AS TO THE ADMISSIBILITY OF

Application No. 13258/87
by M. & Co.
against the Federal Republic of Germany

The European Commission of Human Rights sitting in private on 9 February 1990, the following members being present:

MM. C.A. NØRGAARD, President
J.A. FROWEIN
S. TRECHSEL
F. ERMACORA
E. BUSUTTIL
A. WEITZEL
J.-C. SOYER
H.G. SCHERMERS
H. DANELIUS
J. CAMPINOS
H. VANDENBERGHE
Sir Basil HALL
MM. F. MARTINEZ
C.L. ROZAKIS
Mrs. J. LIDDY
Mr. L. LOUCAIDES

Mr. H.C. KRÜGER, Secretary to the Commission

Having regard to Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms;

Having regard to the application introduced on 3 September 1987 by M & Co. against the Federal Republic of Germany and registered on 2 October 1987 under file No. 13258/87;

Having regard to the report provided for in Rule 40 of the Rules of Procedure of the Commission;

Having regard to the Commission's decision of 15 December 1988 to bring the application to the notice of the respondent Government and invite them to submit written observations on the admissibility and merits of the application;

Having regard to the observations submitted by the respondent Government on 6 April 1989 and the observations in reply submitted by the applicant on 8 May 1989;

Having regard to the parties' submissions at the oral hearing on 9 February 1990;

Having deliberated;

Decides as follows:

THE FACTS

The applicant is a limited partnership (Kommanditgesellschaft) seated in Bremen. Its object is the import and export of goods; inter alia, it imported hi-fi equipment manufactured by the Japanese firm Pioneer Electronic Corporation until the end of 1977. The

applicant is represented by its active partners (Komplementäre) Messrs. Jürgen Dettmers and Henning Melchers, both living in Bremen.

The facts not disputed between the parties may be summarised as follows.

On 14 December 1979 the Commission of the European Communities (EC Commission) imposed a fine of 1,450,000 European Units of Account (i.e. 3,596,667 DM) on the applicant for having violated Article 85 (1) of the EC Treaty. A Belgian, a British and a French undertaking dealing with Pioneer equipment were likewise fined. According to the findings of the EC Commission there existed - from the latter part of 1975 until the latter part of 1977 - a concerted practice between the applicant and the other Pioneer importers for the prevention of parallel imports from the Federal Republic of Germany to France of Pioneer hi-fi equipment so that the relatively high prices on the French market would be protected against foreign competition. In accordance with this concerted practice the applicant had, after having accepted an order from a German dealer, company G., refused to deliver to this dealer the Pioneer equipment ordered by it, having, in the meantime, received information concerning the destination of the goods ordered. The refusal caused substantial losses to a French firm and, as the EC Commission pointed out, prevented French consumers from buying a considerable amount of Pioneer equipment at more advantageous prices.

As to the applicant's defence that it never accepted G.'s order, the acceptance having allegedly been declared without proper instructions by a temporary employee, the EC Commission noted that at the time the applicant did not invoke vis-à-vis company G. that the order had been accepted by mistake. Furthermore, with regard to the argument that the refusal to sell was the consequence of normal business considerations and contractual necessities, the EC Commission noted that, even if the applicant did not have sufficient goods in stock, it did not try to obtain the balance of the order from Pioneer, where plenty of goods were available, or start negotiations for a reduced order.

The applicant and the co-accused companies took the case to the EC Court of Justice requesting this Court to set aside the EC Commission's decision of 14 December 1979. In the proceedings before the Court of Justice the applicant was represented by Messrs. Bellis and van Bael, lawyers in Brussels. After a hearing of witnesses on 18 September 1981 and an oral hearing on 30 November 1982, the Court of Justice on 7 June 1983 annulled the EC Commission's decision insofar as it stated that the concerted practice exceeded the period of end of January / beginning of February 1976. It reduced the applicant's fine to 400,000 European Units of Account (= 992,892 DM) and dismissed the remainder of the action.

Before the European Court of Justice the plaintiff companies had inter alia alleged:

a) that the EC Commission acted both as a prosecuting and decision-making authority;

b) that they had not been informed about all charges which were determined in the EC Commission's decision;

c) that the EC Commission had not made available for examination all documents on which it later based its decision;

d) that the observations of the Advisory Committee (on Restrictive Practices and Monopolies) had not been communicated to them.

As to complaint a) the Court of Justice stated that the EC Commission was not a 'court' within the meaning of Article 6 of the European Convention on Human Rights. Nevertheless, in the administrative proceedings which it carried out the EC Commission did have to respect certain procedural principles inherent in the Community law. Consequently, before taking a decision the EC Commission had, in accordance with Article 19 (1) of EC Regulation No. 17, to give the parties concerned the opportunity to submit their observations on the charges raised against them. Also, according to Article 4 of Regulation No. 99/63 the EC Commission could determine only those charges with regard to which the undertaking concerned had the opportunity to defend itself. The provisions mentioned reflected the fundamental principle in Community law according to which in all proceedings, including administrative proceedings, the parties had to be heard and be given the opportunity to state their observations on the facts and the law.

As regards complaint b) the Court of Justice found that the EC Commission had not informed the plaintiff companies adequately about the period in which the contravention had allegedly been committed. Initially the Commission had indicated it would examine whether contraventions had been committed during the period end of January / beginning of February 1976, while in its decision it found that the concerted practice already began towards the end of 1975.

As regards complaint c) the Court of Justice noted that some of the documents relied on by the EC Commission had not been made available to the plaintiffs. These documents, however, related to circumstances of little importance for the determination of the charges. The Court added that, in any event, it did not take these documents into consideration when examining whether or not the EC Commission's decision was well founded.

As regards complaint d) the Court of Justice found that Article 10 (6) of EC Regulation No. 17, which provides that the Advisory Committee's opinions are not published, cannot be interpreted as allowing a confidential communication of such opinions to the undertakings concerned.

As to the applicant's substantive complaints, the Court of Justice found that the EC Commission's decision did not disclose any error of law or facts, and that there was sufficient evidence that the applicant company refused to sell goods ordered for the French market.

As to the calculation of the fine, the Court of Justice considered that the EC Commission wrongly took into consideration only the applicant's total turnover and no other factors such as quantity and value of the goods which were the object of the contravention, size and economic power of the contravening undertaking. The fine was therefore reduced by the Court of Justice, inter alia, in view of the fact that the period of the concerted practice was shorter than that indicated in the EC Commission's decision.

Insofar as the applicant had alleged that its managing partners were not aware of the incriminating practice and the refusal

to sell, the Court of Justice pointed out that an undertaking is liable for all persons who are authorised to act on its behalf and that there was nothing to show that the applicant's representatives had acted ultra vires.

Subsequent to the pronouncement of the Court of Justice's judgment the applicant tried to prevent the Federal Minister of Justice from issuing a writ of execution. Its efforts, i.e. various court actions, were, however, to no avail and eventually, on 22 January 1985, a group of three judges of the Federal Constitutional Court (Bundesverfassungsgericht) dismissed a constitutional complaint as partly offering no prospects of success and partly being inadmissible. Insofar as the applicant had requested the Federal Constitutional Court to declare that the issuing of a writ of execution would violate constitutional rights, the Constitutional Court considered the complaint to be inadmissible for non-exhaustion of ordinary remedies as the applicant had only sought injunctive relief preventing the (future) issue of a writ of execution whilst an action against such a writ, once it was issued, was an adequate and effective remedy allowing the applicant to have the German courts determine the question whether the issue was lawful and in accordance with Article 192 (2) second sentence of the Treaty of Rome.

Meanwhile, on 4 January 1985 the writ of execution was issued.

The applicant then brought an action for damages against the Federal Republic of Germany represented by the Federal Minister of Justice. It argued that the Minister had wrongly issued a writ of execution because the judgment of the European Court of Justice violated constitutional rights in that

- it based its decision on pre-trial statements of a witness which that witness revoked when heard by the Court. This violated the principle in dubio pro reo;

- it fined the applicant on the basis of faults committed by employees but not the managing partners. This violated the principle nulla poena sine culpa;

- the managing partners were not heard personally. This was contrary to Article 103 (1) of the Basic Law (Grundgesetz) and Article 6 para. 3 (c) of the Convention;

- the amount of the fine was disproportionate and excessive.

On 2 October 1985 the Bonn Regional Court (Landgericht) dismissed the action. The Regional Court pointed out that it followed from the jurisprudence of the European Court of Justice that this Court applied as an inherent part of Community law those fundamental rights that are generally recognised in the legal orders of the member States of the EC. Nevertheless, the Regional Court considered that the issuing of a writ of execution in accordance with Article 192 (1) of the Treaty of Rome had to be denied by the competent German authorities if the judgment which was to be executed violated the very essence (Wesensgehalt) of German constitutional law. However, there was no such violation in the applicant's case.

Insofar as the applicant invoked the principle in dubio pro reo, its arguments simply questioned the Court of Justice's

appreciation of the evidence and were therefore irrelevant as German authorities were not competent to examine whether or not the Court of Justice had committed errors of law or fact.

Insofar as the applicant complained that its managers were not heard personally, the Regional Court considered that the applicant's right to be heard had been complied with in that it had every opportunity to defend its case via its counsel.

Insofar as the applicant had invoked the principle nulla poena sine culpa, the Regional Court stated that a fine on account of a violation of anti-trust legislation was justified only if the person fined was responsible for the violation in question. As for legal persons, he who acts on their behalf is of necessity responsible for them. Therefore, a legal person could be held responsible not only for acts or omissions of its partners and managing directors but also of other employees in a leading position. Finally, the Regional Court found no violation of the principle of proportionality.

The applicant's appeal on points of law (Sprungrevision) against the Regional Court's judgment was rejected by the Federal Court (Bundesgerichtshof) on 25 September 1986 as being inadmissible. The Court considered that the case did not raise an issue of general importance as the judgment of the European Court of Justice did not violate any of the applicant's constitutional rights. Therefore the applicant's argument was irrelevant that the Minister of Justice, before issuing a writ of execution in accordance with Article 192 (2) of the Treaty of Rome, had to examine whether or not the Court of Justice's judgment conformed with domestic constitutional law.

On 10 April 1987 a group of three judges of the Federal Constitutional Court rejected as offering no prospects of success the applicant's constitutional complaint against the Federal Court's decision and against the writ of execution. It is pointed out in the decision that the Court of Justice's jurisprudence adequately implements the guarantee of fundamental rights and that therefore there is no obligation for German authorities to examine whether or not a judgment of this Court conforms with German constitutional law before issuing a writ of execution.

COMPLAINTS

The applicant repeats the complaints already raised in the domestic proceedings. It considers that convicting or fining an employer for a wrong committed by an employee violates the principle nulla poena sine culpa. To assume until proven to the contrary that a fault was committed by the employee(s) in the course of his/their operational tasks, would violate the presumption of innocence.

Furthermore, the applicant alleges a violation of the principle in dubio pro reo, in that the Court of Justice did not take into account that the principal witness, who had initially incriminated the applicant, later revoked his statements and declared under oath that he had made them to protect his own interests.

Finally, the applicant complains that its managing partners were not allowed to participate in the proceedings before the Court of Justice, to put questions to the witnesses and to defend themselves personally.

The applicant invokes Articles 1 and 6 paras. 2 and 3 (c) of

the Convention.

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 3 September 1987 and registered on 2 October 1987.

On 15 December 1988 the Commission decided to invite the respondent Government, pursuant to Rule 42 para. 2 (b) of its Rules of Procedure, to submit written observations on the application before 3 March 1989. At the respondent Government's request the time-limit was extended to 19 April 1989. The Government's observations were submitted on 12 April 1989.

The applicant company was invited to submit observations in reply before 2 April 1989. Following an extension of the time-limit the applicant company's observations were submitted on 17 May 1989.

On 7 September 1989 the Commission decided to hold a hearing. At the hearing on 9 February 1990 the parties were represented as follows:

For the Government

Mr. J. Meyer-Ladewig, Agent, Federal Ministry of Justice

MM. Teske and Stöcker, Advisers, both of the Federal Ministry of Justice

For the applicant

Mr. Jürgen Dettmers, lawyer and partner of the applicant company

THE LAW

The applicant company complains that the German authorities issued a writ for the execution of a judgment of the European Court of Justice according to which it has to pay a heavy fine for having violated Article 85 of the EC Treaty. The applicant company mainly submits that in its case the Court of Justice violated the principle of presumption of innocence as guaranteed by Article 6 para. 2 (Art. 6-2) of the Convention by fining its associates for a wrong committed without their knowledge by an employee. Furthermore the applicant company considers the right of every accused to defend himself in person as guaranteed by Article 6 para. 3 (c) (Art. 6-3-c) of the Convention as being violated.

According to the applicant company the respondent State's obligation to secure the rights guaranteed by the Convention has absolute priority over any other treaty obligations. Therefore the competent Minister, before issuing a writ of execution, should examine whether or not the judgment of the European Court of Justice had been given in proceedings respecting the guarantees set out in Article 6 (Art. 6) of the Convention. As this was not the case the granting of the writ of execution, so the applicant company argues, gave effect to the violations complained of and therefore violated the provisions invoked.

The respondent Government argue that the Federal Republic of Germany is not responsible under the Convention for acts and decisions of the European Communities. The Federal Minister of Justice, in granting a writ of execution for a judgment of the European Court of

Justice, did not have to examine whether the judgment in question had been reached in proceedings compatible with fundamental rights guaranteed by the European Convention on Human Rights or the German Basic Law. He only had to examine whether the judgment was authentic. Therefore he neither had to determine a civil right, nor a criminal charge within the meaning of Article 6 (Art. 6) of the Convention.

Furthermore, the Federal Republic's responsibility under the Convention could not be derived from the fact that it transferred part of its powers to the European Communities. Otherwise all Community acts would indirectly be subject to control by the Convention organs. However, such a result would not be compatible with the generally accepted principle that the Convention did not apply to the European Communities and would become binding for them only if they formally adhered to it. In this context the respondent Government also point out that, in any event, observance of fundamental rights is secured by the European Court of Justice. Even if it should be found that national authorities nevertheless also remained bound to control Community acts as to manifest and flagrant violations of fundamental rights, such a control had, in the present case, been effected by the German civil courts which had found no appearance of such a violation.

The Commission first recalls that it is in fact not competent ratione personae to examine proceedings before or decisions of organs of the European Communities, the latter not being a Party to the European Convention on Human Rights (see No. 8030/77, CFDT v. European Communities, Dec. 10.7.78, DR 13 p. 231; No 13539/88, Dufay v. European Communities, Dec. 19.1.89). This does not mean, however, that by granting executory power to a judgment of the European Court of Justice the competent German authorities acted quasi as Community organs and are to that extent beyond the scope of control exercised by the Convention organs. Under Article 1 (Art. 1) of the Convention the Member States are responsible for all acts and omissions of their domestic organs allegedly violating the Convention regardless of whether the act or omission in question is a consequence of domestic law or regulations or of the necessity to comply with international obligations (cf. mutatis mutandis No. 6231/73, Ilse Hess v. United Kingdom, Dec. 28.5.75, D.R. 2 p. 72 [74]).

The question therefore is whether by giving effect to a judgment reached in proceedings that allegedly violated Article 6 (Art. 6) the Federal Republic of Germany incurred responsibility under the Convention on account of the fact that these proceedings against a German company were possible only because the Federal Republic has transferred its powers in this sphere to the European Communities.

For the purpose of the examination of this question it can be assumed that the anti-trust proceedings in question would fall under Article 6 (Art. 6) had they been conducted by German and not by European judicial authorities (cf. Eur. Court H.R., Öztürk judgment of 8 December 1983, Series A no. 73, paras. 46-56; No. 11598/85, Dec. 11.7.89).

It has next to be observed that the Convention does not prohibit a Member State from transferring powers to international organisations. Nonetheless, The Commission recalls that "if a State contracts treaty obligations and subsequently concludes another international agreement which disables it from performing its obligations under the first treaty it will be answerable for any resulting breach of its obligations under the earlier treaty" (cf. N° 235/56, Dec. 10.6.58, Yearbook 2 p. 256 (300)). The Commission

considers that a transfer of powers does not necessarily exclude a State's responsibility under the Convention with regard to the exercise of the transferred powers. Otherwise the guarantees of the Convention could wantonly be limited or excluded and thus be deprived of their peremptory character. The object and purpose of the Convention as an instrument for the protection of individual human beings requires that its provisions be interpreted and applied so as to make its safeguards practical and effective (cf. Eur. Court H.R., Soering judgment of 7 July 1989, Series A no. 161, para. 87). Therefore the transfer of powers to an international organisation is not incompatible with the Convention provided that within that organisation fundamental rights will receive an equivalent protection.

The Commission notes that the legal system of the European Communities not only secures fundamental rights but also provides for control of their observance. It is true that the constituent treaties of the European Communities did not contain a catalogue of such rights. However, the Parliament, the Council and the Commission of the European Communities have stressed in a joint declaration of 5 April 1977 that they attach prime importance to the protection of fundamental rights, as derived in particular from the Constitution of the Member States and the European Convention for the Protection of Human Rights and Fundamental Freedoms. They pledged that, in the exercise of their powers and in pursuance of the aims of the European Communities, they would respect and continue to respect these human rights (Official Journal of the European Communities, XX, 1977, Information and Notices, No. C 103/I). In addition the Court of Justice of the European Communities has developed a case-law according to which it is called upon to control Community acts on the basis of fundamental rights, including those enshrined in the European Convention on Human Rights. In accordance with this reasoning the Court of Justice underlined in the present case that the right to a fair hearing is a fundamental principle of Community law. It stated that Community law contained all criteria which are prerequisites not only to examine but, if necessary, to remedy the applicant company's complaint that its right to a fair hearing was violated (see p. 76 of the judgment). However, it came to the conclusion that this complaint was unfounded.

The Commission has also taken into consideration that it would be contrary to the very idea of transferring powers to an international organisation to hold the member States responsible for examining, in each individual case before issuing a writ of execution for a judgment of the European Court of Justice, whether Article 6 (Art. 6) of the Convention was respected in the underlying proceedings.

It follows that the application is incompatible with the provisions of the Convention ratione materiae and must be rejected in accordance with Article 27 para. 2 (Art. 27-2) of the Convention.

For these reasons, the Commission

DECLARES THE APPLICATION INADMISSIBLE.

Secretary to the Commission — President of the Commission

(H.C. KRÜGER) — (C.A. NØRGAARD)