

JUDGMENT OF THE COURT  
17 October 1989 \*

In Case 85/87

**Dow Benelux NV**, formerly Dow Chemical (Nederland) BV, a company incorporated under Netherlands law, whose registered office is in Rotterdam, represented by P. V. F. Bos, of the Rotterdam Bar, with an address for service in Luxembourg at the Chambers of Marc Loesch, 8 rue Zithe,

applicant,

v

**Commission of the European Communities**, represented by René Barents, a member of its Legal Department, and Norbert Koch, Legal Adviser, acting as Agents, with an address for service in Luxembourg at the office of Georgios Kremliis, a member of its Legal Department, Wagner Centre, Kirchberg,

defendant,

APPLICATION for a declaration that the Commission Decision of 15 January 1987 (C(87)19/10) concerning an investigation under Article 14(3) of Regulation No 17 of the Council of 6 February 1962 (Official Journal, English Special Edition 1959-62, p. 87), adopted in Cases IV/31.865 — PVC, and IV/31.866 — Polyethylene, is void,

THE COURT

composed of: O. Due, President, Sir Gordon Slynn, C. N. Kakouris, F. A. Schockweiler and M. Zuleeg (Presidents of Chambers), T. Koopmans, G. F. Mancini, R. Joliet, T. F. O'Higgins, J. C. Moitinho de Almeida, G. C. Rodríguez Iglesias, F. Grévisse and M. Diez de Velasco, Judges,

Advocate General: J. Mischo

Registrar: B. Pastor, Administrator

having regard to the Report for the Hearing and further to the hearing on 8 December 1988,

\* Language of the case: Dutch.

after hearing the Opinion of the Advocate General delivered at the sitting on 21 February 1989,

gives the following

### Judgment

1 By application lodged at the Court Registry on 23 March 1987, Dow Chemical (Nederland) BV (now Dow Benelux NV) brought an action under the second paragraph of Article 173 of the EEC Treaty for a declaration that the Commission Decision of 15 January 1987 (C(87)19/10) concerning an investigation under Article 14(3) of Regulation No 17 of the Council of 6 February 1962, the First Regulation implementing Articles 85 and 86 of the Treaty (Official Journal, English Special Edition 1959-62, p. 87), adopted in Cases IV/31.865 — PVC, and IV/31.866 — Polyethylene, is void.

2 Having grounds for suspecting the existence, as between certain producers and suppliers of PVC and polyethylene in the Community, of agreements or concerted practices concerning the fixing of prices and delivery quotas for those products, the Commission decided to carry out an investigation into several undertakings, including the applicant in respect of which it adopted the contested decision.

3 The investigation was carried out on 20 and 21 January 1987. The applicant's representatives assisted the Commission's officials but raised objections and made protests in regard both to the contents of the decision and the conduct of the Commission's officials during the investigation.

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

- 5 In support of its application, the applicant relies on three submissions alleging, principally, the defective nature of the statement of the reasons on which the contested decision is based, in the alternative, the lack of reasonable or proper evidence as to whether or not the investigation was well founded and, in the further alternative, an infringement of the fundamental right to the inviolability of the home and the unlawful implementation of the decision.

### **Defective statement of reasons**

- 6 According to the applicant, the contested decision does not fulfil the requirements regarding the statement of the reasons on which measures are based laid down in Article 190 of the Treaty and Article 14(3) of Regulation No 17, in particular, because it contains an incorrect definition of the relevant market, fails to provide any geographical definition of that market, does not provide an adequate description of the presumed infringements and contains no indication as to the period during which those infringements were supposedly committed.
- 7 It should be pointed out that, as the Court held in its judgment of 26 June 1980 in Case 136/79 *National Panasonic v Commission* [1980] ECR 2033, paragraph 25, 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 by providing that it 'shall specify the subject-matter and the purpose of the investigation, appoint the date on which it is to begin and indicate the penalties provided for in Article 15(1)(c) and Article 16(1)(d) and the right to have the decision reviewed by the Court of Justice'.
- 8 As the Court held recently in its judgment of 21 September 1989 in Joined Cases 46/87 and 227/88 *Hoechst v Commission* [1989] ECR 2859, paragraph 41, the Commission's obligation to specify the subject-matter and purpose of the investigation constitutes a fundamental guarantee of the rights of the defence of the undertakings concerned. It follows that the scope of the obligation to state the reasons on which decisions ordering investigations are based cannot be restricted on the basis of considerations concerning the effectiveness of the investigation.
- 9 In the same judgment, the Court also stated 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, it must none the less clearly indicate the presumed facts which it intends to investigate.

10 In the light of the foregoing considerations, the applicant's complaints concerning the statement of the reasons on which the contested decision is based must be rejected. It is not indispensable for a decision ordering an investigation to delimit precisely the relevant market, to set out the exact legal nature of the presumed infringements and to indicate the period during which those infringements were committed provided that it contains the essential information set out above.

11 In that regard, it should be noted that although the statement of the reasons on which the contested decision is based is drawn up in very general terms which might well have been made more precise, and is, therefore, open to criticism in that respect, it none the less contains the essential indications prescribed by Article 14(3) of Regulation No 17. The decision at issue refers in particular to information suggesting the existence and application of agreements or concerted practices between certain producers and suppliers of PVC and polyethylene (including, but not limited to, LdPE) in the EEC, concerning prices, quantities or sales targets for those products. It states that those agreements and practices may constitute a serious infringement of Article 85(1) of the Treaty. According to Article 1 of the decision in question, the applicant 'is required to submit to an investigation concerning its possible participation' in those agreements or concerted practices and, consequently, to give the Commission's officials access to its premises and to produce or allow copies to be made for the purpose of inspection of business documents 'related to the subject-matter of the investigation'.

12 It follows from the foregoing that the submission alleging that the statement of the reasons on which the decision is based is defective must be rejected.

**The submission alleging the lack of reasonable or proper evidence that the investigation was well founded**

13 In its application and reply, the applicant claims that the contested decision infringes Article 14(3) of Regulation No 17 inasmuch as it does not contain any 'reasonable evidence' justifying an investigation. The Commission's silence in that regard shows that, either it did not have any information or evidence, or what it had did not constitute reasonable evidence or had been obtained unlawfully.

- 14 Since it had subsequently discovered that the Commission had adopted the contested decision on the basis of information obtained during investigations carried out into other undertakings on 13 and 14 October 1983, concerning a suspected polypropylene cartel, the applicant claims that the Commission infringed Articles 14 and 20 of Regulation No 17 by using the said information for a purpose other than that for which the investigations were carried out.
- 15 The applicant asks for leave to rely on those facts, of which it became aware after the end of the written procedure but before the hearing, either as a procedural issue under Article 91 of the Rules of Procedure or as new facts on the basis of Article 42(2) of the said rules.
- 16 With regard to the submission as originally made, it is sufficient to note that the applicant's argument, which is in effect that the Commission is obliged under Article 14(3) of Regulation No 17 to indicate in a decision ordering an investigation all the information in its possession concerning the presumed infringements, has already been rejected by the Court in its consideration of the submission that the statement of reasons was defective.
- 17 With regard to the complaint concerning the improper use of information obtained during the investigations carried out on 13 and 14 October 1983, it should be pointed out that it does indeed follow from Article 20(1) and Article 14(3) of Regulation No 17 that information obtained during investigations must not be used for purposes other than those indicated in the order or decision under which the investigation is carried out.
- 18 As has been pointed out above, in addition to professional secrecy, expressly mentioned in the aforesaid Article 20, that requirement is intended to protect the rights of the defence of undertakings, guaranteed by Article 14(3). Those rights would be seriously endangered if the Commission could rely on evidence against undertakings which was obtained during an investigation but was not related to the subject-matter or purpose thereof.

19 On the other hand, it cannot be concluded that the Commission is barred from initiating an inquiry in order to verify or supplement information which it happened to obtain during a previous investigation if that information indicates the existence of conduct contrary to the competition rules in the Treaty. Such a bar would go beyond what is necessary to protect professional secrecy and the rights of the defence and would thus constitute an unjustified hindrance to the performance by the Commission of its task of ensuring compliance with the competition rules in the common market and to bring to light infringements of Articles 85 and 86 of the Treaty.

20 In this case, the applicant's complaint is directed precisely against the fact that the Commission relied on information obtained during earlier investigations having a different subject-matter in order to open a new inquiry concerning infringements of the competition rules in the Treaty. It follows from the foregoing that the complaint must be rejected.

21 Without it being necessary to consider the admissibility of the application concerning a procedural issue submitted by the applicant in that regard, therefore, the submission alleging the lack of reasonable or proper evidence that the investigation was well founded must be rejected.

**The submission alleging an infringement of the fundamental right to the inviolability of the home and the unlawful implementation of the contested decision**

22 The applicant considers that the contested decision is unlawful inasmuch as it permitted the Commission's officials to take steps which the applicant describes as a search, which are not provided for under Article 14 of Regulation No 17 and which infringe fundamental rights recognized by Community law. It adds that if that provision is to be interpreted as empowering the Commission to carry out searches, it is unlawful on the ground that it is incompatible with fundamental rights, for the protection of which it is necessary that searches should be carried out only on the basis of a judicial warrant obtained in advance. It also argues, merely in the alternative, that in the contested decision the Commission infringed Article 14 of Regulation No 17 inasmuch as it exceeded its investigatory powers and in fact carried out a search.

- 23 The Court has recently pointed out (judgment of 21 September 1989 in *Hoechst*, cited above) that Article 14 of Regulation No 17 cannot be interpreted in such a way as to give rise to results which are incompatible with the general principles of Community law and in particular with fundamental rights.
- 24 The Court has consistently held that fundamental rights are an integral part of the general principles of law the observance of which the Court ensures, in accordance with constitutional traditions common to the Member States, and the international treaties on which the Member States have collaborated or of which they are signatories (see, in particular, the judgment of 14 May 1974 in Case 4/73 *Nold v Commission* [1974] ECR 491). The European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 (hereinafter referred to 'the European Convention on Human Rights') is of particular significance in that regard (see, in particular, the judgment of 15 May 1986 in Case 222/84 *Johnston v Chief Constable of the Royal Ulster Constabulary* [1986] ECR 1651).
- 25 In interpreting Article 14 of Regulation No 17, regard must be had in particular to the rights of the defence, a principle whose fundamental nature has been stressed on numerous occasions in the Court's decisions (see, in particular, the judgment of 9 November 1983 in Case 322/81 *Michelin v Commission* [1983] ECR 3461, paragraph 7).
- 26 In that judgment, the Court pointed out that the rights of the defence must be observed in administrative procedures which may lead to the imposition of penalties. But it is also necessary to prevent those rights from being irremediably impaired during preliminary inquiry procedures including, in particular, investigations which may be decisive in providing evidence of the unlawful nature of conduct engaged in by undertakings for which they may be liable.
- 27 Consequently, although certain rights of the defence relate only to the contentious proceedings which follow the delivery of the statement of objections, other rights, such as the right to legal representation and the privileged nature of correspondence between lawyer and client (recognized by the Court in the judgment of 18 May 1982 in Case 155/79 *AM & S v Commission* [1982] ECR 1575) must be respected as from the preliminary-inquiry stage.

28 With regard to the requirements stemming from the fundamental right to the inviolability of the home, on which the applicant has also relied, it should be observed that, although the existence of such a right must be recognized in the Community legal order as a principle common to the laws of the Member States in regard to the private dwellings of natural persons, the same is not true in regard to undertakings, because there are not inconsiderable divergences between the legal systems of the Member States in regard to the nature and degree of protection afforded to business premises against intervention by the public authorities.

29 No other inference is to be drawn from Article 8(1) of the European Convention on Human Rights which provides that: 'Everyone has the right to respect for his private and family life, his home and his correspondence'. The protective scope of that article is concerned with the development of man's personal freedom and may not therefore be extended to business premises. Furthermore, it should be noted that there is no case-law of the European Court of Human Rights on that subject.

30 None the less, 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 recognized as a general principle of Community law. In that regard, it should be pointed out that the Court has held that it has the power to determine whether measures of investigation taken by the Commission under the ECSC Treaty are excessive (judgment of 14 December 1962 in Joined Cases 5 to 11 and 13 to 15/62 *San Michele and Others v Commission* [1962] ECR 449).

31 The nature and scope of the Commission's powers of investigation under Article 14 of Regulation No 17 should therefore be considered in the light of the general principles set out above.

32 Article 14(1) authorizes the Commission to undertake all necessary investigations into undertakings and associations of undertakings and provides that: "To this end the officials authorized by the Commission are empowered:

- (a) to examine the books and other business records;
- (b) to take copies of or extracts from the books and business records;
- (c) to ask for oral explanations on the spot;
- (d) to enter any premises, land and means of transport of undertakings'.

33 Article 14(2) and (3) provide that investigations may be carried out upon production of an authorization in writing or of a decision requiring undertakings to submit to the investigation. As the Court has already decided, the Commission may choose between those two possibilities in the light of the special features of each case (judgment of 26 June 1980 in *National Panasonic*, cited above). Both the written authorizations and the decisions must specify the subject-matter and purpose of the investigation. Whichever procedure is followed, the Commission is required to inform, in advance, the competent authority of the Member State in whose territory the investigation is to be carried out and, according to Article 14(4), that authority must be consulted before the decision ordering the investigation is adopted.

34 According to Article 14(5), the Commission's officials may be assisted in carrying out their duties by officials of the competent authority of the Member State in whose territory the investigation is to be made. Such assistance may be provided either at the request of that authority or of the Commission.

35 Finally, according to Article 14(6), the assistance of the national authorities is necessary for the carrying out of the investigation where it is opposed by an undertaking.

36 As the Court pointed out in the abovementioned judgment of 26 June 1980 (*National Panasonic*, paragraph 20), it follows from the seventh and eighth recitals in the preamble to Regulation No 17 that the aim of the powers given to the

Commission by Article 14 of that regulation is to enable it to carry out its duty under the EEC Treaty of ensuring that the rules on competition are applied in the common market. The function of those rules is, as follows from the fourth recital in the preamble to the Treaty, Article 3(f) and Articles 85 and 86, to prevent competition from being distorted to the detriment of the public interest, individual undertakings and consumers. The exercise of the powers given to the Commission by Regulation No 17 thus contributes to the maintenance of the system of competition intended by the Treaty with which undertakings are absolutely bound to comply. The eighth recital states that for that purpose the Commission must be empowered, throughout the common market, to require such information to be supplied and to undertake such investigations 'as are necessary' to bring to light any infringement of Articles 85 or 86.

37 Both the purpose of Regulation No 17 and the list of powers conferred on the Commission's officials by Article 14 thereof show that the scope of investigations may be very wide. In that regard, the right to enter any premises, land and means of transport of undertakings is of particular importance inasmuch as it is intended to permit the Commission to obtain evidence of infringements of the competition rules in the places in which such evidence is normally to be found, that is to say, on the business premises of undertakings.

38 That right of access would serve no useful purpose if the Commission's officials could do no more than ask for documents or files which they could identify precisely in advance. On the contrary, such a right implies the power to search for various items of information which are not already known or fully identified. Without such a power, it would be impossible for the Commission to obtain the information necessary to carry out the investigation if the undertakings concerned refused to cooperate or adopted an obstructive attitude.

39 Although Article 14 of Regulation No 17 thus confers wide powers of investigation on the Commission, the exercise of those powers is subject to conditions serving to ensure that the rights of the undertakings concerned are respected.

40 In that regard, it should be noted first that the Commission is required to specify the subject-matter and purpose of the investigation. That obligation is a funda-

mental requirement not merely in order to show that the investigation to be carried out on the premises of the undertakings concerned is justified but also to enable those undertakings to assess the scope of their duty to cooperate while at the same time safeguarding the rights of the defence.

- 41 It should also be pointed out that the conditions for the exercise of the Commission's investigative powers vary according to the procedure which the Commission has chosen, the attitude of the undertakings concerned and the intervention of the national authorities.
- 42 Article 14 of Regulation No 17 deals in the first place with investigations carried out with the cooperation of the undertakings concerned, either voluntarily, where there is a written authorization, or by virtue of an obligation arising under a decision ordering an investigation. In the latter case, which is the situation here, the Commission's officials have, *inter alia*, the power to have shown to them the documents they request, to enter such premises as they choose, and to have shown to them the contents of any piece of furniture which they indicate. On the other hand, they may not obtain access to premises or furniture by force or oblige the staff of the undertaking to give them such access, or carry out searches without the permission of the management of the undertaking, which may, however, be implied, in particular by the provision of assistance to the Commission's officials.
- 43 The situation is completely different if the undertakings concerned oppose the Commission's investigation. In that case, the Commission's officials may, on the basis of Article 14(6) and without the cooperation of the undertakings, search for any information necessary for the investigation with the assistance of the national authorities, which are required to afford them the assistance necessary for the performance of their duties. Although such assistance is required only if the undertaking expresses its opposition, it may also be requested as a precautionary measure, in order to overcome any opposition on the part of the undertaking.
- 44 It follows from Article 14(6) that it is for each Member State to determine the conditions under which the national authorities will afford assistance to the Commission's officials. In that regard, the Member States are required to ensure

that the Commission's action is effective, while respecting the general principles set out above. It follows that, within those limits, the appropriate procedural rules designed to ensure respect for undertakings' rights are those laid down by national law.

45 Consequently, if the Commission intends, with the assistance of the national authorities, to carry out an investigation other than with the cooperation of the undertakings concerned, it is required to respect the relevant procedural guarantees laid down by national law.

46 The Commission must make sure that the competent body under national law has all that it needs to exercise its own supervisory powers. It 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. On the other hand, 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 constraint 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.

47 In the light of the foregoing, it must be held that the measures which the contested decision ordering the investigation permitted the Commission's officials to take did not exceed their powers under Article 14 of Regulation No 17. Article 1 of that decision merely requires the applicant 'to permit officials authorized by the Commission to enter its premises during normal office hours, to produce for inspection and to permit copies to be made of business documents related to the subject-matter of the inquiry which are requested by the said officials and to provide immediately any explanations which those officials may seek'.

48 During the proceedings before the Court, the Commission did indeed argue that its officials are entitled, when making investigations, to carry out searches without

the assistance of the national authorities and without respecting the procedural guarantees provided for under national law. However, that misinterpretation of Article 14 of Regulation No 17 cannot render unlawful decisions adopted on the basis of that provision.

49 With regard to the argument put forward in the alternative by the applicant concerning the way in which the contested decision was implemented, it should be pointed out that even if the conduct of the Commission's officials was not in accordance with their powers under Article 14 of Regulation No 17 and the contested decision, that does not affect the lawfulness of the decision. As the Court held in its judgment of 8 November 1983 in Joined Cases 96 to 102, 104, 105, 108 and 110/82 *LAZ v Commission* [1983] ECR 3369, paragraph 16), the validity of a decision cannot be affected by acts subsequent to its adoption. Consequently, there is no need in these proceedings to consider the complaints concerning the way in which the investigation was carried out.

50 It follows from the foregoing that the submission alleging an infringement of the fundamental right to the inviolability of the home and the unlawful implementation of the contested decision must be rejected.

51 Since none of the submissions made in regard to the contested decision has been upheld, the application must be dismissed in its entirety.

### Costs

52 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been asked for in the successful party's pleading. Since the applicant has failed in its submissions, it must be ordered to pay the costs.

On those grounds,

THE COURT

hereby:

- (1) Dismisses the application;
- (2) Orders the applicant to pay the costs.

Due	Slynn	Kakouris	Schockweiler	Zuleeg
Koopmans	Mancini	Joliet	O'Higgins	
Moitinho de Almeida	Rodríguez Iglesias	Grévisse	Diez de Velasco	

Delivered in open court in Luxembourg on 17 October 1989.

J.-G. Giraud  
Registrar

O. Due  
President