OPINION OF MR ADVOCATE GENERAL MISCHO
delivered on 21 February 1989 *

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Mr President,
Members of the Court,

1. On 15 January 1987, the Commission adopted, on the basis of Article 14(3) of Regulation No 17 of the Council of 6 February 1962,[1] a series of decisions ordering various undertakings to submit to investigations into their possible participation in agreements or concerted practices which fixed prices and quotas or sales objectives for PVC and polyethylene in the Community.

2. Five of them applied to the Court for a declaration that the decision addressed to them was void. In support of their

* Original language: French.

1 — First Regulation implementing Articles 85 and 86 of the Treaty (OJ, English Special Edition 1959-62, p. 87).

application, all reply on the infringement of the fundamental right to the inviolability of the home, in addition to defects in the statement of the reasons on which the decision is based and formal and procedural defects.

3. Before examining those submissions, I consider it essential to recall briefly the way in which the applicants reacted to the Commission's decisions ordering the investigation.

4. Hoechst (Case 46/87) categorically refused to submit to the investigation, notwithstanding three attempts by the Commission's officials to carry it out. On each occasion, Hoechst insisted that its formal opposition to the carrying out of the investigation, which it regarded as a search, should be noted in writing. Ultimately, it was not until 2 April 1987 that it permitted the investigation, since by then a search warrant had bee issued in favour of the Commission by the Amtsgericht (local court), Frankfurt, on the application of the Bundeskartellamt (Federal Cartel Office). [2]

5. Moreover, the Commission, by decision of 3 February 1987 adopted under Article 16(1)(d) of Regulation No 17, imposed on Hoechst a periodic penalty payment of ECU 1 000 per day in order to compel it to submit to the investigation which had been ordered. Hoechst is also seeking the amendment of that decision and the decision of 26 May 1988, under Article 16(2) of Regulation No 17, in which the Commission fixed the definitive amount of the periodic penalty payment at ECU 55 000 (Case 227/88).

2 — See the Minute of 2 April 1987, annex 4 to the reply.

6. Dow Benelux (Case 85/87) raised objections to the Commission's decision ordering the investigation and to the implementation thereof but since it considered itself obliged to cooperate, it did not formally oppose the implementation of the decision and in fact assisted the Commission's officials.

7. The representatives of Dow Ibérica (Case 97/87), Alcudia (98/87) and EMP (99/87) were 'troubled' by the first 'surprise inspection' carried out by the Commission in Spanish undertakings but 'following the Commission officials' explanations, orally and in writing, of their duties' under Articles 14, 15 and 16 of Regulation No 17, not merely tolerated the inspection without raising any formal objection but also cooperated actively therein.

8. Having made those facts clear, I can now consider the legal submissions put forward by the applicants, beginning with the submission common to all the cases and which is by far the most important.

I — The submission alleging an infringement of a fundamental right

9. The applicants make some or all of the following claims:

(i) Article 14(3) of Regulation No 17 is void on the ground that it is incompatible with fundamental rights recognized in the Community legal order;

(ii) the decisions ordering the investigations are unlawful because they breach the basic provision, Article 14(3), or the fundamental rights recognized in the Community legal order or both;

(iii) in implementing those decisions, the Commission's officials exceeded their powers and infringed fundamental rights.

10. I hope to clarify matters by proceeding as follows.

11. I shall first consider whether the powers granted to the Commission's officials by the decisions ordering the investigations adopted on 15 January 1987 remain within the bounds laid down in Article 14 of Regulation No 17.

12. After establishing on the basis of a study of the national laws of the Member States, the European Convention on Human Rights and the Court's case-law that undertakings have a fundamental right to the inviolability of their premises, I shall consider whether that right is infringed by investigations carried out on the basis of the abovementioned provision.

13. I shall then look at what conclusions may be drawn in these cases from the principles thus deduced. Finally, I shall make a few remarks on the role of the national courts and the Court of Justice of the European Communities respectively in regard to the implementation of decisions ordering an investigation.

A — *Scope of the decisions ordering investigations and the powers conferred on the Commission by Article 14 of Regulation No 17*

14. Article 1 of each of the contested decisions of 15 January 1987, the terms of which are essentially identical,[3] states that the undertaking 'is required to permit the officials designated by the Commission to have access to their premises during normal office hours, at the request of the said officials, to produce for inspection and allow copies to be taken of business documents relating to the subject-matter of the investigation demanded by the said officials, and to furnish immediately any explanation those officials may demand'.

15. The use of the expressions 'produce the documents demanded' by the Commission's officials and 'furnish the explanations' which are demanded shows that the decision requires undertakings not merely to tolerate the investigation but to cooperate actively therein. With a few exceptions[4] the legal writers also consider that Article 14(3)

3 — It is true that the German version of the decision addressed to Hoechst uses the words 'relating to the subject-matter of the inquiry' only with regard to the explanations that may be demanded by the Commission officials. However that is merely a textual error which could not be, and was not, of any significance. On the one hand, it is apparent from the preamble to the decision that the measures ordered therein concerned only agreements and concerted practices whose existence was suspected by the Commission. On the other, Hoechst was not misled regarding the fact that the investigation could relate only to the matters so defined and its complaint was merely that the Commission did not sufficiently specify the subject-matter.

4 — Blum: *Die Auskunfts- und sonstigen Ermittlungsrechte der Kartellbehörden*, Thesis, Heidelberg 1986, p 252; Deringer: *Das Wettbewerbsrecht der Europäischen Wirtschaftsgemeinschaft*, *Kommentar*, 1962 (updated 1963), paragraph 9 on Article 14 of Regulation No 17; Goldmann and Lyon-Caen: *Droit commercial européen*, Fourth Edition, 1983, No 699, p. 791

itself imposes such a duty of cooperation on undertakings.[5] I shall return to that aspect of the problem later.

16. The terms of the decisions ordering the investigations contain no precise details as to the *specific* documents which the Commission's officials were to examine. Reference is made solely to 'business documents related to the subject of the inquiry'. Hoechst relies on that fact to argue that 'even *voluntary* submission of business documents in order to give effect to a decision ordering an investigation constitutes a search where the Commission knows neither the precise nature nor the detailed contents of the documents submitted' (Minute of the investigation of 2 April 1987, cited at p. 7 of the reply in Case 46/87). I cannot accept that reasoning because, as the Court will see later, in all the national legal systems there are investigation procedures which presuppose the cooperation of undertakings, in the context of which the competent administrative authority does not know in advance whether it will find information which will lead to the conclusion that the undertaking has committed an offence and, *a fortiori*, it is not aware of the nature of that information. Such operations cannot on that ground be regarded as searches.

17. It remains to determine the manner in which the Commission's officials must define, *vis-à-vis* the representatives of the undertaking, the documents which they wish to be able to examine.

18. Thus, although it is obvious that they could ask, for example, to see 'the correspondence entered into by the firm during the last three years with other producers of PVC or polyethylene' or 'the Minutes of the board meetings held between 1983 and 1987', may they also ask to see 'all documents dealing with the conditions under which PVC is marketed' or the 'documents to be found in the office of the head of the Marketing Division' or even 'the files contained in such and such a cupboard or such and such a drawer'?

19. All of those steps seem to me to be acceptable for the following reasons. According to Article 14(1) of Regulation No 17, the Commission may undertake 'all necessary investigations'. For that purpose, the said article provides that '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'.

5 — Gleis and Hirsch: *Kommentar zum EWG-Kartellrecht*, Third Edition, 1978, paragraph 25 on Article 14 of Regulation No 17; Graupner: 'The investigatory powers of the European Commission in anti-trust cases', *International Business Lawyer*, 1981, p. 453; Kuyper and van Rijn: 'Procedural guarantees and investigatory methods in European law, with special reference to competition, 1982', *Yearbook of European Law*, p. 13; Schröter: 'Kommentar zu Art. 87 EWG-Vertrag' in V. D. Groeben, Thiesing and Ehlermann: *Handbuch des Europäischen Rechts*, Vol. 8, 212, November 1984 edition, Article 87 of the EEC Treaty, paragraph 38; Mestmäcker: *Europäisches Wettbewerbsrecht*, 1974, pp. 606 and 607.

20. That definition, and in particular the right of the Commission's officials to enter any premises or even means of transport, implies that those officials may look at all the objects in those places and demand to be shown anything they designate because otherwise, what purpose would there be in giving them a right of access? Let us imagine, for example, that while looking out of the window, the Commission's officials suddenly notice that workers are in the process of loading files on to a lorry. They must in such a case have the right to send one of their number to that place to demand that the operation be stopped and that the documents in question be shown to him.

21. The duties of the Commission's officials are in no way comparable to those of officials of the national authorities carrying out an investigation in a tax or labour law matter. In regard to taxation, the inspectors consider very specific categories of documents, namely accounting ledgers and invoices for purchases or sales whereas, in regard to labour law, it is essentially pay-slips and personal files which are relevant.

22. If the Commission's inspectors were entitled only to demand to be shown the classic files to be found in any undertaking, such as files of correspondence or other official Minutes of the governing bodies of the undertaking, they would probably never be able to find indications of an unlawful agreement. Such indications are more likely to be found on 'loose pieces of paper', often hand-written, such as notes containing cryptic or coded references made at secret meetings held outside the undertaking, sometimes in a hotel situated in a country outside the Community.

23. Often, it is expense accounts for trips made by managers of the firm which, when compared with those of managers of other undertakings under investigation, enable the Commission to discover which undertakings may have been party to the agreement, when concertation took place, etc. The interest of the Community requires that those responsible for ensuring the realization of the objective defined in Article 3(f) and compliance with the rules laid down in Articles 85 and 86 of the Treaty have access to documents of that kind once there is a sufficiently serious suspicion of unlawful conduct. That is why I consider that the Commission's officials were also entitled to look into the briefcases of the undertakings' managers and even into their diaries to see if they contain documents or indications relating to their business activities.

24. On the other hand, it is for the Commission itself and for the Commission alone to check and decide, subject only to review by the Court, whether the documents which it has demanded are related to the subject-matter of its investigation.

25. That was expressly confirmed by the Court in its judgment of 18 May 1982 in Case 155/79 *AM & S* v *Commission* [1982] ECR 1575, at pp. 1609 and 1610, in which it was held:

'since the documents which the Commission may demand are, as Article 14(1) confirms, those whose disclosure it considers

"necessary" in order that it may bring to light an infringement of the Treaty rules on competition, it is in principle for the Commission itself, and not the undertaking concerned or a third party, whether an expert or an arbitrator, to decide whether or not a document must be produced to it' (paragraph 17).

26. It is true that the Court accepted that the Commission's 'wide powers of *investigation* and of obtaining information'[6] may be subject to certain limits, such as, in that case, respect for the confidential nature of written communications between lawyer and client, in so far as those communications are in the framework and for the purpose of the client's rights of the defence and that they emanate from independent lawyers, that is to say, lawyers not linked to the client by an employment relationship. However, even where the undertaking claims that the documents which it is called upon to disclose come within that category, the Commission may order, pursuant to Article 14(3), production of the communications in question and, if necessary, impose fines or periodic penalty payments on the undertaking as a penalty for its refusal to comply (paragraph 31).

27. In no circumstances, therefore, is it for the undertaking itself to select the documents which it is prepared to submit even if it considers that certain are protected under the general principle of confidentiality common to the legal systems of all the Member States. The Court has decided that the interests of the undertaking are sufficiently safeguarded by the possibility which exists under Articles 185 and 186 of the Treaty, as well as under Article 83 of the Rules of Procedure of the Court, of obtaining an order suspending the operation of the decision which has been taken, or any other interim measure (paragraph 32). In its judgment of 24 June 1986 in Case 53/85 *AKZO Chemie* v *Commission* [1986] ECR 1965, at p. 1992, the Court also accepted that it is for the Commission to assess whether or not a particular document contains business secrets the confidentiality of which is protected by a general principle which applies during the course of the administrative procedure (paragraphs 28 and 29).

28. If the Commission is therefore entitled to require submission of documents which the undertaking regards as protected by virtue of general principles of law and to assess, subject only to review by the Court, whether that is in fact the case, the Commission must also be entitled to check itself whether or not the documents it is demanding are related to the subject of the investigation. The Commission's officials therefore necessarily have the right to have shown to them files in regard to which it is not immediately clear whether they contain items likely to be relevant to the investigation and in particular, to demand access to all files or papers contained in a given cupboard or drawer.

29. It remains to be determined whether the Commission's officials are entitled to themselves remove documents from the cupboards and drawers in which they are contained in order to examine them, if necessary, after asking to have the cupboards and drawers concerned opened. Dow Benelux and the three Spanish undertakings which, unlike Hoechst, did not oppose the investigation, allege that the Commission's officials proceeded in that manner.

6 — See the judgment in *AM & S*, paragraph 15.

30. The Commission in fact claimed such a right during the procedure before the Court. Thus, in its rejoinder in Case 46/87 (*Hoechst*), the Commission described as follows the usual manner in which its officials go about their duties:

'When a Commission official is in an office, he enquires as to the place in which the files at issue are kept and asks to be given access to the desk drawers or filing cabinet in order to determine the nature of the files which they contain. If the drawers are locked, he demands that they be opened. *Once that has been done it is of no importance whether it is the Commission's official or an employee of the abovementioned undertaking who removes the files from the place in which they are kept.* As a general rule, the Commission official will none the less examine each of the files to check whether it contains documents relevant to the subject-matter of the investigation. Documents not connected with the investigation procedure and private papers may thus be eliminated' (p. 20, paragraph (k)).

31. In its rejoinder in Case 85/87 (*Dow Benelux*), the Commission stated that 'the Commission's officials may themselves open cupboards or desks which are not locked, withdraw files and documents therefrom, examine them and make copies of them' (p. 8, first paragraph).

32. Finally, in its reply to a question from the Court on the instructions it gives to its officials, the Commission indicated, *inter alia*, that 'the official responsible for the investigation will personally examine, in the presence of a representative of the undertaking, all files, cupboards and desks in which documents may be stored and he will examine all documents so as to be in a position to sort them; a rapid examination generally makes it possible to eliminate many documents which are of no interest'.

33. Can it be considered that that method of proceeding on the part of the Commission's officials is 'covered' by the Commission's standard-form decisions which require undertakings to '*produce* for inspection and allow copies to be taken of business *documents* relating to the subject-matter or of the investigation *demanded* by the . . . officials'?

34. It is possible to interpret the term 'produce' restrictively or widely. In its restricted meaning, that term could mean that the documents designated by the Commission's officials must be given to them by the company's representatives. In the wider sense, it could be interpreted as meaning that the undertaking's obligation to cooperate implies a duty to conduct the Commission's officials to the places in which relevant documents might be kept or to the premises which those officials ask to visit, giving them free access to all storage areas, so that they may remove the documents contained therein and examine them.

35. However, I do not think that the latter interpretation can be accepted. The use of the expression 'produce . . . and allow copies to be taken of documents demanded', taken together with the duty of the undertaking's representative 'to furnish immediately any explanation those officials may demand' leads me to believe that the Commission's officials must first give the company's managers an opportunity to cooperate actively in the investigation.

36. The Commission's officials must certainly be given every facility to ensure that no document of relevance escapes their scrutiny. In order to do so, they must have, as I have indicated above, the right to have the files and documents contained in any cabinet they designate submitted to them because otherwise how could they find any information as to the conduct of the undertaking which the latter has an interest in hiding and which it will ensure does not appear in its 'classic' files? If that principle is accepted, in the last analysis, certainly, it makes no difference whether it is the official himself or an employee of the undertaking who removes the files from a cabinet and an undertaking which is prepared fully to perform its duty to cooperate will no doubt end up saying to the Commission's officials: 'Go ahead, take the files yourselves'.

37. However, that situation is somewhat different from the one in which the Commission's officials proceed immediately to carry out a thorough search of filing cabinets. I consider that such a power, which is undoubtedly a power of search, is included in Article 14 but only as a last resort and it may be exercised only under the conditions laid down in Article 14(6).

38. In my view, that is the only interpretation which is compatible with the terms of Article 15(1)(c) of the regulation. That provision is manifestly based on the principle of the submission (Vorlage) of documents by the representatives of the undertaking because it permits the Commission to impose fines on undertakings if they intentionally or negligently '*produce* the required books or other business records in incomplete form during investigations under *Articles 13* or *14*, or refuse implementation of Article 14(3)'.

39. The fact that the first part of that provision refers to Article 14 in its entirety and does not therefore distinguish between Article 14(2) (an investigation carried out on the basis of a mere authorization) and Article 14(3) (an investigation carried out on the basis of a formal decision of the Commission) indicates to me that in both cases it is for the representatives of the undertaking to submit documents to the Commission's officials. Furthermore, the same view is set out in a brochure published by the Commission in 1984 entitled *The European Commission's powers of investigation in the enforcement of competition law.* At page 36 of that document, it is stated that 'the firm's representatives must open the filing cabinets and hand over the documents in them to the inspectors, who are not allowed to remove them from the filing cabinets themselves. Any refusal by the firm's representatives to produce the documents is recorded and the inspectors may ask the national authorities to enforce the decision ordering the investigation'. It is true that it is stated on the title page of the brochure that 'the views expressed do not necessarily represent an authentic statement of the Commission's official position'. It is no less true that the view which I have just cited must, at the time, have been the prevailing view in the Commission's departments.

40. The system set up by Article 14 is thus the following.

(1) In cases covered by Article 14(2), the undertaking is entitled to refuse to accept the investigation in principle, but if it accepts it, it must submit all the documents called for without any exception whatsoever.

41. (2) In the context of the procedure under Article 14(3), the undertaking is obliged to submit to the investigation *and* to produce all the documents called for without any exception whatsoever, and if it does not do so, a fine or a periodic penalty payment or both may be imposed on it. I agree with those legal writers [7] who consider that that paragraph grants the Commission only powers of information and examination (Auskunfts- und Einsichtsrechte), with undertakings having a corresponding duty of cooperation. I agree with Mestmäcker [8] in considering that 'undertakings are obliged to permit the Commission's officials to carry out their mission in such a way that, without there being any need to use actual force, the information required is correctly supplied' ('Die Unternehmen sind verpflichtet, den Bediensteten die Erfüllung ihrer Aufgabe so zu ermöglichen, daß ohne Anwendung von unmittelbarem Zwang die geforderten Aufschlüsse sachlich richtig gegeben werden.'). It is thus important that a very clear line should be drawn between the situation where an undertaking cooperates in the investigation and that where it does not cooperate. If the Commission's officials were entitled, in the context of the procedure provided for in Article 14(3), to themselves take documents, there would be confusion between that procedure and the procedure provided for in Article 14(6). An additional argument in favour of such an interpretation of the Commission's powers is to be found in the fact that if the Commission could immediately carry out a full search of the undertaking's premises merely on the basis of the decision ordering the investigation, it is difficult to see what purpose would be served by the threat of a fine if books and other documents are presented in incomplete form.

42. (3) Finally, if the undertaking refuses to produce one or more documents which the Commission's officials wish to examine and, *a fortiori*, if it refuses to even open certain locked drawers or cupboards or to remove objects contained in the briefcase of one of its managers, the Commission's officials can only draw up a formal Minute of that refusal. That Minute triggers the procedure leading to the fixing of a fine or a periodic penalty payment and will lead to the Commission asking the Member State concerned to 'afford the necessary assistance to the officials authorized by the Commission to enable them to make their investigation', as is provided for in Article 14(6). In other words, the refusal to submit the contents of a cabinet to the Commission's officials constitutes opposition within the meaning of Article 14(6) which those officials cannot themselves overcome by seizing the files but requires the intervention of representatives of the Member State in question. I consider that the same conclusion may be drawn by analogy from the provision in Article 192 of the Treaty on enforcement or decisions of the Council and the Commission, which is referred to in Article 187 on the enforcement of judgments of the Court. I consider that Article 192 shows that the EEC Treaty intended to reserve to the Member States all forms of intervention which could be assimilated to direct enforcement.

7 — W. Kreis: 'Ermittlungsverfahren der EG-Kommission in Kartellsachen', in *Recht der Internationalen Wirtschaft*, Vol. 5, May 1981, p. 281, in particular at p. 291; W. A. Rehmann: 'Zur Vollstreckung einer Nachprüfungsentscheidung der Kommission der EG', in *Neue Juristische Wochenschrift* 1987, Vol. 48, p. 3061 *et seq.*

8 — Mestmäcker, op. cit, p. 607.

43. Article 14(6) imposes on the Member States an *obligation to achieve a particular result*, namely to permit the Commission's officials to check whether certain documents in the possession of the undertaking are such as to prove that it participated in an agreement, decision or concerted practice. The last sentence of Article 14(6) required the Member States, after consultation with the Commission, to take the necessary measures to fulfil that obligation before 1 October 1962.

44. That sentence did not appear in the proposal for a regulation submitted by the Commission to the Parliament and the Council. The possibility cannot be excluded that it was introduced by the Council as a result of the observations made by the Parliament's Internal Market Committee (Report of 7 September 1961, document 57, known as the Deringer Report) according to which the intervention of a court is to be provided for where a search is to be carried out. In any event, it is no longer possible to determine whether the Council thereby intended to call upon the Member States to provide in their national legislation that a court order would not be necessary for acts carried out on the basis of Article 14(6) (for example, by providing in a law that such acts are to be regarded as cases in which delay would be dangerous) or if it merely intended to leave each Member State a choice as to the means which it wished to employ, including, if necessary, the requirement to obtain a court order.

45. What is certain is that the measures to be adopted had to permit the Commission's officials to obtain access to the documents sought without the undertaking having the time to cause them to disappear.

46. In any event, no Member State will have adopted, on the basis of Article 14(6), measures incompatible with its own concept of the protection due to the fundamental right to the inviolability of the premises of undertakings. Therefore, in all cases in which the Commission calls upon the national authorities to overcome an undertaking's opposition, the protection of that fundamental right will be automatically guaranteed to the full extent provided for in the national legal order.

47. I must now consider whether an investigation in the context of which Commission officials merely ask to be handed files which they designate without themselves searching the cabinets represents an infringement of the fundamental right to the protection of the home *by reason of the fact that it takes place under the threat of a fine of periodic penalty payment.* It is clear that if an undertaking cooperates voluntarily and without any reserve with the inspectors, no problem of a violation of the home can arise.

48. In order to decide that question it is necessary to consider the situation existing in the national legal systems and the guidance which may be drawn from the European Convention on Human Rights and the case-law of the Court of Justice.

B — *The guidance which may be drawn from the national legal systems, the European Convention on Human Rights and the case-law of the Court of Justice*

49. In *Belgium* Article 10 of the Constitution provides as follows:

'The home is inviolable: it may be entered only in the cases provided for by law and in the form prescribed by law'.

50. Beside the fact that the application of the principle to legal persons and business premises is disputed, the *Constitution* does *not* therefore itself make it necessary to obtain *a court order* before entering a person's home. Although the *legislature* requires a prior court order for inspections and searches of premises used as *private dwellings*, it has granted very broad powers of investigation to inspectors without the need to obtain a court order in advance, in regard to taxation and social affairs and in regard to price control and commercial practices. Those powers generally permit them to enter any business premises to take cognizance of and copy or seize any relevant documents and to obtain the assistance of the police. Only the question of whether they may themselves open a cupboard and search archives seems to be disputed. [9]

51. In *competition* matters the Law of 27 May 1960 on protection against abuses of economic power provides for *a right of search, without a prior court order.* Moreover the Law of 28 July 1987 implementing the regulation and directives adopted pursuant to Article 87 of the EEC Treaty (*Moniteur belge*, 24.9.1987, p. 138171) adopts a definition of the powers of national officials assisting Commission inspectors which exactly reproduces the wording of Article 14(1) of Regulation No 17. Article 2(3) of that law provides for criminal sanctions against any persons wilfully preventing or hindering inspections or steps taken to assist therein. Pursuant to the Royal Decree of 1 February 1988 implementing Articles 12 to 14 of Regulation No 17 (*Moniteur belge*, 11.2.1988, p. 22021), inspection warrants are to be issued by the head of the general economic inspectorate and not by any judicial authority.

52. In *Denmark*, the Constitution (Article 72) itself provides that a court order is necessary to enter a home or to seize or to examine letters and other papers, except in cases expressly provided for by law. That principle is also applicable to legal persons inasmuch as the premises concerned are not open to the public. Even though the long controversial question whether that principle also applies, outside the context of criminal proceedings, to measures of administrative coercion now seems to have been answered in the affirmative, it should be noted that the legislature may provide for derogations therefrom.

53. Neither Law No 102 of 31 March 1955 on competition nor Law No 505 of 29 November 1972 implementing Article 14(6) of Regulation No 17 provided for such derogations. It must therefore be accepted that, in principle, no investigation may be carried out without a court order first being obtained. However, it is also accepted that if the undertaking consents to the operation, the authority concerned may carry it out without obtaining a court order.

54. It should however be noted that in the context of Law No 505, a Danish court, when called upon to authorize the measures

9 — Van Fraeyenhoven: 'Le respect de la vie privée et le pouvoir d'investigation du fisc', *Annales de droit de Louvain*, 1984, p. 85 *et seq.*

required by a Commission decision ordering an investigation, merely determines that the decision exists and does not consider whether it is well founded.

55. Finally, it is worth noting that in a judgment of 1976, the Højesteret (Supreme Court) decided that the fact that an administrative check was subject to the prior issue of a court order under the Constitution did not prevent the legislature from providing that a fine could be imposed on a person who opposed a check even though it had not been previously authorized by a court.

56. In *Germany* Article 13 of the Basic Law declares that 'the home is inviolable' and Article 13(2) provides that:

'searches may be ordered only by a court or, if delay would be dangerous, by other bodies provided for by law; they may be carried out only in the manner prescribed by law'.

Under Article 19(3) of the Basic Law, legal persons also enjoy fundamental rights and both the case-law and the legal writers are unanimous in considering that the term 'home' covers business premises.

57. Article 46 of the Gesetz gegen Wettbewerbsbeschränkungen (law concerning restrictions on competition) of 27 July 1957 distinguishes between the power of *investigation (Einsichts- und Prüfungsrecht)* and the power to carry out searches (Durchsuchungsrecht). Although the distinction is sometimes difficult to draw, reference is usually made to the criteria employed by the Bundesverfassungsgericht (Federal Constitutional Court) in its judgment of 3 April 1979 to define the concept of a search (BVerfG E 51, p. 97, 107). According to that definition, a search means

'searching carried out with a precise objective and purpose by the authorities of a State to find persons or objects or to ascertain facts, so as to discover something that the occupant of the dwelling in which the search takes place does not wish to disclose or hand over himself' ('... kennzeichnend ist das ziel- und zweckgerichtete Suchen staatlicher Organe nach Personen oder Sachen oder zur Ermittlung eines Sachverhalts, um etwas aufzuspüren, was der Inhaber der Wohnung von sich aus nicht offenlegen oder herausgeben will').

58. On the other hand, the power of investigation which includes a right to enter the undertaking's premises, permits examination only of documents submitted to the authorities by the managers of the undertaking. Investigation presupposes therefore cooperation on the part of the representatives of the undertaking being investigated, whereas a search may be carried out without any activity on their part.

59. It should be noted that that does not mean that such active cooperation cannot be 'forced' by periodic penalty payments or the threat of fines or other means of administrative coercion. The *refusal* of the representatives of the undertaking, who are under an *obligation to cooperate* in the investigation, constitutes an *administrative offence* (Ordnungswidrigkeit). However, a persistent refusal notwithstanding those measures of coercion can be overcome only by a search warrant which alone permits the use of force (unmittelbarer Zwang). Thus, it seems that in practice the competent auth-

orities apply for a search warrant whenever they have reason to believe that the undertaking will not voluntarily produce all the documents which they wish to examine.

60. As can be seen from the conduct of the officials of the Bundeskartellamt in the Hoechst case, it appears that that distinction, with the ensuing consequences, is also to be followed in the application of the German Law of 17 August 1967 implementing Regulation No 17 even though Paragraph 3(2) expressly makes the use of force (unmittelbarer Zwang) subject only to the condition that such officials have a written order from the President of the Bundeskartellamt.

61. In *Greece* Article 9(1) of the Constitution of 1975 provides as follows:

'A person's home is a place of asylum. The private and family life of the individual is inviolable. No search may be carried out in a person's home other than in the cases and in the forms provided for by law, and representatives of the judicial authorities must always be present'.

62. Although it is accepted that that provision also applies to legal persons, it seems that legislative practice, in particular in the field of competition, is to interpret the concept of home in the strict sense, that is to say, as not including business premises, with the effect that a representative of the judicial authorities is required to be present only during searches of private dwellings.

63. In any event, Article 26(1) of Law No 703/77 on the control of monopolies and oligopolies and on the protection of free competition, which sets out an exhaustive list of the powers of officials responsible for carrying out inspections, refers to the constitutional requirements only in regard to searches of the home (subparagraph (c)), and not in regard to other forms of inspection, such as inspection of books, or documents (subparagraph (a)) or inspections carried out at offices and other premises of undertakings and association of undertakings (subparagraph (b)). Furthermore, those officials are expressly granted the same powers as tax inspectors whom certain laws exempt from the obligation to apply to the courts. Finally, it appears to follow from Opinion No 1381/1981, delivered by the Greek Council of State on the lawfulness of a draft decree concerning the protection of the environment, that an inspection by the administration of the premises of industrial or craft undertakings does not constitute a search of a home within the meaning of Article 9 of the Constitution.

64. In *Spain*, Article 18(2) of the Constitution of 1978 provides that

'the home is inviolable' and that 'no one may enter a home or carry out a search there without the consent of the occupier or without a court order, except where an offence is actually being committed'.

65. Since Judgment No 124/85 of the Constitutional Court of 17 October 1985, it appears settled that the business premises of legal persons are also covered by that provision.

66. As in Denmark, the requirement of prior judicial authorization is therefore a

requirement of a constitutional nature. At the same time, the consent of the person concerned may make such an authorization unnecessary unless the contrary is provided by law. [10]

67. In the field of *competition*, finally, Law No 110 of 20 July 1963 against anti-competitive practices gives officials responsible for carrying out investigations considered necessary by the competent authorities the same rights and powers as those granted by law to officials of the tax authorities. Under a Law of 28 December 1963 (Ley general tributaria), confirmed, in particular, by an implementing regulation of 25 April 1986 (Reglamento general de la inspección de los tributos), those officials have a right to enter and search the places in which the economic activities have taken place on the basis of a mere written authorization from the tax authorities, even if the person concerned objects. It is only in cases of entry into the homes of a natural person or of a legal person without the consent of the person concerned that a court order is required.

68. Under Royal Decree No 1882 of 29 August 1986, those same officials, assigned to the Directorate-General for the Protection of Competition of the Ministry of Economic Affairs are responsible for carrying out, on the basis of a written order from their Director-General, investigations called for by the Commission.

69. In *France* the right to the inviolability of the home is deeply rooted in constitutional tradition. At the moment, it is regarded as part of the principle of individual liberty laid down in Article 66 of the Constitution of 1958. It is thus conceived more from the point of view of human dignity and the degree to which it is protected may vary according to whether the premises are private or business premises, or whether they belong to a natural or legal person. However, the recent trend in legislation is undoubtedly towards greater protection, including greater protection for business premises.

70. Thus, Ordonnance 86/1243 of 1 December 1986 on freedom to fix prices and freedom of competition distinguishes between two types of investigation. Article 47, formulated in positive terms, permits investigators *to enter any premises, land or means of transport used for business purposes and to demand access to business documents for the purposes of making copies.* Article 48, formulated in restrictive terms, permits them to enter any premises, and seize documents only with the prior authorization of the President of the tribunal de grande instance (Regional Court) for the place in which the premises are situated. Thus, once the investigators wish to take an active part in the investigation and are not merely seeking communication of documents but are searching for them themselves, a court order must first be obtained. Furthermore, Article 48 provides that 'the court must check whether the application for authorization submitted to it is well founded' and that 'that application must contain information justifying the entry' into the premises.

71. Since that very strict protection is based on a relatively recent decision of the Conseil constitutionnel (Constitutional Court) of 29 December 1983 under which searches may be ordered only by the judicial auth-

10 — Thus, the law on criminal procedure requires consent and a warrant for entry and search of a home or, where that consent is refused, a warrant issued by a court stating the reasons on which it is based.

orities for the purpose of discovering specified infringements and may be carried out only under its control and on its responsibility, it seems obvious that the same protection applies in the context of Decree No 72-151 of 18 February 1972 on the implementation of Articles 85 to 87 of the Treaty of Rome concerning agreements, decisions and concerted practices and undertakings in a dominant position, inasmuch as the inspections which the Commission wishes the French authorities to carry out or for which it seeks their assistance must include 'entry to any premises' within the meaning of the French legislation.

72. In *Ireland*, Article 40(5) of the Constitution recognizes the inviolability of the home in the following terms:

'The dwelling of every citizen is inviolable and shall not be forcibly entered save in accordance with law.'

73. The case-law seems to indicate that the said constitutional protection is afforded neither to legal persons nor to business premises.

74. Thus, several Irish laws, in particular in regard to taxation, social affairs and customs matters, give the administration the right to enter and inspect, without prior judicial authorization, any premises in which commercial activities are carried on and sometimes even allow business documents to be removed for a reasonable period. However, those laws do not give officials the unrestricted rights to enter by force and to carry out an unlimited search. If the person concerned refuses his consent, he is liable to penalties under the criminal law.

75. The same is true in competition matters. The Restrictive Practices Act 1972 permits the Examiner to order, without any prior application to the court, an inspection at all reasonable times 'for the purposes of obtaining any information necessary for the exercise of his functions'. If the owner objects, he must, if he is not to make himself liable to penalties under the criminal law, apply to the High Court within seven days for a declaration that the inspection which has been ordered is contrary to the exigencies of the common good. There is a rebuttable presumption that the inspection is in accordance with those exigencies and, in general, that will be confirmed if the inspection was necessary for the preparation of a fair and accurate report.

76. In principle, it is therefore only if the undertaking objects to the inspection that Irish law requires judicial intervention.

77. In *Italy* Article 14 of the Constitution declares that 'the home is inviolable'. It is settled that the business premises of legal persons are also covered. Article 14(2) and (3) draw a distinction between, on the one hand, 'ispezioni o perquisizioni o sequestri', which may be carried out only in the cases and in accordance with the methods provided for by law, in accordance with the guarantees laid down for the protection of personal liberty, and, on the other hand, *'accertamenti e ispezioni'* carried out on grounds of public health and hygiene or for economic and tax purposes, which are governed by special laws.

78. Prior authorization by a court is in principle necessary only for searches (perquisizioni). On the other hand, the laws adopted to regulate the exercise of verifi-

cations (accertamenti) and inspections (ispezioni), particularly in regard to health matters and safety at work as well as in customs and tax matters, generally grant public officials wide powers to inspect premises, books and documents without previously obtaining a court order.

79. Under Decree No 884 of the President of the Republic of 22 September 1963 adopted for the implementation of Article 14(6) of Regulation No 17, officials of the 'polizia tributaria' may be called upon, if needed, to assist officials of the Ministry of Industry and Commerce called upon to aid the Commission. Those officers have *powers of entry, investigation and search* on the premises of commercial or industrial undertakings. However, the Constitutional Court has decided that that does not include a power to open suitcases, safes or doors which are locked and which the taxpayer refuses to open. Thus, once force is used, the inspection becomes a search, requiring prior judicial authorization.

80. In *Luxembourg*, the situation is largely the same as that in Belgium. As in Belgian law, the Constitution (Article 15) does not itself make inspection of a home subject to prior judicial authorization, but left it to the legislature to determine the cases and the forms in which such inspections could be made. The question whether that constitutional protection also applies to legal persons has not yet been settled by the courts.

81. Outside the area of criminal procedure, the Luxembourg legislature has not provided for judicial intervention in regard to access and searches of business premises. In regard to income tax and indirect taxation, in particular, in regard to VAT, the tax authorities are not merely entitled to require production of documents, but may also carry out inspections and enter homes. The Law on Supervision in the Financial Sector, in the coordinated version of 15 April 1986, authorizes the management of the Institut monétaire luxembourgeois itself to 'take or cause to be taken by officials of the institute books, accounts, registers or other acts and documents of credit establishments'. In the realm of *competition* law, the competent officials have a 'comprehensive power of investigation', on the basis of a mere authorization issued by the Minister for Economic Affairs, Small Firms and Traders, and are entitled to call for the assistance of the police.

82. The Law of 9 August 1971 implementing and approving Decisions and Directives, and approving Regulations of the European Communities in Economic, Agricultural, Forestry, Social and Transport Matters allows officials responsible for discovering infringements of those measures access, without a search warrant, to premises, land, means of transport, and *business books and documents* belonging to the persons and undertakings concerned, except where the premises constitute a private dwelling.

83. In *the Netherlands*, Article 12 of the Constitution

'prohibits the entry into dwellings against the will of the occupier except in the cases provided for by law or a measure adopted under the law and such entry must be made

by persons designated by law or by a measure adopted under the law'.

84. The legislature may therefore leave to the executive the power to determine itself, in the abstract, within the framework of the law, cases in which dwellings may be entered. Furthermore, that provision, which contains no obligation of prior judicial supervision, *does not apply to legal persons or to places other than the dwellings of natural persons* and presupposes that the occupier has not given his consent.

85. Furthermore, the special laws granting officials powers of supervision or inspection and the right to obtain documents generally draw a distinction between private dwellings and other places. Both the law on economic competition and the general tax code authorize the competent officials to enter premises at any time, in so far as they truly believe that is necessary in order for them to perform their duties, if necessary with the assistance of the police. In respect of competition matters they need a written order, which is not issued by a court, and need to be accompanied by a senior police officer or the mayor of the municipality only if the premises to be entered are a private dwelling.

86. Judicial review of entry into business premises always takes place *a posteriori.*

87. The Law of 10 July 1968, adopted on the basis of Article 14(6) of Regulation No 17, permits officials responsible for carrying out an investigation to engage in all the activities set out in Article 14(1) except that of entering any premises forming part of a dwelling. In regard to all other premises, entry is therefore permitted without restriction.

88. In *Portugal* the constitutional protection of the inviolability of the home is fairly strict. Article 34(2) of the Constitution of 1976 provides as follows:

'entry into homes of citizens against their will may be ordered only by the competent court in cases provided for by law and in the forms prescribed by law'.

Under Article 34(3), there is a total prohibition of entry during the night.

89. The requirement of prior judicial supervision and the restriction to cases provided for by law thus both apply to entry into a home.

90. However, the question whether that constitutional protection applies to the *business premises* of legal persons does *not* seem to have been *definitively settled.* Furthermore, prior judicial authorization is not necessary if the person concerned consents. That was expressly confirmed by the Constitutional Court in a decision delivered on 9 January 1987 in proceedings to test the constitutionality of the provisions of the new penal code prior to their entry into force on 1 January 1988.

91. It may also be mentioned that the draft decree law to be adopted for the purpose of implementing Article 14(6) of Regulation No 17 appears to provide for the imposition of fines on undertakings which refuse to cooperate in investigations ordered by the Commission.

92. In the *United Kingdom*, the principle of the absolute sovereignty of Parliament means that, strictly speaking, there is no constitutional protection of fundamental rights. However, the courts have traditionally considered themselves competent to ensure respect for the fundamental liberties which the citizen enjoys under the common law and the legislature has generally been prompted to adopt measures for the protection of those liberties which are in conformity with the case-law.

93. That is the case, in particular, in regard to the right to the inviolability of the home, which also covers commercial premises.

94. However, certain legislation, particularly *in regard to VAT* and *social security* permit the administration to enter commercial premises and to inspect and demand production of business documents without obtaining prior judicial authorization. It is only where force is used to enter and search premises that a warrant issued by a judge must be obtained in advance.

95. Parliament did not adopt specific measures for the implementation of Article 14(16) of Regulation No 17. If need be, the consent of the undertaking may be ensured by an order of the High Court, which may be obtained without delay. Such an order does not permit forceable entry if the undertaking continues to object to the inspection, but a second refusal may lead to the immediate imprisonment of the person concerned.

96. The question may be asked in passing whether that procedure, by imposing a sanction only after a second refusal, does not make it too easy for the undertaking to cause compromising documents to disappear.

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97. It follows from that brief comparative study that there can be no doubt, and the Commission freely admits it, that the fundamental right to the inviolability of the home is common to the constitutional traditions of all the Member States.

98. Moreover, that right finds specific expression in the European Convention for the Protection of Human Rights, ratified by all the Member States, Article 8(1) of which provides that: 'Everyone has the right to respect for his private and family life, *his home* and his correspondence'.

99. The right to the inviolability of the home must therefore be regarded as one of the fundamental rights which all the institutions of the Community must respect.

100. However, the question arises whether that principle also protects the business premises of legal persons and, in such a

case, what is the extent of that protection and the manner in which it is to be ensured.

101. As has already been seen, the situation is not identical in all the Member States. In certain Member States, the question has not been definitively and clearly settled. In others, it has been answered in the negative. That is the case, in particular, in regard to Ireland and the Netherlands, in which the concepts of 'dwelling' and 'woning' are defined in such a way that the legal protection of the home is regarded as applying only to the private dwellings of persons living there.

102. Furthermore, the question has not yet been definitively and clearly decided in regard to Article 8 of the European Convention. Professor Frowein, in his commentary dating from 1985,[11] argued against the assimilation of commercial premises to the homes of private persons.

103. Above and beyond those differences, however, a general trend is discernible in the national legal systems towards the assimilation of business premises to a home. In any event, in the great majority of Member States, the inspection of business premises is made subject, by virtue of special legislation, to more or less stringent formal or procedural conditions. I therefore propose, as the Commission does, that it should be expressly accepted that there is at Community level a fundamental right to the inviolability of business premises.

11 — Frowein and Peukert: 'Europäische Menschenrechtskonvention', *EMRK-Kommentar*, Article 8, No 27.

104. Is it true that in its judgment in *National Panasonic*,[12] the Court was confronted with the problem whether, in particular, the fact that Regulation No 17 permits the Commission to carry out investigations without any prior communication to the undertaking concerned constitutes an infringement of the said right and concluded that such was not the case without first expressly deciding whether Article 8 of the European Convention applied to legal persons (see [1980] ECR 2057, paragraph 19: 'in so far as it applies to legal persons').

105. However, in its judgment of 14 April 1960 in Case 31/59 *Acciaieria e Tubificio di Brescia* v *High Authority* [1960] ECR 71, the Court decided that 'the right to privacy extended to business premises, whether those of an individual or of a company'.[13]

106. However, it can be seen from the foregoing comparison of national legal systems that even in Member States in which the constitutional guarantee of the inviolability of the home is extended to business premises, it does not apply to them to the same extent as to a private dwelling.

107. In the economic, fiscal and social spheres, there are, in the various national legal systems, many measures providing for inspections of various kinds from a mere request for information to a search for documents with the help of the police. The terms used to describe such measures vary (inspection, check, inquiry, search . . .) and do not correspond in all the legal systems.

12 — Judgment of 26 June 1980 in Case 136/79 *National Panasonic* v *Commission* [1980] ECR 2033, at pp. 2056 and 2057.

13 — See, on that point, the Opinion of Mr Advocate General Warner in *National Panasonic* [1980] ECR 2061, 2068.

108. On the other hand, even in Germany, Denmark, Spain, France, Italy and Portugal, where prior judicial supervision is required by constitutional law, that requirement is not absolute. In Denmark, exceptions may be provided for by law. In Spain and Portugal, by virtue of the Constitution itself, judicial authorization is not required if the person concerned consents to the search. In Italy, investigations and inspections, particularly for economic and fiscal purposes, are governed by special laws.

109. Finally, in the field of competition law, even in Germany and in France, no prior court order is required to enter premises or inspect documents which the undertakings themselves submit. It is only in so far as the inspectors wish to carry out a search themselves for documents which have not been submitted to them voluntarily that such an order is necessary.

110. It should further be noted that, also in regard to competition law, in Spain and Greece, notwithstanding the constitutional requirements, no prior court order is required for inspections in business premises, even if they have to be carried out by force.

111. Finally, in the Member States which, like Germany, Denmark and France, make the use of force conditional on the issue of a prior court order, undertakings may be ordered to submit to inspections and to cooperate in investigations under pain of sanctions such as fines or periodic penalty payments without any prior judicial intervention being necessary.

112. The European Convention on Human Rights, for its part, expressly provides for the right of the legislature to derogate under certain provisions from the principle of the inviolability of the home. Article 8(2) of that Convention reads as follows:

'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 freedom of others'.

113. In its judgment in *National Panasonic,* the Court implicitly accepted that Article 14 of Regulation No 17 constitutes a legal provision fulfilling those conditions because it decided that

'... as follows from the seventh and eighth recitals of the preamble to Regulation No 17, 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 these rules is, as follows from the fourth recital of 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 contributes to the maintenance of the system of competition intended by the Treaty which undertakings are absolutely bound to comply with. In these circumstances, it does not therefore appear that Regulation No 17, by giving the Commission the powers to carry out investigations without previous notification, infringes the right invoked by the applicant (paragraph 20)'.

114. Even though in *National Panasonic*, it was the absence of any communication prior to the investigation which was the subject of the dispute, I consider that it may be deduced from that judgment that in the Court's view, the powers of investigation provided for in Article 14 of Regulation No 17 fulfilled the conditions laid down in Article 8(2) of the European Convention on Human Rights.

115. That conclusion is supported by the judgment of 23 September 1986 in Case 5/85 *AKZO Chemie* v *Commission* [1986] ECR 2585, at pp. 2612 and 2613, in which the Court decided as follows:

'The applicants themselves admit that if the conditions laid down in Article 14(3) of Regulation No 17 are fulfilled, a decision ordering an undertaking to submit to an investigation is not contrary to the fundamental principles laid down in Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. As can be seen from the examination of the first two submissions, that is so in this case. The third submission must therefore also be rejected' (paragraph 27).

116. I therefore conclude that it follows both from a comparison of the national legislation and from the analysis which the Court has already made of Article 14 of Regulation No 17 in the light of Article 8 of the European Convention on Human Rights that the exercise of the powers conferred on the Commission by Article 14(3) of Regulation No 17 cannot pose any problem in regard to the principle of the inviolability of the home as applied to undertakings notwithstanding the fact that those powers are exercised under threat of a periodic penalty payment or a fine.

117. However, it should be borne in mind that the investigation procedure set up by Article 14(3) of the regulation is, in my opinion, based on the principle of cooperation on the part of the undertakings and although it permits the Commission's officials to ask to be shown any file or document so that they may check whether it contains information material to the investigation, it does not give those officials themselves the right to search cabinets and remove the document from them.

118. The rights of the undertakings are sufficiently protected by the possibility afforded to them of contesting before this Court the validity of decisions ordering investigations and applying for suspension of their operation. It should also be borne in mind that if a decision ordering an investigation is declared void by the Court after the investigation has taken place, the Commission is not entitled to use the documents which it found.

119. On the other hand, if an undertaking refuses to permit the Commission's officials to enter its buildings or a particular room, or to open a locked cabinet or to hand to the Commission officials certain documents

from a cabinet or even the briefcase of an employee, and that refusal is formally recorded, Article 14(6) comes into play.

120. The situation is then the quite different one of implementation by force of a Community decision, which may be carried out only by the competent national authorities. It may therefore be said that it is opposition by an undertaking which transforms an inspection into a procedure in the nature of a search. However, the national authorities may use force only under the conditions provided for in the law of their own country. Whenever their law makes such a procedure subject to the prior issue of a judicial order or decision, that order or decision must therefore be obtained by the competent national authorities.

121. Let us now consider what are the consequences of the foregoing for the resolution of the disputes now before the Court.

C — *Application of the principles proposed to these cases*

122. *1.* Hoechst AG is seeking a declaration that the decision of 15 January 1987 ordering an investigation is void 'in so far as it contains the authorization to conduct a search, and in particular the authorization to inspect premises and storage facilities to see whether they contain business documents and if so what documents'.

123. The other applicants claim that the Commission's officials actually carried out a search of their archives and of certain personal items (briefcases, diaries). Consequently, they have asked the Court to declare void either the decisions themselves, in so far as they authorize that manner of proceeding, or the implementation of the decision by the Commission's officials.

124. Let me point out first of all that at the beginning of this Opinion, I rejected Hoecht's contention that even the voluntary submission of business documents pursuant to a decision ordering an investigation constitutes a search if the Commission does not know the precise nature or details of the documents submitted.

125. In the second place, I have just concluded that an investigation carried out with the cooperation of the undertaking and in the course of which the Commission's officials do not themselves search premises and cabinets but merely ask to be handed the documents which they designate (even in very general terms) cannot raise any problem in regard to the fundamental right to the inviolability of the home. That is precisely the kind of investigation which is provided for under Article 14(3) of Regulation No 17, the terms of which are simply referred to in the decisions ordering investigations.

126. However, the Commission interprets its powers more widely as meaning that its officials have the right actually to carry out a search themselves even without obtaining a court order. The question arises whether a decision may be declared unlawful not because of the terms in which it is drafted

but because of the interpretation which the institution which drew it up gives to it and the approach it believes it may take in practice on the basis of that interpretation.

127. I consider that that question must be answered in the negative. The powers of the Commission's officials do not flow from the decisions ordering the investigation but from the law, namely Article 14(3) of Regulation No 17. The decision ordering investigations merely apply those powers to a particular case and refer for the benefit of the undertaking concerned, to the powers vested in the Commission's officials. In so far as the terms of the decision ordering the investigation are, as in this case, fully in accordance with those of the enabling provision (Article 14(3)), the decision cannot be unlawful. On the other hand, any conduct on the part of the inspectors which exceeds the limits laid down by a decision ordering an investigation is such as to affect the validity of the subsequent stages of the procedure, that is to say, the validity of any decision of the Commission declaring that there has been an infringement of Article 85 of the Treaty.

128. The decisions of 15 January 1987 ordering investigations on the premises of Hoechst AG, Dow Benelux NV, Dow Chemical Ibérica SA, Alcudia SA and Empresa Nacional del Petroleo SA cannot therefore be regarded as unlawful.

129. 2. What consequences must be drawn from the foregoing in regard to the validity of the imposition of a period penalty payment? In that regard, I consider that from the time an undertaking refuses to submit to the Commission's inspectors all documents designated by them, (even in very general terms), it may be ordered to pay a periodic penalty payment. However, its refusal must be established in a manner leaving no room for doubt. In this type of situation, that must be done by drawing up a formal Minute.

130. According to the Commission's reply to a question from the Court concerning the instructions which it gave to its officials, those officials begin by asking the undertaking's representatives if it is willing to submit to the investigation. If the undertaking refuses to submit to the investigation or purports to submit to it while rendering it impossible, a formal Minute taking note of the refusal is drawn up and signed by the Commission, the undertaking (if it wishes) and by the representative of the Member State concerned. The Commission's officials then leave the undertaking's premises and enter immediately into contract with the Commission in order to obtain a decision under Article 14(6).

131. What actually happened in regard to Hoechst? When the Commission's officials visited its premises for the first time on 20 January 1987, a formal Minute was drawn up, signed by the undertaking's legal adviser, recording that the undertaking simply refused to submit to the investigation (Annex 2a to the application).

132. When the Commission's officials visited the undertaking for the second time on 22 January 1987, the legal adviser once again stated that any action on the part of the Commission's officials on the basis of the decision of 15 January 1987 must be regarded as unlawful and that the undertaking's representatives, without actually

resisting, would refuse to take *any* part in the investigation (Annex 2b to the application).

133. On 23 January 1987, the Commission's officials, once again accompanied by representatives of the Bundeskartellamt, asked, *inter alia*, to be handed business documents supposedly kept in places which were locked. However, it can be seen in the Minute of that visit that the legal adviser 'refused to submit the business documents called for and, in particular, refused the request to open a locked cabinet' (Annex 2c to the application).

134. Since the representative of the competent national authority considered that he did not have the power to open the cabinet in question by force without a search warrant, the investigation procedure stopped there.

135. Hoechst therefore opposed any form of investigation on three occasions, including a form of investigation consisting merely in the production by the undertaking's own managers of files called for by the Commission's officials. The Commission was therefore fully entitled to impose a periodic penalty payment on the undertaking.

136. It should be borne in mind that the investigation which was ultimately carried out at Hoechst on 2 and 3 April 1987 could only proceed, as the Commission points out at p. 6 of its rejoinder, by reason of the existence at that time of a search warrant, because the undertaking's legal adviser insisted on inserting the following in the Minute of 2 April 1987:

'Having regard to the fact that a search warrant has now been issued by a court, Hoechst AG submits *to the investigation and* the search' (emphasis added).

137. *3.* I must now say a word about the position adopted by the other applicant undertakings.

Unlike Hoechst, those undertakings did not oppose the investigations but it seems that in the course of those investigations the Commission's officials searched cupboards, drawers and the briefcase and diary of a manager of one of the undertakings. The undertakings claim that their managers present at the time protested orally against that conduct. The Commission contends that they agreed to its officials searching all cupboards and desks.

138. What is to be made of that dispute? First of all, it is impossible to establish at this stage what really happened because no independent witness was present during the investigations. In the second place, it is plain that if the undertaking's managers agree to the Commission's officials themselves taking documents from cupboards and drawers, the procedure cannot be regarded as defective in that regard. Finally, as I mentioned above, undertakings are expressly informed that they may oppose the investigation, and therefore, the form in which the Commission's officials propose to carry it out, and have their opposition noted in a formal Minute, which will lead to the withdrawal of the Commission's officials.

139. However, the mangers of Dow Benelux and those of the three Spanish undertakings did not have formal note taken of their alleged opposition to the Commission's officials searching for documents. Those undertakings must therefore be regarded as having tolerated the investigation in the form in which it was carried out, with the result that there can be no question of declaring the implementation of the decision unlawful in regard to them, even supposing that such were possible in principle. Nor are the subsequent procedural steps taken by the Commission in regard to them unlawful.

140. I therefore propose that the Court should dismiss the applicants' applications in so far as they allege an infringement of the fundamental right to the inviolability of the home.

D — *The role of the national courts and the powers that are or could be vested in the Court of Justice*

141. I have concluded that in cases in which national law provides that an investigation carried out in the fact of the opposition for the undertaking constitutes a search requiring a court order, it is for the competent national authorities to obtain such an order. In my view, the assessment to be made by the national court cannot however extend to the lawfulness of the Commission decision ordering the investigation. Only the Court of Justice has jurisdiction to annul or declare invalid a measure adopted by a Community institution. In its judgment of 22 October 1987 in Case 314/85 *Foto-Frost* v *Hauptzollamt Lübeck-Ost* [1987] ECR 4199, the Court decided that although national courts may consider the validity of a Community act and may conclude that it is completely valid (paragraph 14) they have no jurisdiction themselves to declare that acts of Community institutions are invalid (paragraph 20). It drew that conclusion from the need to ensure that Community law is applied uniformly and to provide the necessary coherence for the system of judicial protection set up by the Treaty. It is true that in paragraph 19 of the same judgment, the Court indicated that

'the rule that national courts may not themselves declare Community acts invalid may have to be qualified in certain circumstances in the case of proceedings relating to an application for interim measures . . .'.

142. But I consider that in regard to the carrying out of an investigation no 'qualification' of that rule would be justified. Article 192 of the Treaty concerning enforcement should be applied to this case by analogy. According to that provision, decisions of the Council or of the Commission which impose a pecuniary obligation are enforceable in accordance with the rules of civil procedure in force in the State in the territory of which it is carried out but the order for its enforcement is to be appended to the decision, without other formality than verification of the authenticity of the decision, by the national authority which the government of each Member State designates for that purpose.

143. However, if it was possible to limit the involvement of the national authority in the application of a fine, an operation which undoubtedly affects property rights, to verification of the authenticity of the decision, there appears to be no reason why, in regard to a search, a national court should have power to verify the lawfulness of the Commission decision because the under-

taking may in any event challenge that decision by an action under Article 173. If the decision ordering the investigation is declared void, the Commission cannot use the information obtained. However, it may be necessary in certain Member States for provisions to that effect to be enacted and incorporated in the national measures adopted in implementation of Article 14(6) of Regulation No 17.

144. Until now, the system set up by Regulation No 17 has functioned more or less correctly because no undertaking has really hindered the carrying out of an investigation. Since Hoechst has set an example, there is a danger that, in the future, the machinery of Article 14(3) will be rendered inoperable in practice by the proliferation of formal objections on the part of undertakings. They are likely to require on each occasion the production of a search warrant, with the result that the Commission will lose the advantage of surprise. The risk is that the investigations will thus prove fruitless.

145. If it wishes to avoid that situation, the Commission will logically have to ask the competent national authorities to obtain in each case, as a precaution, a search warrant or a court order which they can produce if the undertaking is not prepared to submit to the investigation, either in whole or in part. It should be noted that in its report of 15 May 1984, the House of Lords Select Committee on the European Communities [14] already pointed out the need for such a course, at least in cases in which there was a danger of objection and the possibility of applying it in England and Wales (paragraph 45 of the report).

14 — Commission's Powers of Investigation and Inspection, House of Lords, Session 1983-84, 18th Report, HMSO.

146. However, it would be far preferable if a court order could be granted to the Commission's officials themselves by the Court of Justice of the European Communities.

147. It is the Court of Justice which will have to rule on any action brought against a decision ordering an investigation, on an application for suspension of the operation of the decision or on any action for annulment of the Commission's final decision finding that the undertaking has infringed Article 85 or Article 86. It would therefore be logical if it could also examine, before the investigation takes place and at the Commission's request, the question whether the Commission's grounds for suspecting that there has been an infringement of the competition rules are sufficiently concrete. That would render superfluous any application for suspension of the operation of the decision brought by the undertaking.

148. An additional argument in favour of such a 'European search warrant' is that, if the Commission considers that it must carry out simultaneous investigations in different countries, the warrants required may not always be obtained in time in all those countries.

149. In the expert's report drawn up at the request of Hoechst (Annex 6 to the reply), Professor Frowein expresses the opinion

that such a power on the part of the Court of Justice of the European Communities may already be deduced from the Community system and its structures and from the principle that the Community ensures respect for fundamental rights.

150. That argument is very attractive, all the more so as Article 81 of the Treaty establishing the European Atomic Energy Community provides for a procedure of that kind in regard to safety inspections. That article provides, in particular, that if the carrying out of an inspection is opposed,

'the Commission shall apply to the President of the Court of Justice for an order to ensure that the inspection be carried out compulsorily. The President of the Court of Justice shall give a decision within three days.

If there is danger in delay, the Commission may itself issue a written order, in the form of a decision, to proceed with the inspection. This order shall be submitted without delay to the President of the Court of Justice for subsequent approval'.

151. It could therefore be argued that in the case in which a detailed inspection procedure was directly provided for, namely, Article 81 of the EAEC Treaty, the Member States envisaged the issue of an order by the President of the Court of Justice and that it should therefore be possible to apply the same solution by analogy in the context of the review procedure which the Council is required to set up under Article 87 of the EEC Treaty. [15]

152. It could be objected that the Court cannot apply, in the context of the EEC Treaty, a solution which was not provided for in that Treaty but was envisaged in another Treaty signed on the same date and that it would be necessary, at least, for the Council to incorporate the wording of Article 81 of the EAEC Treaty in an amended version of Regulation No 17. For that purpose, the Council could rely on Article 164 of the EEC Treaty, which gives the Court the general task of ensuring that in the interpretation and application of the Treaty the law is observed.

153. The only solution which would not be open to criticism would obviously be to supplement the EEC Treaty itself. The opportunity could be taken to exclude expressly the possibility of suspending the operation of a decision ordering an investigation on the basis of Article 185 because such a suspension might allow the destruction of all compromising documents. The placing of seals on the undertakings' cabinets and archives, suggested by the Commission, does not seem to offer a sufficient guarantee and it would also no doubt be difficult to carry out in practice.

154. In any event, I do not think it is necessary for the Court to give a decision on those questions in the present cases and I will therefore confine myself to the remarks I have just made without proposing that the Court opt for one or other of the possibilities envisaged.

15 — Although, in a completely different context, Article 1 of the Protocol on the Privileges and Immunities of the European Communities also provides for the authorization of the Court of Justice if a search is to be made in Community premises and buildings.

II — The submission alleging a breach of essential procedural requirements

155. According to Hoechst, the decision ordering the investigation infringes the *principle of collegiality* because it was adopted by a single Member of the Commission and not by the entire Commission even though it is actually described as a decision of the Commission.

156. The decision was indeed adopted by one member of the Commission responsible for competition matters who, under an internal decision of 5 November 1980, has power to adopt certain procedural measures provided for under Regulation No 17 on behalf of the Commission and, in particular power to order an undertaking to submit to an investigation under Article 14(3).

157. In its judgment of 23 September 1986 in Case 5/85 *AKZO* v *Commission* [1986] ECR 2585, the Court considered in detail the lawfulness of such an authorization granted to a single Member of the Commission. It reached the conclusion that

'the decision of 5 November 1980 authorizing the Member of the Commission responsible for competition matters to adopt in the name of the Commission and subject to its control a decision under Article 14(3) of Regulation No 17 ordering undertakings to submit to investigations does not breach the principle of collegiate responsibility laid down in Article 17 of the Merger Treaty' (paragraph 40).

158. That Member may therefore validly adopt such a decision but he does so on behalf of the Commission, which is fully responsible for the decision (paragraph 36 of the judgment). There can therefore be no objection to the decision being described as a decision of the Commission.

159. Hoechst has suggested that the Court should reconsider that decision in the light of the principle *nulla poena sine lege.* In its view, in so far as non-compliance with a decision ordering an investigation under Article 14(3) makes an undertaking liable to a fine under Article 15(1) of Regulation No 17, the Commission has amended, by a mere internal administrative measure affecting Article 14, the conditions under which a fine may be imposed under Article 15.

160. That argument is not convincing. Article 15 adds nothing to the definition of the infringement which it is intended to punish. The infringement consists of the failure on the part of an undertaking to fulfil its obligation to submit to investigations as defined in Article 14(1) and specified in the decision adopted under Article 14(3). Thus, both infringement and the penalty are defined by law and their substance is in no way affected by the delegation of authority in question.

161. On the basis of the foregoing I may also reject the arguments put forward by the Spanish companies alleging defects of form in the decisions. Since those decisions remain Commission decisions even if they were adopted under the delegation of authority granted to one of its Members, the fact that they are presented as Commission decisions provides correct information as to the *identity of the decision-making body.*

162. Similarly, since the Court has already decided in *AKZO*, cited above, that the system of delegation of authority at issue here 'does not have the effect of divesting the Commission of powers conferring on the Member to whom authority is delegated powers to act in his own right' (paragraph 36), they were in fact adopted under the decision-making power granted to the Commission, regardless of the procedure followed and regardless of the fact that they were signed by a single Member of the Commission, in this case, the Member to whom authority had been delegated.

163. Finally, the fact that the decisions notified to the undertakings concerned end with the formula 'For the Commission, P. Sutherland, Member of the Commission', without actually bearing Mr Sutherland's signature cannot constitute a breach of an essential procedural requirement. The applicants could not in any circumstances fail to understand that they were decisions of the Commission, particularly since they were certified by the Commission's seal and by the signature of its Secretary-General and were presented to the applicants by Commission officials duly authorized to implement the decisions.

III — The submission that the statement of reasons was defective

164. All the applicants allege an infringement of Article 190 of the Treaty and of Article 14(3) of Regulation No 17 on the ground that the contested decisions do not sufficiently define the subject-matter and purpose of the investigation which they order and provide no indication as to the time or period when the infringements were allegedly committed.

165. Dow Benelux and the Spanish companies add that the Commission failed to define the geographical limits of the market at issue, to distinguish between the PVC and polyethylene markets and, within the polyethylene market, between the markets for each of the three different types of polyethylene, and to indicate whether the alleged infringement is a horizontal agreement, a vertical agreement or both.

166. It should first be noted that Article 14(3) of Regulation No 17 itself defines the essential elements of the statement of reasons for a decision ordering an investigation providing that the decision is to 'specify the subject-matter and 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'.

167. In *National Panasonic*, cited above, the Court considered that a decision similar to those at issue in this case contained a sufficient statement of the reasons on which it was based because it fulfilled the requirements of that provision ([1980] ECR 2033, 2059).

168. It is true that in that case, the statement of reasons was allegedly defective on the ground, in particular, that the Commission had not indicated why it had recourse to the powers granted to it by Article 14(3) and not to those under Article 14(2).

169. However, unlike the Spanish companies, I do not deduce therefrom that the requirements to be fulfilled by a statement of reasons differ depending on

whether a point is one of substance or merely of procedure.

170. Generally, I consider that it is permissible to limit the requirements of a statement of reasons to those expressly provided for in Article 14(3), having regard to the nature and purpose of the decisions in question.

171. On the one hand, decisions ordering investigations, like those requesting information under Article 11(5), constitute a form of preparatory inquiry which must be regarded as straightforward measures of management. [16] As such, they may be clearly distinguished from the other decisions provided for under Regulation No 17, such as those granting negative clearance (Article 2), ordering the termination of infringements (Article 3), granting exemptions under Article 85(3) of the Treaty (Article 6), revoking an exemption (Article 15) or periodic penalty payments (Article 16). It is in particular because of that difference in nature that Article 19, concerning the hearing of the persons concerned and of third parties, does not apply to decisions adopted under Article 14(3) and Article 11(5). [17]

172. On the other hand, the objective of a decision ordering an investigation is to enable the Commission to 'gather the necessary information to check the actual existence and scope of a given factual and legal situation'. [18] Of necessity, therefore, such a decision cannot contain a detailed, precise and complete statement of reasons.

173. In this case, the contested decisions all indicate in their preamble the objective which it is sought to achieve, namely 'to permit the Commission to establish all the facts and to obtain complete information on the subject of agreements or practices' (fifth recital) which, if it is shown that they exist, 'could constitute a serious infringement of Article 85(1) of the Treaty' (third recital). In both the first recital in the preamble and Article 1, it is stated that the subject-matter of the investigation is the possible participation of the addressees in agreements or concerted practices 'between certain producers and suppliers of PVC and polyethylene (including LdPE) in the EEC in which they fixed the selling price for those products, quotas and targets'.

174. The business books and documents which the undertakings must produce and the oral explanations which they must provide are defined in terms of the subject-matter of the investigation thus described. The fact that they are not otherwise defined or even enumerated does not, as has been seen, unduly extend the powers of the Commission's officials, who must be in a position to ensure that documents relating to the investigation are not hidden from them. On the other hand, the purpose of any investigation is precisely to establish facts which the Commission has reason to believe exist and to supplement and consolidate the sometimes sketchy information at its disposal. Its power of investigation must necessarily therefore extend to documents of which it does not have cognizance.

16 — See the judgment of 23 September 1986 in Case 5/85 *AKZO* v *Commission* [1986] ECR 2615, paragraph 38.

17 — With regard to 'this substantive difference between the decisions taken at the end of such a procedure and the decisions ordering an investigation', see the judgment in *National Panasonic*, cited above, [1980] ECR 2058, paragraph 21. I will return to that subject in the context of the decision imposing a periodic penalty payment on Hoechst.

18 — Judgment in *National Panasonic*, paragraph 21.

175. The latter observation also justifies the fact that it is not required to state the date or period when the suspected infringements were committed. It is partly to obtain that information that the Commission undertakes an investigation.

176. The same is true of the definition of the kind of infringement (horizontal or vertical agreement) or the precise definition of the relevant market on which the infringements were committed. It is only in any subsequent Commission decision finding that an infringement of Article 85 of the Treaty has actually occurred that such details must be given.

177. Accordingly, the fact that Dow Benelux does not produce PVC and that Dow Ibérica and Alcudia neither produce nor market PVC does not justify the annulment of a decision ordering an investigation dealing with 'the existence of agreements or concerted practices between certain producers and suppliers of PVC and polyethylene'. They may be party to such agreements or practices merely as suppliers of PVC or as producers and suppliers of polyethylene. It is when taking the final decisions finding that an infringement of Article 85 of the Treaty has occurred that the Commission must take account of their actual involvement and the exact role which they played in such an agreement and the degree of their participation in regard to each of the markets at issue.

178. The same is true in regard to EMP which neither produces nor markets PVC or polyethylene, but is the majority shareholder in Alcudia. Leaving aside the fact that an undertaking may be party to agreements without actually contributing to their implementation by producing and marketing the products with which they deal, it is settled case-law that 'the fact that a subsidiary has separate legal personality is not sufficient to exclude the possibility of imputing its conduct to the parent company ... in particular where the subsidiary, although having separate legal personality, ... carries out, in all material respects, the instructions given to it by the parent company'.[19] The parent company may therefore have imputed to it an infringement of the competition rules in so far as it can influence the conduct of its subsidiary in a decisive manner and has in fact made use of that power. It is in order to check whether such has been the case that the Commission must also be able to carry out investigations on the premises of the parent company. If it finds that the subsidiary had such a degree of commercial autonomy in the matter that its conduct cannot be imputed to the parent company, the Commission must take account of that fact in adopting its final decision.

I conclude from the foregoing that the statements of the reasons on which the contested decisions are based are sufficient and correct.

IV — The submission that evidence was lacking or imprecise

179. All the applicants point out that the contested decisions do not indicate clearly the 'information' or 'evidence' on which the

19 — Judgment of 26 October 1983 in Case 107/82 *AEG* v *Commission* [1983] ECR 3151, paragraph 49; see also the judgment of 14 July 1972 in Case 48/69 *ICI* v *Commission* [1972] ECR 619, paragraphs 132 and 133.

Commission based itself when ordering the contested investigations.

180. Whereas Hoechst puts forward that complaint in the context of its arguments regarding the statement of reasons, the Spanish companies present it as a separate submission. In their view, the adoption of a decision restricting individual rights without disposing in advance of concrete, reliable, real and serious information constitutes an infringement of the principle of legality. Dow Benelux considers the fact that the decision is not supported by any reasonable evidence to constitute an infringement of Article 14(3) of Regulation No 17.

181. It follows from what I have just said concerning the requirements which must be met by the statement of reasons for a decision ordering an investigation that those complaints must be rejected.

182. Article 14(3) does not require the Commission to state precisely in its decision the information and evidence before it. The powers granted to it under that provision are designed precisely to permit it to check whether information leading it to suspect the existence of an infringement of the competition rules is correct.

183. In its judgment in *National Panasonic*, cited above, the Court stated that the Commission's choice of one method of investigation rather than another depends on the needs of the inquiry, having regard to the special features of the case, and not on the facts relied upon here by the applicant, such as the gravity of the situation or extreme urgency.[20] Applying the same reasoning, it is also for the Commission itself to assess whether the information before it justifies a measure of inquiry such as an investigation.

184. Dow Benelux's argument to the effect that 'the Commission's powers of investigation authorize it only to verify an existing presumption, based on established evidence' (Report for the Hearing in Case 85/87, p. 17) is only half true. An investigation must indeed relate only to an 'existing presumption'. That is why Article 14(3) requires that the subject-matter and purpose of the investigation must be stated. However, an investigation does not necessarily have to be based on 'established evidence', since otherwise it would be superfluous.

185. That reasoning also applies to the alleged infringement of the principle of legality which, according to Dow Ibérica, Alcudia and EMP, renders the decision void 'by reason of the non-existence, at the time of its adoption, of the facts legally defined as underlying the decision and purporting to justify it' (point II.B.2.1, p. 7, of the applications in Cases 97 to 99/87). At the time of the adoption of a decision ordering an investigation, those facts are, by definition, still mere supposition. The purpose of the investigation is precisely to prove and establish them.

186. That principle, as well as that of legal certainty (end of point II.B.2.2 of the applications in Cases 97 to 99/87), is also not affected by the fact that the contested decisions permitted the investigations to go beyond existing evidence or actual indications; an investigation cannot be confined to known evidence and indication but also serves to gather other information concerning the presumed facts.

20 — [1980] ECR 2033, paragraphs 28 to 30.

187. If adequate information is not obtained and the presume facts are not proved, the Commission must terminate the proceedings and if it does not do so, the Court may declare void any decision finding, on the basis of insufficient evidence, that an infringement has been committed.

188. Dow Benelux raises a more fundamental objection when it argues that the evidence available to the Commission at the time that it ordered the investigation had been unlawfully obtained and, therefore, that that evidence was itself unlawful.

V — The submission alleging that the information on the basis of which the investigation was ordered was obtained unlawfully

189. It was in its reply (paragraph 66) that Dow Benelux made this claim in explanation, *inter alia*, of the Commission's persistent refusal to place the information and evidence in question on the file, notwithstanding the fact that Dow Benelux had impliedly called upon it to do so by raising the issue of the absence of any reasonable evidence.

190. Subsequently, Dow Benelux learned that the Commission had obtained the information and evidence concerned in the context of an investigation into an alleged cartel in polypropylene, and Dow Benelux therefore concluded that its initial supposition had been correct.

191. Thus, in a document lodged on 26 October 1988, that is to say, after the closure of the written procedure, it asked the Court to permit the introduction into the pending proceedings of those facts, which it regarded as 'new' and as corroborating the submission alleging the absence of any reasonable evidence or, in the alternative, it asked the Court to accept new submissions, arising out of the said new facts, alleging an infringement of Articles 14 and 20 of Regulation No 17.

192. Since, as a result of the Commission's objections to the introduction of 'new' facts or 'new' submissions, the Court decided on 23 November 1988 to join the application to the substance of the case, it is first necessary to consider the admissibility of that application.

193. Dow Benelux based its principal application on the first subparagraph of Article 91(1) of the Rules of Procedure of the Court which provides: 'A party wishing to apply to the Court for a decision on a preliminary objection or on any other procedural issue shall make the application by a separate document'. It based its alternative application on Article 42(2) of the Rules of Procedure which prohibits the raising of a fresh issue in the course of proceedings 'unless it is based on matters of law or of fact which come to light in the course of the written procedure'.

194. It is obvious that neither of those provisions applies directly to Dow Benelux's application. Since Article 91 is part of Title III of the Rules of Procedure entitled 'Special forms of procedure', it does not envisage the introduction of new facts or submissions in 'normal' proceedings, the course of which is governed by Title II. As its wording indicates, it is intended to permit the parties to apply to the Court to

resolve a 'preliminary' issue, thus being confined to objections or procedural issues.

195. With regard to Article 42(2), it should be noted that the terms thereof do not permit account to be taken of matters of law or fact which came to light only after the end of the written procedure. Is it sufficient in such a case to permit the procedure to continue its normal course and accept that the applicant might apply later on the basis of Article 98 for revision of the judgment terminating the proceedings? The reply to that question must be in the negative because by virtue of Article 41 of the Statute of the Court of Justice of the EEC, 'An application for revision of a judgment may be made to the Court only on discovery of a fact which is of such a nature as to be a decisive factor, and which, when the judgment was given, was unknown to the Court and to the party claiming the revision'. Consequently, a decisive fact which came to light between the end of the written procedure and the delivery of the judgment cannot be relied upon, either before the delivery of the judgment or after it. Such a lacuna is hardly compatible with the requirements of sound administration of justice.

196. On the other hand, it may be seen from Article 60 of the Rules of Procedure that the Court may, even after the closure of the oral procedure, order further measures of inquiry to be taken. In its judgment of 16 June 1971,[21] it indicated that such an application 'may only be admitted if it relates to facts which are capable of having a decisive influence and which the party concerned was not able to put forward before the closure of the oral procedure' (paragraph 7).

21 — Case 77/70 *Prelle* v *Commission* [1971] ECR 561.

197. Furthermore, Article 61 of the Rules of Procedure permits the Court to reopen the oral procedure. In an order of 3 December 1962,[22] it dismissed an application to reopen the oral procedure on the ground that the matters raised in support thereof were known before the date of the oral procedure to the party making the application for the reopening of the said procedure 'which therefore had the time and opportunity to argue them at the hearing'.

198. It follows from the foregoing that facts likely to have a decisive influence on the dispute at hand which could be raised during the written procedure may still be introduced at the oral procedure and in fact they must be so introduced if an application for new measures of inquiry or reopening of the oral procedure is not to be inadmissible or without foundation.

199. In order for such facts to be regarded as 'new', they do not necessarily have to have occurred after the end of the written procedure, it is sufficient that the party relying upon them became aware of them only at that time.[23]

200. Thus, the Commission's argument that the facts being relied upon in this case are not new because it was not obliged to inform the undertaking concerned at the time of the inspection either of the information at its disposal or the way in which it had obtained that information (which is correct) cannot be accepted. Even if the

22 — Joined Cases 2 and 3/62 *Commission* v *Luxembourg and Belgium* [1962] ECR 445.

23 — See, in that regard, the judgment of 1 April 1982 in Case 11/81 *Dürbeck* v *Commission* [1982] ECR 1251, paragraph 17, and the two judgments mentioned in the two preceding footnotes. See also the wording of Article 42(2) of the Rules of Procedure and Article 98 thereof, which provides that, in regard to an application for revision, time is to run from 'the date on which the applicant receives knowledge of the facts on which the application is based'.

Commission never expressly denied that the investigation of Dow Benelux was based, *inter alia*, on information which it had obtained during previous investigations of other undertakings relating to other products and other infringements, Dow Benelux became aware of that fact only in July or August 1988, that is to say, after the end of the written procedure.

201. Dow Benelux was therefore entitled to put the new facts forward after the end of the written procedure and to draw legal consequences therefrom by alleging an infringement of Article 14(3) and Article 20(1) of Regulation No 17.

202. I therefore propose that the Court should develop a little further the principles arising out of the last-mentioned judgments and hold that Article 42(2) of the Rules of Procedure may also apply to the raising of a fresh issue based on facts which came to light after the end of the written procedure. Such an extension will still enable the other party to express its views in regard to such an issue, either in writing (second subparagraph of Article 42(2)) or orally, the decision on the admissibility of the submission being made in the final judgment (third subparagraph of Article 42(2)). In this case, the Commission had both possibilities, the first, because Dow Benelux's memorandum of 26 October 1988 was transmitted to it for observations and, the second, because the Court decided on 23 November 1988 to join the application to the substance of the case.

203. Let us now consider whether the submission alleging that this evidence was unlawfully obtained is well founded.

204. According to the applicant, by obtaining, in the context of an investigation into polypropylene, information which formed the basis of the decision ordering the investigation in regard to PVC and polyethylene, the Commission went beyond the subject-matter and purpose of the first investigation and thereby infringed Article 14(3) of Regulation No 17. By subsequently using that information for a purpose other than that for which the investigation in regard to polypropylene was ordered, namely, in the investgation concerning PVC and polyethylene, it also infringed Article 20(1) of Regulation No 17, which provides: 'Information acquired as a result of the application of Articles 11, 12, 13 and 14 shall be used only for the purpose of the relevant request or investigation'.

205. In my opinion, neither of those requirements justifies the annulment of the decision ordering the investigation at issue here.

206. The reason why Article 14(3) provides that decisions ordering investigations must specify the subject-matter and purpose of the investigation is, first of all, to avoid investigations being carried out by the Commission on a speculative basis, without having any concrete suspicions. However, that does not oblige the Commission's officials to close their eyes if, during an investigation dealing with one product, they find by chance indications regarding an agreement or a dominant position concerning another product, because the Commission has a general duty to bring to light any agreement, decision or concerted practice prohibited by Article 85(1) or any abuse of a dominant position prohibited by Article 86 (see the eighth recital in the preamble to Regulation No 17). Otherwise, undertakings could even have an interest in

placing such information in the files submitted to the Commission's officials in order to make it impossible to initiate proceedings in regard to those products.

207. However, the purpose of Article 14(3) is also to protect an undertaking which has been ordered to submit to an investigation against a search for information having no connection with the subject-matter of the investigation. Thus, it does not permit the Commission, in the context of an investigation, to examine and make copies of documents unconnected with the investigation which has been ordered. If it wishes to obtain evidence regarding an infringement of the competition rules other than that of which it suspected the existence and in regard to which it wishes to obtain evidence, it may do so only be making a request for information or by carrying out a further investigation, either into the same undertaking or into other undertakings.

208. For its part, Article 20(1) is intended to ensure that the Commission uses the information obtained, in particular in the context of an investigation, only to determine whether the infringement of the competition rules which it suspects actually exists. But if the Commission obtained, in the course of such an investigation, evidence of the participation of other undertakings in the suspected infringement, it is self-evident that it could make a finding regarding their participation without necessarily having to carry out a further investigation into those undertakings. That would be necessary only if the Commission still had doubts as to their participation and could not prove it by other means.

209. However, Article 20(1) prohibits it from using evidence discovered by chance during an investigation dealing with product A concerning an agreement dealing with product B as a basis for directly addressing a statement of objections to all the undertakings taking part in that agreement.

210. However, in this case, it should be noted that the Commission has not used information which its officials may have found by chance in the context of an investigation concerning polypropylene carried out into other undertakings which are not parties to these proceedings either to prove infringements committed by those undertakings in other areas, which, incidentally, would be completely irrelevant in regard to these cases, or to prove that Dow Benelux committed infringements in regard to PVC and polyethylene. The Commission merely relied on the said information, obtained by chance, as a basis for ordering investigations in regard to PVC and polyethylene produced by other firms and, in particular, Dow Benelux. For the reasons indicated above, that cannot be regarded as incompatible with Articles 14 and 20. The Commission did not therefore base its decision to order an investigation in regard to PVC and polyethylene on information unlawfully obtained.

VI — The other submissions put forward by Dow Ibérica, Alcudia and EMP

211. The Spanish companies have put forward several other submissions which were not relied on by the other applicants and which I shall now consider in turn.

212. (a) According to those companies, until the accession of Spain to the Community, the Commission did not have the power to carry out investigations into Spanish companies. After that date it could not therefore have such a power in regard to conduct and acts prior to accession.

213. The applicants do not contest the Commission's power to punish conduct on their part prior to accession in so far as it produced and is producing anti-competitive effects within the common market. In its judgment of 27 September 1988 in the 'wood pulp' cases,[24] the Court confirmed that the competition rules in the Treaty apply to undertakings whose registered offices are situated outside the Community if they take part in concertation which has the object and effect of restricting competition within the common market (paragraphs 13 and 14).

214. It would be paradoxical, to say the least, if it were to be held that Spanish undertakings could be punished for conduct occurring before Spanish accession but that the investigations to which they are obliged to submit since accession cannot cover that very conduct, all the more so as the conduct involved may continue to produce anti-competitive effects after accession.

215. On the other hand, investigations carried out by the Commission into companies following Spain's accession may also yield evidence against undertakings established in other Member States which have participated in agreements or concerted practices or both which are subject to investigation.

216. I would add that the fact that they deal with facts arising prior to their adoption does not mean that decisions ordering investigations may be regarded as retroactive. By their very nature, they can deal only with facts which arose in the past, even if the conduct in question continues into the present.

217. There also is no infringement of Article 2(2) of the Treaty of Accession and Article 2 of the Act of Accession,[25] which provide that the provisions of the original treaties and the acts adopted by the institutions of the Communities before accession are to apply from the date of accession, fixed at 1 January 1986.

218. By virtue of those articles, Regulation No 17 became applicable in Spain on 1 January 1986 and Spanish undertakings are required to submit to investigations ordered since that date on the basis of Article 14(3) thereof, which does not limit the scope of investigations to facts occurring after the entry into force of Regulation No 17.

219. (b) The Spanish applicants also claim that there has been an infringement of the presumption of innocence, which is a fundamental right, by virtue of the fact that the contested decisions speak of the existence of

24 — Joined Cases 89, 104, 114, 116, 117 and 125 to 129/85, [1988] ECR 5193.

25 — OJ L 302, 15.11.1985.

'evidence', rather than mere indications, of their anti-competitive conduct.

220. In that regard, it should be noted that the first two recitals in the preambles to the decisions ordering the investigations addressed to three Spanish undertakings use the word 'evidence' twice where the decisions addressed to Hoechst and Dow Benelux speak of 'information'. In particular, it is stated in Spanish that 'La Comisíon ha conseguido pruebas que indican la existencia de acuerdos ...' ('The Commission has obtained evidence which indicated the *existence* of agreements ...'), whereas the decision addressed to Hoechst refers to 'Informationen die den Verdacht begründen, daß ...' (information giving grounds to *suspect* that ...'). In the decision addressed to Dow Benelux, it is stated '... dat de Commissie informatie heeft ontvangen waaruit het bestaan kan worden afgeleid van overeenkomsten ...' ('... that the Commission has received information on the basis of which it may be concluded that there are in existence agreements ...').

221. Those differences in drafting are certainly to be regretted, but it can be seen very clearly from the following recitals in all the decisions that the Commission intended to refer only to the information which led it to suspect the existence of agreements or concerted practices and not to conclusive evidence. Thus, the third recital in the preamble to the Spanish version of the decision states: 'Si se prueba la existencia de tales acuerdos ... ello podría constituir una grave infracción ...' ('If the existence of such agreements can be proved ... it could constitute a serious infringement ...'). The fourth recital refers to: 'Los acuerdos y prácticas concertadas de que se sospecha ...' ('The suspected agreements and concerted practices ...'). The fifth recital contains the same form of words and also refers to '... las empresas sospechosas de participar en los mismos' ('... the undertakings suspected of participating therein').

222. (c) The Spanish applicants also allege an infringement of the general principle of proportionality which requires that, in the exercise of its administrative powers, the Commission should not interfere with legal situations created for the purpose of protection rights under national law save in so far as it is strictly necessary to do so. In this case, that general principle of Community law should have caused the Commission to interpret Article 14 of Regulation No 17 in conformity with the Spanish constitutional protection of fundamental rights.

223. That submission must also be rejected. On the one hand, the validity of Community measures may be assessed only in regard to Community law and not in regard to any provision of national law, even a constitutional provision. Similarly, compliance with a general principle of Community law cannot be made to depend on concepts and rules drawn from national law.

224. On the other hand, it has been seen that the contested decisions are in conformity with Article 14(3) of Regulation No 17 and do not infringe the fundamental right to the inviolability of the home. It cannot therefore be considered that they go beyond what is necessary to achieve the legal objective they envisage.

225. (d) Finally, the Spanish applicants allege an infringement of the principle of non-discrimination by virtue of the fact that other undertakings established in other

Member States enjoyed prior judicial safeguards of the lawfulness and sound basis of the investigation to which they were required to submit.

226. If that was indeed the case, the alleged discrimination would certainly not have been due to any act on the part of the Commission and could not therefore justify the annulment of a decision ordering an investigation adopted by the Commission.

227. On the one hand, it has not been shown that the Commission has itself ever sought a court order prior to an investigation in any other Member State. In regard to Hoechst, it expressly refused to do so and it was the Bundeskartellamt which applied to the national court.

228. On the other hand, since there can be question of such an order only in cases where the undertaking concerned refuses to submit to the investigation which has been ordered, any differences of treatment stem solely from differences in the situations created by the undertakings themselves.

229. Finally, if, in cases in which undertakings object to investigations, they are none the less obliged to submit to them by virtue of the assistance afforded by the national authorities pursuant to Article 14(6) of Regulation No 17 and, in the absence of uniform procedures and rules, in accordance with national law, any ensuing disparities of treatment are merely a reflection of the differences between the laws of the various Member States, and such differences are not covered by Article 7 of the Treaty and the principle of non-discrimination. [26]

230. Consequently this submission must also be rejected.

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231. The applications for the annulment of the Commission decisions ordering investigation of 15 January 1987 brought by Hoechst AG, Dow Benelux NV, Dow Chemical Ibérica SA, Alcudia SA and Empresa Nacional del Petroleo SA are therefore without foundation and must be dismissed.

232. The other claims made in Cases 85 and 97 to 99/87 to the effect, essentially, that the Court order the Commission to return or destroy all the documents collected during the investigations or certain of them as well as the notes made on those occasions, or else prohibit the Commission from using or revealing the information obtained must be regarded as inadmissible since the Court has no jurisdiction to make such an order in connection with a review of the legality of an act under Article 173 of the Treaty. [27]

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233. All that remains is for me to state my position on Hoecht's applications for the annulment of the decisions of 3 February 1987 and 26 May 1988 imposing a periodic penalty payment under Article 16 of Regulation No 17 and, in the alternative, for a reduction in the definitive amount so fixed.

26 — See, in particular, the judgment of 19 January 1988 in Case 233/86 *Pesca Valentia* v *Minister for Fisheries and Forestry, Ireland and the Attorney General* [1988] ECR 83, paragraph 18.

27 — See, in particular, the judgment of 24 June 1986 in Case 53/85 *AKZO Chemie* v *Commission* [1986] ECR 1965, paragraph 23.

VII — The decision of 3 February 1987 imposing a periodic penalty payment on Hoechst (Case 46/87)

234. Two submissions are advanced against the decision imposing a periodic penalty payment.

235. The first alleges that the decision ordering the investigation, which the periodic penalty payment decision served to enforce, was unlawful: the annulment of the former would deprive the latter of its legal basis. However, it can be seen from what I have already said that the premise on which this submission is based is incorrect and for that reason, it should be rejected.

236. The second submission alleges a breach of essential procedural requirements. In that connection, the applicant claims that the decision was adopted:

(a) by the accelerated written procedure,

(b) without previously consulting the Advisory Committee on Restrictive Practices and Dominant Positions,

(c) without hearing the undertaking concerned.

237. In its reply to the question put to it by the Court, Hoechst withdrew the objections which it had made to the power of a single Member of the Commission to adopt decisions on periodic penalty payments. The delegation of authority granted by the internal decision of 5 November 1980 to the Member of the Commission with responsibility for competition does not extend to such decisions and the contested decision was adopted by the written procedure which the Commission described in its defence (p. 5, paragraph 6) as the 'accelerated' procedure.

238. The complaint which the applicant has said it wishes to maintain is not however directed against the written nature of the procedure but against its accelerated nature. In that regard, it must be observed that an accelerated written procedure may be distinguished from a normal written procedure solely by the fact that under the former, the Members of the Commission have fewer days to raise any objections to the decision submitted for their approval. That cannot affect the validity of the decision and that complaint must therefore be rejected.

239. The applicant also claims that 'Article 16 of Regulation No 17, in particular, does not lay down any procedure authorizing the Commission not to comply with the legal obligation to hear the persons concerned and the Member States'. That argument refers to the points mentioned at (b) and (c), which must be dealt with together.

240. Article 16 deals with periodic penalty payments. Article 16(3) provides that 'Article 10(3) to (6) shall apply'. Those provisions deal with the procedure for consulting the Advisory Committee on Restrictive Practices and Dominant Positions, which is composed of representatives of the Member States.

241. Article 19(1) provides: 'Before taking decisions provided for in Articles 2, 3, 6, 7, 8, 15 and 16, the Commission shall give the

undertakings or associations of undertakings concerned the opportunity of being heard on the matters to which the Commission has taken objection'. The implementing rules concerning such hearings were fixed by Regulation No 99/63/EEC of the Commission of 25 July 1963.[28] That regulation provides, in particular, that before consulting the Advisory Committee, the Commission is to inform undertakings in writing of the objections raised against them (Article 2) and to afford to those who have so requested in their written comments the opportunity to put forward their arguments orally if the Commission proposes to impose on them a fine or periodic penalty payment (Article 7).

242. The applicant deduces from the fact that Article 16(3) and Article 19(1) of Regulation No 17 do not distinguish between decisions imposing periodic penalty payments adopted on the basis of Article 16(1) for the purpose of compelling undertakings, in particular, to submit to an investigation (subparagraph (d)) and those provided for in Article 16(2) fixing the definitive amount of the periodic penalty payment once the undertakings have submitted to the investigation, that the Commission must consult the Advisory Committee and hear the persons concerned when it is adopting both of those decisions. On the other hand, the Commission considers that it is required to follow those procedures only in regard to one or other of the decisions, but not both.

243. In my opinion, the Commission is not obliged to follow those procedures when it adopts the first of the said decisions for the following reasons.

244. *1.* None of those formalities is prescribed for the adoption of the decision ordering an investigation. Article 14 provides only that the competent authorities of the Member State in whose territory the investigation is to be made are to be informed (paragraph 2) or to be consulted (paragraph 4). The reason is that: 'Since the purpose of Article 14(2) of Regulation No 17 is to enable the Commission to carry out investigations without prior warning on the premises of undertakings suspected of infringements of Articles 85 and 86 of the Treaty, the Commission must be able to adopt its decision without being made subject to conditions of a formal nature which would have the effect of delaying such adoption.[29]

245. It may be wondered whether the Court did not actually intend to refer to Article 14(3) for Case 5/85 (*AKZO*) dealt with the annulment of a decision adopted on the basis of that provision. In any event, the Court's finding is equally valid for Article 14(3) since the Court has expressly decided that the Commission is not required to act first under Article 14(2) before adopting a decision on the basis of Article 14(3) (judgment in *National Panasonic* [1980] ECR 2055, paragraph 11).

246. However, a decision imposing a periodic penalty payment under Article 16(1) is merely intended to compel an undertaking which objects to an investigation to submit to it. It is associated, as it were, with the decision ordering that investigation. Both the consultation of the Advisory Committee and the hearing of the persons concerned will, in the nature of things, relate not to the decision imposing the periodic penalty payment but to the reasons which led the undertaking concerned to refuse to submit to the investigation. To require that those procedures be

28 — Regulation on the hearings provided for in Article 19(1) and (2) of Regulation No 17 of the Council (OJ, English Special Edition 1963-64, p. 47).

29 — Judgment of 23 September 1986 in Case 5/85 *AKZO Chemie* v *Commission* [1986] ECR 2585, paragraph 24.

followed for the adoption of such a decision would be to reintroduce by that means something which Regulation No 17 does not prescribe for decisions ordering an investigation.

247. *2.* Undertakings could even be prompted to object initially to the decision ordering an investigation in order to gain time without running the risk of having to pay a periodic penalty payment in respect of that delay. The Commission would not be able to impose such a payment until the Advisory Committee had been consulted and the undertaking concerned had been heard. If the undertaking was then obliged to submit to an investigation, it would take place after a delay which would cause the Commission to lose the benefit of surprise and would probably deprive the investigation of all useful purpose, by reason of the combined effect of the time-limits for the consultation of the Advisory Committee, which cannot meet earlier than 14 days after dispatch of the notice convening it (Article 10(5) of Regulation No 17) and the time-limits for the communication of objections, under which the persons concerned are allowed a minimum of two weeks to submit their written observations (Article 11(1) of Regulation No 99/63). Moreover, within that period, they may ask to be heard.

248. *3.* The decision ordering an investigation and the decision imposing a periodic penalty payment in order to compel the undertaking concerned to submit to the investigation are not really matters adversely affecting the undertaking within the meaning of Article 19(1) of Regulation No 17. The third recital in the preamble to Regulation No 99/63 states expressly that, in accordance with that provision, as well as the rights of the defence, undertakings must have the right to submit their comments 'on conclusion of the inquiry ... on the whole of the objections raised against them which the Commission proposes to deal with in its decisions'. However, a decision ordering an investigation is a mere measure of preparatory inquiry. It is certainly a measure which produces legal effects and directly affects the legal position of the undertaking concerned by obliging it to submit to the investigation and for that reason, is a measure open to challenge within the meaning of the judgment of the Court of 11 November 1981 in Case 60/81 *IBM* v *Commission.*[30] However, it does not presuppose any fault or infringement on the part of the undertaking of which the Commission is complaining. That is precisely the point upon which the Court relied in its judgment in *National Panasonic*, cited above, to explain why the right to a hearing does not apply to the investigation procedure. It decided that that procedure 'does not aim at terminating an infringement or declaring that an agreement, decision or concerted practice is incompatible with Article 85; its sole objective is to enable the Commission to gather the necessary information to check the actual existence and scope of a given factual and legal situation' ([1980] ECR 2058, paragraph 21).

249. The decision imposing the periodic penalty merely contributes to the proper functioning of the investigation procedure and therefore is also a measure of preparatory inquiry. It can have independent effects only if the undertaking concerned continues to object to the investigation, the daily periodic penalty payment applying only from the date of notification of the decision. Ultimately it is only the decision fixing the definitive amount of the periodic penalty payment which punishes

30 — [1981] ECR 2639. In that judgment, the Court held: 'According to the consistent case-law of the Court, any measure the legal effects of which are binding on, and capable of affecting the interests of, the applicant by bringing about a distinct change in his legal position is an act or decision which may be the subject of an action under Article 173 for a declaration that it is void' (paragraph 9).

the undertaking's failure to fulfil its obligation to submit to the investigation.

250. *4.* The decision imposing a periodic penalty payment is not in itself definitive. In order for the periodic penalty payment to be levied, it must be definitively fixed taking account of the period which elapsed between the notification of the decision and the carrying out of the investigation and also of the possibility for the Commission, under Article 16(2) of Regulation No 17, to fix the total amount of the periodic penalty payment at a lower figure than that which would arise under the original decision. (In relation to that second decision, it could even be considered that the first decision was no more than a measure of preparatory inquiry.)

Since there was no breach of essential procedural requirements in the adoption of the decision imposing the periodic penalty payment, Hoecht's application for its annulment must be dismissed.

251. The same conclusion must be reached regarding the alternative application for the annulment of that decision in so far as it served to force Hoechst to submit to a search. I have pointed out above that Hoechst objected to any kind of investigation and that the Commission was therefore entitled to impose a periodic penalty payment on it.

VIII — The decision of 26 May 1988 fixing the definitive amount of the periodic penalty payment (Case 227/88)

252. Since neither the decision ordering the investigation nor that imposing the periodic penalty payment is unlawful, Hoechst's submissions alleging the nullity of those decisions as a basis for seeking the annulment of the decision fixing the definitive amount of the periodic penalty payment must be rejected.

253. With regard to Hoechst's application in the alternative for a reduction in the amount of the periodic penalty payment, it is sufficient to note that by fixing it at ECU 55 000, the Commission merely multiplied the daily rate of ECU 1 000, imposed by the decision of 3 February 1987, by the number of days which elapsed between the date on which that decision was notified (5 February 1987) and the date on which the investigation actually took place (2 April 1987). By so doing, it remained within the range permitted under Article 16(1) of Regulation No 17 which, it should be said, certainly needs to be amended.

254. Since actions brought before the Court of Justice do not have suspensory effect, the Commission is not obliged to take account, in calculating the number of days' delay, of the fact that an action has been brought or an application for the suspension of the operation of the measure, if that application is unsuccessful. In this case, the application for suspension of the operation of the decisions ordering the investigation and imposing a periodic penalty payment was refused by the President of the Court by an Order of 26 March 1987.

255. Furthermore, measures adopted by the Community institutions are presumed to be valid so long as the Court has not made a finding that they are invalid.[31] Thus, Hoechst cannot rely, as justification for its refusal to accept that the decisions ordering the investigation and imposing periodic

31 — See, in addition to the judgment of 13 February 1979 in Case 101/78 *Granaria* v *Hoofdproduktschap voor Akkerbouwprodukten* [1979] ECR 623, paragraph 4, cited by the Commission, the judgment of 1 April 1982 in Case 11/81 *Dürbeck* v *Commission* [1982] ECR 1251, paragraph 17.

penalty payments have full legal effect, on 'the superior interests of a preparatory inquiry procedure in conformity with law and the constitution', which it seeks to have respected and 'the difficult nature of the legal questions raised, which have not yet been resolved'. Hoechst has appointed itself judge rather than leaving to the Court the task of ensuring that the law is observed. It persisted in that attitude even after the President of the Court had decided in his Order of 26 March 1987 that the two decisions whose operation Hoechst was seeking to have suspended, could not cause it serious and irreparable damage and that its main action afforded effective judicial protection of its interests.

256. The application for the reduction in the definitive amount of the periodic penalty payment is therefore also without foundation.

I would conclude, therefore, by proposing that the Court dismiss the applications brought against the Commission of the European Communities by Hoechst AG (Cases 46/87 and 227/88), Dow Benelux NV (Case 85/87) and Dow Chemical Ibérica SA, Alcudia SA and Empresa Nacional del Petroleo SA (Joined Cases 97 to 99/88) and order the applicants to pay the costs, including those of the applications for interim measures in Cases 46 and 85/87.