OPINION OF ADVOCATE GENERAL MISCHO

delivered on 20 September 2001 [1]

1. In the context of an appeal by Roquette Frères SA (hereinafter 'Roquette') against an order of the President of the Tribunal de grande instance (Regional Court), Lille (France) of 14 September 1998, authorising investigations at the premises of that undertaking, the Cour de cassation (Court of Cassation) of the French Republic has referred to the Court of Justice for a preliminary ruling two questions concerning the point whether a national court may refuse to authorise the conduct of the investigations ordered by the Commission.

I — Factual and legislative background

A — *The Commission's decision*

2. By decision of 10 September 1998, adopted pursuant to Article 14(3) of Regulation No 17/62 of the Council of 6 February 1962, First Regulation implementing Articles 85 and 86 of the Treaty, [2] the Commission ordered Roquette to submit to an investigation.

3. Article 1 of the operative part of that decision is worded as follows:

'[T]he undertaking Roquette Frères SA is required to submit to an investigation concerning its possible participation in agreements and/or concerted practices in the fields of sodium gluconate and gluconodelta-lactone, which may constitute an infringement of Article 85 of the EC Treaty. The investigation may take place at any of the undertaking's premises.

The undertaking shall give the officials authorised by the Commission to carry out the investigation, and the officials of the Member States assisting them, access to any premises, lands and means of transport during normal office hours. The undertaking shall submit for inspection the books and other business records required by the said officials; it shall allow them to inspect its books and other business records at the places where these are to be found or to take copies of or extracts from them. Furthermore, it shall immediately provide the said officials with any oral explanations they may request in connection with the subject-matter of the investigation.'

1 — Original language: French.

2 — OJ, English Special Edition, 1959-62, p. 87.

4. The essential grounds of the decision, as they appear from its preamble, are as follows:

'...

The Commission has information to the effect that the officers of the above-mentioned undertaking held regular meetings with competitors, during which shares of the sodium gluconate market were allocated and minimum prices agreed for the users in the various areas of the market. The sales levels — both global and relating to the various areas — were also fixed. At each meeting the degree to which the agreements had been observed was assessed, and it appears that any undertaking exceeding the sales allocated to it had to try to reduce its sales during the following period.

...

The Commission has information according to which these contacts with competitors extended also to glucono-delta-lactone. In particular, bi- or multilateral talks were held, often on the fringe of the meetings relating to sodium gluconate (before or after them, or during breaks). On those occasions, the participants exchanged information relating to the market, market prices and demand. They also held talks on manufacturing capacity and sales volumes. The contacts were aimed at controlling prices and, it appears, were such as to result in coordinating the participants' behaviour on the market.

If their existence were established, the above-mentioned agreements and/or concerted practices might constitute a serious infringement of Article 85 of the Treaty.... The very nature of such agreements and/or concerted practices suggests that they are carried out in accordance with secret procedures and that in this connection an investigation is the most appropriate means of gathering evidence of their existence.

...

In order for the investigation to be effective, it is necessary that the undertaking should not be informed in advance.

It is therefore necessary to compel the undertaking, by a decision, to submit to an investigation within the meaning of Article 14(3) of Regulation No 17.'

5. The Commission made representations to the French Government, asking it to take the necessary steps to ensure that the assistance of the national authorities, as prescribed in Article 14(6) of Regulation No 17 in the event of the undertaking's opposing an investigation, was provided.

6. Further to that request, the Direction Générale de la Concurrence, de la Consommation et de la Répression des Fraudes (Directorate-General for Competition, Consumer Affairs and the Punishment of Fraud, hereinafter 'the DGCCRF') requested the competent decentralised administrative departments to place themselves at the disposal of the officials authorised by the Commission and also to submit an application to the President of the Tribunal de grande instance, Lille, for the authorisation required under French legislation to effect entry and seizure.

7. Such an application was lodged on 14 September 1998. The above-mentioned Commission decision and the text of the judgment in *Hoechst* v *Commission*,[3] together with other documents, were attached to it.

8. The President of the Tribunal de grande instance, Lille, granted the application by the order of 14 September 1998, mentioned above, to which I shall return.

3 — Joined Cases 46/87 and 227/88 *Hoechst* v *Commission* [1989] ECR 2859.

B — *The applicable national law*

9. The Conseil Constitutionnel (Constitutional Council) (France) ruled, on 29 December 1983, that investigations on private premises could only be carried out in accordance with Article 66 of the French Constitution, which entrusts to the judiciary the protection of individual liberty and, in particular, of the inviolability of the home. It concluded on that basis that the statutory provisions applicable in that connection must expressly entrust the competent court *with the task of verifying whether, in the specific circumstances, the application before it is justified.*

10. Subsequent to that decision, Order No 86-1243 of 1 December 1986 was adopted, relating to free pricing and free competition (hereinafter 'the Competition Order') which lays down the investigation procedures permitted in that field.

11. Article 47 of the Competition Order provides:

'[I]nvestigators may have access to any premises, lands or means of transport used for business purposes, request to be shown the books, invoices and any other business records and take copies of them, and gather

information and receive explanations either by convening meetings or on the spot. They may ask the authority by which they are employed to appoint an expert to draw up any report that may be necessary, after hearing the party concerned.'

12. Article 48 of the Competition Order provides:

'[I]nvestigators may enter any premises and seize documents only within the framework of investigations requested by the Ministre chargé de l'Economie (Minister for Economic Affairs) or the Conseil de la Concurrence (Competition Council), and upon judicial authorisation being granted by order of the President of the Tribunal de grande instance of the judicial district in which the premises to be entered are situated or by a judge delegated by him....

The judge must verify whether the request for authorisation before him is justified; the request must contain all such information as may justify the entry. [4] He shall appoint one or more police officers ["officiers de police judicaire"] to assist in these operations and to keep him informed of their progress...

The judge may enter the premises during the operation. He may decide, at any time, to suspend or terminate the visit.

The order referred to in the first paragraph of this article shall be subject only to an appeal in cassation, accordance with the rules laid down by the Code of Criminal Procedure. The appeal shall not have suspensory effect.

The visit, which may not begin before 6.00 a.m. or after 9.00 p.m., shall be carried out in the presence of the occupier of the premises or his representative. Only the investigators, the occupier of the premises or his representative and the police officer may acquaint themselves with the documents before they are seized....'

13. The requirements of Articles 47 and 48 of the Competition Order have been made applicable to investigations decided on the basis of Article 14 of Regulation No 17. Article 56a of the Competition Order provides as follows:

'[F]or the implementation of Articles 85 to 87 of the Treaty of Rome, the Minister of Finance and the officials appointed or empowered by him in accordance with the provisions of this order, on the one

4 — Emphasis added.

hand, and the Competition Council, on the other hand, shall have the powers conferred on them by Titles III, VI and VII of this order, in the case of the said Minister and officials, and by Title III, in the case of the Competition Council. The rules of procedure laid down by the said provisions shall be applicable to them.'

14. For the purpose of clarifying the interpretation given to the above-mentioned national provisions, Roquette, for its part, cites extracts from three judgments of the French Cour de cassation which confirm that the President of the Tribunal de grande instance must enable the Cour de cassation to review whether it has been verified that the application was justified.

C — *The decision appealed against before the Cour de cassation*

15. The order of the President of the Tribunal de grande instance, Lille, contains in particular the following points:

'... Whereas the aforementioned *Commission decision is based on grounds,* both factual and legal, concerning the suspicion of practices prohibited under Article 85 of the Treaty establishing the European Economic Community and involving the undertaking Roquette Frères SA, *which it is not for me to evaluate, such evaluation falling within the jurisdiction of the Court of First Instance of the European Communities in Luxembourg;* [5]

Whereas the aforementioned Commission decision must accordingly be attached to this order and form an integral part thereof;

Whereas the information contained in the aforementioned Commission decision is such as to constitute the statement of reasons defined in Article 48 of the above-mentioned order [the Competition Order];...'

16. After summarising the account of the suspected facts as set out in the Commission's decision, the order the President of the Tribunal de grande instance, Lille, continues by stating, in particular:

'... Whereas those practices are the consequence of periodic meetings at which information is exchanged and kept secret;

5 — Emphasis added.

Whereas the documents which could provide evidence of those practices are, as a result, confidential and are thus unknown to the investigators;...

Whereas the exercise of the powers defined in Article 47 of the order of 1 December 1986 seems to me inadequate to ensure proper performance of the obligation imposed on the French national authority in the present circumstances;

Whereas the manifestly confidential nature of the documents sought and the pressures which may be brought to bear on certain third parties are such as to justify the exercise of the powers defined in Article 48 of the order of 1 December 1986;

Whereas those powers seem to me to be such as to enable the intended objectives to be attained while also safeguarding the rights of defence since the said powers are exercised under my control;

Whereas, in those circumstances, since the undertaking Roquette Frères SA is suspected of being involved in practices prohibited under Article 85 of the Treaty establishing the European Economic Community and the application of Article 48 of the abovementioned order is not disproportionate in relation to the measures envisaged, provided that the original documents are restored to the undertaking whose premises have been entered, the Commission having requested only copies of the documents;

...,

...'

17. The order of the President of the Tribunal de grande instance, Lille, was served on 16 September 1998 and the investigation took place on 16 and 17 September 1998. Roquette cooperated in the investigation although it expressed reservations in respect of the taking of copies of a series of documents.

D — *The appeal in cassation and the order for reference*

18. Roquette then brought an appeal against that order before the Cour de cassation. It submitted in particular that the President of the Tribunal de grande instance could not order that premises be entered *without exercising in full his own powers of review as conferred on him by the Constitution and the Competition Order*. It was for the President himself to verify, *in the light of the file of documents with which the administrative authority making the application is required to pro-*

vide him, whether there were reasonable grounds for suspecting the existence of anti-competitive practices such as to justify granting coercive powers. He could not confine himself to taking his decision solely on the basis of the Commission's decision, *without satisfying himself that that decision was indeed taken on the basis of documents submitted to the Commission's assessment.*

19. In the order for reference the Cour de cassation, after referring to the abovementioned decision of the Cour Constitutionelle of 29 December 1983, states that 'in the present case no information or evidence providing grounds for suspecting the existence of anti-competitive practices was put before the President of the Tribunal de grande instance, Lille... so that it was impossible for him to verify whether, in the specific circumstances, the application before him was justified' and that 'moreover, the decision of the Commission... merely states that the Commission has information to the effect that Roquette is engaging in anti-competitive practices on the market in sodium gluconate and glucono-delta-lactone, which it describes, without, however, referring, even briefly, in its analysis to the information which it claims to have and on which it bases its assessment;...'

20. The Cour de cassation also refers to the statements contained in paragraphs 17 and 18 of the judgment in *Hoechst* v *Commission*, according to which there is no principle common to the laws of the Member States in regard to the inviolability of the premises of undertakings or any case-law of the European Court of Human Rights which infers such a principle from Article 8 of the European Convention on Human Rights and Fundamental Freedoms (hereinafter 'the Convention'). It observes, in this connection, that, in its judgment of 16 December 1992 in *Niemietz*, the European Court of Human Rights nevertheless subsequently held that that provision could indeed apply to certain business activities or premises. In a similar vein, the Cour de cassation lays particular stress on Article 6(2) EU which provides that the Union is to respect the fundamental rights as guaranteed by the European Court of Human Rights as general principles, and Article 46 EU which submits that provision to review by the Court of Justice.

21. The Cour de cassation goes on to point out that in the judgment in *Hoechst* v *Commission* it is stated that the Commission, when exercising its powers of investigation, is required to respect the procedural rules laid down for that purpose by national law.

22. It was in those circumstances that, by judgment of 7 March 2000, the Cour de cassation stayed proceedings and sought a preliminary ruling from the Court of Justice on the questions

'whether,

1. having regard to the fundamental rights recognised by the Community

legal order and to Article 8 of the European Convention for the Protection of Human Rights, the judgment in *Hoechst* of 21 September 1989 must be interpreted as meaning that the national court, which has the power under national law, where a matter relating to competition is concerned, to order entry upon premises and seizures there by officers of the Administration, cannot refuse to grant the authorisation requested where it considers that the information or evidence presented to it as providing grounds for suspecting the existence of anti-competitive practices on the part of the undertakings mentioned in the Commission's decision ordering an investigation is not sufficient to authorise such a measure or where, as in the present case, no information or evidence has been put before it;

2. in the event that the Court of Justice declines to accept that the Commission is required to put before the competent national court the evidence or information in its possession which gives rise to a suspicion of anti-competitive practices, the national court is, given the above-mentioned fundamental rights, none the less empowered to refuse to grant the application for entry and seizure if it considers, as in the present case, that the Commission decision does not state sufficient reasons and does not enable it to verify, in the specific circumstances, whether the application before it is justified, thereby making it impossible for it to carry out the review required by its national constitutional law.'

II — Assessment

23. It is important, first, to define the scope of the problem submitted to the Court by the Cour de cassation of the French Republic.

24. In my view, it follows from the provisions of French law which I have just cited and from a reading of the order for reference that the two questions, taken together, raise the problem whether the national court has the power to refuse to authorise an investigation (in practice equivalent to a search) when neither the text of the Commission decision nor the information or evidence put before it to supplement the decision is such as to establish, in the eyes of the court, the need for the investigation. The words 'to verify whether, in the specific circumstances, the application... is justified' in the second question leave no room for doubt in this respect.

25. In paragraph 35 of the judgment in *Hoechst* v *Commission*, the Court stated that the competent body under national law, 'whether judicial or otherwise, cannot... substitute its own assessment of the need for the investigations ordered for that of the Commission, the lawfulness of whose assessments of fact and law is subject only to review by the Court of Justice.'

26. In those circumstances, it may therefore be concluded that the Cour de cassation is asking, essentially, whether the decision in *Hoechst* v *Commission* ought not to be reconsidered.

A — *The judgment in* Hoechst *v* Commission *and Article 8 of the Convention*

27. In this connection, the Cour de cassation puts forward two reasons.

28. While noting that fundamental rights have for a long time formed an integral part of the general principles of law, whose observance is ensured by the Court of Justice, and that the Convention is, in that respect, of particular significance, the Cour de cassation wonders whether the Convention should be accorded even greater significance than in the past, following the adoption of Article 6(2) of the Treaty on European Union, which provides that the Union is to respect the 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. Article 46(d) of that Treaty provides, furthermore, that the Court has jurisdiction to apply Article 6(2) with regard to action of the Community institutions.

29. However, in this connection, I support the observations made by the Commission, which contends that those provisions have a purely confirmatory role. As the Court stated in its judgment in *Bosman and Others*,[6] regarding the principle of freedom of association, this 'is one of the fundamental rights which, as the Court has consistently held and as is reaffirmed in the preamble to the Single European Act and in Article F(2) of the Treaty on European Union, are protected in the Community legal order.' Article 6(2) of the present version of the Treaty on European Union is identical to the former Article F(2).

30. Second, the Cour de cassation points out that, in paragraph 18 of its judgment in *Hoechst* v *Commission*, cited above, the Court of Justice held that Article 8 of the Convention was concerned with the development of man's personal freedom and could not therefore be extended to business premises. Furthermore, the Court observed that there was still no case-law of the European Court of Human Rights on that subject.

31. Such case-law, however, the Cour de cassation points out, has now existed since the *Niemietz* judgment of 16 December 1992 and other subsequent judgments.

6 — Case C-415/93 *Bosman and Others* [1995] ECR I-4921.

32. However, it is also important to note that, in the above-mentioned judgment in *Hoechst* v *Commission*, the Court did not find that undertakings had no protection against arbitrary interventions, but stated that 'in all the legal systems of the Member States, any intervention by the public authorities in the sphere of private activities of any person, whether natural or legal, must have a legal basis and be justified on the grounds laid down by law, and, consequently, those systems provide, albeit in different forms, protection against arbitrary or disproportionate intervention. The need for such protection must be recognised as a general principle of Community law.' (paragraph 19).

33. However, since in the meantime the European Court of Human Rights has delivered the judgment *Niemietz*, and since the Court of Justice attaches the greatest importance to the case-law of that court, it is necessary to consider whether even greater protection should be accorded to the premises of legal persons.

34. I would recall, first of all, that Article 8 of the Convention is worded as follows:

'1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.'

35. Protection of the home is not, therefore, absolute. When the European Court of Human Rights found it necessary, in the *Niemietz* case, to examine an 'interference' within the meaning of Article 8(2), it considered in turn:

— whether there was an 'interference';

— whether such interference was in accordance with the law;

— whether it had legitimate aims;

— whether it was necessary in a democratic society.

1. The existence of an interference

36. There can be no doubt that an investigation carried out under Article 14(6) of Regulation No 17 does indeed constitute an interference within the meaning of Article 8 of the Convention.

37. However, it must be pointed out that, in paragraph 31 of its judgment in *Niemietz*, the European Court of Human Rights stated as follows:

'... to interpret the words "private life" and "home" as including *certain* professional or business activities or premises would be consonant with the essential object and purpose of Article 8 (art. 8), namely to protect the individual against arbitrary interference by the public authorities (see, for example, the Marckx v. Belgium judgment of 13 June 1979, Series A no. 31, p. 15, para. 31). Such an interpretation would not unduly hamper the Contracting States, for they would retain their entitlement to "interfere" to the extent permitted by paragraph 2 of Article 8 (art. 8-2); *that entitlement might well be more far-reaching where professional or business activities or premises were involved than would otherwise be the case*' [7].

38. This passage shows that, for the European Court of Human Rights, the professional or business sphere does not necessarily, or in every respect, deserve protection as extensive as that enjoyed by the private sphere. This could concern, in particular, the requirements which must be met by the act ordering the investigation, for example as regards the evidence which provides grounds for suspecting the existence of an infringement of competition law.

2. The interference must be *in accordance with the law*

39. An investigation carried out on the basis of Article 85 of the EC Treaty (now Article 81 EC) and on the basis of Regulation No 17 clearly does constitute an 'interference in accordance with the law'.

3. The interference must have *legitimate aims*

40. It has not been disputed during these proceedings, nor can it be disputed, that, when the Commission carries out investigations with a view to establishing the existence of agreements between undertakings, of decisions of associations of undertakings or of concerted practices which may fall under the prohibition laid down in Article 85 of the Treaty, such investigations constitute interferences having a legitimate aim.

7 — Emphasis added.

4. The interference must be *necessary* in a democratic society

41. In the case of agreements and concerted practices, the criteria to be adopted in that regard are clearly the 'economic well-being of the country' and the 'prevention of disorder'.

42. As the Court pointed out in its judgment in *National Panasonic*, [8] cited in paragraph 25 of *Hoechst* v *Commission*, the function of the relevant rules of Community law is 'to prevent competition from being distorted to the detriment of the public interest, individual undertakings and consumers.'

43. It may therefore be said that, in principle, investigations carried out under Regulation No 17 are 'necessary' within the meaning of Article 8 of the Convention.

44. However, the criterion of the necessity of the investigation must be fulfilled in each specific case. In this connection, the European Court of Human Rights, in paragraph 55 of its judgment in *Funke* v *France*, [9] expressed itself as follows:

'[T]he Court has consistently held that the Contracting States have a certain margin of appreciation in assessing the need for an interference, but it goes hand in hand with European supervision. The exceptions provided for in paragraph 2 of Article 8 (art. 8-2) are to be interpreted narrowly (see the Klass and Others v. Germany judgment of 6 September 1978, Series A no. 28, p. 21, para. 42), and the need for them in a given case must be convincingly established.'

45. In that regard, it should be stressed that, within the Community, the necessity for an investigation — that is to say, whether or not the arguments put forward by the Commission to justify it are convincing — is, each time it is disputed, subject to the review by the Court of Justice (paragraph 35 of the judgment in *Hoechst* v *Commission*).

46. It should be added that it in no way follows from the above-mentioned judgments of the European Court of Human Rights that the court with jurisdiction to evaluate that necessity must have given its ruling before the search takes place. Admittedly, I do consider that it would be

8 — Case 136/79 *National Panasonic* [1980] ECR 2033, paragraph 20.

9 — Application No 0001 0828/84, A256-A.

preferable for that to be the case. That is why I had already proposed, in my Opinion in *Hoechst* v *Commission* (points 146 and 147), that a search warrant could be granted to the Commission's officials by the Court of Justice (or, now, by the Court of First Instance). However, such a procedure could only be introduced by legislation.

47. Nevertheless, the fact that, at present, the necessity for the search can only be reviewed *a posteriori* does not seem to me to pose a problem from the point of view of the protection of fundamental rights, since the Court expressly acknowledges that results obtained on the basis of a warrant or decision which is subsequently declared unlawful cannot be used. I would observe, furthermore, that in France, too, a search may take place before the supreme judicial authority has ruled on its justification, since an appeal in cassation against an order authorising a search in the context of competition does not have suspensory effect.

48. In the light of all the foregoing considerations, I come to the same conclusion as the French and the United Kingdom Governments, and also the Commission, which is that neither the amendments made to the Treaty on European Union by the Treaty of Amsterdam nor the judgments of the European Court of Human Rights which have touched on the question of the application of the principle of the inviolability of the home to business premises, are such as to call in question the principles resulting from the judgment in *Hoechst* v *Commission*. Those principles accord undertakings protection equivalent to that which the European Court of Human Rights infers from Article 8 of the Convention.

49. That said, it still remains for me to examine in greater detail what is really at issue in the questions referred by the Cour de cassation, namely who is responsible for carrying out the judicial review and, in particular, what must be the role of the national court in that process.

B — *The role of the national court in the review process*

50. According to Roquette,

'applications emanating from the Commission for an order authorising entry and seizure are not exempt from the French national court's exercise of its power of review and assessment and... they must therefore comply with the requirements to produce specific documents or give a specific explanation in order to be justified.

It also appears that a Commission decision taken on the basis of Article 14 of Regulation No 17 is one of the elements submitted for assessment by the court, which it may hold to be adequate if the measure is sufficiently explicit, or to require further explanation if this is not the case.

It also seems that this purely factual review carried out by the court does not affect either the exclusive jurisdiction of the Community courts or the effectiveness of the Commission's work.

Consequently, Roquette submits that the court may refuse to make an order authorising entry and seizure where, as the Cour de cassation pointed out was the situation in the present case, "no information or evidence has been put before it"'.

51. What are we to make of this argument?

52. Let me stress, at the outset, that I consider it essential, from the point of view of consistency in the implementation of Community law, that the review of the necessity (or justification) for the investigations remain within the jurisdiction of the Court of Justice and that it should not be transferred to the courts or tribunals of the Member States.

53. First of all, it clearly follows from Article 173 of the EC Treaty (now, after amendment, Article 230 EC), that only the Court of Justice may review the legality of acts adopted by the institutions. The Commission's decisions relating to investigation operations are unquestionably decisions within the meaning of Article 189 of the EC Treaty (now Article 249 EC).

54. The principle that acts of the institutions can be annulled only by the Community courts (the Court of Justice or the Court of First Instance) is the sole principle that can ensure that those acts are judged in accordance with uniform criteria. That principle alone can prevent an act of the institutions from being declared unlawful in one Member State but not in another. In that connection, it is sufficient to refer to the judgment in *Foto-Frost*, [10] which has been most opportunely cited by the United Kingdom Government and to which I had already referred in my Opinion in *Hoechst* v *Commission*.

55. It is true that Roquette maintained at the hearing that it was not a question of annulling an act of the Commission but only of blocking its execution momentarily pending the supply of further information by the Commission. The fact is, however, that the Cour de cassation has very clearly posed the problem in terms of an inadequate statement of reasons for the Com-

10 — Case 314/85 *Foto-Frost* [1987] ECR 4199.

mission's decision and, therefore, in terms of the illegality of that decision. It is the questions referred by the Cour de cassation that this Court is called upon to answer.

56. In any event, if one looks carefully at Roquette's observations, it seems undeniable that that undertaking is indeed demanding that the national judge be entitled to verify the need or the justification for the search. Merely by asking the Commission for further information, he is making it clear, in fact, that the information initially contained in the decision or presented to him orally has not persuaded him that the search is necessary. When, some hours later or some weeks later (in the case of an amendment to the decision itself), further evidence is submitted to him and, on that basis he grants the authorisation, he is thereby indicating, at least implicitly, 'I am now convinced that the search is necessary'. But he could also state that he is still not convinced.

57. Moreover, the mere fact of delaying the grant of the authorisation, if only for a few hours, could have a devastating effect where parallel searches have to take place in different undertakings in the same sector, located in several Member States. In that case, news of the searches taking place in the other Member States, on the date initially specified, would quickly reach the undertaking situated in the Member State in which the authorisation is momentarily blocked, and would enable it to destroy all trace of the unlawful agreement or concerted practice.

58. For all those reasons, I therefore conclude that it is important to uphold resolutely the principle that the assessment of the justification, that is to say, of the necessity, for the investigation cannot be a matter for the national court.

59. That said, I have to say that I fully understand the concerns of the Cour de cassation, confronted with the national legislation cited above. That legislation extends to the investigations carried out by the Commission the substantive and procedural provisions which are applicable when only French competition law is in point. It is perfectly normal that French law should provide that the judge who authorises a search must be convinced that it is justified and must have sufficient evidence before him for that purpose. The decision whether or not to authorise the search rests essentially with that judge, since the Cour de cassation carries out a review on points of law only. The facts must therefore be properly ascertained by the President of the Tribunal de grande instance and the Cour de cassation must be in a position to judge whether, in holding those facts to be sufficient, the President of the Tribunal de grande instance erred in law.

60. However, the position is different in Community law, since, in that case, review of the necessity for the search is a matter for the Court of Justice, and it alone. It is to this Court that it falls, when it is seised by the undertaking in question, to verify scrupulously whether the Commission, before taking its decision, had before it sufficiently strong indications of the probable existence of an unlawful agreement or concerted practice. The Commission will have to submit to the Community court all such information as may establish that the search was justified. I would repeat that, if it fails to do so, the Court will annul the decision and the Commission will be prohibited from using any documents it has photocopied and also any information it has obtained orally from the undertaking's employees.

61. Must it be concluded from all this that the sole task of the national court will be to ascertain whether the decision before it does indeed emanate from the Commission and whether the persons who wish to carry out the investigation have documents proving that they have in fact been authorised by the Commission to do so?

62. Like the French and United Kingdom Governments and the Commission, I consider that the role of the national court goes a little beyond that, but that it does not go as far as Roquette and the other governments which have submitted observations seem to think.

63. A distinction has to be made, in my view, between the review which the national court may carry out in order to establish that the investigation is not arbitrary or disproportionate, and review of the conduct of the investigation/search itself.

64. As regards the first point, the *Commission* contends that it is possible to maintain, first of all, that, to the extent to which review of the statement of reasons forms part of the review of legality, it falls within the exclusive jurisdiction of the Community courts.

65. The Commission concedes, however, that an absolute impossibility for the national court to review the statement of reasons for the decision ordering the investigation seems hard to reconcile with the possibility, afforded to it by the judgment in *Hoechst* v *Commission*, to assess the possibly arbitrary or excessive nature of the measures envisaged. Such an assessment necessarily presupposes an analysis by the national court of the subject-matter and purpose of the investigation, which, moreover, the Commission points out, in fact comprise one of the essential constituents of the statement of reasons on which the Commission decision is based. [11]

66. Nevertheless, the Commission submits that the analysis of the statement of reasons

11 — See Article 14(3) of Regulation No 17 and paragraph 40 of the judgment in *Hoechst* v *Commission*.

by the national court must be confined to what is strictly necessary to enable it to exercise the limited power of assessment reserved to it by the judgment in *Hoechst* v *Commission*.

67. It contends, in that regard, that the question whether the coercive measures envisaged are arbitrary or excessive must be assessed exclusively in the light of the subject-matter of the investigation, [12] so that it is sufficient if the national court is informed of the suspected infringement and of its context (market position of the undertaking involved, risk of concealment of documents, possibility of pressure being exerted, etc.).

68. Thus, according to the Commission, the national court could legitimately refuse to grant the authorisation requested if the Commission decision did not contain any of the elements mentioned above, or if the description of the conduct complained of is so imprecise, or lacking, that it renders impossible any assessment of the possibly excessive or arbitrary nature of the measures envisaged, or, again, if the subject-matter of the investigation is worded in terms which are manifestly too vague (for example, 'to ascertain whether an undertaking has engaged in anti-competitive practices') to enable it to carry out the review entrusted to it.

12 — See the judgment in *Hoechst* v *Commission*, paragraph 29.

69. The *French Government* contends that the competent national court may refuse to authorise the entries and seizures applied for if the information submitted to it does not enable it to exercise its power of review as defined in the judgment in *Hoechst* v *Commission*. Nevertheless, the competent national court cannot refuse to grant authorisation for the entries and seizures applied for — without improperly impairing the effectiveness of the Commission's action — if the essential constituents of a statement of reasons, as prescribed in Article 14(3) of Regulation No 17, have been placed before it.

70. Referring to paragraphs 40 and 41 of the judgment in *Hoechst* v *Commission*, the French Government contends that the Court previously brought the scope of the obligation to state reasons under Article 190 of the EC Treaty (now Article 253 EC) into line with that established in Article 14(3) of Regulation No 17 by stating that the Commission must specify the subject-matter and purpose of the investigation, while adding that '[although] the Commission is not required to communicate to the addressee of a decision ordering an investigation all the information at its disposal concerning the presumed infringements, or to make a precise legal analysis of those infringements, it must none the less clearly indicate the presumed facts which it intends to investigate.'

71. The French Government points out that, in *Hoechst* v *Commission*, the Court had held, in that connection, that the

statement of reasons for the decision ordering the investigation could be worded in 'very general terms' without this affecting its legality.

72. In practice, the information given in support of an application for authorisation made to the court is the information contained in the Commission's decision, so that the distinction between those two acts seems rather artificial for the purposes of the review of the statement of reasons carried out by the national court.

73. However, the decision in *Hoechst* v *Commission* still does not enable the national court to ascertain what is the information on the basis of which it is to examine the proportionality of the coercive measures envisaged in relation to the subject-matter of the investigation, as is shown, in particular, by the order for reference. According to the French Government, the practical difficulties with which the national courts are thus faced make it necessary to have a definition that is as precise as possible, if not exhaustive, of the scope of the requirement to provide a statement of the reasons on which a decision ordering an investigation is based.

74. That statement of reasons could thus be broken down into three categories of information. First, information about the undertakings in question (name and address of the undertaking, address of the premises to be entered). Next, information relating to the precise nature of the suspected practices (agreement or concerted practice on prices, sharing of markets, etc.) enabling the court to assess the scope of the investigation. The information relating to the possibly secret nature of those practices should also be provided so that the court may take this factor into account when assessing the proportionality of the coercive measures envisaged in relation to the subject-matter of the investigation. From the secrecy of the practices the court might infer that the undertaking is sufficiently organised for it to be presumed that it has a strategy of concealment which might lead it to resist the investigation. Finally, a last category of information — relating to the products or services in respect of which it is suspected that anti-competitive practices exist — must, as is already clear from the case-law of the Court, be contained in a decision ordering an investigation.

75. The *United Kingdom Government* maintains that the national court cannot refuse to grant the requested authorisation on the ground that it considers that the Commission's decision to investigate does not state sufficient reasons to enable the national court to ascertain whether the decision is justified.

76. First, that government submits that it is well established that the requirements of national law — even national constitutional law — cannot qualify or remove a

duty arising under Community law and must be disapplied to the extent that they conflict with that duty. [13]

77. Second, it also points out, as does the French Government, that Article 14(3) of Regulation No 17 itself lays down the essential constituents of the statement of the reasons upon which a decision ordering an investigation is based, amongst them the subject-matter and purpose of the investigation, and that the Commission is required, moreover, in the terms of paragraph 41 of the judgment in *Hoechst* v *Commission*, to indicate clearly the presumed facts which it intends to investigate.

78. However, the review of the factual or legal basis of a Commission decision ordering an investigation is a matter for the Court of Justice.

79. The *German Government* contends that the national court may refuse to grant the authorisation if the Commission, in the statement of the reasons for its decision or by production of documents, does not make detailed reference to the nature and content of the information in its possession relating to the undertaking concerned and forming the basis for its suspicion that there is an infringement of Article 85(1) of the Treaty. However, the Commission is not obliged to produce documents, be they originals or copies, of an evidentiary nature or to disclose the identity of any informants. However, the review by the national court must not become an empty shell for lack, for example, of any specific information regarding the basis for the Commission's suspicions.

80. The *Greek Government*, for its part, states that if a decision ordering an investigation does not mention the subject-matter and purpose and give sufficient indications to justify an investigation on the premises of an undertaking, and does not enable the national court to ascertain that all the safeguards provided by national law are respected, that court has the power to refuse to grant the requested authorisation.

81. The *Italian Government* considers that the national court is required to assess whether the coercive measures are arbitrary or disproportionate in relation to the aim of the investigation and if the appropriateness of the inspection is evident from the reasoning followed by the Commission in its decision, reasoning which is necessarily based on the indication of information or evidence designed to show the subject-matter and purpose of the investigation (paragraph 29 of the judgment in *Hoechst* v *Commission*).

13 — See the judgment in Case C-213/89 *Factortame* [1990] ECR I-2433, paragraphs 17 to 20.

82. The *Norwegian Government* which, like the German Government, confines itself to answering the first question referred for a preliminary ruling and which therefore refers to all the information to be supplied by the Commission through its decision and as a supplement to it, contends that it is for the Commission to provide a prima facie justification, that is to say that the competent national court may require a minimum of information or evidence to enable it to examine whether the coercive measures envisaged are arbitrary or excessive in relation to the subject-matter of the investigation.

83. That Government acknowledges, however, that unlawful anti-competitive practices are often engaged in by using methods which do not leave many traces. Requests to the Commission for information regarding the basis for the suspicions it harbours must not, therefore, be too exacting. The information available will normally only be indications of infringement of the competition rules and that ought to be enough to give rise to an investigation. It must be borne in mind that the very aim of the investigations carried out on the premises of undertakings is to gather evidence which ordinarily will not be found. It would be illogical to require factual evidence to be submitted to the national reviewing authority before an actual investigation has taken place.

84. For my part, I wholly concur with these last observations. I also find that the expression 'prima facie justification' used by the Norwegian Government is judicious, but, unlike that government, I consider that that justification must emerge from the Commission's decision and from it alone.

85. If it is desired to avoid sliding towards a situation in which the necessity for the investigation is reviewed by the national court, that court must not be entitled to call for additional explanations. Its role must be limited, as the Commission states, 'exclusively to review for truly patent interferences with the rights of the undertakings concerned. What this amounts to is, in one form or another, review for "manifest error"'. Elsewhere in it observations, the Commission states that the review concerned is what in French law is called a 'minimum review'.

86. However, I should like to add the following further observation, which should meet, at least in part, the concerns of the German, Italian and Norwegian Governments. I think, that, to the extent to which the Commission is in a position — without disclosing its sources and without causing harm to third parties — to provide indications concerning the *evidence on which it relies*, it must do so.

87. I shall illustrate this point of view with the help of the decision at issue in the main proceedings.

88. The decision contains the 'essential constituents of the statement of the reasons' [14] defined in Article 14(3) of Regulation No 17. It describes, with sufficient precision, the subject-matter and purpose of the investigation and clearly states 'the presumed facts which it intends to investigate'. [15]

89. But it also contains an additional element which did not have its counterpart in the decision at issue in the *Hoechst* judgment, [16] namely that 'the Commission has information to the effect that the officers of the aforementioned undertaking *held regular meetings with competitors*, [17] during which shares of the... market were allocated and minimum prices agreed...'.

90. Further on, the Commission decision continues as follows: '[T]he Commission has information according to which these contacts with competitors extended also to glucono-delta-lactone. In particular, *bi- or multilateral talks* were held, *often on the fringe of the meetings* [18] relating to sodium gluconate (before or after them, or during breaks). On those occasions, the participants exchanged information relating to the market, market prices and demand....'.

91. As the national court states in its second question that the Commission's decision 'does not state sufficient reasons... and does not enable [the national court] to verify whether, in the specific circumstances, the application before it is justified...', we are entitled to assume that the Cour de cassation considers that the Commission should have inserted in its decision additional indications concerning the dates or frequency of those meetings, and the reasons which led it to think that the anti-competitive measures mentioned in that decision were indeed discussed and probably adopted during those meetings.

92. That would require the Commission to disclose, at least to some degree, the identity of its informants, who will more often than not be employees [19] or former employees of one of the undertakings party to the agreement or concerted practice or even the officers of one of those undertakings, which hoped to benefit from 'clemency' measures on the part of the Commission.

14 — See the judgment in *Hoechst* v *Commission*, paragraph 40.

15 — See the judgment in *Hoechst* v *Commission*, paragraph 41.

16 — The decision at issue in the judgment in *Hoechst* v *Commission* was worded as follows: '[T]he Commission has received information giving grounds for suspecting that...' ('die den Verdacht begründen, dass...') without giving any other details of the information on which its suspicions were based.

17 — Emphasis added.

18 — Emphasis added.

19 — The judgments in Cases 145/83 *Adams* v *Commission* [1985] ECR 3539, 53/84 *Adams* v *Commission* [1985] ECR 3595 and 294/84 *Adams* v *Commission* [1986] ECR 977, showed to what human tragedies and to what a flood of proceedings the disclosure, even accidental, of the name of an informant could give rise.

93. On the other hand, if, as the Norwegian Government mentions, the Commission had found the existence on the market of virtually parallel price changes put into operation by all the manufacturers in the sector, or if the industries using the products in question had, as was the case in regard to the cartel in the cartonboard sector, lodged with the Commission a complaint which they themselves publicised in the press, there would obviously be no reason why the Commission should not take note of this in its decision. However, that occurs only in exceptional cases.

94. I therefore firmly adhere to the view that, in the text of its decision, the Commission must, indeed, clearly indicate the presumed facts which it intends to investigate, but that it has to back them up them with evidence only to the extent to which the citation of that evidence does not reveal the Commission's sources of information or cause harm to third parties.

95. It is therefore inevitable that, in many cases, the Commission will be obliged to confine itself to stating that 'the information in its possession shows' that the undertaking in question has probably participated in the adoption of anti-competitive measures of such and such a kind for such and such products.

96. That said, the Commission could, out of courtesy, reply to any additional questions asked by the national court provided that this could be done in absolute secrecy. However, as the Commission pointed out at the hearing, in France, at least, disclosure of the documents which were shown to the judge cannot be refused to the parties during the proceedings in cassation. Furthermore, I think it can be inferred from the judgments of the Cour de cassation that, in his order, the President of the Tribunal de grande instance must summarise all the oral statements made before him which helped to justify, in his eyes, the grant of authorisation to carry out a search.

97. Let us now turn to the second aspect of the role of the national court, namely, review of the investigation procedure itself.

98. In support of its argument, Roquette lays great stress on two passages from paragraph 35 of the judgment in *Hoechst* v *Commission*, which are formulated as follows:

'[T]he Commission must make sure that the competent body under national law has all that it needs to exercise its own supervisory powers'.

'... it is within the powers of the national body, after satisfying itself that the decision ordering the investigation is authentic, to consider whether the measures of con-

straint envisaged are arbitrary or excessive having regard to the subject-matter of the investigation and to ensure that the rules of national law are complied with in the application of those measures.'

99. As regards the first passage, the one relating to the 'information' ['éléments'] [20] which the competent body must have, this is immediately followed by the sentence '[I]t should be pointed out that that body, whether judicial or otherwise, cannot in this respect substitute its own assessment of the need for the investigations ordered for that of the Commission, the lawfulness of whose assessments of fact and law is subject only to review by the Court of Justice.' It follows from the sequence of those two sentences that 'the information' to be supplied to the national court cannot mean all the evidence and confidential information in the Commission's possession, which is, in any event, excluded by paragraph 41 of the judgment in *Hoechst* v *Commission*. It can therefore only mean the information which the national court needs in order to carry out its own task, which is defined in paragraph 34 of that judgment, and which is to ensure observance of 'the... procedural guarantees laid down by national law.'

100. By 'procedural guarantees' the Court was clearly referring to the national rules designating the competent court and the form in which that court must adopt its decision. Those guarantees may also include specifying the precise addresses of the various premises of the undertaking on which the investigation is to be carried out, the date and time on which it will take place, the identity of the Commission's officials and the national officials who will carry it out and other practical details of that order which might be required under national law.

101. As regards the second passage cited by Roquette, this concerns, as the United Kingdom Government and the Commission rightly pointed out at the hearing, only the way in which the coercive measures may be carried out. For that purpose, the national judge may, if allowed or required to do so by national law, attend the investigation himself. He may order the police officers accompanying the Commission's officers to force the locks of doors, cupboards or vehicles only if the employees of the undertaking refuse to open them, for, otherwise, the coercive measures would be arbitrary or excessive. As the United Kingdom Government stated, the national judge may point out that the undertaking has the right to send for its in-house lawyer (provided this does not cause a delay which might be used for destroying evidence) and that the employees have the right not to make statements or give answers which may incriminate the undertaking.

102. To sum up, it is for the national court to ensure that physical coercive measures are not used when the attitude of the officers of the undertaking does not warrant it, and, generally, to ensure that the investigation is carried out in accordance with the rules in force in the State in question.

20 — Translator's note: The passage in *Hoechst* v *Commission*, to which the Advocate General refers, and from which he cites in the French text, in inverted commas, the word 'éléments', reads 'tous les éléments nécessaires pour' (literally, in English, in the context in question, 'all the information that it needs to'). In the ECR this is contracted to 'all that it needs to', the French word 'éléments' not being specifically rendered.

Conclusion

103. On the basis of all the foregoing considerations, I propose that the Court should reply to the two questions which the Cour de cassation of the French Republic has referred to it for a preliminary ruling by giving the single answer suggested by the Commission, namely:

Having regard to the fact that decisions of the Commission of the European Communities ordering an investigation, adopted on the basis of Article 14 of Regulation No 17 of the Council of 6 February 1962, First Regulation implementing Articles 85 and 86 of the Treaty, are subject to judicial review by the Court of Justice of the European Communities, which recognises the general principle of the protection of all persons, whether natural or legal, against arbitrary or disproportionate intervention by the public authorities, Article 14(6) of Regulation No 17 must be interpreted as meaning that the national court with jurisdiction to rule on a request for assistance submitted by the Commission under that provision

— may not require the disclosure of the information or evidence on which the Commission has based its decision ordering an investigation, nor may it review the veracity and relevance of that material;

— may not refuse to grant the requested authorisation unless the subject-matter and purpose of the investigation are not indicated in the Commission's decision or are described in a manner which is manifestly too imprecise to enable the court to carry out the review of proportionality with which it is entrusted.