2. Orders the applicant to pay the costs.

Kutscher O'Keeffe Touffait Mertens de Wilmars Pescatore

Mackenzie Stuart Bosco Koopmans Due

Delivered in open court in Luxembourg on 26 June 1980.

A. Van Houtte
Registrar

H. Kutscher
President

OPINION OF MR ADVOCATE GENERAL WARNER DELIVERED ON 30 APRIL 1980

My Lords,

This action is brought under Article 173 of the EEC Treaty by an English company, National Panasonic (UK) Limited, to challenge a decision of the Commission dated 22 June 1979 requiring it to submit to an investigation pursuant to Article 14 (3) of Regulation No 17.

Article 14 of Regulation No 17 is, so far as material, in these terms:

"Investigating powers of the Commission

1. In carrying out the duties assigned to it ... by provisions adopted under Article 87 of the Treaty, the Commission may undertake all necessary investigations into undertakings ... To this end the officials authorized by the Commission are empowered:

(a) to examine 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.

2. The officials of the Commission authorized for the purpose of these investigations shall exercise their powers upon production of an authorization in writing specifying the subject-matter and

purpose of the investigation and the penalties provided for in Article 15 (1) (c) in cases where production of the required books or other business records is incomplete. In good time before the investigation, the Commission shall inform the competent authority of the Member State in whose territory the same is to be made of the investigation and of the identity of the authorized officials.

3. Undertakings ... shall submit to investigations ordered by decision of the Commission. The decision shall 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.

4. The Commission shall take decisions referred to in paragraph 3 after consultation with the competent authority of the Member State in whose territory the investigation is to be made.

5. Officials of the competent authority of the Member State in whose territory the investigation is to be made may, at the request of such authority or of the Commission, assist the officials of the Commission in carrying out their duties.

6. Where an undertaking opposes an investigation ordered pursuant to this article, the Member State concerned shall afford the necessary assistance to the officials authorized by the Commission to enable them to make their investigation. Member States shall, after consultation with the Commission, take the necessary measures to this end ..."

National Panasonic (UK) Limited, the applicant, is a wholly-owned subsidiary of a Japanese company, Matsushita Electric Trading Company Limited, which is itself a wholly-owned subsidiary of another Japanese company, Matsushita Electric Industrial Company Limited. The applicant is the exclusive distributor in the United Kingdom, Ireland and Iceland of electrical and electronic goods, such as television sets, wireless sets, video cassette systems, high-fidelity equipment and dictating machines, manufactured by the Matsushita group and sold under various trade marks and names, in particular "National Panasonic" and "Technics". (I shall refer to those goods, compendiously, as "Panasonic equipment"). Another wholly-owned subsidiary of the Matsushita group is National Panasonic Vertriebsgesellschaft mbH, a German company, which distributes Panasonic equipment in the Federal Republic.

On 11 January 1977 the German company notified to the Commission an agreement relating to the distribution of Panasonic equipment in the Federal Republic of Germany, with a request for negative clearance or exemption under Article 85 (3) of the Treaty. The notification did not suggest that the agreement was supported by any export ban imposed in any other Member State.

Certain evidence that reached the Commission gave rise, however, to a suspicion in its mind that export bans were being imposed within the Community in respect of Panasonic equipment. In particular the Commission

was led to suspect, rightly or wrongly, that the applicant was operating a ban on exports from the UK to Germany. Some particulars of that evidence were given to us by the Commission, but I need not, I think, go into it.

One of the grounds on which the validity of the Decision of 22 June 1979 is challenged by the applicant is that it was inadequately reasoned. I must therefore read the main recitals in its preamble. After referring to Article 85 of the Treaty, to Article 14 (3) of Regulation No 17 and to the fact that the Commission had consulted "the competent authority of the relevant Member State for the purpose of Article 14 (4) of Regulation No 17" (i. e. the Director-General of Fair Trading), the preamble continued:

"WHEREAS

NATIONAL PANASONIC (UK) Ltd is a subsidiary company of MATSUSHITA ELECTRIC INDUSTRIAL COMPANY of Japan and is the exclusive distributor of NATIONAL PANASONIC and TECHNICS consumer electronic products in the United Kingdom;

A selective distribution agreement for NATIONAL PANASONIC and TECHNICS equipment in the Federal Republic of Germany was notified to the Commission on 11 January 1977 by NATIONAL PANASONIC VERTRIEBSGESELLSCHAFT mbH together with a request for negative clearance or exemption under Article 85 (3) of the EEC Treaty;

The Commission has obtained documentary evidence and other information indicating that NATIONAL PANASONIC (UK) Ltd has required trade customers not to re-export NATIONAL PANASONIC and TECHNICS products to other EEC Member States;

The Commission therefore has grounds for believing that NATIONAL PANASONIC (UK) Ltd has participated and is still participating in agreements and concerted practices the object and effect of which is to insulate national markets within the EEC from the competitive effect of parallel imports from other Member States;

If established, the foregoing would constitute a serious infringement of Article 85 of the EEC Treaty and would be relevant to the Commission's assessment of the selective distribution agreement notified by NATIONAL PANASONIC VERTRIEBSGESELLSCHAFT;

In order for the Commission to ascertain all the relevant facts and circumstances a decision must be adopted requiring NATIONAL PANASONIC (UK) Ltd to submit to an investigation and to produce the requisite business records."

Lastly the preamble summarized the effect of Articles 15 (1)(c) and 16 (1)(d) of Regulation No 17, the full texts of which were annexed to the Decision.

The operative part of the Decision consisted of three articles.

By Article 1 the applicant was required to submit to an investigation at its business premises in Slough, Berks. It was to permit the Commission officials authorized to carry out the investigation to enter its premises during normal office hours and was to produce the business records required by them for examination and photocopying, including certain categories of documents that were listed in the Article. It was also to give such explanations regarding the subject-matter of the investigation as those officials might require.

Article 2 provided that the investigation should be carried out at the business premises of the applicant in Slough and should begin on or after 25 June 1979.

Article 3, after stating that the Decision was addressed to the applicant, went on:

"It shall be notified by being handed over personally immediately before the investigation is to begin to a representative of the undertaking by the Commission's officials authorized for the purposes of the investigation.

Proceedings against this decision may be instituted in the Court of Justice of the European Communities in Luxembourg in accordance with Article 173 of the EEC Treaty. As provided by Article 185 of the EEC Treaty, such proceedings shall not have suspensory effect."

The investigation took place on 27 June 1979. It was conducted by two Commission officials, who were accompanied by an official from the Office of Fair Trading. Consistently with Article 3 of the Decision, the applicant did not receive prior notice of the investigation.

In their pleadings the parties give accounts of the investigation that differ in minor respects. I do not think, however, that the differences are relevant to any of the issues in the case.

The officials arrived at the applicant's premises at about 10 a. m. The Decision was served on Mr Aoki, the applicant's sales director, who signed a minute of its notification (see Annex 2 to the application). The nature and purpose of the investigation were explained to him and he passed the information on by telephone to Mr Imura, the managing director. Mr Imura sent Mr Maskrey, who was described as the applicant's "legal and training manager", to join the officials and Mr Aoki. The applicant's solicitor, Mr Robinson, was contacted at his office in Norwich and arrangements were made for him to be brought by air and road to Slough. A request (made either by Mr Aoki or by Mr Maskrey) that the investigation be postponed until the arrival of Mr Robinson was refused by the inspectors who began their work at about 10.45 a. m.

Mr Imura, Mr Aoki and other senior executives of the applicant left the premises at lunch-time because they had previously arranged to attend a trade exhibition in Cardiff.

Mr Robinson arrived at 1.30 p. m. He was introduced to the officials and a copy of the Decision was given to him. He was informed of what the officials had so far done and he stayed for the remainder of the investigation.

The investigation ended at about 5.30 p. m. The Commission officials took with them copies of a number of documents from the applicant's files — according to the Commission 26 consisting of 50 pages in all, according to the applicant a greater number. They did not take, nor of course were they empowered to take, originals, which is one of the features that distinguish this case from *C. I. R.* v *Rossminster Ltd* [1980] 2 WLR 1, to which some reference was made during the argument.

The applicant's case, as first put forward in its application, rested on four distinct grounds:

(1) that Article 14 of Regulation No 17, on its correct interpretation, did not permit the Commission to issue a decision requiring an undertaking to submit to an investigation without first requesting it to do so by "the informal procedure";

(2) that the Decision of the Commission was inadequately reasoned;

(3) that in proceeding by way of decision instead of by way of informal request the Commission had infringed the principle of proportionality;
and

(4) that the Commission had infringed the applicant's fundamental rights.

As the argument developed those grounds appeared to merge into each other, the essence of the applicant's complaint being that it had had no warning of the investigation.

Nevertheless the first question is whether Article 14, correctly interpreted, provides, as the applicant contends, for an obligatory two-stage procedure under which the Commission must begin by informally requesting the undertaking concerned to submit to an investigation on the basis only of an authorization under paragraph 2 of that article, and may resort to a binding decision under paragraph 3 only if that request is not complied with or is incompletely complied with, or whether, as the Commission contends, the Article confers upon it a discretion to carry out an investigation either on the basis of an authorization under paragraph 2 only or on the basis of a decision under paragraph 3, without its being bound to use the former procedure before adopting the latter.

There is no doubt that the actual wording of Article 14 is inapt to impose on the Commission the obligation for which the applicant contends. Nor indeed did Counsel for the applicant seek to argue otherwise. His submission was that the Court should leave aside the wording of the Article and look to its spirit and purpose. As to that the Commission pointed out, rightly in my opinion, that the spirit and purpose of Article 14 would be defeated if the Commission were always obliged to adopt a procedure that would give the undertaking concerned an opportunity to hide or destroy relevant documents. The Commission also relied on the judgment of this Court in Case 31/59, *Acciaieria di Brescia* v *High Authority* [1960] ECR 71. That authority is not of course directly in point since the Court was there concerned with the interpretation of Article 47 of the ECSC Treaty, but there is a similarity between that Article and Article 14 of Regulation No 17, and the judgment does at least show that the Court will not readily imply into such a provision a requirement that information should be sought before any investigation is carried out. It is significant, I think, that the Court there held (at p. 80) that there was "nothing in the letter, spirit or aim of the first paragraph of Article 47 to prohibit information being obtained and a check being made at the same time".

In support of the applicant's contention five arguments were put forward.

First it was pointed out that Article 11 of Regulation No 17, on requests by the Commission for information, undoubtedly prescribes an obligatory two-stage procedure; and reference was made to what I said about that in Case 17/74, *Transocean Marine Paint Association* v *Commission* [1974] 2 ECR 1063, at pp. 1089-1090. The same "must" be true, it was submitted, of Article 14. In my opinion that is not so, because neither the wording nor the purpose of the two Articles is the same. As to the wording, paragraphs 2 to 4 of Article 11 lay down a procedure under which the Commission may send to an undertaking

a request for information. Then paragraph 5 provides:

"Where an undertaking ... does not supply the information requested within the time-limit fixed by the Commission, or supplies incomplete information, the Commission shall by decision require the information to be supplied ...".

Thus failure to obtain a satisfactory answer to a request for information is, under Article 11, expressly made a condition precedent to the adoption of a decision. There is no corresponding language in Article 14. Given the proximity of the two provisions, their different language must, in my opinion, mean that they are intended to operate differently. As to purpose, Article 11 enables the Commission to seek, and if necessary to compel, the co-operation of the undertaking concerned in providing information, which may or may not be contained in documents in the possession of the undertaking. Article 14 in contrast enables the Commission to take action to obtain evidence directly through its own officials.

The applicant's second argument was also based on Article 11. Pointing to the power in Article 14(1) (c) to "ask for oral explanations on the spot" the applicant submitted that, unless its interpretation of Article 14 were adopted, that Article could be used by the Commission to circumvent the two-stage procedure prescribed by Article 11. In my opinion that is not so, because, as was submitted by the Commission, the only explanations that can be sought under Article 14(1) (c) are explanations relating to the books and records under examination or their contents.

Thirdly it was argued on behalf of the applicant that support for its interpretation of Article 14 was to be found in a passage in the Report of the European Parliament's Internal Market Committee on the proposal that ultimately became Regulation No 17, the "Deringer Report" (European Parliament Doc. 57/1961, Annex 2(5) to the Application, paragraph 120); in a speech made to the European Parliament on 19 October 1961, during the debate on that proposal, by Dr Hans von der Groeben, the Member of the Commission then responsible for competition policy (see Annex 2(6) to the Application at p. 233); and in an article written by Dr W. Schlieder, the Commission's Director-General for Competition, in *Der Betriebs-Berater,* 1962, at p. 311 (Annex 1 to the Reply). Those passages do, I think, suggest that their authors regarded Articles 11 and 14 (which were Articles 9 and 11 respectively in the proposal) as laying down similar procedures. That, however, cannot, in my view, provide guidance as to the intentions of the Council when it enacted Regulation No 17. As I ventured to point out in Case 28/76, *Milac* v *HZA Freiburg* [1976] 2 ECR at p. 1664, what the members of the Council do when they adopt a regulation is to agree upon a text. They do not necessarily all have the same views as to its meaning.

That is to be sought, if necessary, by judicial interpretation of the text. It cannot be sought by enquiry from individual members of the Council. *A fortiori* can it not be sought by ascertaining the views of particular Members of the Parliament or of the Commission, let alone of members of the Commission's staff, however eminent and however much they may have been concerned in the preparation of the text. The authority relied upon on behalf of the applicant for the contrary view was the judgment of this Court in Case 26/69, *Stauder* v *City of Ulm* [1969] ECR 419. That case, however, was about a decision of the Commission adopted under the Management Committee

procedure. It was discovered that, whilst the French and Italian texts of the decision accorded with what the Management Committee had agreed upon, the German and Dutch texts did not. Not surprisingly the Court held that the French and Italian texts were to be preferred. That authority would only be in point here if the text of Regulation No 17 in one or more of the official languages of the Community were found not to accord with the text agreed upon by the Council. It does not support the proposition for which it was relied upon by the applicant. I ought to add that the Commission drew our attention to a passage in a book written by Dr Deringer in which he clearly expressed the view that Article 14 did not impose on obligatory two-stage procedure (see Deringer, *The Competition Law of the European Economic Community*, Commerce Clearing House 1968, at p. 335). Indeed the parties in their pleadings exhaustively reviewed the opinions of learned writers on that question and it is manifest that, on balance, they favour the view contended for by the Commission.

Fourthly the applicant relied on what it described as the practice of the Commission. This led to a discussion of the manner in which the Commission had operated Article 14 in the past. I need not, I think, go into the details of it. It transpired that the Commission had resorted to decisions under Article 14(3) without prior notice much more frequently since the beginning of 1979 than previously. On behalf of the Commission it was explained to us that was because, as Community law became better known and clearer in its content, undertakings were more and more tending to conceal their cartels, particularly the more obviously unjustifiable ones. Be that as it may, it does not seem to me that the nature of the powers conferred on the Commission by Article 14 can depend on the manner in which it has thought fit to exercise them in the past.

Lastly on this first question the applicant referred to fundamental rights. Although its argument here had of course a similarity to its argument in support of its fourth ground of challenge to the validity of the Commission's Decision, there was an essential difference. Its argument here was that, in the absence of clear words relieving the Commission from any obligation to give prior notice of an investigation, Article 14 must be interpreted in such a way as to encroach as little ás possible on an undertaking's fundamental rights, i.e. as requiring such prior notice. The fundamental rights relied upon by applicant were the right to privacy, the right to be heard (with the concomitant right to be told what was proposed), the right "to prepare for the investigation," and the right to appeal to this Court and seek a stay from it.

On the right to privacy the applicant relied on Article 8 of the European Convention on Human Rights, which is in these terms;

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

(2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the

economic well-being of the country, for the prevention of discorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

The wording of that article might at first sight suggest that it applied only to an individual and his home. This Court, however, in the *Acciaieria di Brescia* case (already cited) clearly considered that the right to privacy extended to business premises, whether those of an individual or of a company (see [1960] ECR at p. 80). That must indeed be so, for a public authority cannot in a "democratic society" be permitted to invade private property save under a specific power conferred by law.

The applicant did not deny that an invasion of privacy might, in accordance with paragraph (2) of Article 8, be authorized by law in the interests of "the economic well-being of the country". The burden of its submission was that the person concerned should be given advance notice of such a proposed invasion. But there is nothing in Article 8 to that effect, nor was any authority cited on behalf of the applicant in support of the proposition. Moreover, if the proposition were correct, most of the powers of inspection and search conferred on national authorities, such as police, fiscal, public health, and weights and measures authorities, quite apart from those concerned with the enforcement of competition law, would be invalid.

What is somewhat unusual about Article 14, if it means what to my mind it does, is that the Commission is empowered to proceed without any sort of warrant from a judicial authority. In general, though not always, the laws of Member States require officers of a public authority to have such a warrant before they may enter private premises. Indeed the Deringer Report suggested, citing the German Constitution, that such a requirement should be written into what are now Articles 11 and 14 of Regulation No 17; it pointed out that the right to have a decision of the Commission reviewed by this Court did not afford the same safeguard (see paragraph 121 of that Report). One may speculate as to why that suggestion was not adopted, but one cannot in my opinion conclude, from the fact that it was not, that Article 14 is to be interpreted as conferring on an undertaking a right to prior notice of an investigation.

As to the right to be heard I will say at once that I was unimpressed by an argument put forward by the Commission which rested on Article 19 of Regulation No 17. That Article lists certain categories of decisions that the Commission may not take without giving the undertakings concerned an opportunity of being heard. It does not mention decisions under Article 14. A right to be heard may however exist although no legislation expressly confers it — consider for instance the *Transocean Marine Paint Association* case (already cited). Nevertheless, the rule that a person whose rights are liable to be affected by an administrative decision is entitled to be heard by the authority concerned is only a general rule. It is subject to exceptions. No-one has ever succeeded in categorizing the exceptions or in defining the circumstances in which they exist. Perhaps I may without undue egotism refer to the discussion of that problem at the 8th Congress of the FIDE at Copenhagen in 1978 (see the Report of the proceedings at that Congress, Vol. 3, pp. 1-6 and 1-7; Vol. 1, pp.

40-41). But one of the exceptions must be, in my opinion, where the purpose of the decision would or might be defeated if the right were accorded. One comes back here, of course, to the Commission's point that the purpose of carrying out an investigation without warning is to forestall the possible destruction or concealment of relevant documents. Nor is it as if an undertaking affected by such an investigation were left without a remedy. Its right to have the decision of the Commission reviewed by the Court is expressly preserved by Article 14. True, that remedy can only be invoked, if the Commission is right, after the investigation has taken place, but that does not make it an ineffective remedy. The Court may, as the Commission concedes, if it holds the decision to have been unlawful, order the Commission to return to the undertaking any copies of documents obtained as a result of the investigation and to refrain from using any information so obtained.

As to the third fundamental right claimed on behalf of the applicant, the right "to prepare for the investigation", by taking legal advice, marshalling the documents considered by the undertaking to be relevant and not privileged from disclosure, and ensuring that "suitable senior executives and lawyers" can be present, I think it enough to say that no authority whatever was cited on behalf of the applicant for the existence of any such right.

The last "fundamental right" claimed on behalf of the applicant was no more, really, than a right to apply to this Court for a stay of the investigation. That right was said to be conferred by Article 185 of the Treaty, which reads:

"Actions brought before the Court of Justice shall not have suspensory effect. The Court of Justice may, however, if it considers that circumstances so require, order that application of the contested act be suspended."

Any right conferred by Article 185 to apply to the Court for an order suspending the application of a decision of the Commission under Article 14 of Regulation No 17 can, however, only be ancillary to the right to bring an action challenging the validity of that decision under Article 173 of the Treaty. It is a right, therefore, that can be invoked only after the decision has been adopted. So its existence cannot lead to the conclusion that the Commission is bound under Article 14 to adopt an informal procedure of the kind contended for by the applicant as a preliminary to adopting the decision.

For those reasons I am of the opinion that Article 14 is not to be interpreted in the manner contended for by the applicant.

I can deal much more shortly with the second, third and fourth grounds on which the applicant challenged the Commission's Decision. Those grounds were of course relied upon on the footing that Article 14 did not provide for a compulsory two-stage procedure.

The second was, Your Lordships remember, that the Decision was inadequately reasoned and the third was that it infringed the principle of proportionality. I take them together because, as Counsel for the applicant said at the hearing, they were linked. The argument in support of them was, as I understood it, essentially this. Either the Commission had reason to fear that the applicant might hide or destroy

evidence, in which case the Commission should have so stated in the preamble to its Decision, so as to justify its proceeding by way of immediate decision rather than by way of informal request first, or the Commission had no such fear, in which case the course it took was disproportionate to the circumstances. I would reject that argument, if only because it seems to me obvious that a recital that the Commission has reason to fear that an undertaking might conceal or destroy evidence is not one that it can be required to include in a decision addressed to that undertaking, or indeed to anyone.

As to the applicant's fourth ground, I think that I have said enough about fundamental rights to show that in my opinion no such rights of the applicant were infringed by the Commission. It was not contended on behalf of the applicant that Article 14 itself, if interpreted as not imposing a two-stage procedure, infringed anyone's fundamental rights. Nor do I think it could have been.

In the result I am of the opinion that this action should be dismissed with costs.