REPORT FOR THE HEARING
delivered in Case 374/87 *

I — Summary of the facts

1. CdF Chimie (hereinafter referred to as 'CdF Chimie') [1] is a limited liability company (*société anonyme*) established in France which produces and distributes low-density polyethylene (LDPE) in the EEC.

CdF Chimie EP (Ethylene et Plastiques) (also a *société anonyme*, hereinafter referred to as 'CdF Chimie EP') is a wholly owned subsidiary of CdF Chimie and has its registered office on the premises of its holding company.

2. In connection with an inquiry into the alleged existence of agreements, decisions or concerted practices contrary to Article 85(1) of the EEC Treaty in the thermoplastics industry, the Commission, by decision of 15 January 1987, pursuant to Article 14(3) 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), subjected CdF Chimie to an investigation concerning its alleged participation in and application of agreements or concerted practices under which the prices and quantities or sales targets for PVC and polyethylene were fixed. That investigation was carried out at the registered office of CdF Chimie EP.

3. On 9 April 1987 the Commission sent a request to CdF Chimie under Article 11 of Regulation No 17 for information relating to certain documents obtained at the time of the investigation.

On 6 May 1987, CdF Chimie EP gave a partial answer, but stated that it was unable to give any clarification regarding one of the documents.

4. By decision of 2 July 1987 relating to a proceeding under Article 11(5) of Regulation No 17, the Commission called upon CdF Chimie to supply within three weeks the answer which it had refused to give in response to the request for information of 9 April 1987.

5. By letter of 28 July 1987, CdF Chimie EP again stated that it was unable to reply to the questions asked by the Commission in its decision of 2 July 1987 and expressed reservations as to the validity of that decision.

6. On 23 August 1987 the Commission sent to CdF Chimie EP a request under Article 11(5) of Regulation No 17 for information on the following points:

'I — *Producers' meetings*

The evidence in the possession of the Commission indicates that your undertaking was among those which took part in such meetings — it even organized some of them.

* Language of the case: French.

1 — Called Orkem SA when judgment was delivered.

(1) Please give a list showing the date and place of all meetings of LDPE producers of the type described in the request for information held since 1 January 1976 (even if you have reservations concerning the nature or the precise purpose of such meetings or the matters discussed therein).

(2) Please indicate the meeting or meetings in which your undertaking took part and the name and post within your undertaking of the persons representing you at such meetings.

(3) If you are not in a position to give precise details for the period or periods concerned, please give the approximate dates and state, in general terms, the frequency of such meetings and indicate those in which your undertaking took part.

(4) Please state for each known meeting whether it was a meeting of "owners" or of "experts", failing which please indicate the functions and rank of the participants in their respective undertakings.

(5) Please give the names of the various undertakings which took part in the meetings. If it is not possible to give details of each meeting, please indicate the names of the undertakings which took part regularly in the meetings during the period concerned and give details of the undertakings which took part occasionally.

(6) Please describe, with details, the frequency of the meetings, attendance and level of presentation and the manner in which the system of periodic meetings has operated since they began and please also describe any changes or modifications which may have been made from time to time.

(7) Please provide a copy of any invitation, agenda, summary, note, memorandum, table, report or other document whatsoever in the possession of your undertaking or any of its employees concerning any of the meetings in question.

II — *Target price or minimum price*

According to the documents obtained by the Commission, one of the main subjects dealt with at the producers' meetings was the "initiatives" for the fixing and maintenance of LDPE price levels satisfactory to all the participants.

(1) Please give, for the period from 1 January 1976 to the present time, details of each price "initiative" affecting the West European market which may have been discussed, proposed or approved by the participants at the meetings, indicating in particular:

(a) the date of its entry into force;

(b) in tabular form, the target price or minimum price for each quality, expressed in each national currency;

(c) every step or concerted measure which may have been envisaged or adopted to support such price initiatives;

(d) any measure which may have been taken to delay or modify the proposed initiative.

(2) Please provide for the same period a copy of all communications sent by your headquarters to each national sales office or commercial agent in the Community concerning LDPE prices or price levels, in particular a copy of every instruction, proposal or recommendation concerning the price levels which those sales offices or commercial agents were to apply, endeavour to apply or propose to their customers.

(3) Please provide for the same period a copy of all the documents from your sales offices or commercial agents reporting any change in prices of that kind proposed or imposed by the head office.

(4) Please also provide for the same period a copy of every business report (monthly or annual), analysis, scale or tariff or any other document whatsoever in the possession of your undertaking which shows the target or recommended selling prices for the main qualities in each country of the common market (where the documents concerned are not already in the Commission's possession).

(5) If the documentation referred to in paragraphs 2 to 4 is not wholly available, please state the reason.

III — *Quotas, targets and sharing among LDPE producers*

It appears from the documents obtained by the Commission that, at their meetings, producers discussed and decided upon the fixing of annual "sales targets" for each undertaking. Under that system, an estimate for the whole available European market was prepared, and that quantity was apportioned among the various producers according to an agreed formula or method, taking account of factors such as the undertaking's capacity and the results obtained in the past.

(1) Please indicate for each year between 1976 (inclusive) and the present time details of any system or method which made it possible to attribute sales targets or quotas to the participants and give details of any alteration or amendment which may have been made from time to time.

(2) Please describe any method for annual monitoring of compliance with any system of targets in terms of volume or quotas and indicate how any deviation from that quota or target may have been corrected.

(3) Please give precise details of any information (with the exception of official Fides statistics) communicated by your undertaking to any other producer or producers concerning the tonnage of

your production or your sales of LDPE on the West European market. To whom was such information communicated, by what means and on what occasion(s)?

IV — *Statements forwarded to, and statistics provided by Fides*

(1) Please indicate at what time your undertaking started to participate in the Fides information-exchange system for LDPE.

(2) Please provide a copy of all monthly or other statements (provisional ("quick") and definitive) concerning LDPE sent to Fides from the day on which you started to participate in the system to the present time.

(3) Please provide a copy of all "quick" and definitive statistics concerning the entire LDPE market which your undertaking received each month from Fides. Please also give details of any corrections or adjustments of such statistics received by your undertaking at the end of each year.

V — *Sales*

...

VI — *Turnover*

...'

7. On 1 October 1987, CdF Chimie EP informed the Commission of its reservations regarding that request, which it considered to constitute an inquisitorial and accusatorial procedure.

8. By decision of 9 November 1987 relating to a proceeding under Article 11(5) of Regulation No 17, the Commission called upon CdF Chimie to supply within two weeks the information required by the questions put to it (Nos I to IV) on 23 August 1987.

In the seventh recital in the preamble to the decision, the Commission indicated that it could not accept the arguments on which CdF Chimie based its refusal to reply. In the eighth recital it pointed out that under Article 11(1) and (5) of Regulation No 17 it was entitled, in the discharge of the duties entrusted to it by Article 89 of the Treaty, to obtain all the information necessary from undertakings, *inter alia* by means of decisions, and in the tenth recital it stated that pursuant to Articles 15(1)(b) and 16(1)(c) of Regulation No 17 it was entitled to impose fines upon undertakings where they provided incorrect information or failed to furnish information within the prescribed time-limit, or to impose a periodic penalty payment in order to compel them to provide complete and correct information, as required of them.

9. On 26 November 1987, CdF Chimie informed the Commission that the decision of 9 November 1987 should have been

notified to CdF Chimie EP, the legal person to which the request for information of 23 August 1987 was addressed.

10. On 4 December 1987, the Commission replied that the subject of the decision was CdF Chimie and it was therefore irrelevant, in Community law, whether the decision was sent, for technical purposes, to the parent company of the group or to the subsidiary.

11. On 7 April 1988 the Commission communicated to CdF Chimie a statement of objections alleging participation in an agreement, decision or concerted practice relating to LDPE.

II — Written procedure and conclusions of the parties

1. By application lodged at the Court Registry on 16 December 1987, CdF Chimie brought an action under the second paragraph of Article 173 of the EEC Treaty for a declaration that the Commission decision of 9 November 1987 was void.

2. By Order of 19 May 1988, the French Republic was granted leave to intervene in support of the Commission.

3. CdF Chimie, the applicant, claims that the Court should:

(i) annul, on the basis of Articles 173 and 174 of the EEC Treaty, the Commission decision of 9 November 1987 inasmuch as it constitutes an infringement of the provisions of the EEC Treaty and of Article 11 of Regulation No 17, in particular paragraph (5) thereof;

(ii) if the Court should, contrary to all expectations, refuse to grant that application, annul the said decision on the grounds that it constitutes an infringement of essential procedural requirements, an infringement of the Treaty of Rome, an infringement of Regulation No 17 of the Council of 6 February 1962, an infringement of Regulation No 99/63 of the Commission of 25 July 1963, a misuse of powers and, more generally, a breach of the general principles common to the legal systems of the Member States and to the European Convention for the protection of Human Rights and Fundamental Freedoms;

(iii) order the commission to pay the costs, in respect of which evidence will be supplied later.

4. The Commission, the defendant, claims that the Court should:

(i) dismiss the application as unfounded;

(ii) order the applicant to pay the costs.

5. The French Republic, the intervener, supports the conclusions of the Commission.

6. Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General, the Court decided to open the oral procedure without any preparatory inquiry.

III — The submissions and arguments of the parties

A — *The absence of a prior request for information*

1. CdF Chimie alleges in its first submission an infringement of the EEC Treaty and of Article 11 of Regulation No 17. The latter provision lays down a procedure in two cumulative stages, an 'ordinary' request for information and a request by means of a decision. The Commission addressed the contested decision to CdF Chimie whereas the request for information of 23 August 1987 was addressed to CdF Chimie EP. The investigation was carried out at the premises of CdF Chimie EP, which had also replied to the first request for information of 9 April 1987 and, surprisingly, the latter was addressed to CdF Chimie.

The Commission cannot justify its conduct by reliance on the concept of the unity of undertakings. The concept of an undertaking, within the meaning of Community law, comprises two components, namely the economic activity carried on by an economic entity and the connection of that activity with a legal entity which is subject to rights and obligations. In this case the economic activity concerned in the Commission's investigation was carried on by CdF Chimie EP and was connected with the public limited company CdF Chimie EP, an independent legal person.

In a decision of 9 December 1981 (on fire insurance; Official Journal 1982, L 80, p. 36) relating to a proceeding under Article 11 of Regulation No 17, which was served on an undertaking with respect to the activities of one of its branch offices, the Commission relied upon the branch office's lack of legal personality in order to deny that that economic entity had the status of an undertaking. However, an economic entity which is the subsidiary of a parent company constitutes an undertaking within the meaning of Community law.

According to legal writers, the individual identity of undertakings, as defined by national law, cannot be disregarded by the Community authorities for procedural purposes.

The concept of unity of undertakings has been developed by the Court in proceedings on substantive matters (see judgments of 14 July 1972 in Case 48/69 *ICI* [1972] ECR 619 and Case 52/69 *Geigy* [1972] ECR 787; judgment of 12 July 1984 in Case 170/83 *Hydrotherm* [1984] ECR 2999). It is concerned with the attributability of the conduct of an undertaking, and in particular the possible responsibility of a parent company for infringements committed by its subsidiary. An extension of that concept to investigative procedures would jeopardize the legal safeguards available to undertakings in so far as it detracts from the protection inherent in the formalism of rules of procedure.

The Commission wrongly argues that there was implicit notification, claiming that the request for information of 23 August 1987, addressed to CdF Chimie EP, arrived within the control of CdF Chimie. The judgment of 10 December 1957 upon which it relies (Case 8/56 *LMA* [1957-58] ECR 95) relates to different circumstances — a letter addressed to the registered office of the

company was handed to an employee — and moreover that judgment upheld the pre-eminence of formal rules. The Commission cannot extend the concept of the 'control' of the addressee of a measure to all the companies belonging to the same group. The principle of the individuality and independence of natural or legal persons is also confirmed by national laws, in particular the new French Code of Civil Procedure, and by international conventions, in particular those of The Hague of 15 November 1965 and of Brussels of 27 September 1968.

2. The Commission states that the two companies form part of the same group and that CdF Chimie EP is a wholly owned subsidiary of CdF Chimie. Both the companies have always had knowledge of the correspondence addressed to each of them and the applicant never raised the matter of the formal difference between the two companies.

According to the Court, unity of conduct in the market by the parent company and its subsidiaries is more important than formal separation. The term undertaking describes an economic unit from the point of view of the subject-matter of the relevant agreement even if, from the legal point of view, that economic unit is make up of several persons, natural or legal (judgments of 14 July 1972 and 12 July 1984 in *ICI* and *Hydrotherm*, cited above, and of 25 October 1983 in Case 107/82 *AEG* [1983] ECR 3151).

The conclusions drawn from the Commission's decision of 9 Dezember 1981 (mentioned above) are logically defective; whilst the absence of individual legal personality might provide a sufficient basis for concluding that there is unity of undertakings, the existence of individual legal personality is not sufficient to negate that same unity. Expressing reservations concerning the reference to legal writers, the Commission criticizes the applicant for giving an incomplete account of their views.

It is true that the concept of unity of undertakings involves an examination of the legal and economic links between the various entities concerned. In the case of CdF Chimie, the allocation of activities as between legally distinct companies is merely indicative of the internal policy of a single group. The drawing of a distinction between the legal definition of undertakings for the purposes of the attributability of their conduct and the definition for the purposes of applying rules of procedure jeopardizes the legal safeguards available to undertakings. In fact, investigations under Regulation No 17 are intended to establish facts which may constitute an infringement.

In its judgment in *LMA*, cited above, the Court recognized that a decision is duly notified provided that it arrives within the control of the addressee, and it did so in the case of the request for information of 23 August 1987, formally addressed to CdF Chimie EP. The references to the new French Code of Civil Procedure and to international conventions are not pertinent.

3. The French Republic supports the views expressed by the Commission. The Court recognized in its judgment in *ICI*, cited above, that possible irregularities in the notification of a decision become irrelevant as soon as it is established that the applicant obtained full knowledge of the text of the decision and that it made use of its right to seek a review within the prescribed period.

B — *The other grounds for annulment*

(a) *The claim that the contested decision constitutes a 'statement of objections'*

1. According to CdF Chimie, the contested decision in reality constitutes a statement of objections within the meaning of Article 19 of Regulation No 17 and Article 2 of Commission Regulation No 99/63 of 25 July 1963 on the hearings provided for in Article 19(1) and (2) of Regulation No 17 (Official Journal, English Special Edition 1963-64, p. 47). In the request for information of 23 August 1987, which is reproduced in the contested decision, the Commission makes statements, said to be substantiated by documents, concerning the applicant's participation in the alleged infringement. The Commission wrongly claims that mention is made of the presumption of an infringement in compliance with the obligation imposed upon it by Article 11(3) to indicate the purpose of its request for information. The statement of objections, of 7 April 1988, confirms that the request for information already constituted a material statement of objections.

The applicant claims that it did not enjoy the right of access to the file which should have been granted to it at the same time as the statement of objections was notified. The Court held in its judgments of 13 February 1979 in Case 85/76 *Hoffmann-La Roche* [1979] ECR 461 and of 7 June 1983 in Joined Cases 100 to 103/80 *Musique Diffusion française and Others* [1983] ECR 1825 that the right to a fair hearing is a fundamental principle of Community law which must be respected in all proceedings, even those of an administrative nature. As soon as an allegation is made of an infringement of Articles 85 or 86, the undertaking concerned is entitled to access to all the data relied on by the Commission, so that it will be in a position to explain its conduct.

2. According to the Commission, the applicant is confusing the procedures provided for by Regulation No 17. The statement of objections — which, moreover, is not a decision against which an action can be brought — is part of the phase preparatory to the decision to implement Article 85(1), whereas a request for information is part of the investigation. At the investigative stage, the Commission enjoys wide powers to gather factual information and it is only at a later stage that the reliability of that information and the characterization thereof is the subject of discussions with the undertakings concerned. For that reason, Article 19 of Regulation No 17 does not provide for a statement of objections or for a hearing of the parties in relation to requests for information or checks. Similarly, Regulation No 99/63 does not provide for information to be supplied to undertakings before the statement of objections is notified.

3. According to the French Republic, the Court recognized in its judgments in *National Panasonic* [1980] ECR 2033, and in Case 60/81 *IBM* [1981] ECR 2639, that Regulations Nos 17 and 99/63 require observance of the right to a fair hearing when the statement of objections is notified at the end of the investigative phase, but not for the preparatory measures envisaged in Articles 11 to 14 of Regulation No 17.

(b) *The unlawful use of the power to require information*

1. CdF Chimie maintains that the contested decision is more than a request for information within the meaning of Article 11 of

Regulation No 17 and that by misapplying that article the Commission has contravened the principles of proportionality and necessity.

Because of their scope, the questions asked constitute a request for the disclosure of documents. But there is an essential difference between the production of documents within the meaning of Article 14 of Regulation No 17 and the obligation to comply with requests for information under Article 11, a difference which the Court emphasized in its judgments of 26 June 1980 in Case 136/79 *National Panasonic* [1980] ECR 2033 and of 18 May 1982 in Case 155/79 *AM & S* [1982] ECR 1575.

Article 11 imposes no formal restriction concerning the nature or number of the items of information requested, but its limitations are to be found in superior rules of law, particularly that relating to the burden of proof. The Commission, although purporting to be in possession of sufficient evidence, seeks from the applicant material evidence and confessions concerning the alleged agreement, decision or concerted practice. It misapplied Article 11 by reversing the onus of proof in that way.

The Commission has also contravened the principle of proportionality which applies, according to the Court, not only to the legislature but also to the law-enforcement authorities; the search for material evidence and the disclosure of documents could have taken place when the investigation was carried out.

The request for information under Article 11 is governed by the criterion of necessity. It may well be for the Commission to appraise that criterion, but the Court carried out a review designed to protect private persons, particularly in cases of manifest error, infringement of essential procedural requirements or of a superior principle of law or in the case of misuse of powers (see the judgment of 14 December 1962 in Joined Cases 5 to 11 and 13 to 15/62 *San Michele* [1962] ECR 449). Since, according to its own statements, the Commission possesses sufficient evidence, the information requested is not necessary to the conduct of the inquiry. The statement of objections, notified on 7 April 1988 despite the absence of a reply, confirms that view.

2. The Commission contends that the request for information may take the form of straightforward questions or requests for the disclosure of documents, otherwise Article 11 would be deprived of its useful effect. Articles 11 and 14 of Regulation No 17 are complementary and the judgment in *AM & S* cited above refers generally to the category of documents covered by Articles 11 and 14. The judgment in *National Panasonic*, cited above, concerns the conditions applicable to requests for information and investigations and is not concerned with the purpose of those procedures.

Infringements of Article 85 are proved at two levels: establishment and analysis of the facts and characterization of the infringement. For the establishment of the facts, Regulation No 17 gives the Commission wide powers of investigation, including those of carrying out checks or requesting information. The obligation of cooperation imposed upon undertakings by Article 11 cannot be assimilated to an obligation to give evidence against oneself or

against others. The applicant is calling in question the very *raison d'être* of Article 11. It could have answered the factual questions, whilst reserving its position on the interpretation of the facts, a question of substance which would be discussed by the parties after the issue of the statement of objections.

The purpose of the powers of investigation conferred on the Commission by Regulation No 17 is to obtain as complete as possible an understanding of the situation, and the principle of proportionality is not contravened if the information requested is relevant to the case.

The Commission considers itself vested with wide powers to appraise the extent to which information is necessary. It has never claimed to be in possession of proof of the applicant's guilt and the investigation was intended precisely to determine whether there was an infringement and to establish the participation of each undertaking therein. The statement of objections in no way prejudges the final decision. Any postponement of the next stage of the procedure on the substance of the case pending the outcome of the present action would have resulted in the applicant's dilatory manoeuvres being allowed to succeed.

3. The French Republic shares the Commission's view. The principle of proportionality would only be contravened if the request for information were excessive, bearing no relation to the purpose of the investigation, and were manifestly abusive. In this case the Commission did not overstep the limits of what was appropriate and necessary to achieve the aim pursued, in accordance with the criteria laid down in the judgment of 20 February 1979 in Case 122/78 *Buitoni* [1979] ECR 677.

(c) *The right of an undertaking not to give evidence against itself*

1. CdF Chimie states that the right not to give evidence against oneself is a general legal principle embodied in Community law. It is enshrined in international conventions binding the Member States and in their legal traditions.

Article 14(3)(g) of the International Covenant on Civil and Political Rights of 19 December 1966 (*Treaty Series*, Vol. 999, p. 171) (hereinafter referred to as 'the International Covenant'), ratified by all the Member States except Greece, prescribes that a person accused of a criminal offence cannot be forced to give evidence against himself or to confess his guilt. The concept of criminal accusation applies both in penal and in administrative proceedings.

The European Convention on Human Rights and Fundamental Freedoms (hereinafter referred to as 'the European Convention') provides (in Article 6(3)) that anyone charged with a criminal offence must be informed of the nature of the accusation against him and be allowed to prepare his defence. The term 'charged with a criminal offence' used in Article 6 constitutes an independent concept, defined by the European Court on the basis of two alternative criteria. The first, which is less important in this case, is that the provision creating the offence must, according to the legal system of the State in question, be part of the criminal law. The second criterion, which is decisive here, lies in the nature of the infringement and in the nature and gravity of the penalty (judgment of 21 February 1984 in the Case of *Öztürk*,

Vol. 73, p. 18). The nature of the infringement depends on the generality of application of the legal rule infringed. Article 85 of the EEC Treaty applies to all undertakings. The penal nature of the penalty depends upon its preventive and repressive purpose. The fines provided for in Article 15(2) of Regulation No 17 fall within that category.

Neither the International Covenant nor the European Convention distinguishes between natural and legal persons. Several States, bound by those international instruments, in particular the United Kingdom and the United States of America, expressly recognize the criminal liability of legal persons. Community competition law expressly regards them as capable of committing acts classifiable as criminal offences. In *Musique Diffusion*, cited above, the Advocate General recommended that fundamental rights should, *mutatis mutandis*, be applied to competition proceedings. The pronouncement of penalties against undertakings may also have repercussions for the executives thereof — natural persons — against whom a right or recourse may be enforced in civil proceedings or who may have criminal penalties properly so called imposed upon them.

The right not to give evidence against oneself is a general principle upheld in all the Member States by constitutional provisions, laws or judicial decisions.

In France, the criminal law is based on the presumption of the innocence of the accused, embodied in the Declaration of Human and Citizens' Rights. In criminal matters, the principle of the right of silence is contained in certain provisions relating to preliminary inquiries and pre-trial measures. According to the Conseil constitutionnel, observance of the right to a fair hearing is mandatory in administrative proceedings in which a penalty can be imposed, even for legal persons.

In the Federal Republic of Germany, the Code of Criminal Procedure grants a witness the right of silence if his answer might expose him to prosecution, and the accused has an absolute right to say nothing. The law on competition offences refers, as far as proceedings in which a fine can be imposed are concerned, to the Code of Criminal Procedure and, in administrative proceedings, grants a witness the right of silence. Legal persons enjoy the same protection, in particular because their rights are exercised by their representative bodies.

In Italy, and likewise in Greece, the right not to incriminate oneself reflects a constitutional principle and is expressly recognized by the Code of Criminal Procedure.

In the United Kingdom, that right is a fundamental principle, expressly recognized in civil proceedings and in certain legislation on competition.

In Ireland, that right is based on custom.

In Spain it is guaranteed by the Constitution and the rule, being general, applies to criminal and administrative matters and to both natural and legal persons.

In Portugal, the right of silence is embodied in the Code of Criminal Procedure. It is the reflection of constitutional principles concerning rights of defence and the presumption of innocence, and it may be relied upon in all proceedings in which a penalty may be imposed.

In Belgium the right of silence in criminal matters is recognized both by legal writers and by the courts. As a general principle of law in the sphere of the rights of the defence, the right of silence applies to other proceedings as well and is available to both natural and legal persons.

In Denmark, the law on judicial organization enables any person questioned by investigators to reveal not more than his identity. A witness enjoys the right of silence if an answer might incriminate him.

In the Netherlands, the right of silence is upheld by the Code of Criminal Procedure, even for preliminary inquiries. It applies to economic matters and only certain specific derogations are allowed in competition matters.

Despite the divergences between national laws, the right of silence is a rule of law common to all the Member States. Those divergences did not prevent the Court, in its judgment in *AM & S*, cited above, from recognizing that the principle of the confidentiality of correspondence between a lawyer and his client is a principle of Community law. The Council's refusal to include the right of silence in Regulation No 17 is not binding on the Court, which in the same judgment implicitly rejected an argument of that kind.

2. The Commission and the French Republic maintain that Community competition law does not grant to undertakings any right to withhold information deemed to be 'self-incriminatory'.

According to the decision of the Court, international conventions provide pointers of which account must be taken in Community law and fundamental rights are observed having regard to the objectives of Community law.

The International Covenant was not invoked until the applicant lodged its reply and the reference to it constitutes a fresh issue which, under Article 42(2) of the Rules of Procedure, is inadmissible. Moreover, the Court has never incorporated the principles of the International Covenant into Community law. Article 14(3)(g) relates only to criminal offences and, in view of the very purpose of the Covenant, applies only to citizens, that is to say natural persons.

As regards the term 'charged with a criminal offence' used in Article 6 of the European Convention, the Commission emphasizes that the Case of *Öztürk*, cited above, related to road traffic offences, for which there was no difference, as regards their nature, between criminal proceedings and administrative proceedings. The procedure for the application of competition rules is of a very different nature and the Court of Justice has recognized that the Commission does not constitute a 'tribunal' within the meaning of Article 6 of the European Convention. Moreover, the Court of Justice is not bound by the interpretation of the concepts of infringements and criminal penalties adopted by the European Court of Human Rights.

Article 85 of the Treaty concerns economic infringements and Article 15(4) of Regulation No 17 expressly provides that the penalties imposed are not criminal in character. Reference to the law of a single Member State, namely that of the United Kingdom, is not a sufficient basis for concluding that there is a general principle concerning the criminal liability of legal persons. The respect, *mutatis mutandis*, in Community law of the rights embodied in the European Convention, proposed by the Advocate General in the *Musique Diffusion* case, proves that those rights must be incorporated into Community law.

Consideration of the laws of the Member States should focus on the existence of a general principle of the right of silence in favour of legal persons in administrative proceedings.

In France, such a principle is not even generally upheld in criminal law. The decisions of the Conseil constitutionnel relate only to the rights of the defence in general. In the Federal Republic of Germany, competition law recognizes the right of silence only in favour of natural persons. In the United Kingdom that right is not absolute in administrative investigations. Reference to a very general provision of the Constitution in Italy and Greece is not a sufficient basis for concluding that there is a right of silence in all administrative proceedings, even in favour of legal persons. As regards Ireland, Portugal and Belgium, the applicant was able to refer only to provisions of criminal law. The reference to Danish law is summary and imprecise and Netherlands law does not recognize a right of silence for undertakings in administrative proceedings.

Both the Commission and the French Republic draw attention to the fact that the *AM & S* judgment related to the particular situation of lawyers cooperating in the administration of justice; moreover, protection of the confidentiality of correspondence between a lawyer and his client does not impede the investigation. When drafting Regulation No 17, the Council expressly excluded the right of silence, being aware, as the Advocate General noted in his Opinion in *AM & S*, that the inclusion of such a principle might have jeopardized the aim pursued by Article 11.

(d) *Infringement of the rights of the defence*

1. CdF Chimie maintains that the statement made by the Court in its judgment of 14 May 1974 in Case 4/73 *Nold* [1974] ECR 491 that fundamental rights are not unfettered prerogatives related to the right of ownership and the right freely to engage in commerce and work and cannot be extended to the rights of the defence. The judgment in *National Panasonic*, cited above, according to which undertakings do not have the right to be heard before a decision to carry out an investigation is adopted, does not mean that the rights of the defence can be denied in all the procedures provided for in Regulation No 17.

The importance of the European Convention in the Community legal order has been underlined in decided cases and in the Common Declaration of 25 April 1977 of the European Parliament, the Council and the Commission. Article 6(2) and (3) of that Convention guarantees everyone charged with an offence certain rights, which apply in the same way in administrative matters and to legal persons. Although it declined to describe the

Commission as a 'tribunal' within the meaning of Article 6 the Court emphasized in its judgments in *AM & S* and *Hoffmann-La Roche*, cited above, the importance of the rights of the defence in administrative proceedings.

The applicant repeats its criticism that the Commission reversed the burden of proof and, in the application of Article 11, misused its powers and misused procedure. The contested decision constitutes a statement of objections, despite the absence of a formal notification. The European Court of Human Rights has consistently held (judgments of 27 June 1968 in the Case of *Neumeister*, of 27 February 1980 in the case of *Deweer* and of 26 March 1982 in the case of *Adolf*) that the concept of a 'charge', within the meaning of the European Convention, is in fact a material and not a formal concept.

2. The Commission, supported by the French Republic, states that it follows from the judgment of 5 March 1980 in Case 98/79 *Pecastaing* [1980] ECR 691 that where a Community law provision fulfils the requirements of Article 6 of the European Convention it is unnecessary to refer to that article when considering a specific case and that it is sufficient to establish whether the measure under review is in conformity with the Community provisions. The applicant's argument could only be accepted if Regulation No 17 itself encroached upon fundamental rights, and more particularly infringed the European Convention.

Fundamental rights do not, as the Court held in its judgment in *Nold*, cited above, constitute unfettered prerogatives. The rights of the defence are to be exercised in the context of Community law and subject to the mandatory rules of public interest laid down by it. In the judgment in *National Panasonic*, cited above, the Court acknowledged that the rights of the defence provided for in Article 6 of the European Convention are to be exercised principally in judicial or administrative proceedings for the termination of an infringement or for a declaration that a legal provision has been infringed, such as the proceedings envisaged in Regulation No 99/63. It also recognized that the investigation procedure under Article 14 of Regulation No 17 has a different aim, in that it is intended solely to enable the Commission to obtain the necessary documentation. The same considerations apply to the procedure for requests for information under Article 11.

Both the Commission and the French Republic point out that the Court has consistently held that the Commission, although required to respect the procedural safeguards provided by Community law, does not constitute a 'tribunal' within the meaning of Article 6 of the European Convention.

IV — Answers to the questions put by the Court

1. In response to a request to specify which of the questions asked by the Commission entails an obligation to confess or report conduct contrary to Article 85 of the EEC Treaty, CdF Chimie SA, which in the mean time has become Orkem SA, states that the dispute raises two questions of principle: the first is whether the Commission may, on the basis of Article 11 and without first having given any details whatsoever of the evidence and documents held by it, ask an undertaking to disclose to it all factual data relating to conduct characterized as unlawful which it intends to use against that

undertaking and against other undertakings: the second question is whether, on the basis of Article 11 and after stating that it has proof of allegedly unlawful meetings, the Commission may ask the undertaking concerned to provide it with details of those meetings and to reveal the identity of other parties which may have participated.

The request for information of 23 August 1987, in which the Commission informed CdF Chimie EP (which in the mean time has become Norsolor) that it held evidence concerning unlawful agreements, decisions or concerted practices, in fact constitutes a statement of objections. In those circumstances, the effect of the contested decision is tantamount to an obligation to confess and report conduct contrary to Article 85.

The first group of questions (I) relates to producers' meetings. The Commission purports to have evidence of the active participation of the undertaking in those meetings and, by its questions, calls upon the undertakings to disclose information to it. By means of the first question, concerning the dates and places of the meetings, the Commission seeks confirmation of unlawful acts of which it purports to have knowledge and/or additional evidence. The second and third questions oblige the undertaking to state the number of meetings in which it took part and therefore to acknowledge conduct contrary to Article 85. In the fourth question, the Commission calls upon the undertaking to indicate, for each known meeting the status of the participants, without specifying the meetings concerned. In its fifth question, the Commission calls upon the undertaking to give details of the other undertakings which took part in the various meetings — which, moreover, are not otherwise specified — and to reveal the level of responsibility of each of them. The sixth question seeks a complete and detailed description of the allegedly unlawful conduct and details of the procedures according to which the meetings were conducted, which is tantamount to requiring a confession of acts contrary to Article 85(1). By its seventh question, whereby documents relating to those meetings are sought, the Commission seeks to obtain the evidence that it needs, in particular evidence which is still lacking.

The second group of questions (II) relates to the function of the target or minimum prices, with which the meetings were concerned. Without giving the slightest indication of what documents it has in its possession, the Commission asks the undertaking, by its first question, to give details of each initiative concerning prices, thus compelling the undertaking to make confessions and report on other undertakings. The second, third, fourth and fifth questions, relating to the prices applied, do not in themselves involve an obligation to confess, but they cannot be dissociated from the general context of the questions.

The third group of questions (III) relates to quotas, targets or shares allocated to producers. Without giving any details of the documents apparently in its possession, proving that the meetings were concerned with sharing the European market, the Commission seeks, by its first question, disclosure of the details of any system or method relating to quotas or targets for sales. In its second question, the Commission obliges the undertaking to disclose the means deployed in order to ensure compliance with the system of sale objectives or quotas. The third question, concerning information relating to producers and to sales of LDPE communicated by the undertaking to other

producers, is also designed to secure confessions as to the exchange of detailed information, and reports concerning other undertakings which took part in those unlawful practices.

2. In response to a request to give details of what prompted it to affirm that CdF Chimie SA and CdF Chimie EP constitute a single undertaking, the Commission states that it is to be inferred from CdF Chimie's organization chart that, formal legal distinctions aside, the economic reality is that the CdF Chimie group is a single undertaking. At the material time, CdF Chimie had five operational divisions, each comprising one or more companies with a distinct legal personality. The 'Petrochemicals' division included, among others, the company CdF Chimie EP; the 'Chemical Specialities' division, the company Norsolor. In parallel with those divisions, there existed two operational managements, both within the company CdF Chimie SA. The 1985 business report proves that the division into separate companies is purely formal and devoid of any economic significance. Since 1 January 1988, the organization chart of CdF Chimie has been recast, so that the petrochemicals and chemical specialities divisions have been brought into a single company, Norsolor, a wholly owned subsidiary of CdF Chimie. That new company has a 'Petrochemicals' division and a 'Chemical Specialities' division and embraces numerous companies, including CdF Chimie EP. It has also taken over certain activities of CdF Chimie SA In an interview given to the monthly publication *Informations chimie* in May 1988, the Chief Executive of the CdF Chimie group laid stress upon the great centralization and far-reaching economic unity of his group.

F. A. Schockweiler
Judge-Rapporteur