JUDGMENT OF THE GENERAL COURT (Fourth Chamber)

26 October 2010 *

In Case T-23/09,

Conseil national de l'Ordre des pharmaciens (CNOP),

Conseil central de la section G de l'Ordre national des pharmaciens (CCG),

established in Paris (France), represented initially by Y.-R. Guillou, H. Speyart van Woerden, T. Verstraeten and C. van Sasse van Ysselt, and subsequently by Y.-R. Guillou, L. Defalque and C. Robert, lawyers,

applicants,

v

European Commission, represented by A. Bouquet and É. Gippini Fournier, acting as Agents,

defendant,

* Language of the case: French.

APPLICATION for annulment of Commission Decision C (2008) 6494 of 29 October 2008 in Case COMP/39510, ordering the Ordre national des pharmaciens (ONP), the CNOP and the CCG to submit to an inspection pursuant to Article 20(4) of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 [EC] and 82 [EC] (OJ 2003 L 1, p. 1),

THE GENERAL COURT (Fourth Chamber),

composed, at the time of the deliberation, of O. Czúcz (Rapporteur), President, I. Labucka and K. O'Higgins, Judges,

Registrar: T. Weiler, Administrator,

having regard to the written procedure and further to the hearing on 23 February 2010,

gives the following

Judgment

Legal context

1 Article 20 of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 [EC] and 82 [EC] (OJ 2003 L 1, p. 1) states:

'1. In order to carry out the duties assigned to it by this Regulation, the Commission may conduct all necessary inspections of undertakings and associations of undertakings.

…

4. Undertakings and associations of undertakings are required to submit to inspections ordered by decision of the Commission. The decision shall specify the subject-matter and purpose of the inspection, appoint the date on which it is to begin and indicate the penalties provided for in Articles 23 and 24 and the right to have the decision reviewed by the Court of Justice …'

Background to the dispute

2 The applicants, the Conseil national de l'Ordre des pharmaciens (CNOP) and the Conseil central de la section G de l'Ordre national des pharmaciens (CCG), are, together with the Ordre national des pharmaciens (ONP), the addressees of Decision C (2008) 6494 of the Commission of the European Communities of 29 October 2008 ordering them to submit to an inspection pursuant to Article 20(4) of Regulation No 1/2003 in Case COMP/39510 ('the contested decision'). In another decision of the same date, the Commission ordered the Laboratoire Champagnat Desmoulins Philippakis to submit to an inspection in the same case. The latter decision is the subject of an action in the related Case T-24/09.

The ONP and its councils

3 The ONP and its councils are governed by the French code de la santé publique (Public Health Code; 'the CSP').

4 Article L 4231-1 of the CSP states the following:

'The purpose of the [ONP] is to:

1. ensure the observance of professional duties;

2. ensure the defence of the honour and independence of the profession;

3. ensure the competence of pharmacists;

4. contribute to promoting public health and quality of care, including the safety of professional measures.

The [ONP] groups together pharmacists practising their profession in France.'

5 Article L 4232-1 of the CSP explains that the ONP comprises seven sections corresponding in each case, with the exception of Section E, for which the grouping criterion is geographical, to the practice of a specific pharmacy discipline (retail, industry, wholesale distribution, liberal and hospital clinical biology, hospital pharmacy). Section G covers biological pharmacists practising in public and private clinical biology analysis laboratories. Each section is managed by a central council.

6 The ONP is organised around the CNOP, central councils, including the CCG, and regional councils. Article L 4233-1 of the CSP provides that the various councils of the ONP have legal personality.

The contested decision

7 The contested decision states in the first four recitals in its preamble:

'The Commission has information that agreements and/or concerted practices between pharmacists in France assembled in the [ONP] and/or decisions of the [ONP] and/or of the [CNOP] and/or of the [CCG …] having as their object and/or effect the prevention, restriction or distortion of competition within the common market, in particular the market for clinical biology analysis services, have existed at least since 2003. That conduct has manifested itself inter alia in the form of decisions intended to prevent pharmacists and/or legal persons from gaining access to the market for clinical biology [analysis] services, to restrict their activity on that market or to exclude them from that market.

The [ONP] is the professional body to which the French State has delegated inter alia the tasks of ensuring the observance of pharmacists' professional duties, the defence of the honour and independence of the profession, the competence of pharmacists and of contributing to the promotion of public health and quality of care, including the safety of professional measures. The [ONP] comprises a national council and seven sections into which pharmacists are divided up: Section G, for example, groups together biological pharmacists practising in public and private clinical biology analysis laboratories. The [ONP] and all its councils have legal personality.

The [ONP] and its councils have powers of control of access to the profession, of control of practice of the profession, of disciplinary sanction over pharmacists and legal persons engaging in an activity related to the profession of pharmacist, such as, for example, that of biological pharmacist within public and private clinical biology analysis laboratories. Control of access to the profession is exercised through the management of registration on the list of each section. The registration of pharmacists

and legal persons engaging in an activity related to the profession of pharmacist on the list is a statutory prerequisite for the pursuit of any activity related to the profession of pharmacist. The list is kept up to date by the central council of the section. Sanctions such as temporary or permanent prohibitions from engaging in any activity related to the profession of pharmacist may be ordered by the [ONP] and its councils, decisions which result in the temporary or permanent removal of the pharmacist and/or legal person from the list.

The Commission has information that agreements and/or concerted practices between the pharmacists in France assembled within the [ONP] have manifested themselves with regard to pharmacists and/or legal persons wishing to provide clinical biology analysis services in the form of decisions not to register them on the list of Section G, not to update their registration on the list and/or to prohibit them from pursuing their activity with the object and/or effect of restricting competition on the market for clinical biology analysis services.'

8 The eighth and ninth recitals in the preamble to the contested decision state:

'In order to ensure the effectiveness of the present inspection, it is … essential that it be conducted without the associations of undertakings suspected of participation in the alleged infringements having been informed of it in advance.

It is therefore necessary to adopt a decision pursuant to Article 20(4) of Regulation No 1/2003 ordering the associations of undertakings to submit to an inspection.'

9 The first paragraph of Article 1 of the contested decision states:

'The [ONP], the [CNOP] and the [CCG] shall submit to an inspection relating to their participation in and/or possible implementation of agreements and/or concerted practices between pharmacists in France assembled within the [ONP] and in the manifestations of those agreements and/or concerted practices in the form of decisions contrary to the provisions of Article 81 [EC] and/or Article 82 [EC] inter alia in the market for clinical biology analysis services. That conduct is alleged inter alia to have manifested itself in the form of decisions designed to prevent pharmacists and/or legal persons from gaining access to the market for clinical biology analysis services, to restrict their activity on that market or to exclude them from that market.'

10 Article 2 of the contested decision states that the inspection could begin on 12 November 2008, the date on which it actually took place at the seat of the applicants.

11 Article 3 of the contested decision provides:

'This Decision is addressed to the [ONP], the [CNOP] and the [CCG].

This Decision shall be notified, just prior to the inspection, to the associations of undertakings to which it is addressed …'

Procedure and forms of order sought

12 By application lodged at the Registry of the Court on 21 January 2009, the applicants brought the present action.

13 In their application, the applicants requested that the present case be joined with Case T-24/09. The President of the Fourth Chamber of the Court did not grant that request.

14 By separate document of the same date, the applicants requested that the case be dealt with under the expedited procedure, pursuant to Article 76a of the Court's Rules of Procedure. That request was rejected by decision of the Fourth Chamber of the Court of 19 February 2009.

15 Upon hearing the report of the Judge-Rapporteur, the Court (Fourth Chamber) decided to open the oral procedure and, in the context of the measures of organisation of procedure provided for in Article 64 of the Rules of Procedure, put a number of questions in writing to the applicants. They complied with that request.

16 At the hearing on 23 February 2010, the parties presented oral argument and replied to questions put by the Court.

17 The applicants claim that the Court should:

— annul the contested decision;

— order the Commission to pay the costs.

18 The Commission contends that the Court should:

— dismiss the action;

— order the applicants to pay the costs.

Law

19 In support of their action, the applicants put forward three pleas in law. The first plea alleges breach of the principle that decisions of the institutions must be addressed to entities having legal personality. The second plea alleges breach of the duty to state the reasons on which a decision is based. The third plea alleges infringement of Article 20(4) of Regulation No 1/2003.

The first plea in law, alleging breach of the principle that decisions of the institutions must be addressed to entities having legal personality

Arguments of the parties

20 As regards the admissibility of the plea, the applicants maintain that it is established that applicants have a legal interest in bringing proceedings against decisions addressed to third parties which are capable of having adverse effects on them, particularly in the area of competition. In the present case, apart from the fact that they clearly have an interest in seeking the annulment of the contested decision since they are directly the subject of it, they are entitled to put forward a plea to the effect that the ONP lacks legal personality since they are its representative bodies. The fact that the contested decision expressly refers to the ONP therefore directly and adversely affects them and they have a direct interest, even in a partial annulment of the contested decision. Indeed, they brought the action in their capacity as representative bodies of the ONP on the latter's behalf.

21 As regards the substance, the applicants submit that the ONP does not have legal personality, in contrast to its various councils. According to the applicants, the addressee of an inspection decision must of necessity be an entity having legal personality.

22 The Commission contends that the plea is inadmissible and in any event unfounded.

Findings of the Court

23 Concerning the admissibility of the plea in law, the latter clearly concerns the part of the enacting terms of the contested decision relating to an entity other than the applicants.

24 In that regard, it is not disputed that the applicants have legal personality. In those circumstances, notwithstanding their capacity as representative bodies of the ONP, even if the Court were to examine the substance of the plea and reach the conclusion that inspection decisions cannot be addressed to entities which do not have legal personality and that the ONP does not, such a conclusion would have no effect on the validity of the contested decision in so far as it is addressed to the applicants.

25 Moreover, it must be observed that, in reply to a written question put by the Court, the applicants stated that the fact that the contested decision had also been addressed to the ONP had not affected the extent of the inspection which the Commission had been able to carry out on the basis of the contested decision, since it had been conducted only at the premises of the applicants in view of the fact that the ONP has no existence in law and no external representation apart from its councils. In those circumstances, annulment of the contested decision, in so far as it was addressed to the ONP, would have no effect on the extent and results of the inspection with regard to the applicants.

26 It must therefore be held that annulment of the contested decision, in so far as it was addressed to the ONP, could not give satisfaction to the applicants. Consequently, the first plea must be rejected.

The second plea in law, alleging breach of the duty to state reasons

Arguments of the parties

27 According to the applicants, the requirements to be satisfied by the statement of reasons depend on the circumstances of each case and in particular the content of the measure in question, a fortiori since the obligation to state reasons is fundamental in character in the light of Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 ('the ECHR'). According to them, the present case is different from that of an inspection in which the Commission conducts its investigation into an entity whose nature as an undertaking is not in doubt. In this case, the addressees of the contested decision are the ONP, the CNOP and the CCG, but it is careful not to identify the entity capable of constituting an undertaking or association of undertakings within the meaning of Article 20(4) of Regulation No 1/2003. The applicants claim not to know which are the entities whose categorisation as an undertaking or association of undertakings enables the Commission to apply that provision and what its analysis is in that regard. They maintain that they were therefore not in a position, at the time of receipt of the contested decision, to know the reasons justifying the measure taken in relation to them, which constitutes a breach of the right to respect for the home within the meaning of Article 8 of the ECHR, which should be subject to sufficient safeguards. Consequently, the statement of reasons for the contested decision does not enable the Court to carry out the review which it is required to undertake.

28 According to the applicants, the Commission suggests that the protection accorded to the home of a legal person is less extensive than that accorded to the home of a natural person and, accordingly, takes the view that the statement of reasons can be briefer in the case of a decision to investigate the premises of a legal person. They reject such an argument on the ground that the protection accorded to the premises of undertakings under Article 8 of the ECHR is equivalent to that enjoyed by the

premises of natural persons and, in any case, is not less extensive. They cite in that regard inter alia the Opinion of Advocate General Mischo in Case C-94/00 *Roquette Frères* [2002] ECR I-9011, I-9015).

29 Moreover, in the reply the applicants argue that the obligation to state reasons constitutes a fundamental guarantee of the rights of defence of the undertakings concerned. Its scope cannot be restricted on the basis of considerations concerning the effectiveness of the investigation. According to the applicants, although it is true that the Commission is not required to communicate to the addressee of a decision ordering an inspection all the information at its disposal concerning the presumed infringements or to make a precise legal analysis of those infringements, it must none the less clearly indicate the presumed facts which it intends to investigate. The Commission is therefore required to show, in a properly substantiated manner, in the decision ordering the inspection, that it is in possession of information and evidence providing reasonable grounds for suspecting the infringement of which the undertaking subject to the inspection is suspected, in order to establish that the inspection is justified. The rights of the defence must be respected from the stage of the administrative procedure at which the contested decision is adopted.

30 The applicants submit that the contested decision nevertheless does not clearly indicate whether the practices suspected by the Commission and constituting the reason for the inspection are alleged against the ONP alone, the CNOP alone, the CCG alone or else against all those entities, so that it is impossible to ascertain the presumed facts which the Commission intended to investigate on the occasion of the inspection. Similarly, the applicants claim that the activities of the ONP and/or the applicants which justify the contested decision are not defined.

31 In the reply and at the hearing, the applicants claim, in addition, that their rights of defence were breached. In fact, the generality of the language used in the contested

decision allowed the Commission to seize numerous documents on the most diverse subjects. They draw up in that regard a list of the types of documents seized. The applicants add, at the hearing, that the breach of their rights of defence was borne out by the fact that the statement of objections, which they received after the action was brought, mentions a second objection different from that relating to the conditions of access to the profession mentioned in the contested decision.

32 The Commission contends that the contested decision is sufficiently reasoned.

Findings of the Court

33 In regard to Commission decisions ordering an inspection, Article 20(4) of Regulation No 1/2003 lays down the essential matters which must appear in such decisions, by requiring the Commission to provide a statement of the reasons for them, by stating the subject-matter and purpose of the inspection, the date on which it is to commence, the penalties provided for in Articles 23 and 24 of that regulation and the right to have such decisions reviewed by the Courts of the European Union. The case-law has clarified the extent of the obligation to state reasons for inspection decisions in the light of the content of that provision (see Case T-340/04 *France Télécom* v *Commission* [2007] ECR II-573, paragraphs 50 to 53, and the case-law cited).

34 In the present case, the contested decision clearly enables the applicants to identify the essential matters laid down by that provision, in particular the subject-matter and purpose of the inspection. That purpose is specified in the first recital in the preamble to and in Article 1 of the contested decision as relating to agreements and/or concerted practices between pharmacists in France assembled within the ONP and/or decisions of the ONP and/or of the applicants having as their object or effect the

prevention, restriction or distortion of competition on the market for clinical biology analysis services at least since 2003. The fourth recital adds that the Commission has information that those agreements and/or concerted practices manifested themselves in the form of decisions not to register the persons in question on the list of Section G, not to update their registration on the list and/or to prohibit them from pursuing their activity and thus provides precise information on the presumed facts which the Commission intends to investigate. The purpose of the inspection is described in the sixth and seventh recitals, which state that the inspection is to enable the Commission to acquaint itself with all the facts concerning those possible agreements and/or practices, their context and the identity of the undertakings or associations concerned, making it clear that the Commission has reasons for believing that knowledge of the existence and operation of the agreements and/or practices and/or decisions in question is limited to a small number of persons within the ONP and its councils.

35 The applicants nevertheless argue, in essence, that the duty imposed on the Commission to provide a statement of reasons in this case must be assessed in the light of the right to the protection of private life, as provided for in Article 8 of the ECHR and interpreted by the case-law of the European Court of Human Rights and by the Opinion of Advocate General Mischo in *Roquette Frères*, paragraph 28 above. By virtue of that right, the Commission is bound, in a decision on the inspection of undertakings or associations of undertakings, by a duty to state reasons which is similar to that imposed in the case of inspections of private individuals.

36 In so far as the applicants refer to the categorisation of the addressees of the contested decision as undertakings or associations of undertakings, it must be pointed out that the first paragraph of Article 3 (see paragraph 11 above) mentions the ONP, the CNOP and the CCG as being its three addressees. It is apparent from the second paragraph of that same provision that those addressees are regarded as associations of undertakings and not as undertakings. Despite the fact that certain recitals in the preamble to the contested decision contain a reference to 'the undertakings/associations

of undertakings concerned', Article 3 does not give rise to confusion. Moreover, it is clear from other references in the contested decision, such as, for example, in the eighth and ninth recitals in the preamble (see paragraph 8 above) and in the final part concerning fines and periodic penalty payments, that those addressees are regarded as being associations of undertakings. Contrary to what the applicants assert, the contested decision does not lack clarity as to the identity of its addressees and whether they are regarded as undertakings or associations of undertakings within the meaning of Article 20(4) of Regulation No 1/2003. The argument must be rejected.

37 In so far as the applicants thus seek to argue that the Commission should have provided, in the contested decision, a properly substantiated statement of reasons as to why it considered them to be associations of undertakings, it must first be pointed out that the contested decision specifies, in the second and third recitals in the preamble (see paragraph 7 above), that the ONP is the professional body to which the French State has delegated inter alia the tasks of ensuring the observance of pharmacists' professional duties, the defence of the honour and independence of the profession and the competence of pharmacists, and of contributing to the promotion of public health and quality of care, including the safety of professional procedures. It also states that the ONP comprises a national council and seven sections into which pharmacists are divided up, Section G grouping together biological pharmacists practising in public and private clinical biology analysis laboratories. It further specifies the power of control exercised by the entities in question in the area of access to the profession of pharmacist and biological pharmacist.

38 It must be held that that statement of reasons makes it possible to understand that the Commission considers the ONP to be a professional body of pharmacists and biological pharmacists to which the French State has delegated certain powers. It is also apparent from the statement of reasons that the Commission mentions the existence of the CNOP and the CCG within the ONP. Those details give some indications as to why the Commission considered that the ONP and the applicants were associations of undertakings. Nevertheless, it must be observed that the contested decision does

not contain any specific arguments relating to the reasons why a professional body such as that in question and its organs are regarded in this case as being associations of undertakings within the meaning of Article 20(4) of Regulation No 1/2003.

39 However, it must be remembered that the purpose of the requirement to give reasons for a particular decision is to enable the Court to exercise its power to review the legality of the decision and to provide the person concerned with sufficient information to ascertain whether or not the decision is well founded or whether it is vitiated by an error giving rise to a right to contest its validity, while the scope of the duty depends on the nature of the measure in question, on the context in which it was adopted and on all the legal rules governing the matter in question (Case 185/83 *Interfacultair Instituut Electronenmicroscopie der Rijksuniversiteit te Groningen* [1984] ECR 3623, paragraph 38; Case T-349/03 *Corsica Ferries France* v *Commission* [2005] ECR II-2197, paragraphs 62 and 63; and *France Télécom* v *Commission*, paragraph 33 above, paragraph 48).

40 In that regard, so far as concerns the nature of the contested decision and the context in which it was adopted, even though the applicants are right in asserting that, under the case-law, the protection of private life provided for in Article 8 of the ECHR must be respected and the protection of the home is extended to the premises of commercial companies (see, to that effect, Eur. Court HR, *Société Colas Est and Others v. France*, no. 37971/97, judgment of 16 April 2002, § 41; see also, concerning Regulation No 17 of the Council of 6 February 1962, First Regulation implementing Articles [81 EC] and [82 EC] (OJ, English Special Edition 1959-1962, p. 87); *Roquette Frères*, paragraph 28 above, paragraph 27; and order of 17 November 2005 in Case C-121/04 P *Minoan Lines* v *Commission*, not published in the ECR, paragraph 31), the Court of Justice has also pointed out that it is important to safeguard the effectiveness of inspections as a necessary instrument to enable the Commission to exercise its functions as guardian of the Treaties in the area of competition. Thus, in order to safeguard the usefulness of the Commission's right of access to the commercial premises of the undertaking subject to a procedure implementing Articles 81 EC and 82 EC, that right implies the power to search for various items of information which are not

already known or fully identified (see, with regard to Regulation No 17, Joined Cases 46/87 and 227/88 *Hoechst* v *Commission* [1989] ECR I-2859, paragraph 27, and order in *Minoan Lines* v *Commission*, paragraph 36).

41 It follows that, in view of the stage of the administrative procedure at which inspection decisions are taken, the Commission does not at that time have precise information enabling it to analyse whether the lines of conduct or acts covered can be categorised as decisions by undertakings or associations of undertakings within the meaning of Article 81 EC. It is precisely by taking account of the specific nature of inspection decisions that the case-law concerning the statement of reasons has made clear the types of information which must be contained in an inspection decision in order to enable the addressees to assert their rights of defence at that stage of the administrative procedure. To impose a more onerous obligation to state reasons on the Commission in that regard would not take due account of the preliminary nature of the inspection, the purpose of which is specifically to enable the Commission to establish at a later stage whether, where appropriate, infringements of Community competition law have been committed by the addressees of an inspection decision or by third parties. The wording of the contested decision itself shows that the agreements and concerted practices at issue were not regarded as proved but were merely suspected (see, to that effect and by analogy, Joined Cases 97/87 to 99/87 *Dow Chemical Ibérica and Others* v *Commission* [1989] ECR 3165, paragraph 55).

42 Moreover, it must be pointed out, as regards the legal rules governing the matter in question, which are in issue in the third plea examined below, that the Court of Justice has held in the past, inter alia in Case C-309/99 *Wouters and Others* [2002] ECR I-1577 ('*Wouters*'), relied on by the applicants, that a professional body representing the members of a liberal profession is not a priori excluded from the scope of Article 81 EC.

43 In those circumstances, in the light in particular of the nature of the contested decision, as clarified above, and of the legal rules governing the matter, it must be concluded that the Commission was not required to set out in the contested decision the specific legal analysis on the basis of which it regarded the addressees as being associations of undertakings, beyond the explanations contained in that regard in the second and third recitals in the preamble to the contested decision (see paragraphs 7, 37 and 38 above).

44 Moreover, as regards the argument alleging breach of the rights of the defence, put forward for the first time at the stage of the reply and repeated at the hearing, in particular as regards the type of documents seized by the Commission, it must be observed that the application merely draws attention, after a reminder of the case-law relating to the duty to state reasons, to the inadequacy of the statement of reasons for the contested decision as regards the nature of the addressees (undertakings and/or associations of undertakings), but does not express any complaint as regards the breach of their rights of defence in this case.

45 The fact that the duty to state reasons in inspection decisions relates specifically to the protection of the rights of defence of the addressees does not alter the fact that a breach of the rights of the defence, which by its nature is individual, does not fall within the scope of an infringement of essential procedural requirements and, therefore, must not be raised by the Court of its own motion (Joined Cases T-67/00, T-68/00, T-71/00 and T-78/00 *JFE Engineering and Others* v *Commission* [2004] ECR II-2501, paragraph 425, and *Corsica Ferries France* v *Commission*, paragraph 39 above, paragraph 77). Consequently, the complaint alleging breach of the rights of the defence, made for the first time at the reply stage, must be rejected as inadmissible, pursuant to Article 48(2) of the Rules of Procedure.

46 Finally, so far as concerns the complaints made with regard to the content of the statement of objections, it is sufficient to observe that they are an element post-dating the contested decision which cannot affect its legality, since that legality must be assessed on the basis of the elements of fact and of law existing at the time when the measure

was adopted (see Case T-322/01 *Roquette Frères* v *Commission* [2006] ECR II-3137, paragraph 325, and the case-law cited).

47 It follows that the second plea must be rejected.

The third plea in law, alleging infringement of Article 20(4) of Regulation No 1/2003

48 The plea is divided into two parts. The first part concerns the allegedly incorrect categorisation of the ONP and the applicants as undertakings, and the second their allegedly incorrect categorisation as associations of undertakings.

The first part, alleging incorrect categorisation of the ONP and the applicants as undertakings

— Arguments of the parties

49 The applicants dispute that the ONP and they themselves are undertakings. They do not engage in any commercial or economic activity. Their activity falls within the sphere of the public authorities. According to them, a detrimental ambiguity results from the wording of the contested decision, given that it does not clearly

define whether its addressees are to be regarded as undertakings or as associations of undertakings.

50 The Commission disputes the applicants' arguments.

— Findings of the Court

51 As was noted in paragraph 36 above, it is clear from the contested decision that its addressees are regarded as being associations of undertakings and not undertakings. The first part of the third plea must therefore be rejected.

The second part, alleging incorrect categorisation of the ONP and the applicants as associations of undertakings

— Arguments of the parties

52 The applicants dispute that the ONP and they themselves are associations of undertakings. They refer, in essence, to the judgment in *Wouters*, paragraph 42 above, which requires a two-stage approach in examining whether a professional body may be regarded as an association of undertakings. It must first be determined whether the members of that body are undertakings within the meaning of Community competition law and

then whether its activities, by their very nature or under the criteria developed by the Court of Justice, do not fall outside the sphere of economic activity.

53 In the first place, the applicants observe that not all the members of the ONP are undertakings within the meaning of Article 81 EC, as some of them are civil servants. They include, inter alia, pharmacists practising in the hospital sector who are registered on the lists of Sections G and H of the ONP. In addition, the members of another category, university lecturers teaching the pharmaceutical sciences, also have civil servant status. Moreover, employed pharmacists, who account for a significant proportion of the members registered on the list of the ONP, cannot be regarded as undertakings either. In that regard, the applicants dispute the relevance of the judgment in Joined Cases T-217/03 and T-245/03 *FNCBV and Others* v *Commission* [2006] ECR II-4987.

54 The applicants also dispute the relevance of the decision of the French Competition Council of 18 March 1997 and of the judgment of the French Court of Cassation of 16 May 2000 upholding it, which found an infringement of competition law in the medicines home delivery sector. They argue that that decision and that judgment, which specifically concerned Section A of the ONP, did not find that it was an association of undertakings and based their assessment on the finding that Section A had exceeded its public service remit whereas the CCG had never exceeded its statutory powers.

55 In the second place, the applicants submit that their activities and those of the ONP are outside the sphere of economic activity, given that they also have a social remit based on the principle of solidarity and that they exercise powers which are typically those of a public authority.

56 As regards their social remit, the applicants make reference to Article L 4231-2(6) of the CSP, under which the CNOP, composed of representatives of all the central councils, including the CCG, 'may deal nationally with all matters of mutual assistance and professional solidarity and in particular claims and pensions'. The social remit thus defined is based on the solidarity manifested in the fact that a proportion of the members' contributions may be set aside for a scheme to assist pharmacists who are in difficulty or retired.

57 In order to prove that they exercise powers which are typically those of a public authority, the applicants list their activities on the basis of the French legal provisions. They perform inter alia judicial and administrative functions.

58 As regards their judicial function, they point out that, as a professional body, French law places them on the same footing as administrative courts and that their disciplinary chambers are presided over by an administrative judge. Moreover, they fulfil the criteria laid down for assessing whether a body has the characteristics of a court or tribunal within the meaning of Article 234 EC, in particular, whether their judicial function is established by law, whether it is permanent and compulsory, whether their procedures are *inter partes*, whether they apply rules of law and whether they are independent.

59 Among their measures of an administrative nature, the applicants point to the organisation of ongoing professional training for pharmacists, the power to suspend pharmacists whose state of health could make it dangerous to practise their profession and the fact that the ONP's councils ensure observance of the rules of professional conduct. Moreover, the collection of the contributions necessary for the functioning of the ONP and for the performance of its functions is also a power typically that of a public authority. Finally, they add that the law entrusts the CNOP with the task of organising the implementation of the pharmaceutical dossier, the first national electronic health dossier.

60 In the third place, the applicants invoke three additional criteria which all demonstrate that they are neither undertakings nor associations of undertakings within the meaning of Community competition law and which were also taken into account in *Wouters*, paragraph 42 above. They are, firstly, the appointment of the members of the management bodies of the professional organisation by the national authorities, secondly, the obligation of the professional organisation in question to observe a number of public interest criteria and, thirdly, the absence of influence by the professional organisation in question over its members.

61 First, as regards their composition as management bodies of the ONP, they point out that they are not exclusively composed of pharmacists elected by their peers and pursuing their activity in a liberal form, but that they also include civil servants, representatives of the State and representatives of the pharmaceutical sciences appointed by the State authorities and remaining under their control.

62 Moreover, the legislature has entrusted them with the task of promoting public health and quality of care, which is a public interest criterion applied to all their actions, and in particular on the occasion of registration on the list. In that regard, they argue that the Court of Justice's recent case-law shows that it is possible for a State, in the context of the protection of fundamental principles, such as public health, to regulate the conditions governing enrolment, by an organisation, in a profession which is itself regulated (Joined Cases C-171/07 and C-172/07 *Apothekerkammer des Saarlandes and Others* [2009] ECR I-4171 and Case C-531/06 *Commission* v *Italy* [2009] ECR I-4103).

63 The applicants further maintain that they are not capable of influencing the conduct of their members, which also precludes their categorisation as associations of undertakings. On the one hand, the CNOP does not intervene directly in matters of registration on the list of pharmacists, since the latter submit their application to one

of the central or regional councils responsible for those matters and it adjudicates only in the event of refusal of registration. On the other hand, in the field of clinical biology, the intervention of the CCG in matters of registration or amendment of entry on the list depends directly on the approvals and authorisations issued by the relevant prefect, who is the representative of the State in the department concerned. The role of the CCG is confined to the expression of non-binding opinions. Moreover, in matters of registration and removal from the list, the CNOP and the CCG have only powers which are strictly regulated by statute. They are circumscribed powers, since those bodies cannot refuse registration on the list for a professional who fulfils all the statutory conditions. In assessing the actual influence of those decisions on the members of the profession, account should also be taken of the possible remedies against refusals of registration and removals from the list.

64 Finally, in answer to the Commission's argument that the formal categorisation of the addressees of the contested decision as undertakings or associations of undertakings is not a condition of its lawfulness, the applicants submit that the principle that the institutions must act within the limits of their powers, as set out inter alia in Articles 5 EC, 7 EC and 211 EC, means that the Commission may legitimately adopt a decision only pursuant to a legal basis, and only provided that all the conditions imposed by that legal basis are satisfied. The categorisation as an association of undertakings must therefore, in their submission, exist at the time of the inspection. The contested decision is otherwise without any legal basis since Article 20(4) of Regulation No 1/2003 clearly states that the Commission may conduct all necessary inspections of 'undertakings and associations of undertakings'.

65 The Commission disputes the applicants' arguments.

— Findings of the Court

66 As a preliminary point, it must be noted that recital 24 in the preamble to Regulation No 1/2003 states that the Commission should be empowered to undertake such inspections as are necessary to detect any agreement, decision or concerted practice prohibited by Article 81 EC. In that regard, Article 20(1) of Regulation No 1/2003 provides that the Commission may conduct all necessary inspections of undertakings and associations of undertakings. Under Article 20(4) of Regulation No 1/2003, undertakings and associations of undertakings are required to submit to inspections ordered by decision of the Commission.

67 It must also be pointed out that, since Regulation No 1/2003 implements the rules on competition laid down in Articles 81 EC and 82 EC, the definition of the terms 'undertakings' and 'associations of undertakings' contained in Article 20 of that regulation must in principle be that adopted in the context of the application of Article 81 EC.

68 It is nevertheless necessary to take into account the specific nature of inspection decisions (see paragraph 40 above). In particular, having regard to the fact that such decisions are adopted at the start of an inquiry, there can be no question at that stage of assessing definitively whether the acts or decisions of the addressee entities or other entities can be regarded as agreements between undertakings, as decisions by associations of undertakings or as concerted practices contrary to Article 81(1) EC or else as practices referred to in Article 82 EC. Even though Article 20(4) of Regulation No 1/2003 provides that the Commission is to specify in an inspection decision what its subject-matter is, it is not a matter at that stage of carrying out an assessment of specific conduct, since the very purpose of the inspection is to obtain evidence relating to alleged conduct.

69 In addition, account must also be taken of the fact that Regulation No 1/2003 gives the Commission powers the aim of which is to enable it to carry out its duty under the Treaty of ensuring that the rules on competition are applied in the common market (see, in regard to Regulation No 17, Case 136/79 *National Panasonic* v *Commission* [1980] ECR 2033, paragraph 20, and order in *Minoan Lines* v *Commission*, paragraph 40 above, paragraph 34), which is also reiterated in recital 24 in the preamble to Regulation No 1/2003 (see paragraph 66 above). The case-law has also confirmed that the scope of inspections may be very wide and that the right to enter any premises, land and means of transport of undertakings is of particular importance inasmuch as it is intended to permit the Commission to obtain evidence of infringements of the competition rules in the places in which such evidence is normally to be found (see, to that effect, in regard to Regulation No 17, *Hoechst* v *Commission*, paragraph 40 above, paragraph 26, and order in *Minoan Lines* v *Commission*, paragraph 40 above, paragraph 35).

70 In the present case, concerning the categorisation of the ONP and the applicants as associations of undertakings within the meaning of Article 20(4) of Regulation No 1/2003, it must be remembered that, in the field of competition law, the concept of an undertaking covers any entity engaged in an economic activity, regardless of its legal status and the way in which it is financed and that any activity consisting of offering goods and services on a given market is an economic activity (*Wouters*, paragraph 42 above, paragraphs 46 and 47).

71 It is clearly the case that pharmacists, at least self-employed pharmacists, offer, in return for payment, in particular, services of retail distribution of medicinal products and assume the financial risks attaching to that activity. It must therefore be concluded that those persons carry on an economic activity and are thus undertakings within the meaning of Articles 81 EC, 82 EC and 86 EC (see, to that effect and by analogy, Joined Cases C-180/98 to C-184/98 *Pavlov and Others* [2000] ECR I-6451, paragraphs 76 and 77, and *Wouters*, paragraph 42 above, paragraphs 48 and 49). Indeed, the applicants do not dispute that a number of pharmacists who are members of the ONP may be regarded as undertakings within the meaning of competition law,

since they practise their profession in the liberal form and thus assume the financial risks attaching to that.

72 Moreover, in addition to retail pharmacists or assistant retail pharmacists, who are members of Section A, some members of Section G, namely directors or assistant directors of clinical biology laboratories, also satisfy the criteria of the concept of undertaking. Even if, as the applicants claim, a majority of the pharmacists in Section G hold posts as employees in private and public clinical biology analysis laboratories, at least a proportion of the members of that section may be regarded as undertakings within the meaning of competition law, which the applicants in fact confirmed at the hearing in reply to a question put by the Court.

73 The applicants nevertheless argue that the fact that a proportion of their members cannot be regarded as undertakings means that the representative bodies in question cannot fall within the scope of Article 81 EC.

74 That argument is clearly contradicted by the case-law. In its judgment in *FNCBV and Others* v *Commission*, paragraph 53 above, the Court held that unions bringing together and representing farmers, who are undertakings within the meaning of Article 81 EC, could be described as associations of undertakings for the purpose of applying that provision in spite of the fact that they might also bring together farmers' spouses, inter alia, because, according to the Court, in any event, the mere fact that an association of undertakings may also bring together persons or entities that cannot be described as undertakings is not sufficient to affect its status as an association within the meaning of Article 81(1) EC (*FNCBV and Others* v *Commission*, paragraph 53 above, paragraph 55).

75 The applicants dispute the relevance of that judgment, raising the point that the Court also accepted in that judgment the fact that farmers'spouses generally share in the tasks of the family farm. They argue that those spouses therefore engage in an economic activity, which is not true of a large number of members of the ONP. However, even though the Court did indeed mention that fact in paragraph 55 of the judgment in *FNCBV and Others* v *Commission*, paragraph 53 above, the applicants' argument cannot succeed, since that paragraph clearly states that,'in any case', the mere fact that certain members are not undertakings is not sufficient to remove the association in question from the scope of Article 81 EC.

76 The ONP and the applicants are therefore organisations which bring together and represent a number of professionals, including retail pharmacists and directors of clinical biology laboratories, who may be described as undertakings within the meaning of Article 81 EC.

77 That finding is sufficient for it to be concluded that the Commission was entitled to describe the ONP and the applicants as associations of undertakings within the meaning of Article 20(4) of Regulation No 1/2003 (see, to that effect and by analogy, *FNCBV and Others* v *Commission*, paragraph 53 above, paragraphs 53 and 54) and was lawfully entitled to subject them to an inspection under that provision. In particular, it is possible that, in that capacity, those organisations may have taken decisions contrary to Article 81 EC, an assumption which the Commission, under its remit, is entitled to investigate, inter alia on the basis of evidence obtained during an inspection.

78 The applicants' arguments derived from the judgment in *Wouters*, paragraph 42 above, cannot alter that conclusion. The question determined in that judgment was whether, when it adopts a given regulation, a professional body such as the Bar of the Netherlands was to be treated as an association of undertakings or, on the contrary, as a public authority (*Wouters*, paragraph 42 above, paragraph 56). However, in the present case, the question whether, in the exercise of their specific powers, the applicants escape the application of Article 81 EC or whether, on the contrary, some of their acts

must be regarded as decisions by associations of undertakings within the meaning of that provision is clearly premature and will have to be determined, where appropriate, in the final decision ruling on the complaints upheld by the Commission. In any case, the *Wouters* judgment clearly confirmed that professional bodies are not a priori excluded from the scope of Article 81(1) EC (see, to that effect, *Wouters*, paragraph 42 above, paragraph 59, and the case-law cited).

79 Moreover, it must also be pointed out that the inspection ordered by the contested decision did not concern exclusively possible decisions by associations of undertakings within the meaning of Article 81(1) EC, as were at issue in *Wouters*, paragraph 42 above, but also possible participation by the applicants in agreements and/or concerted practices between pharmacists in France assembled within the ONP, and an infringement of Article 82 EC.

80 Furthermore, the file shows that there are a number of decisions by the French Competition Council finding the existence of infringements of competition law by the ONP and/or its bodies and that the French Court of Cassation has upheld at least one of those decisions. Contrary to what the applicants claim and regardless of the fact that those decisions concerned Section A and not Section G of the ONP, they are a further circumstantial factor which permitted the Commission to take the view that the ONP and the applicants could not a priori be excluded from the scope of Article 81 EC, since Section A and Section G include some members which can be described as undertakings and the existence of public interest tasks circumscribed by statute does not preclude either of those sections from adopting acts outside that statutory framework and in contravention of Article 81 EC.

81 Finally, as regards the reference made by the applicants to the judgments in *Apothekerkammer des Saarlandes and Others* and *Commission* v *Italy*, paragraph 62 above, which, they claim, show that it is possible for a State, in the context of the protection of fundamental principles such as public health, to regulate the conditions governing enrolment, by an organisation, in a profession which is itself regulated, those judgments clearly concern, in essence, the application of Articles 43 EC and 56 EC, relating to freedom of establishment and the free movement of capital, to national legislation relating to the conditions governing the practice of the profession of pharmacist. Those judgments are irrelevant to the outcome of these proceedings, since it is clear from the case-law that the fact that rules do not constitute restrictions on freedom of movement because they have, as such, nothing to do with economic activity means neither that the activity in question necessarily falls outside the scope of Articles 81 EC and 82 EC nor that the rules do not satisfy the specific requirements of those articles (see, to that effect and by analogy, Case C-519/04 P *Meca-Medina and Majcen* v *Commission* [2006] ECR I-6991, paragraph 31).

82 It is clear from the foregoing that the Commission was entitled to consider, at the stage when the contested decision was adopted, that the ONP and the applicants were associations of undertakings within the meaning of Article 20(4) of Regulation No 1/2003. No infringement of that provision by the Commission, inasmuch as it described the addressees of the contested decision as associations of undertakings, has therefore been established.

83 Consequently, the second part of the third plea and, therefore, the third plea in its entirety must be rejected.

84 It follows from all the foregoing that the action must be rejected in its entirety.

Costs

85 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the applicants have been unsuccessful, they must be ordered to bear their own costs and, in addition, to pay those incurred by the Commission, in accordance with the form of order sought by the latter.

On those grounds,

THE GENERAL COURT (Fourth Chamber)

hereby:

1. **Dismisses the action;**

2. **Orders the Conseil national de l'Ordre des pharmaciens (CNOP) and the Conseil central de la section G de l'Ordre national des pharmaciens (CCG) to pay the costs.**

Czúcz Labucka O'Higgins

Delivered in open court in Luxembourg on 26 October 2010.

[Signatures]