PROCEDURE (STEEL): THE MANNESMANNROEHREN-WERKE CASE

Subject: Procedure
Annulment (of Commission Decision)
Investigation
Self-incrimination
Human rights

Industry: Steel tubes
(Implications for all industries)

Parties: Mannesmannröhren-Werke AG
Commission of the European Communities

Source: Judgment of the Court of First Instance in Case T-112/98 (*Mannesmannröhren-Werke AG v Commission of the European Communities*) dated 20 February 2001

(This important decision clarifies the extent to which the Commission may legitimately pursue its investigation of a possible breach of the rules on competition, in circumstances in which the answers given to the Commission's questions may incriminate the party concerned. Under the European Convention for the Protection of Human Rights and Fundamental Freedoms, which does not bind the Court, but is accepted by the Treaty on European Union, parties are entitled to a fair legal process. But "the applicant cannot directly invoke the Convention before the Community courts": paragraph 75. On the other hand, "Community law does recognise as fundamental principles both the rights of defence and the right to fair legal process ... and the recipient of requests sent by the Commission pursuant to Article 11(5) of Regulation 17 is entitled to confine himself to answering questions of a purely factual nature and to producing only the pre-existing documents and materials sought and, moreover, is so entitled as from the very first stage of an investigation initiated by the Commission": paragraph 77. Consequently, the Commission's Decision to request information in the present case was largely annulled. The Court's judgment provides a thorough review of the relevant earlier case law.)

Judgment

Relevant legislation

1. Paragraphs 1, 4 and 5 of Article 11, headed 'Requests for information, of Council Regulation 17 of 1962: First regulation implementing Articles 85 and 86 of the Treaty provide as follows:

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

the Member States and from undertakings and associations of undertakings.

...

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

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

2. Article 16 of Regulation 17, entitled 'Periodic penalty payments, provides:

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

...

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

....

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

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

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

Background

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

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

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

1.6 Meetings between European and Japanese producers

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

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

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

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

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

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

1.7 Special Circle meetings

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

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

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

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

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

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

1.8 1962 agreement

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

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

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

...

2.3 Meetings between European and Japanese producers

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

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

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

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

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

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

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

8. In its reply of 10 November 1997, the Commission rejected the applicant's argument that it was not obliged to answer the said four questions and, on the basis of Article 11(4) of Regulation 17, set a time-limit of 10 days from the date of receipt of its letter for answers to be given to the four questions. It added that, should the applicant fail to answer the questions within the given time, a periodic penalty payment could be imposed on it.

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

10. On 15 May 1998 the Commission adopted a decision pursuant to Article 11(5) of Regulation 17 (the contested decision), Article 1 of which provided that the applicant must, within 30 days of notification of the contested decision, reply to the four questions at issue, which were set out in an annex to the decision. Article 2 provided that should [the applicant] fail to provide the information requested in the manner specified in Article 1, a fine of €1,000 per day of delay [would] be imposed on it as from the end of the period laid down in Article 1.

Procedure

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

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

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

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

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

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

Forms of order sought by the parties

17. The applicant claims that the Court should:
-annul the contested decision;
-in the alternative, annul Article 2 of the contested decision;
-order the Commission to pay the costs.

18. The Commission contends that the Court should:
-dismiss the action as manifestly inadmissible in so far as it seeks the annulment of Article 2 of the contested decision;
-dismiss the action as unfounded in so far as it seeks the annulment of Article 1 of the contested decision;
-order the applicant to pay the costs.

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

Substance

20. In support of its claim for annulment of Article 1 of the contested decision, the applicant puts forward four pleas in law. It is appropriate to begin by

considering together the first three of those pleas, all of which concern an alleged infringement of the rights of defence.

[Paragraphs 21-58 set out the arguments of the parties.]

Findings of the Court

59. It must be emphasised at the outset that the Court of First Instance has no jurisdiction to apply the Convention when reviewing an investigation under competition law, because the Convention is not itself part of Community law (Case T-374/94, *Mayr-Melnhof v Commission*, paragraph 311).

60. However, it is settled case-law that fundamental rights form an integral part of the general principles of Community law whose observance is ensured by the Community judicature (see, in particular, the Opinion of the Court of Justice of 28 March 1996 in Case 2/94, paragraph 33, and the judgment in Case C-299/95, *Kremzow*, paragraph 14). For that purpose, the Court of Justice and the Court of First Instance draw inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international treaties for the protection of human rights on which the Member States have collaborated and to which they are signatories. The Convention has special significance in that respect (Case 222/84, *Johnston*, paragraph 18, and *Kremzow*, cited above, paragraph 14). Furthermore, paragraph 2 of Article F of the Treaty on European Union (now Article 6(2)) provides that 'the Union shall respect fundamental rights, as guaranteed by the [Convention] and as they result from the constitutional traditions common to the Member States, as general principles of Community law.

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

62. During the preliminary-investigation procedure, Regulation 17 does not give an undertaking that is subjected to an investigative measure any right to avoid the application of that measure on the ground that the results thereof might provide evidence of an infringement by it of the competition rules. On the contrary, it places the undertaking under a duty of active cooperation, which means that it must be prepared to make available to the Commission any information relating to the subject-matter of the investigation (*Orkem*, paragraph 27, and *Société Générale*, paragraph 72).

63. In the absence of any right to silence expressly provided for in Regulation 17, it is necessary to consider whether certain limitations on the Commission's powers of investigation during a preliminary investigation are, however, implied by the need to safeguard the rights of defence (*Orkem*, paragraph 32).

64. In this respect, it is necessary to prevent the rights of defence from being irremediably impaired during preliminary-investigation procedures which may

bedecisive in providing evidence of the unlawful nature of conduct engaged in by undertakings (*Orkem*, paragraph 33, and *Société Générale*, paragraph 73).

65. However, it is settled case-law that, in order to ensure the effectiveness of Article 11(2) and (5) of Regulation 17, the Commission is entitled to compel an undertaking to provide all necessary information concerning such facts as may be known to it and to disclose to the Commission, if necessary, such documents relating thereto as are in its possession, even if the latter may be used to establish, against it or another undertaking, the existence of anti-competitive conduct (*Orkem*, paragraph 34, and Case 27/88, *Solvay v Commission*, summary publication, and *Société Générale*, paragraph 74).

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

67. It follows that an undertaking in receipt of a request for information pursuant to Article 11(5) of Regulation 17 can be recognised as having a right to silence only to the extent that it would be compelled to provide answers which might involve an admission on its part of the existence of an infringement which it is incumbent upon the Commission to prove (*Orkem*, paragraph 35).

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

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

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

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

72. On this point, it must be observed that the Commission expressly indicated in the last indent of the three questions at issue that the applicant was to

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

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

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

75. As regards the arguments to the effect that Article 6(1) and (2) of the Convention enables a person in receipt of a request for information to refrain from answering the questions asked, even if they are purely factual in nature, and to refuse to produce documents to the Commission, suffice it to repeat that the applicant cannot directly invoke the Convention before the Community courts.

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

77. However, it must be emphasised that Community law does recognise as fundamental principles both the rights of defence and the right to fair legal process (see *Baustahlgewebe v Commission*, cited above, paragraph 21, and Case C-7/98, *Krombach*, paragraph 26). It is in application of those principles, which offer, in the specific field of competition law, at issue in the present case, protection equivalent to that guaranteed by Article 6 of the Convention, that the Court of Justice and the Court of First Instance have consistently held that the recipient of requests sent by the Commission pursuant to Article 11(5) of Regulation 17 is entitled to confine himself to answering questions of a purely factual nature and to producing only the pre-existing documents and materials sought and, moreover, is so entitled as from the very first stage of an investigation initiated by the Commission.

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

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

The fourth plea, alleging disregard for national procedural safeguards

[Paragraphs 80 to 83 set out the arguments of the parties]

Findings of the Court

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

85. As regards the applicant's argument that there is a risk that information obtained by the Commission and communicated to the national authorities may be used by those authorities against it, it is sufficient to refer to the judgment in *AEB and Others*, where, at paragraph 42, the Court of Justice, after pointing out that information obtained by the Commission must be communicated to the national authorities, gave the following clear statement of the law in this respect: "Such information cannot be relied on by the authorities of the Member States either in a preliminary investigation procedure or to justify a decision based on provisions of competition law, be it national law or Community law. Such information must remain internal to those authorities and may be used only to decide whether or not it is appropriate to initiate a national procedure."

86. It follows that the German authorities cannot rely on information obtained by the Commission by means of its request for information pursuant to Article 11 of Regulation 17 in order to justify a decision taken against the applicant on the basis of the provisions of competition law.

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

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

89. That plea must therefore be rejected.

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

Costs

91. Under Article 87(2) of the Rules of Procedure of the Court of First Instance, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. However, under the first subparagraph of Article 87(3), where each party succeeds on some and fails on other heads, or where the circumstances are exceptional, the Court of First Instance may order that the costs be shared or that each party bear its own costs.

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

Court's Ruling

The Court hereby:

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

2 Dismisses the remainder of the application;

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

[The above report is taken from the Court's web-site and is freely available. It may be corrected on linguistic and other grounds and is not therefore definitive.]

State Aids: The CWP Case

In this case a Belgian company, Prayon-Rupel, sought the annulment of a Decision by the Commission not to raise objections to the grant of aid from the German Government to the German firm, Chemische Werke Piesteritz GmbH (CWP). The Court had to establish whether in the case in question the procedure followed by the Commission had significantly exceeded what would normally constitute a preliminary investigation within the meaning of Article 93(3) [old numbering] of the EC Treaty.

The Court recalled that, in its so far unpublished judgment in Case T-46/97, *SIC v Commission*, the length of the time taken by the Commission might lead to the conclusion that the Commission had found serious difficulties in assessing the case. The Court therefore looked at the Commission's internal rules of procedure to see whether these threw light on what a reasonable length of time would be.

It was evident both from the rules of procedure and from the course of events after the Commission had asked the German Government for further information about its proposed aid to the company, that the German Government had not fully complied with the duty imposed on it by Article 5 [old numbering] of the EC Treaty to cooperate fully in the implementation of the Treaty's provisions. The failure to supply the requested information had led to an unnecessary prolongation of the proceedings; and this was in itself evidence of the existence of "serious difficulties".

Although two companies, one of them the applicant in this case, had expressed their fears about the consequences of the grant of state aid to CWP, the Commission proceeded to a Decision. In the Court's opinion, the Commission did so on the basis of an insufficient knowledge of the facts. Even though the assessment of compatibility with the common market raised serious difficulties, the Commission had failed to open the procedure envisaged in Article 93(2) and to gather fuller information by way of a hearing of the interested parties. The Decision therefore had to be annulled.

Source: Judgment of the Court of First Instance in Case T-73/98 (*Société chimique Prayon-Rupel SA v Commission of the European Communities*, supported by the Federal Republic of Germany), dated 15 March 2001. The judgment is available only in French; and the extracts from the judgment included in the text above are our own translation. As to the *SIC* case referred to by the Court, this is available on the Court's website, under the heading "Recent Judgments of the Court" (judgment was in fact given in April, 2000). We did not carry a report at the time in view of the length and complexity of the case and a shortage of space.