Competition Commission, a body not empowered to impose penalties. It seems that the right not to give evidence against oneself cannot be invoked when the request for information is addressed to persons who have not yet been charged and precedes the commencement of the prosecution, but may be invoked if a 'potential defendant' is called on to give information which might be used in subsequent criminal proceedings.

104. Danish law upholds very widely the right of parties not to give evidence against themselves in both criminal and civil matters, without distinguishing between natural and legal persons. 'Administrative' laws, in particular the law relating to monopolies and competition, provide that the administration may require information. It seems that the right not to give evidence against oneself does not apply in administrative proceedings, but academic writers consider that in certain cases a person is not required to provide information where he is to be regarded as a defendant. Although interpretation of the law appears difficult, it is thought that the conclusion whether the person concerned is to be regarded as a 'defendant' depends on the gravity of the suspicions of which he is the subject.

105. In Belgium the right not to give evidence against oneself is recognized in criminal matters in favour of the accused or defendant, but in criminal proceedings there is no prohibition of questioning him or any requirement that he be informed of his right of silence. Until such time as a person becomes, from a procedural point of view, an accused or defendant, he is deemed to be a witness under oath, which does not appear to allow him to refuse to reply. In tax matters, the administration may require production of any documents or information in order to verify a tax situation, and in default a fine may be imposed. In economic matters, a number of laws grant the administration far-reaching powers of investigation, but the powers are not widely used in practice. Thus, although they provide for a penalty for the refusal to supply the information requested, it is possible that, under the case-law accumulated to date, there may be a right to decline to give evidence against oneself.

106. In Luxembourg the right not to give evidence against oneself is recognized in criminal procedure on terms comparable to those in Belgium or France. Although no provision expressly upholds the right of silence during the preliminary judicial investigation, it is considered that that right is inherent in the rules governing such investigations. Witnesses do not, in principle, enjoy that right. A draft law at present under discussion in the Chamber of Deputies provides for the introduction into the Code of Criminal Procedure of a provision identical to Article 105 of the French Code of Criminal Procedure, which prohibits the taking of evidence from a person in respect of whom there exist 'serious and corroborated indications of guilt'. In competition law, the power to penalize prohibited agreements is vested in the Minister for the National Economy. A 'Committee on Restrictive Trade Practices' set up within his Ministry is entitled to collect all information, depositions and evidence and to secure disclosure of all documents and information which it considers necessary for the discharge of its duties. At the request of the Committee, the Minister may designate officials and others in order to carry out the necessary inquiries. The latter are vested with the powers provided for in the legislation on prices and may thus question the persons concerned and anyone else who may be able to supply information. Refusal to provide information and failure to supply it within the period prescribed or the provision of information known by the person concerned to be incorrect attracts a fine or imprisonment. These rules thus exclude any right of silence for economic agents who are the subject of an investigation.

107. In Portugal, the right not to give evidence against oneself is generally upheld by criminal law. In competition law there is a contradictory situation. Anti-competitive conduct may be classified as 'contra-ordenações', offences which are less serious than criminal offences, and may be punished by fines or, in the most serous cases, by imprisonment. The decree-law on 'contra-ordenações' provides for the application, on a subsidiary basis, of the procedural rules of the Code of Criminal Procedure. But the decree-law on competition empowers the Directorate-General for Competition, when endeavouring to establish unlawful practices, to require undertakings to produce certain information and provides that a refusal to provide information is punishable as the criminal offence of 'disobedience'. Which of the two

enactments takes precedence? It might be concluded that the Code of Criminal Procedure, and with it the right not to give evidence against oneself, prevails, but there is no decided case or specific reference in legal literature to support that view.

108. In Greece the Code of Criminal Procedure upholds the right not to give evidence against oneself for witnesses and the accused. On the other hand, that right is not available in administrative inquiries conducted by the Directorate for the Protection of Competition of the Ministry of Commerce. Undertakings, associations of undertakings and other natural and legal persons are required to provide the Directorate immediately with complete and accurate information requested of it. On conclusion of the inquiry, the Minister of Commerce may impose penalties, in particular fines for refusing to provide information or delaying or rendering more difficult the provision of the information requested. Criminal penalties are provided for impeding the provision of the information called for.

109. In Italy, the right not to give evidence against oneself is upheld by the Code of Criminal Procedure in favour of the accused. The new Code of Criminal Procedure, which came into force in October 1989, also confers that right on any person who is the subject of preliminary inquiries and, more generally, any person who makes statements to the police which might be indicative of his own guilt. But, outside the area of the criminal law, it seems that the right not to give evidence against oneself is not available. The Constitutional Court has stated, with respect to fiscal law, that the protection of rights of defence does not extend to administrative activity intended to verify the fulfilment of obligations imposed by law. In the absence of competition law as such in Italy at the present time, it may be observed that the tax laws, concerning VAT and income tax, provide for pecuniary penalties to be imposed by the tax authorities in the event of taxpayers failing to supply the information required of them or providing incomplete or incorrect information.

110. Finally, in France the Code of Criminal Procedure grants to every person liable to be charged the right of silence in the pre-trial judicial investigation but not at the stage of preliminary inquiries. Competition law is mainly governed by an Order of 1 December 1986 which confers investigative powers on agents of the Directorate-General for Competition and powers of decision on the conseil de la concurrence, an administrative body. The investigators may obtain all information and supporting documents considered necessary, either by requiring the person concerned to produce them personally or by conducting on-the-spot investigations. In inquiries and proceedings before the conseil de la concurrence, all the parties are given a hearing but they are called on to answer the questions put by the rapporteur and to supply him with all the documents needed to establish the facts. Any refusal to cooperate with the investigators and rapporteurs in the discharge of their duties is punishable by imprisonment or fines. It is considered that those penalties are applicable to the refusal to give information verbally or in writing. It seems that in administrative proceedings in competition matters the right not to give evidence against oneself is not available. In conclusion, I would point out that on completion of the investigations the conseil de la concurrence may order that the anti-competitive practice be brought to an end and it may, if need be, impose a pecuniary penalty.

111. After this review of national legislation — a very brief outline, I would hasten to add — it seems that the success of the endeavour to identify a common principle will depend on the subject-matter chosen. If one seeks evidence of a common principle prevailing in classic criminal law, the enterprise presents no major difficulty. Indeed, in that area there is no doubt that a common principle can be identified. The laws in each country protect, to a greater or lesser extent, persons being questioned in criminal proceedings in the strict sense. Admittedly, there are significant differences. In some cases the right not to give evidence against oneself is available at every stage of the procedure whereas in others it is available only at the stage of preliminary inquiries. In some cases protection is available both for witnesses and for persons who have been formally charged, and in others only the latter are protected. But in no case is that right denied to a person who has been formally charged in judicial proceedings *stricto sensu.*

112. An analysis of national laws does not however yield such a clear result if, leaving aside the criminal law properly so called, one broadens the review to take in proceedings relating to competition law.

113. We find, in fact, that three Member States, Greece, Luxembourg and France, exclude the right not to give evidence against oneself in administrative competition proceedings. The position in Italy might be regarded as comparable in so far as that right is not available in tax investigations, but it is impossible to foresee precisely what the situation might be if competition law as such existed in that Member State.

114. Moreover, a degree of doubt exists in certain circumstances under the various national laws. The conclusions which it is possible to draw from an analysis of Portuguese law or Belgian competition law are largely conjectural and are more a matter of legal academic opinion than of specific solutions existing as part of positive law.

115. Furthermore, in other States, which distinguish in general between investigations conducted by the administration and proceedings where the power of imposing penalties is vested in the courts under criminal law in the strict sense, difficulties arise in identifying the precise borderline between the two phases. Thus, I have been unable to determine for certain whether, in Ireland, a charge before a criminal court may rely on information which the administration, that is to say the Examiner for Restrictive Practices, may have called for. In the Netherlands it seems that the right not to reply to requests for information from the Competition Committee depends on whether the weight of the charges against an undertaking is such that it is a potential defendant in criminal proceedings. That is comparable with the situation observed in Denmark where it seems that the intention is to make the right not to supply the information demanded by the administration conditional on whether the gravity of the suspicions against the undertaking concerned is such that it may be regarded as an 'accused'.

116. Neither will it escape notice that the United Kingdom legislation is not consistent; the Restrictive Trade Practices Act 1976 appears not to grant the right to refuse to provide information whereas the other laws on competition do not depart from that principle. It is interesting to note that the legislature in the United Kingdom may create exceptions to the right not to give evidence against oneself.

117. It is therefore only in Spain and the Federal Republic of Germany that both in investigations into anti-competitive conduct and in proceedings concerning such conduct the right not to give evidence against oneself is available (subject to an exception in Germany in administrative proceedings against legal persons). It should also be noted that in Germany it would be difficult to identify, as far as undertakings are concerned, the expression of any fundamental right. One may more readily perceive an extension, resulting from the will of the legislature, of safeguards which may perhaps be classifiable as fundamental only as far as individuals are concerned.

118. Can such a mosaic of national approaches to the problem be synthesized to arrive at a single conclusion? Some years ago in a case before this Court it was claimed that the confidentiality of correspondence between a lawyer and his client was embodied in a principle common to the Member States.[51] Two Advocates General were called upon to deliver an Opinion before the Court gave judgment. The second, Sir Gordon Slynn, expounded his view by a method which is of particular interest having regard to the present case. He took care first to draw attention to the fact that, despite the inevitable differences between the Member States, a principle whereby relations between a lawyer and his client were confidential could be identified which, even though not co-extensive in all the Member States, had to be classified as a rule of Community law. Then, in a second phase, he endeavoured to clarify how that principle applied and the extent to which it applied in Community law in order

'to achieve the best and most appropriate solution in the light not only of considerations of the practices of the various Member States, but the interests of the Community and its institutions, Member States and individuals which are subject to its laws'.[52]

119. It was against that background that the question arose whether, for the sake of balancing the various aspects of the public interest, under the laws of the Member States the protection of confidential relations between lawyer and client should yield to

'the powers needed to investigate alleged infringement of competition law'.[53]

His answer was as follows:

'I am not aware of any provision of national law which expressly excludes all right of legal confidence from competition inquiries or proceedings'.[54]

He went on to add that it seemed clear that

'there is no universal, or even widely accepted, rule that such protection of legal confidence as exists is excluded in competition matters. At most, there is doubt in some cases; the general rule is that the protection continues'.[55]

51 — Case 155/79, *supra*.

52 — Ibid., p. 1654.
53 — Ibid., p. 1656.
54 — Ibid.
55 — Ibid., p. 1658.

120. The Court will already have realized that the application of that method of analysis to the question of the right not to give evidence against oneself cannot lead to consistent results. Whilst it is conceivable that, from an analysis of the laws of the Member States, the right not to give evidence against oneself might be identified in the context of proceedings to penalize an offence, it is not possible to say that no Member State excludes such a right in proceedings for infringements of competition rules, or that at most doubts exist in certain cases. Three Member States (Greece, France and Luxembourg) exclude the right entirely; the position in two others (Belgium and Portugal) is somewhat doubtful and in three others (Denmark, Ireland and the Netherlands) there is a system whereby that right is excluded, during the course of the investigation, at least for so long as the suspicions against the person questioned do not go beyond a limit which it appears difficult to define.

121. In those circumstances, should a midway solution be suggested on the basis of the laws of the Member States, whereby the right not to give evidence against oneself is *partially* upheld in competition proceedings? More specifically, would it be appropriate, on the basis of what appears to be the position in certain Member States, to say that Community law requires any information which may have been required of an undertaking in the course of the investigation not to be used in evidence in subsequent proceedings against that undertaking? Such an approach would be of interest only in a system where the powers of investigation and of prosecution are not vested in the same authority, which is not the case under Community law. It should also be remembered that in its judgment in *Musique Diffusion* the Court rejected a submission that the fact that the Commission combined 'functions of judge and prosecutor' was illegal.[56] Therefore it seems to me that it would be inappropriate to adopt that approach on the basis of the laws of the Member States.

122. Accordingly, I consider that, although a comparative analysis of the laws of the Member States indicates that the right not to give evidence against oneself exists as a general principle, the same analysis also shows that it is not a principle of such 'force' that it cannot be excluded in an area such as competition law, in so far as the legislation of several Member States makes a derogation specifically on that point. I associate myself in that respect with the view of Sir Gordon Slynn who, in his Opinion in *AM & S*, indicated that

'It is for the Member States and (within their various powers) those who make the Community legislation to decide whether the general principle which exists should be modified or excluded'.[57]

Moreover, a similar view inspired Mr Warner when, delivering his first Opinion in the case concerning confidentiality of relations between lawyers and their clients, he spoke of a

'right that the laws of civilized countries generally recognize, but not one so entrenched that, in the Community, the

56 — Joined Cases 100 to 103/80 [1983] ECR 1825, paragraphs 6 to 11.

57 — Case 155/79, *supra*, p. 1650.

Council could never legislate to override or modify it'. [58]

123. In the present case, the exception to the principle was specifically laid down in Regulation No 17, since it was the Council's intention, in the circumstances to which I referred earlier, not to allow undertakings the right not to give evidence against themselves in the course of the investigation. I think it is important to make it clear that in reviewing, under the circumstances to which I referred earlier, the need for the information requested, the Court has an opportunity to ensure that the Commission does not manifestly abuse its powers by artificially prolonging the investigation phase.

124. I would add, in case it should be necessary, that in setting aside, for the purposes of investigations concerning infringements of Community competition rules, the general principle common to the Member States whereby a person need not give evidence against himself, the Council does not appear to have exceeded its powers, in view of the fact that it is in the general interest of the European Economic Community for those rules to be complied with and that that general principle applies as from the stage of the statement of objections.

125. Consequently, the contested decisions cannot in my opinion be regarded as being in breach of that general principle, since they were adopted in a situation in which its application is excluded by Regulation No 17.

58 — Ibid., p. 1636.

126. It having been impossible to identify in the laws of the Member States a common principle of sufficient authority for the decision at issue to be regarded as in breach of it, is such a principle to be found in the United Nations International Covenant to which I referred earlier? Article 14(3) of that Convenant states that 'In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:

...

(g) not to be compelled to testify against himself or to confess guilt'.

127. It does not seem that the Court has yet referred to that instrument as being amongst those on which it relies in determining the fundamental rights applicable in Community law. But it is true that the Court has never stated that there is an exhaustive list of international instruments for that purpose. I do not know whether the fact — to which the Commission drew attention — that Greece has not ratified the International Convenant prevents the Court from having regard to it. That aspect should not in fact be decisive since it is clear from the preamble to the Convenant that it relates only to individuals — human beings — and not to legal persons, such as undertakings. I should also point out that no reference was made to the travaux préparatoires, to legal literature or to case-law to support the view that the specific provision referred to can be interpreted as referring to undertakings in administrative proceedings in competition matters. Accordingly, I do not think that it is even necessary to discuss whether the

concept of criminal charge within the meaning of Article 14(3)(g) must — as I think — be strictly interpreted by the Court or whether the situation of the person charged is not relevant, if at all, until the statement of objections has been issued.

128. In view of the foregoing considerations, the Court will perhaps not have to dwell overlong on the objection of inadmissibility raised by the Commission, based on the fact the CdF Chimie did not formally refer to any infringement of the Convenant in its reply. According to the Commission, that issue amounts to a fresh submission and as such it is inadmissible by virtue of Article 92(2) of the Rules of Procedure. It is true that CdF Chimie did not mention that infringement in either of the submissions which it made before the expiry of the period for bringing an action. That aspect of its application must therefore be dismissed as inadmissible, a fact which, if the Court shares my view, will not have any great impact on its chances of success.

129. The fact that the contested decisions disregard the right not to give evidence against oneself does not in itself appear to constitute an infringement of a principle common to the laws of the Member States or of the International Covenant, but should it be regarded as illegal on the ground that it infringes the European Convention on Human Rights? The applicants consider that a breach has been committed in the present case, specifically an infringement of Article 6 of the Convention.

130. Solvay refers in particular to Article 6(1) and (2) of the Convention, concerning the right to a fair hearing and the presumption of innocence, whereas CdF Chimie refers more particularly to Article 6(3) concerning the rights of a person charged with a criminal offence.

131. Both applicants state in support of their arguments in particular that proceedings — even if formally purporting to be administrative — concerning infringements of the competition rules give rise to the application of the provisions of Article 6, which provide safeguards in criminal matters. They refer in that regard to the judgment of the European Court of Human Rights in the case of Öztürk.[59] The applicants add that Article 6 applies to both natural and legal persons and that that fact has been recognized both by this Court and by the Strasbourg Court.

132. That argument calls for a first observation, namely that the European Convention on Human Rights does not formally and expressly uphold the right not to give evidence against oneself in criminal proceedings. A second observation is required: no judgment of the European Court of Human Rights or any decision of the European Commission of Human Rights has upheld the existence of that right under any provision of the Convention. Solvay referred to a decision of the Commission of Human Rights which, in connection with the admissibility of a complaint concerning an infringement of Article 6(1) and (2) resulting from an obligation to incriminate oneself, rejected the complaint because the person concerned had never in fact been compelled to make a statement or been prosecuted. Such a decision rejecting a complaint at the

59 — *Publications of the European Court of Human Rights, Series A*, Vol. 73.

admissibility stage is not a binding precedent.

133. In a decision of 6 October 1988, the European Commission of Human Rights, ruling on the admissibility of a complaint lodged by a Mr Funke against France, stated that it considered that the application raised complex problems, particularly as regards the question whether the obligation imposed on the applicant by the customs administration 'to make available to the prosecuting authority documents which might incriminate him' was 'compatible with the right to a fair trial and the presumption of innocence'. It added that the complexity of those problems was such that it was not possible to declare that part of the application to be manifestly unfounded. [60] The decision which the Human Rights Commission ultimately gives on the substance of the case will without doubt be of great interest regarding the problem involved in the present case. But, having regard to the decisions so far adopted by the judicial authorities operating under the Convention, the opinion that any of the paragraphs of Article 6 upholds the right not to give evidence against oneself is confined to the sphere of academic legal literature.

134. However, even if it were to be assumed that Article 6 of the European Convention on Human Rights actually upheld that right, would it have to be concluded that it applies to investigations into possible infringements of the competition rules conducted by an administrative body which is also empowered to impose penalties? Let it be said straight away that that question could not be based on Article 6(1). It will be recalled that that provision lays down certain conditions regarding a fair hearing before an 'independent and impartial tribunal'. However, it seems to me to be clear from the judgments of the Court of 29 October 1980 in *Fedetab* [61] and *Musique Diffusion* [62] that the Court is of the opinion that Article 6(1) does not apply to proceedings conducted by the Commission in the sphere of Community competition law. Moreover, in his Opinion in the last-mentioned case, Sir Gordon Slynn stated that although the fundamental rights recognized by the Court

'have been long recognized as forming an integral part of the general principles of Community law, which no doubt *mutatis mutandis* must be observed in competition cases as well as in others',

it did not follow that

'the Commission's functions in investigating such allegations in competition cases . . . are subject to the provisions of Article 6(1) of the European Convention. The procedure before the Commission in such cases is not judicial but administrative'. [63]

In *Musique Diffusion* the Court, referring to *Fedetab*, stated unequivocally that

'the Commission cannot be described as a "tribunal" within the meaning of the . . . Convention'. [64]

60 — Application No 10828/84.

61 — Joined Cases 209 to 215 and 218/78 [1980] ECR 3125.

62 — Joined Cases 100 to 103/80, *supra*.

63 — Joined Cases 100 to 103/80, *supra*, at p. 1920.

64 — Joined Cases 100 to 103/80, *supra*, paragraph 7.

135. It is therefore with respect only to Article 6(2) and (3) that it is necessary to consider whether the safeguards provided for must apply *mutatis mutandis* in cases such as those brought before this Court.

136. In other words, the issue is whether the presumption of innocence provided for in Article 6(2) and the rights of the person charged, embodied in Article 6(3), which include *ex hypothesi* the right not to give evidence against oneself, are available to an undertaking being investigated by the Commission in a competition matter. In such circumstances, can the undertaking be regarded as a person 'charged with a criminal offence'? The problem here is that of applying the safeguards provided for in Article 6(2) and (3) to proceedings involving administrative penalties. It is true that the *Öztürk* judgment cited earlier appeared to adopt a rather wide definition of the concept of a person 'accused of a criminal offence'. In that decision, the European Court of Human Rights noted that 'there generally come within the ambit of the criminal law offences that make their perpetrator liable to penalties intended, *inter alia*, to be deterrent and usually consisting of fines and of measures depriving the person of his liberty'.[65] It also stated that 'the general character of the rule and the purpose of the penalty, being both deterrent and punitive, suffice to show that the offence in question was, in terms of Article 6 of the Convention, criminal in nature'[66] even though the case was concerned with an administrative infringement.

137. However, it does not seem to me to be blindingly clear that the *Öztürk* judgment should be seen as being so far-reaching that the concept of 'charged with a criminal offence' within the meaning of the Convention should be taken to extend to undertakings which are the subject of administrative proceedings intended to determine whether or not they have committed an infringement of competition rules. In fact, that judgment was concerned with infringements which, in the Federal Republic of Germany, were traditionally covered by the criminal law, before being 'transferred' to the administration, subject to the reservation that the person penalized might bring an appeal before a court. The complainant had been penalized for a road traffic offence. And, it must be emphasized, the Strasbourg Court expressly stated in the grounds of its judgment that an infringement of the kind committed by the complainant continued to be a matter of criminal law in the great majority of the contracting States.

138. I did not wish to inflict on the Court any further comparison of national competition laws in all the Member States parties to the European Convention on Human Rights, but it seemed to me at least doubtful whether one could state a priori that competition-law infringements in those States are in general covered by 'classic' criminal law. There is no need to remind the Court of the varying — to say the least — tableau of the law in the countries of the European Community. In the Member States competition law is largely administrative law, in fact I would say that it is administrative *ab initio* in so far as competition law did not originally come within the field of criminal law. Therefore, it seems to me that there is no certainty that the Strasbourg Court would, in competition matters, follow the same reasoning as in the *Öztürk* case.

139. Finally, and most importantly, I must not fail to remind the Court that, according

65 — *Supra*, see note 59, p. 20, paragraph 53.
66 — Ibid.

to its case-law, the existence in Community law of fundamental rights drawn from the European Convention on Human Rights does not derive from the wholly straightforward application of that instrument as interpreted by the Strasbourg authorities. In its judgment of 14 May 1974 in *Nold*,[67] confirmed by that of 13 December 1979 in *Hauer*,[68] the Court stated that, in the discharge of its duty to safeguard the fundamental rights which form an integral part of Community law,

'international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories can supply guidelines which should be followed within the framework of Community law'.[69]

The most authoritative commentators on the decisions of this Court also emphasize that the Court's position regarding the European Convention on Human Rights consists in most cases 'in using it merely as a reference' even though it 'goes as far as possible in that direction' and that, by so doing, it develops 'directly or indirectly its own case-law interpreting the Convention'.[70]

140. This Court may therefore adopt, with respect to provisions of the Convention, an interpretation which does not coincide exactly with that given by the Strasbourg authorities, in particular the European Court of Human Rights. It is not bound, in so far as it does not have systematically to take into account, as regards fundamental rights under Community law, the interpretation of the Convention given by the Strasbourg authorities. It seems to me that *a fortiori* the Court is even less bound in the present case since *no* authorized interpretation of the Convention has been given showing that administrative infringements of competition law give rise to the application of Article 6(2) and (3) or that those provisions make available, in such matters, the right not to give evidence against oneself.

141. I therefore consider that the scope that the Court should attribute to Article 6(2) and (3) of the Convention in the present case should be focused much more on taking account of the positions which it has already taken concerning the application of fundamental rights in Community competition law than on extrapolating from the position taken by the European Court of Human Rights in the case of *Öztürk*.

142. The positions taken by this Court appear to be very clear. In *Hoffmann-La Roche*, cited earlier, it stated that

'observance of the right to be heard is in all proceedings in which sanctions, in particular fines or penalty payments, may be imposed a fundamental principle of Community law which must be respected even if the proceedings in question are administrative proceedings'.[71]

67 — Case 4/73 [1974] ECR 21, paragraph 5.

68 — Case 44/79 [1979] ECR 3727.

69 — Case 4/73, paragraph 13, and Case 44/79, paragraph 15.

70 — J. Boulouis and R.-M. Chevallier: *Grands arrêts de la CJCE*, 4th edition, 1987, Vol. 1, pp. 105-6.

71 — Case 85/76, *supra*, paragraph 9.

Then, in *National Panasonic*, the Court drew a distinction, in Commission competition proceedings, between the investigation procedure, which enables the Commission to

'gather the necessary information to check the actual existence and scope of a given factual and legal situation',[72]

and the phase commencing with the issue of the statement of objections, which marks the initiation of a procedure under Regulation No 99/63. The Court stated that the 'substantive difference'[73] between the decisions taken in the course of the investigation and those taken at the end of such a procedure explains the fact that Regulation No 17 did not safeguard the right of defence to the same extent in each of the two phases. Specifically with regard to the right not to answer questions, it should be borne in mind that, whilst Regulation No 17 excludes it before the commencement of the procedure, it is on the other hand regarded as applying as from such commencement. The undertaking is then *entitled* to be heard but is no longer under an *obligation* to supply information.

143. The positions taken by this Court appear to support the conclusion that, according to its view of the balance between the rights of defence and the powers of the Commission, the fact that an undertaking may not refuse to give evidence against itself until after the Commission has served on it a statement of objections concerning infringement of the competition rules does not constitute a violation of the presumption of innocence or of the rights of the person charged, within the meaning of Article 6(2) and (3) of the European Convention on Human Rights, in so far as those provisions are relevant to the matter in hand. That situation is indeed the situation envisaged by Community law. It seems to me to be wholly compatible with the provisions of the Convention in question, which apply, as I have said, to a 'person charged', to consider that an undertaking which is the subject of Commission action under Regulation No 17 cannot be regarded as 'charged' within the meaning of the Convention until the objections have been communicated to it. Before they are so communicated, it has not been 'charged' and Article 6(2) and (3) do not apply at that stage. That approach seems to me to be perfectly consistent with the general definition of a 'charge' within the meaning of Article 6, adopted by the Strasbourg Court and referred to in the *Öztürk* judgment: 'the official notification given to an individual by the competent authority of an allegation that he has committed a criminal offence'.[74]

144. In those circumstances I consider that the contested decisions were not in breach of the European Convention on Human Rights in so far as the latter upholds a right not to give evidence against oneself.

145. The Court will have noted that I have not considered the question whether the provisions relied on by the applicants are applicable to legal persons. I have taken the view that that issue is not really a problem here. In its judgment in the *Agosi* case of 24 October 1986,[75] the European Court of

72 — Case 136/79, *supra*, paragraph 21.

73 — Ibid.

74 — Judgment cited above, p. 21, paragraph 55.

75 — *Publications of the European Court of Human Rights, Series A*, Vol. 108.

Human Rights rejected on substantive grounds a complaint by a German company based in particular on Article 6(2) of the Convention. For its part, this Court referred in its judgment in *Acciaieria di Brescia*, cited earlier, to the principle of the inviolability of private premises, even though the case concerned a steel undertaking. That principle is incorporated in Article 8 of the Convention. With respect to the latter provision the Court, in *National Panasonic*, considered the substance of a complaint concerning infringement of that provision, to the detriment of an undertaking, by an investigation decision under Article 14 of Regulation No 17. Despite the cautious wording of the judgment, in which the Court refers to Article 8 'in so far as it applies to legal persons', it seems to me that the trend in the case-law of the Court is towards not excluding reliance on the Convention with respect to undertakings in competition matters merely because they are legal persons.

146. The question of the right not to give evidence against oneself prompts a last observation, inspired by the arguments put forward at the hearing. It seems that, at that time, the representatives of the applicants clarified their view of the right not to give evidence against oneself, indicating that it is not unconditional. The right, we were told, may be relied on when the Commission asks for information without disclosing what evidence it already holds. In other words, to compel undertakings to answer, the Commission must question them only on the basis of the evidence which it discloses to them. That approach to the problem, which departs from that adopted in their written submissions, is very puzzling. The right not to give evidence against oneself referred to in the applications is, when applied, unconditional. The tempered version suggested to the Court at the hearing bears little relation to such a right.

147. In fact, the view put forward by the applicants at the hearing, in response to questions, seems once again, one might say, to prejudge the content of the statement of objections, whereby the Commission informs the undertakings of the evidence on which its objections are based. I understand the attraction of that idea for the undertakings, but it seems to me to be excluded by the system of Regulation No 17, under which the Commission is not required to disclose its evidence until after the investigation. I do not see in what way that system runs counter to Article 6(2) and (3) of the European Convention, assuming that those provisions are relevant. Whilst every person charged is entitled 'to be informed promptly . . . of the nature and cause of the accusation against him',[76] an investigative measure such as a request for information is not an accusation. The latter, in the context of Regulation No 17, is the statement of objections, in which the Commission discloses why the objections are formulated.

148. Similarly, I do not see in what way the Commission's request that an undertaking provide information, without the Commission's disclosing the evidence which it already holds, constitutes a breach of any principle of the Convention, since the undertaking has not yet been formally 'charged'.

149. In conclusion, I do not consider that the contested decisions illegally excluded any right to decline to give evidence.

76 — Article 6(3)(a) of the Convention.

VI — The presumption of CdF Chimie's innocence and its rights as a defendant

150. I must now examine the fourth submission, or third alternative submission, made by CdF Chimie. It alleges an infringement of the Treaty and of fundamental rights, contained in particular in the European Convention, in so far as the Commission failed to observe the presumption of its innocence and its rights as a defendant. It will be seen that it is once again Article 6(2) and (3) of the Convention which are relied on, but no longer to claim the right not to give evidence against oneself. I believe I have already largely answered those arguments in the course of this Opinion and can therefore deal with this issue briefly.

151. CdF Chimie is once again criticizing the fact that the Commission told it that it already had evidence of its participation in an infringement, which undermines the presumption that it is innocent. It considers that, once the belief has been formed that an undertaking has participated in an infringement, the undertaking must enjoy the rights available to defendants, which means that it may refuse to be a party to an accusation against itself. I shall merely say that the extent of the information requested in the contested decision shows that, if the Commission harboured suspicions based on evidence, it had not yet formed a definite conviction as to CdF Chimie's guilt or the precise scope of the acts for which it might criticize CdF Chimie. Furthermore, that is what leads me to conclude that the information was necessary. In those circumstances, the presumption of CdF Chimie's innocence does not therefore seem to have been undermined.

152. As regards the rights associated with the status of defendant, I shall merely point out that, in so far as the position of undertakings under Community competition law comes within the scope of Article 6(3) of the Convention, an undertaking may not be regarded as a defendant until the Commission has served on it a statement of objections. Decisions requesting information, preceding any statement of objections, are not addressed to an undertaking that has been 'charged'.

153. I consider that this submission is unfounded.

VII — The reversal of the onus of proof

154. At this stage it seems to me that the answers that I have suggested in response to certain arguments or submissions deprive the last argument of any substance. I refer to the alleged reversal of the onus of proof which is the third limb of Solvay's second submission or of its first alternative submission, and the second argument in CdF Chimie's third submission, or second alternative submission. Since the Commission has in fact asked the two companies for information which is necessary in order to establish that they have committed infringements, and since it was able to do so without illegally encroaching on a claimed right not to give evidence against oneself, it seems to me that the assertion that, by virtue of its decisions, the Commission has reversed the onus of proof is necessarily devoid of any foundation. To be more precise on this point, with regard to CdF Chimie, which alleges

both misuse of powers and abuse of procedure, it must be stated that the Commission used the power vested in it by Community law to request the 'necessary' information to obtain information actually acknowledged to be necessary and that it did not misuse that power, and it must be added that, not having issued a dissimulated statement of objections, it did not commit any abuse of procedure by failing to ensure observance of the safeguards provided for in relation to statements of objections.

VIII — Final observations and proposals

155. In concluding this Opinion, I should like to ask the Court to reflect for a moment. The procedure under Article 11, let it be said, facilitates collaboration between undertakings and the Commission in relation to competition investigations. If the two applications now before the Court were to be regarded as reflecting the general attitude of undertakings to Commission investigations, one might wonder whether it is not somewhat naïve to speak of collaboration, or cooperation, between undertakings and the Commission in competition proceedings. It is true that, on an abstract level, the view that relations between the Commission and an undertaking suspected of an infringement of the Community competition rules should be seen in terms of criminal proceedings, more precisely proceedings of the common-law type, may be sustained from an intellectual standpoint. One would then move from a logic of at least partial collaboration to one of confrontation. However, it also seems, in that context, that in order to ensure at least a minimum of efficacy for the role of the Commission and hence for that of Community competition law, very wide use by the Commission of its powers would be essential. This means that if, for one reason or another, the Commission was deprived of the right to request information, or to ask for information productively, it would have to make almost systematic use of more coercive measures. Would the undertakings consider in those circumstances that that situation represented an improvement over the present position? I pose the question.

156. I propose that:

(i) the applications be dismissed;

(ii) the applicants be ordered to pay the costs.