9. The decision empowering the Member of the Commission with responsibility for competition to adopt a decision under Article 14(3) of Regulation No 17 on behalf of and under the responsibility of the Commission does not infringe the principle of collegiate responsibility enshrined in Article 17 of the Merger Treaty.

10. Since no derogation from Regulation No 17 is provided for in the Act concerning the conditions of accession of the Kingdom of Spain, that regulation is applicable in the new Member States as from the time of accession by virtue of the general rule laid down in Article 2(2) of the said Act. Consequently, undertakings established in Spain could be the subject of investigations with effect from 1 January 1986.

The subject-matter of investigations carried out by the Commission after that date into undertakings established in Spain may be limited only by the scope of the Community competition rules. No such rule limits the Commission's powers of investigation merely to conduct after accession.

REPORT FOR THE HEARING
delivered in Joined Cases 97 to 99/87 *

I — Facts

The applicants are chemical companies. Dow Chemical Ibérica (hereinafter referred to as 'Dow Ibérica') and Alcudia produce and market, *inter alia*, polyethylene, but not PVC. Empresa Nacional del Petróleo (hereinafter referred to as 'EMP') is the principle shareholder in Alcudia but does not itself either produce or market the substances at issue.

Since it had grounds for suspecting the existence of agreements or concerted practices concerning the fixing of prices and delivery quotas for PVC and polyethylene between certain producers and suppliers of those substances in the Community, the Commission decided to carry out an investigation into several undertakings, including the applicants, and adopted the contested decisions on 15 January 1987.

Commission officials, having in their possession the appropriate decision and accompanied by an official of the Directorate-General for the Protection of Competition of the Spanish Ministry of Economic Affairs, paid an unannounced visit to Dow Ibérica and Alcudia on 20

* Language of the case: Spanish.

January 1987 and to EMP on 21 January 1987 in order to carry out the investigation.

After being shown the appropriate contested decision and being informed by the Commission's officials of the rights and obligations of the undertakings concerned, the applicants' representatives considered that they were required to permit the investigation to take place and, consequently, they did not object to the Commission's officials taking, examining and photocopying files, and assisted them therewith.

The Commission thus gained access to all offices, archives, cabinets and files and to a briefcase and personal diary belonging to a representative of Dow Ibérica, and it made all the photocopies it wished, including copies of documents which, according to the applicants, contained business secrets, confidential information and information on products which were not covered by the investigation. The Commission stated that it would not take any account of any information unrelated to the subject-matter of the investigation.

II — Written procedure

By applications lodged at the Court Registry on 2 April 1987, Dow Chemical Ibérica SA, Alcudia, Empresa para la Industria Química SA and Empresa Nacional del Petróleo SA brought action under the second paragraph of Article 173 of the EEC Treaty for a declaration that the Commission decisions of 15 January 1987 are void.

The written procedure in each case followed the normal course.

By order of 13 July 1988, the Court joined the cases for the purposes of the oral procedure and the judgment.

Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General, the Court decided to open the oral procedure without any preparatory inquiry. The parties were invited to reply in writing to certain questions which they did within the prescribed period.

III — Conclusions of the parties

Each applicant claims that the Court should:

(1) declare admissible this action for the annulment of the Commission decision of 15 January 1987 addressed to the applicants and order such inquiry and other steps as may be necessary in the procedure until judgment is delivered;

(2) if necessary, order the production of evidence;

(3) declare null and void (Article 174 of the EEC Treaty) the contested decision and the investigations carried out at the offices of the applicant and therefore order the Commission:

(a) to return to the applicant all the documents obtained in that investigation,

(b) to destroy all the documents and notes drawn up as a result of that investigation,

(c) in any event, to make no use whatsoever of the documents referred to in (a) and (b),

(d) to make no disclosure whatsoever of the information contained in the documents obtained in the course of that investigation;

(4) if the Court considers that Article 14 of Regulation No 17 authorizes searches of homes or gives discretionary powers of investigation, declare under Article 184 of the EEC Treaty, that the said Article 14 does not apply to the applicant on the grounds set out in the reply;

(5) order the Commission to pay the costs.

In each of the cases, the Commission contends that the Court should:

(1) declare inadmissible the application for the annulment of the investigation;

(2) declare inadmissible the objection to the effect that Article 14 of Regulation 17 does not apply;

(3) dismiss the applicant's application;

(4) order the applicant to pay the costs.

IV — Submissions and arguments of the parties

A — *Admissibility*

Without raising an objection of inadmissibility, the Commission contends that two of the applicants' claims are inadmissible:

(1) the implementation of a decision cannot be the subject of an independent application for annulment. The implementation will be void if the measure which ordered it was void. The applicant is guaranteed judicial protection in that regard by the possibility, on the one hand, of bringing an action under the second paragraph of Article 215 of the Treaty and, on the other, of relying on irregularities in the implementation of the decision in the context of an application for the annulment of any decision finding that an infringement has taken place;

(2) the objection of illegality raised in the reply in regard to Article 14 of Regulation No 17 is inadmissible on the ground that it is out of time, since the matters of law and of fact involved have already been put forward in the application.

B — *Substance of the case*

The applicants rely on eight submissions concerning the form and content of the contested decisions.

1. *Non-existence or indeterminate nature of the facts underlying the decisions; infringement of the principle of legality*

(a) Independently of the submission concerning the defects of the statement of reasons (see 2, below), the applicants point out that the decisions do not indicate the type of indicia or evidence that may form the basis of the decision, nor the characteristics, reliability, and seriousness thereof and whether it is up to date. The adoption of a decision restricting individual rights in the absence of such indicia or evidence constitutes an infringement of the principle of legality. In the case of EMP, such evidence or proof cannot exist because EMP neither produces nor markets PVC or polyethylene.

(b) The Commission considers that Community law does not require it to communicate to the undertaking concerned the indicia or evidence justifying the adoption of a decision ordering an investigation, neither in the decision itself nor in the course of an action for annulment before the Court. It is for the Commission to decide, in the context of the tasks assigned to it by the Treaty, whether an investigation is necessary.

The applicants are confusing the decision ordering the investigation with the decision on the substance of the case, finding that an infringement has occurred. It is only before the adoption of the latter decision that a procedure is envisaged allowing access to the file.

In any event, even if there is already any obligation to communicate the complaints at this stage, it can in no circumstances affect the validity of the decision ordering the investigation.

2. *Inadequate statement of reasons; infringement of the principle of legal certainty*

(a) The applicants consider that the contested decisions are 'open-ended administrative authorizations' because they are vague and imprecise in every respect and are partly manifestly erroneous.

While recognizing the distinction, pointed out by the Commission, between the definitive decisions finding that an infringement has occurred and the decisions ordering the investigation, the applicants claim that the latter decisions must also contain an adequate statement of the reasons on which they are based. However, the contested decisions do not meet those requirements as set out in Article 190 of the Treaty and Article 14(3) of Regulation No 17: on the one hand, to permit the addressee to take cognizance of the reasons why he must submit to the investigation; on the other, to define the scope of the investigating officials' powers and, finally, to permit the Court to carry out its review.

The judgments of the Court of 26 June 1980 in Case 136/79 *National Panasonic* v *Commission* [1980] ECR 2033 and of 14 April 1960 in Case 31/59 *Acciaieria di Brescia* v *High Authority* [1960] ECR 71 do not run counter to that argument. The first is concerned only with a procedural point and the second is from a completely different legal context.

More particularly, the applicants make the following points:

(i) the decisions failed to take account of the fact that Dow Ibérica and Alcudia neither produce nor market PVC. With regard to EMP, the mere fact of being the majority shareholder in Alcudia does not constitute a sufficient reason for making it subject to inspections concerning the conduct of the latter company, especially as the Commission is aware of Alcudia's commercial independence;

(ii) the decisions do not draw a distinction either between the separate markets for the three different types of polyethylene, which is merely a generic concept, nor between those products and PVC;

(iii) the decisions do not specify either the type of collusion which is the subject of the investigation (horizontal or vertical agreement) nor the geographical area concerned;

(iv) the decisions do not show that the applicants may be presumed to have taken part in the activities in question;

(v) the decisions do not clearly indicate the subject-matter of the investigation; mere formal compliance with the requirements of Article 14(3) of Regulation No 17 is not sufficient;

(vi) the decisions make no reference whatsoever to the period during which the alleged collusion took place.

(b) The Commission contends that the applicants are confusing a decision ordering an investigation with a definitive decision finding that an infringement has occurred. With regard to the former, Article 14(3) of Regulation No 17 lays down all the essential elements (judgment of the Court of 26 June 1980 *National Panasonic*, cited above; judgment of 14 April 1960 *Acciaieria di Brescia*, cited above). The contested decisions fulfil those requirements. There is no basis for the additional conditions posited by the applicants. If the Commission could already provide such information, the investigation would hardly be necessary.

With regard to the date on which the suspected infringement was committed, the Commission observes that infringements of competition rules rarely take the form of a single act or of several independent acts.

With regard to the products involved, the Commission does not deny the distinctions referred to by the applicants, but states that its initial information on the suspected infringements did not permit it to distinguish between the products, particularly as undertakings in the thermoplastics sector normally produce and sell several types of product. The purpose of the investigations was therefore to enable the Commission to determine precisely the degree of participation of each undertaking and to determine the product or products at issue.

With regard to the role of EMP, the Commission denies that the only reason for its action was the fact that the company is

Alcudia's majority shareholders. As is clearly indicated in the decision, the Commission had information according to which EMP itself had participated in the agreements or concerted practices or both. Furthermore, the Commission points out that for the purpose of applying the competition rules, unity of conduct of the market on the part of companies overrides the formal separation resulting from their separate legal personality (judgment of 14 July 1972 in Case 48/69 *ICI* v *Commission* [1972] ECR 619).

3. *Defects of form in the decisions*

(a) According to the applicants, the decisions do not comply with the formal requirements which stem from a principle common to the administrative systems of the Member States and therefore, a general principle of the Community administrative system:

(i) they do not make it possible to identify precisely the decision-making body;

(ii) they do not make it possible to judge whether that body did nor did not have power to adopt the decision at issue;

(iii) they are not signed by the decision-making body.

Those are not mere formalities but fundamental questions touching on the relationship between the administration and the public. The applicants consider that, in this context, the Court should decide that the public has a right, at the beginning of any contentious administrative proceedings at Community level, to consult the relevant documents on the relevant administrative file. That would permit the applicant to discover any defects of form which it could rely upon before the Court.

(b) With regard to the identity and powers of the body which adopted the decision, the Commission refers to the judgment of the Court of 23 September 1986 in Case 5/85 *AKZO* v *Commission* [1986] ECR 2585.

Furthermore, the Commission contends that no provision provides that the copy of the decision communicated to the undertaking must be signed by the competent Member of the Commission. The stamp and signature of the Secretary-General on the copy given to the party concerned is sufficient to ensure that the normal internal procedure has been followed in that case and that the document is a true copy of the original.

4. *Conduct prior to accession*

(a) The applicants consider that the contested decisions are unlawful or else that their implementation constitutes a misuse of powers inasmuch as they are concerned with conduct which occurred before the accession of Spain to the Community.

They do not deny the Commission's powers to impose penalties in respect of the conduct of Spanish companies before accession as companies established outside the Community. Such conduct is subject to the territorial jurisdiction of the Community in

so far as it produces anti-competitive effects within Community territory.

On the other hand, such conduct is not subject to the 'personal' jurisdiction of the Community, that is to say, it may not be the subject of a compulsory investigation since the undertakings which engaged in it are not subject to the authority of the Commission. The power of investigation presupposes a transfer of sovereignty which took place in the case of Spain with effect only from 1 January 1986. It would be an infringement of Article 2(2) of the Treaty of Accession and Article 2 of the Act of Accession to make that transfer retroactive.

(b) The Commission contends that its powers of investigation under Article 14(3) of Regulation No 17, which was applicable in Spain with effect from 1 January 1986, are not limited in time in regard to the conduct being investigated. That results from the fact that, on the one hand, the conduct of Spanish undertakings before that date may come within the scope of Article 85 of the Treaty and, on the other, that the documents held by those undertakings could provide evidence that other undertakings participated in prohibited agreements or practices or both. Furthermore, since the infringements involved are normally continuous, the Commission cannot know, when it adopts a decision ordering an investigation, the precise date of the conduct which is the subject of the inquiry.

Consequently, there are no grounds for considering whether or not the Commission's powers of investigation are being exercised retroactively.

5. *Infringement of the fundamental right to be presumed innocent*

(a) The applicants deduce from the fact that the contested decisions referred to 'evidence' that there has been an infringement of the fundamental right to be presumed innocent. The statement that evidence exists implies a finding that the applicants are guilty. If such evidence really existed, the failure to specify the nature and identity thereof infringed the obligation to state the reasons on which the decision was based and the rights of the defence. If it did not exist, or if it consisted of mere indicia or suspicions, the decisions constituted an infringement of the presumption of innocence.

(b) The Commission replies that the decisions do not declare the applicants guilty of any infringement and do not therefore disregard the presumption of innocence. As the decisions indicate, the Commission has evidence permitting it to suppose that the applicants participated in agreements or concerted practices or both which, if their existence and implementation are proved, could constitute an infringement of Article 85 of the Treaty.

6. *Infringement of the fundamental right to the inviolability of the home and respect for private life*

(a) According to the applicants, the contested decisions, or at least the implementation thereof, infringed the fundamental right to the inviolability of the home and respect for private life.

That right exists in the national legal orders of the Member States and, therefore, at

Community level. It applies to both natural and legal persons. The latter are entitled to the same protection as natural persons, otherwise the concept of undertakings as persons would not be correctly applied. The protection accorded to legal persons cannot therefore be restricted to the protection of their business and industrial secrets.

Derogation from that fundamental right is permissible only by means of legislation. Article 14 of the regulation constitutes such a derogation for mere investigations, inspections or fact-finding missions, in regard to which the active participation of the undertaking is essential and may be required under pain of a fine.

On the other hand, as an exception to the general rule, that article must be given a restrictive interpretation and precludes searches, arbitrary or disproportionate investigations or investigations carried out for no good reason.

Only by means of such a narrow interpretation is it possible to achieve an adequate balance in the protection of the two legal interests at issue, namely the inviolability of the home and the effectiveness of investigations in competition matters.

Consequently, either the contested decisions or the implementation thereof or both should be declared void because the investigations ordered or carried out by the Commission on the applicants' premises are unlawful, or, if, contrary to the applicants' view, Article 14 of Regulation No 17 is to be interpreted as authorizing what the Commission did, that article must be declared not to apply to the applicants.

The applicants consider that their right to the inviolability of the home and respect for private life has therefore been infringed irrespective of whether or not an inspection of their premises such as that made by the Commission requires prior judicial authorization.

Furthermore, the applicants consider that, in the absence of judicial proceedings at which the undertaking concerned is heard, such judicial authorization is necessary to protect individuals against arbitrary administrative action and to ensure a balance between the abovementioned two interests.

Judicial review only after the event is not sufficient to ensure that the Commission does not render nugatory any subsequent annulment of such a decision by making it impossible in practical terms to return the documents obtained. Since these actions were brought, the Commission has already given copies of those documents to other undertakings.

(b) The Commission contends at the outset that there has been no violation of the home or interference with private life because the applicants submitted to the investigation without raising the slightest objection.

For the rest, the Commission agrees with the applicants that there is, at Community level, a fundamental right to the inviolability of the home of natural and legal persons and that that right can be interfered with

only in the cases provided for in legislative provision, such as Article 14 of Regulation No 17. On the other hand, the Commission has a different interpretation of that article and the level of protection afforded to legal persons.

Natural and legal persons are entitled to different measures of protection. In the case of natural persons the right to private life and to the inviolability of the home are more capable of prevailing over the public interest. On the other hand, the inviolability of commercial premises is intended in particular to protect the business or industrial secrets of undertakings and that protection is sufficiently ensured by Article 20 of Regulation No 17.

Article 14 of Regulation No 17 imposes on the undertaking concerned an obligation to cooperate. It must itself supply the documents called for by the Commission's officials. Since those officials cannot be aware of the exact nature or details of those documents, they must examine all documents likely to have a connection of any kind with the subject-matter of the investigation. To that end, they may also examine personally all files, cabinets and offices in which such documents may be kept, for the purpose of sorting them.

If the undertaking concerned refuses to submit to the investigation, the Commission's officials may not use force. It is only national officials, providing assistance under Article 14(6) of Regulation No 17, who are entitled to use force against the undertaking and, for example, force open doors and cabinets.

In principle, judicial protection *a posteriori* is sufficient. If a decision ordering an investigation is declared void, the Commission is obliged to return all the photocopies which it took and to refrain from using the information obtained during the investigation.

With regard to the particular case of Alcudia, the Commission admits that it sent photocopies of two documents found on the premises of that undertaking to Imperial Chemical Industries (ICI). It had strong grounds for suspecting that those documents, which were of very great importance for the inquiry, had been drawn up by ICI. For that reason, it contacted ICI on the basis of Article 11 of Regulation No 17 in order to obtain information as to the origin of the documents involved. The reply largely confirmed its suspicions. The Commission considers that it was entitled to use those documents on the basis of the presumption of validity of Community measures. An action for a declaration that a decision ordering an investigation is void does not suspend the operation of that decision. Subsequent annulment by the Court produces effects *ex tunc*. The fact of asking the undertaking which is presumed to have drawn up two documents for information as to their origin cannot be of such a nature as to render such an annulment nugatory.

If the undertaking which is the subject of the investigation wishes to obtain prior judicial review of a decision ordering an investigation, it can always, on its own initiative, apply for the adoption of interim measures under Article 83 of the Rules of Procedure. The Commission is prepared to suspend implementation of its decision until the Court has ruled on that application. However, certain safeguards are necessary

to avoid evidence being removed (the placing of seals on archives or cupboards, for example).

Furthermore, the Commission contends that Community law does not currently envisage the possibility of obtaining in advance authorization from the Court of Justice. The investigation order is an administrative decision and the Court's jurisdiction is limited to reviewing the lawfulness of such a decision.

7. Infringement of the principle of proportionality

(a) The applicants point out that they do not contest the fact that the validity of Community measures may be assessed exclusively in the light of Community law. Without however disregarding the primacy of Community law, they consider that the contested decisions infringe the general Community principle of proportionality by encroaching unnecessarily on the fundamental right of undertakings under Article 18(2) of the Spanish Constitution to oppose investigations and searches except where the undertaking has been caught in the act of committing an infringement or where a court order has been issued in advance. By virtue of the Community principle of proportionality, the Commission should have interpreted Article 14 of Regulation No 17 in accordance with the abovementioned article so as to avoid grave interference with the Spanish constitutional order, which is compatible in this regard with the structure and objectives of the Community.

The Commission had a choice between two possibilities. On the one hand, it could have applied in advance to the Court of Justice for an order requiring the applicants to submit to the investigation. On the other hand, under Article 14 of Regulation No 17 it could also have sought, through the competent national administrative authorities, the assistance of the national courts, namely a court order issued in advance by a Spanish court. Each of those alternatives could have required the Commission to comply with certain minimal procedural guarantees, in particular, the submission of the supposed evidence of the conduct complained of.

(b) In the Commission's view, the applicants cannot rely on the general principle of proportionality in order to base an argument against the contested decisions on Spanish constitutional law. Recourse to rules of national law in assessing the validity of Community measures would diminish the unity and effectiveness of Community law.

8. Infringement of the principle of non-discrimination

(a) According to the applicants, the investigation ordered and carried out by the Commission on their premises implies discriminatory treatment in favour of other Community undertakings which enjoyed prior judicial guarantees that the investigation was lawful and well founded.

In Denmark, for example, the Commission is required to obtain a court order before carrying out an investigation.

(b) The Commission contends first of all that the applicants cannot rely on any

possible failure on the part of a Member State in contesting the validity of a measure adopted by the Commission.

Furthermore, it states that it has never sought a court order prior to an investigation in any Member State.

Furthermore, in Denmark, no obligation of that kind is provided for under Law No 505 of 29 November 1972, implementing Article 14(6) of Regulation No 17.

With regard to the United Kingdom, the Commission explained that it is considering the compatibility with Community law of a bill providing that if the undertaking concerned refuses to submit to the investigation, the Member State is to obtain from the courts an *ex parte* order which merely endorses the decision, without any discretion in the matter and without assessing the evidence relied on by the Commission nor whether the decision is well founded.

(c) That explanation led the applicants to abandon that submission in so far as it concerns the position in the United Kingdom. None the less, they subsequently put forward information to the effect that 'the Crown obtained an injunction from the Commercial Court for the purposes of assisting an investigation' under Article 14(6) of Regulation No 17.

G. C. Rodríguez Iglesias
Judge-Rapporteur