JUDGMENT OF THE COURT
18 October 1989 *

In Case 374/87

Orkem, formerly called CdF Chimie, a limited liability company (*société anonyme*) whose registered office is in Paris, represented by Dominique Voillemot and Joëlle Salzmann, of the Paris Bar, and Marc Loesch, of the Luxembourg Bar, with an address for service in Luxembourg at the Chambers of Jacques Loesch, 8 rue Zithe,

applicant,

v

Commission of the European Communities, represented by its Legal Adviser, Anthony Mc Clellan, acting as Agent, assisted by Nicole Coutrelis, of the Paris Bar, with an address for service in Luxembourg at the office of Georgios Kremlis, a member of its Legal Department, Wagner Centre,

defendant,

supported by the

French Republic, represented by Edwige Belliard, sous-directeur du droit économique, Ministry of Foreign Affairs, with an address for service in Luxembourg at the French Embassy,

intervener,

APPLICATION for a declaration that the Commission Decision IV/31.866 of 9 November 1987 relating to a proceeding under Article 11(5) of Regulation No 17 of the Council is void,

* Language of the case: French.

THE COURT

composed of: O. Due, President, Sir Gordon Slynn, F. A. Schockweiler and M. Zuleeg (Presidents of Chambers), T. Koopmans, G. F. Mancini, R. Joliet, J. C. Moitinho de Almeida, G. C. Rodríguez Iglesias, F. Grévisse and M. Diez de Velasco, Judges,

Advocate General: M. Darmon
Registrar: H. A. Rühl, Principal Administrator

having regard to the Report for the Hearing and further to the hearing on 16 March 1989,

after hearing the Opinion of the Advocate General delivered at the sitting on 18 May 1989,

gives the following

Judgment

1 By application received at the Court Registry on 16 December 1987, CdF Chimie SA, now called Orkem SA, brought an action under the second paragraph of Article 173 of the EEC Treaty for the annulment of Commission Decision IV/31.866 of 9 November 1987 relating to a proceeding under Article 11(5) of Regulation No 17 of the Council of 6 February 1962, the first regulation implementing Articles 85 and 86 of the Treaty (Official Journal, English Special Edition 1959-62, p. 87).

2 The decision was adopted as a result of an inquiry into the existence of agreements or concerted practices contrary to Article 85(1) of the EEC Treaty in the thermoplastics industry. After carrying out the investigations referred to in Article 14 of Regulation No 17 and unsuccessfully requesting information under Article 11(1) of that regulation, the Commission, by means of the contested decision, required CdF Chimie SA to reply to the questions set out in the request for information.

3 In support of its application, the applicant makes a number of submissions, based on:

(i) the absence of a prior request for information,

(ii) the claim that the decision is in reality a statement of objections,

(iii) the Commission's unlawful use of its power to request information,

(iv) breach of the rights of the defence, in so far as the Commission sought to compel the applicant to give evidence against itself.

4 Reference is made to the Report for the Hearing for a fuller account of the facts of the case, the course of the procedure and the submissions and arguments of the parties, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

The absence of a prior request for information

5 The applicant criticizes the Commission for addressing the contested decision to it when the request for information under Article 11(1), which must without fail precede a request by way of decision, was addressed to its subsidiary, CdF Chimie EP, at which undertaking the investigation was also carried out.

6 The Court has held that a decision is properly notified if it reaches the addressee and the latter is in a position to take cognizance of it (judgments of 14 July 1972 in Case 48/69 *ICI* v *Commission* [1972] ECR 619 and of 21 February 1973 in Case 6/72 *Continental Can* v *Commission* [1973] ECR 215). In the present case, without its being necessary to decide whether, by virtue of the concept of unity of undertakings, it may be regarded as proper to address a request for information under

Article 11(1) to a subsidiary company and the decision under Article 11(5) to the parent company, it need merely be stated, first, that the contested decision was notified to the applicant and, secondly, that the latter in fact had full knowledge of the prior request for information. Throughout the procedure conducted by the Commission, the applicant and its subsidiary, each of which has its registered office at the same address, both replied to requests addressed by the Commission to one or the other of them, without their at any time mentioning any problem resulting from the existence of two distinct legal persons. The confusion between the parent company and its subsidiary persisted until the stage of the written procedure before the Court in so far as the parent company answered a question addressed by the Court to its subsidiary.

7 The submission as to the absence of a prior request for information must therefore be dismissed.

The allegation that the contested decision was a 'statement of objections'

8 The applicant maintains that the contested decision, which contains precise charges as to its participation in an infringement of Article 85 of the EEC Treaty, in reality constitutes a statement of objections and that the applicant was not given an opportunity to express its views.

9 In considering whether that submission is well founded, it must be recalled that Article 11(3) of Regulation No 17 requires the Commission to state in its request for information the legal basis and the purpose of the request.

10 In its judgment of 26 June 1980 in Case 136/79 *National Panasonic (UK) Ltd* v *Commission* [1980] ECR 2033, the Court held, in relation to Article 14(3), an analogous provision relating to investigations, that a decision which indicated that its purpose was to check facts which might show the existence of an act contrary to the Treaty satisfied the requirements of Regulation No 17 concerning the statement of the reasons on which it was based.

11 By disclosing its suspicion of the existence of agreements contrary to Article 85(1) of the EEC Treaty, the Commission merely complied with the obligation imposed on it by Article 11(3) to state the purpose of its request.

12 The submission that the contested decision constitutes a statement of objections must therefore be dismissed.

The unlawful exercise of the power to request information

13 The applicant claims that the Commission exercised the powers conferred on it by Article 11 in an unlawful manner by endeavouring to obtain documents — a measure authorized only by Article 14 — and by asking for information which was unnecessary, thus infringing the principle of proportionality.

14 It must be stated, with respect to the Commission's right to require the disclosure of documents in connection with a request for information, that Articles 11 and 14 of Regulation No 17 establish two entirely independent procedures. The fact that an investigation under Article 14 has already taken place cannot in any way diminish the powers of investigation available to the Commission under Article 11. No consideration of a procedural nature inherent in Regulation No 17 thus prevents the Commission from requiring, for the purposes of a request for information, the disclosure of documents of which it was unable to take a copy or extract when carrying out a previous investigation.

15 With regard to the necessity of the information requested, it must be borne in mind that Regulation No 17 confers on the Commission wide powers to make investigations and to obtain information by providing in the eighth recital in its preamble that the Commission must be empowered, throughout the common market, to require such information to be supplied and to undertake such investigations as are necessary to bring to light infringements of Articles 85 and 86 of the Treaty. As the Court held in its judgment of 18 May 1982 in Case 155/79 *AM & S Europe Limited* v *Commission* [1982] ECR 1575, it is for the Commission to decide, for the purposes of an investigation under Article 14, whether particular information is necessary to enable it to bring to light an infringement of the competition rules. Even if it already has evidence, or indeed proof, of the existence

of an infringement, the Commission may legitimately take the view that it is necessary to request further information to enable it better to define the scope of the infringement, to determine its duration or to identify the circle of undertakings involved.

16 In the present case it does not appear that the information requested falls outside those limits or exceeds what might be regarded as necessary in the light of the purpose of the investigation.

17 The submissions as to the unlawful use by the Commission of the powers conferred on it by Article 11 of Regulation No 17 must therefore be dismissed.

Breach of the rights of the defence

18 The applicant claims, essentially, that the Commission used the contested decision to compel it to incriminate itself by confessing to an infringement of the competition rules and to inform against other undertakings. By doing so, the Commission has, in its view, infringed the general principle that no one may be compelled to give evidence against himself, which forms part of Community law in so far as it is a principle upheld by the laws of the Member States, by the European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 (hereinafter referred to as 'the European Convention') and by the International Covenant on Civil and Political Rights of 19 December 1966 (*United Nations Treaty Series*, Vol. 999, p. 171), hereinafter referred to as 'the International Covenant'. It has thus, in the applicant's view, infringed the rights of the defence.

19 In considering whether that submission is well founded, it should be recalled that, as the Court held in its judgment in Case 136/79 *National Panasonic*, *supra*, the aim of the powers given to the Commission by Regulation No 17 is to enable it to carry out its duty under the EEC Treaty of ensuring that the rules on competition are applied in the common market. The function of those rules, as is apparent from the fourth recital in the preamble to the Treaty, Article 3(f) and Articles 85 and 86, is to prevent competition from being distorted to the detriment of the public interest, individual undertakings and consumers. The exercise of the powers given to the Commission by Regulation No 17 contributes to the maintenance of the system of competition intended by the Treaty which undertakings have an absolute duty to comply with.

20 The rules necessary for the application of Articles 85 and 86, introduced by the Council, prescribe two successive but clearly separate procedures: first, a preparatory investigation procedure, and secondly, a procedure involving submissions by both parties initiated by the statement of objections.

21 The sole purpose of the preliminary investigation procedure is to enable the Commission to obtain the information and documentation necessary to check the actual existence and scope of a specific factual and legal situation (*National Panasonic, supra*).

22 For that purpose, Regulation No 17 conferred on the Commission wide powers of investigation and imposed on undertakings the obligation to cooperate in the investigative measures.

23 Thus, Article 11(1) of Regulation No 17 empowers the Commission to obtain all necessary information from undertakings and Article 11(5) authorizes it to require, by decision, that information be supplied to it where an undertaking does not supply the information requested or supplies incomplete information.

24 If the Commission considers that the information thus obtained justifies such a course of action, it sends a statement of objections to the undertaking concerned, thus initiating the *inter partes* procedure governed by Regulation No 99/63 of the Commission of 25 July 1963 on the hearings provided for in Article 19(1) and (2) of Council Regulation No 17 (Official Journal, English Special Edition 1963-64, p. 47).

25 For the purposes of that *inter partes* procedure, Article 19 of Regulation No 17 and Regulation No 99/63 provide in particular that the undertaking concerned is entitled to make known in writing and, if appropriate, orally its views on the objections raised against them (see also the judgments of 13 February 1979 in Case 85/76 *Hoffmann-La Roche* v *Commission* [1979] ECR 461, and of 7 June 1983 in Joined Cases 100 to 103/80 *Musique Diffusion française and Others* v *Commission* [1983] ECR 1825). In any decision which the Commission might be prompted to adopt on conclusion of the procedure, it will be entitled to set out only those objections on which the undertaking concerned has had an opportunity of making known its views.

26 In the course of the preliminary investigation procedure, Regulation No 17 expressly accords only certain guarantees to the undertaking under investigation. Thus, a decision requiring information to be supplied may be taken only after a prior request has proved unsuccessful. Similarly, a decision fixing the definitive amount of a fine or penalty payment, in a case where the undertaking concerned fails to supply the information required by the decision, may be adopted only after the undertaking in question has been given an opportunity to make its views known.

27 On the other hand, Regulation No 17 does not give an undertaking under investigation any right to evade the investigation on the ground that the results thereof might provide evidence of an infringement by it of the competition rules. On the contrary, it imposes on the undertaking an obligation to cooperate actively, which implies that it must make available to the Commission all information relating to the subject-matter of the investigation.

28 In the absence of any right to remain silent expressly embodied in Regulation No 17, it is appropriate to consider whether and to what extent the general principles of Community law, of which fundamental rights form an integral part and in the light of which all Community legislation must be interpreted, require, as the applicant claims, recognition of the right not to supply information capable of being used in order to establish, against the person supplying it, the existence of an infringement of the competition rules.

29 In general, the laws of the Member States grant the right not to give evidence against oneself only to a natural person charged with an offence in criminal proceedings. A comparative analysis of national law does not therefore indicate the existence of such a principle, common to the laws of the Member States, which may be relied upon by legal persons in relation to infringements in the economic sphere, in particular infringements of competition law.

30 As far as Article 6 of the European Convention is concerned, although it may be relied upon by an undertaking subject to an investigation relating to competition law, it must be observed that neither the wording of that article nor the decisions of the European Court of Human Rights indicate that it upholds the right not to give evidence against oneself.

31 Article 14 of the International Covenant, which upholds, in addition to the presumption of innocence, the right (in paragraph 3(g)) not to give evidence against oneself or to confess guilt, relates only to persons accused of a criminal offence in court proceedings and thus has no bearing on investigations in the field of competition law.

32 It is necessary, however, to consider whether certain limitations on the Commission's powers of investigation are implied by the need to safeguard the rights of the defence which the Court has held to be a fundamental principle of the Community legal order (judgment of 9 November 1983 in Case 322/82 *Michelin* v *Commission* [1983] ECR 3461, paragraph 7).

33 In that connection, the Court observed recently, in its judgment of 21 September 1989 in Joined Cases 46/87 and 227/88 *Hoechst* v *Commission* [1989] ECR 2859, paragraph 15, that whilst it is true that the rights of the defence must be observed in administrative procedures which may lead to the imposition of penalties, it is necessary to prevent those rights from being irremediably impaired during preliminary inquiry procedures which may be decisive in providing evidence of the unlawful nature of conduct engaged in by undertakings and for which they may be liable. Consequently, although certain rights of the defence relate only to contentious proceedings which follow the delivery of the statement of objections, other rights must be respected even during the preliminary inquiry.

34 Accordingly, whilst the Commission is entitled, in order to preserve the useful effect of Article 11(2) and (5) of Regulation No 17, to compel an undertaking to provide all necessary information concerning such facts as may be known to it and to disclose to it, if necessary, such documents relating thereto as are in its possession, even if the latter may be used to establish, against it or another undertaking, the existence of anti-competitive conduct, it may not, by means of a decision calling for information, undermine the rights of defence of the undertaking concerned.

35 Thus, the Commission may not compel an undertaking to provide it with answers which might involve an admission on its part of the existence of an infringement which it is incumbent upon the Commission to prove.

36 The foregoing criteria must be observed in considering the questions to which the Commission, by means of the contested decision, required the applicant to give an answer.

37 The questions in Section I relating to meetings of producers, which are intended only to secure factual information on the circumstances in which such meetings were held and the capacity in which the participants attended them, and also the requirement of disclosure of documents in the applicant's possession relating thereto, are not open to criticism.

38 The questions on prices in Section II relate essentially to the measures taken in order to determine and maintain price levels satisfactory to all the participants at the meetings. Whilst those questions are not open to criticism in so far as the Commission seeks factual clarification as to the subject-matter and implementation of those measures, the position is different as regards those which relate to the purpose of the action taken and the objective pursued by those measures. In that respect, sub-question 1(c), which seeks clarification on 'every step or concerted measure which may have been envisaged or adopted to support such price initiatives', is such as to compel the applicant to acknowledge its participation in an agreement whose object was to fix selling prices and which was capable of preventing or restricting competition, or to state that it intended to achieve that objective.

39 The same finding applies to Questions 1 and 2 of Section III concerning the quotas, targets or shares allocated to the producers. By requiring disclosure of the 'details of any system or method which made it possible to attribute sales targets or quotas to the participants' and details of 'any method facilitating annual monitoring of compliance with any system of targets in terms of volume or quotas', the Commission endeavoured to obtain from the applicant an acknowledgment of its participation in an agreement intended to limit or control production or outlets or to share markets.

40 No such criticism may be made against Question 3 in Section III, which deals with the information disclosed by the undertaking to the other producers regarding the production and sale of the product in question or against the questions in Section

IV on the statements forwarded to, and statistics provided by, Fides, since those questions were intended only to elicit factual information on the functioning of the system for the exchange of statistical and other information.

41 It must be concluded that, by requiring the undertaking to which the decision was addressed to acknowledge, in response to Questions II(1)(c) and III(1) and (2) of the request for information, that it had infringed Article 85 of the EEC Treaty, the Commission undermined the applicant's rights of defence.

42 The contested decision must therefore be annulled as regards Questions II(1)(c) and III(1) and (2); the remainder of the application must be dismissed.

Costs

43 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs. However, pursuant to Article 69(3) of those rules, where each party succeeds on some and fails on other heads, the Court may order the parties to bear their own costs. Since each of the parties has failed in some of its submissions, they must be ordered to bear their own costs.

On those grounds,

THE COURT

hereby:

(1) Annuls Questions II(1)(c) and III(1) and (2) of Commission Decision IV/31.866 of 9 November 1987 relating to a proceeding under Article 11(5) of Regulation No 17 of the Council of 6 February 1962, the first regulation implementing Articles 85 and 86 of the EEC Treaty;

(2) Dismisses the remainder of the application;

(3) Orders the parties to bear their own costs.

Due Slynn Schockweiler Zuleeg

Koopmans Mancini Joliet Moitinho de Almeida

Rodríguez Iglesias Grévisse Diez de Velasco

Delivered in open court in Luxembourg on 18 October 1989.

J.-G. Giraud
Registrar

O. Due
President