JUDGMENT OF THE COURT

22 October 2002 *

In Case C-94/00,

REFERENCE to the Court under Article 234 EC by the Cour de cassation (France) for a preliminary ruling in the proceedings pending before that court between

Roquette Frères SA

and

Directeur général de la concurrence, de la consommation et de la répression des fraudes,

Third party:

Commission of the European Communities,

on the interpretation of Article 14 of Regulation No 17 of the Council of 6 February 1962: First Regulation implementing Articles 85 and 86 of the Treaty (OJ, English Special Edition 1959-1962, p. 87) and of the judgment in Joined Cases 46/87 and 227/88 *Hoechst* v *Commission* [1989] ECR 2859,

* Language of the case: French.

THE COURT,

composed of: G.C. Rodríguez Iglesias, President, J.-P. Puissochet, M. Wathelet and R. Schintgen (Presidents of Chambers), C. Gulmann, D.A.O. Edward, A. La Pergola (Rapporteur), P. Jann, V. Skouris, F. Macken, N. Colneric, S. von Bahr and J.N. Cunha Rodrigues, Judges,

Advocate General: J. Mischo,
Registrar: L. Hewlett, Administrator,

after considering the written observations submitted on behalf of:

— Roquette Frères SA, by O. Prost and A. Choffel, avocats,

— the Commission of the European Communities, by G. Marenco and F. Siredey-Garnier, acting as Agents,

— the French Government, by K. Rispal-Bellanger and F. Million, acting as Agents,

— the German Government, by W.-D. Plessing and B. Muttelsee-Schön, acting as Agents,

— the Greek Government, by A. Samoni-Rantou and G. Karipsiadis, acting as Agents,

— the Italian Government, by U. Leanza, acting as Agent, assisted by F. Quadri, avvocatto dello Stato,

— the United Kingdom Government, by J.E. Collins, acting as Agent, assisted by J. Turner, Barrister,

— the Norwegian Government, by H. Seland, acting as Agent,

having regard to the Report for the Hearing,

after hearing the oral observations of Roquette Frères SA, represented by O. Prost and A. Choffel, of the Commission, represented by G. Marenco and F. Siredey-Garnier, of the French Government, represented by R. Abraham, acting as Agent, of the Greek Government, represented by A. Samoni-Rantou and G. Karipsiadis, of the Italian Government, represented by M. Greco, acting as Agent, and of the United Kingdom Government, represented by J.E. Collins and J. Turner, at the hearing on 10 July 2001,

after hearing the Opinion of the Advocate General at the sitting on 20 September 2001,

gives the following

Judgment

1 By judgment of 7 March 2000, received at the Court on 13 March 2000, the Cour de cassation (French Court of Cassation) referred to the Court for a preliminary ruling under Article 234 EC two questions on the interpretation of Article 14 of Regulation No 17 of the Council of 6 February 1962: First Regulation implementing Articles 85 and 86 of the Treaty (OJ, English Special Edition 1959-1962, p. 87) and of the judgment in Joined Cases 46/87 and 227/88 *Hoechst* v *Commission* [1989] ECR 2859.

2 Those questions have been raised in the context of an appeal by Roquette Frères SA ('Roquette Frères') against an order of the President of the Tribunal de grande instance (Regional Court), Lille (France), authorising entry upon and seizures at the premises of that company with a view to gathering evidence of its possible participation in agreements and/or concerted practices which may constitute an infringement of Article 85 of the EC Treaty (now Article 81 EC).

Legal framework

Regulation No 17

3 Article 14 of Regulation No 17 confers on the Commission investigatory powers to look into possible infringements of the competition rules applying to undertakings. It provides as follows:

'1. ...

... the officials authorised by the Commission are empowered:

(a) to examine the books and other business records;

(b) to take copies of or extracts from the books and business records;

(c) to ask for oral explanations on the spot;

(d) to enter any premises, land and means of transport of undertakings.

...

3. Undertakings and associations of 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.

6. Where an undertaking opposes an investigation ordered pursuant to this Article, the Member State concerned shall afford the necessary assistance to the officials authorised 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 before 1 October 1962.'

National law

4 In France, investigation procedures in competition matters are governed by Order No 86-1243 of 1 December 1986 relating to free pricing and free competition (JORF of 9 December 1986, p. 14773, hereinafter 'the Competition Order').

5 Article 48 of the Competition Order provides:

'Investigators may enter any premises and seize documents only within the framework of investigations requested by the Ministre chargé de l'économie

(Minister for Economic Affairs) or the Conseil de la concurrence (Competition Council), and upon judicial authorisation being granted by order of the President of the Tribunal de grande instance...

The judge must verify whether the request for authorisation before him is justified; that request must contain all such information as may justify the entry.

... He shall appoint one or more senior law enforcement officers to assist in those operations and to keep him informed of their progress.

...'

6 By way of clarification of that provision, the referring court states that, by decision of 29 December 1983, the French Conseil constitutionnel (Constitutional Council) ruled that investigations on private premises may only be carried out in conformity with Article 66 of the French Constitution, which entrusts to the judiciary the protection of individual liberty and, in particular, of the inviolability of the home. The Conseil constitutionnel concluded on that basis that the statutory provisions applicable in that connection must expressly entrust the competent court with the task of verifying whether, in the specific circumstances, the application before it is justified.

7 Under Article 56a of the Competition Order, the requirements of Article 48 of that order are to apply where the Commission requests assistance pursuant to Article 14(6) of Regulation No 17.

Facts and procedure in the main proceedings and the questions referred for a preliminary ruling

8 Roquette Frères is engaged in the marketing of sodium gluconate and glucono-delta-lactone.

9 On 10 September 1998 the Commission adopted, on the basis of Article 14(3) of Regulation No 17, a decision ordering Roquette Frères to submit to an investigation (hereinafter 'the investigation decision of 10 September 1998').

10 Article 1 of the operative part of that decision is worded as follows:

'The undertaking Roquette Frères SA is required to submit to an investigation concerning its possible participation in agreements and/or concerted practices in the fields of sodium gluconate and glucono-delta-lactone, which may constitute an infringement of Article 85 of the EC Treaty. The investigation may take place at any of that undertaking's premises.

The undertaking shall give the officials authorised by the Commission to carry out the investigation, and the officials of the Member State assisting them, access to any premises, lands and means of transport during normal office hours. The undertaking shall submit for inspection the books and other business records required by the said officials; it shall allow them to inspect its books and other business records at the places where these are to be found and to take copies of or extracts from them. Furthermore, it shall immediately provide the said officials with any oral explanations they may request in connection with the subject-matter of the investigation.'

11 The grounds of the investigation decision of 10 September 1998 state as follows:

'The addressee of this decision is active in the field of sodium gluconate. Sodium gluconate is used *inter alia* as an industrial cleaning product, for the surface treatment of metals and the production of synthetic textile substances, and as a setting retarder in the concrete industry.

The Commission has information to the effect that officers of the abovementioned undertaking held regular meetings with competitors, during which shares of the sodium gluconate market were allocated and minimum prices agreed for the users in the various areas of the market. The sales levels — both global and relating to the various areas — were also fixed. At each meeting the degree to which the agreements had been observed was assessed, and it appears that any undertaking exceeding the sales allocated to it had to try to reduce its sales during the following period.

The addressee of this decision is also a producer of glucono-delta-lactone. Glucono-delta-lactone is used in the production of cheese, meat-based products and tofu.

The Commission has information indicating that the abovementioned contacts with competitors also extended to glucono-delta-lactone. In particular, bi- or multilateral talks were held, often on the fringe of the meetings relating to sodium gluconate (before or after them, or during breaks). On those occasions, the participants exchanged information relating to the market, market prices and

levels of demand. They also held talks on manufacturing capacity and sales volumes. The contacts were aimed at controlling prices and, it appears, were such as to result in coordination of the participants' behaviour on the market.

If their existence were established, the abovementioned agreements and/or concerted practices might constitute a serious infringement of Article 85 of the Treaty establishing the European Community. The very nature of such agreements and/or concerted practices suggests that they are implemented by secret means and that, in this connection, an investigation is the most appropriate means of gathering evidence of their existence.

In order to enable the Commission to discover all the facts concerning the possible agreements and/or concerted practices and the context in which they fit, it is therefore necessary to carry out an investigation pursuant to Article 14 of Regulation No 17.

The addressee of this decision may hold information which the Commission needs in order to pursue its inquiries into the matter described above.

In order for the investigation to be effective, it is necessary that the undertaking should not be informed of it in advance.

It is therefore necessary to compel the undertaking, by a decision, to submit to an investigation pursuant to Article 14(3) of Regulation No 17.'

12 The Commission requested the French Government to take the necessary steps to ensure that, in the event of opposition by Roquette Frères to the investigation thus proposed, the national authorities would provide the assistance provided for in Article 14(6) of Regulation No 17.

13 On 14 September 1998, in response to that request, the competent administrative authorities submitted an application to the President of the Tribunal de grande instance de Lille for authorisation pursuant to Articles 48 and 56a of the Competition Order to enter the premises of Roquette Frères and seize documents there. The annexes to that application consisted, in essence, of a copy of the investigation decision of 10 September 1998 and the text of the judgment in *Hoechst*, cited above.

14 The President of the Tribunal de grande instance de Lille granted that application by order likewise dated 14 September 1998 ('the authorisation order').

15 The authorisation order was served on 16 September 1998 and the investigation took place on 16 and 17 September 1998. Roquette Frères cooperated in that investigation, whilst expressing reservations concerning the taking of copies of various documents.

16 In its appeal against the authorisation order, Roquette Frères asserts that it was not open to the President of the Tribunal de grande instance de Lille to order entry onto private premises without first satisfying himself, in the light of the

documents which the administrative authority was required to provide to him, that there were indeed reasonable grounds for suspecting the existence of anti-competitive practices such as to justify the grant of coercive powers.

17 In the judgment making the reference, the Cour de cassation states that no information or evidence justifying any presumption of the existence of anti-competitive practices was put before the President of the Tribunal de grande instance de Lille, so that it was impossible for him to verify whether, in the specific circumstances, the application before him was justified. It further observes that, in the investigation decision of 10 September 1998, the Commission merely stated that it had information to the effect that Roquette Frères was engaging in the anti-competitive practices described by it, without however referring, even briefly, in its analysis to the information which it claimed to have and on which it based its assessment.

18 The Cour de cassation, having set out the characteristics of the review to be carried out by the competent French court under Article 48 of the Competition Order and the decision of the Conseil constitutionnel of 29 December 1983 as referred to in paragraph 6 of this judgment, goes on to recall in that connection the principle established by the judgment in *Hoechst*, namely that, in exercising its investigatory powers, the Commission is required to respect the procedural guarantees laid down by national law.

19 In addition, the Cour de cassation refers to paragraphs 17 and 18 of the judgment in *Hoechst*, according to which there exists no general principle of Community law enshrining, with regard to undertakings, any right to the inviolability of the home, or any case-law of the European Court of Human Rights inferring the existence of any such principle from Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ('the ECHR'), signed in Rome on 4 November 1950.

20 However, the Cour de cassation notes in that connection that, in Eur. Court HR, Niemietz v. Germany judgment of 16 December 1992, Series A No 251-B, postdating *Hoechst*, the European Court of Human Rights held that Article 8 of the ECHR may apply to certain professional or business activities or premises. The Cour de cassation also refers to Article 6(2) EU, which requires the European Union to respect as general principles of Community law the fundamental rights guaranteed by the ECHR, and to Article 46(d) EU, which provides that Article 6(2) EU falls within the jurisdiction of the Court of Justice.

21 In those circumstances, the Cour de cassation stayed proceedings and referred the following questions to the Court for a preliminary ruling:

'whether,

(1) having regard to the fundamental rights recognised by the Community legal order and to Article 8 of the European Convention for the Protection of Human Rights, the judgment in *Hoechst* of 21 September 1989 must be interpreted as meaning that a national court having jurisdiction under national law in competition matters to order entry upon premises and seizures there by officers of the administration, may not refuse to grant the authorisation requested where it considers that the information or evidence presented to it as providing grounds for suspecting the existence of anti-competitive practices on the part of the undertakings mentioned in the Commission's decision ordering an investigation is not sufficient to authorise such a measure or where, as in the present case, no information or evidence has been put before it;

(2) in the event that the Court of Justice declines to accept that the Commission is required to put before the competent national court the evidence or information in its possession which gives rise to a suspicion of anti-competitive practices, the national court is none the less empowered, given

the abovementioned fundamental rights, to refuse to grant the application for entry and seizure if it considers, as in the present case, that the Commission decision does not state sufficient reasons and does not enable it to verify, in the specific circumstances, whether the application before it is justified, thereby making it impossible for it to carry out the review required by its national constitutional law.'

The effect of general principles of Community law

22 As is apparent from the judgment making the reference, the Cour de cassation is uncertain as to the possible effect on the principles established by the Court in *Hoechst*, and hence on the answers to be given to its questions, of certain developments which have taken place in the field of the protection of human rights since delivery of the judgment in *Hoechst*.

23 According to settled case-law, fundamental rights form an integral part of the general principles of law observance of which the Court ensures. For that purpose, the Court draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international treaties for the protection of human rights on which the Member States have collaborated or to which they are signatories. The ECHR has special significance in that respect (see, in particular, *Hoechst*, paragraph 13, and Case C-274/99 P *Connolly* v *Commission* [2001] ECR I-1611, paragraph 37).

24 As the Court has also stated, the principles established by that case-law have been reaffirmed in the preamble to the Single European Act and in Article F.2 of the Treaty on European Union (Case C-415/93 *Bosman* [1995] ECR I-4921, paragraph 79). They are now set out in Article 6(2) EU (*Connolly* v *Commission*, cited above, paragraph 38).

25 In a different connection, the Court has likewise consistently held that, where national rules fall within the scope of Community law and reference is made to it for a preliminary ruling, it must provide all the criteria of interpretation needed by the national court to determine whether those rules are compatible with the fundamental rights the observance of which the Court ensures and which derive in particular from the ECHR (see, in particular, Case C-260/89 *ERT* [1991] ECR I-2925, paragraph 42, and Case C-159/90 *Society for the Protection of Unborn Children Ireland* [1991] ECR I-4685, paragraph 31).

26 Since the questions referred relate in essence to the scope of the review which may be carried out by a court of a Member State where that court is called upon to act on a request by the Commission for assistance pursuant to Article 14(6) of Regulation No 17, the Court of Justice is clearly competent to provide the referring court with all the criteria of interpretation needed by that court to determine whether the applicable national rules are compatible, for the purposes of such review, with Community law, including, as the case may be, the rights established by the ECHR as general principles of law observance of which is to be ensured by the Court of Justice.

27 It should be recalled in that regard that, in paragraph 19 of the judgment in *Hoechst*, the Court recognised that the need for protection against arbitrary or disproportionate intervention by public authorities in the sphere of the private activities of any person, whether natural or legal, constitutes a general principle of Community law.

28 The Court has likewise stated that the competent authorities of the Member States are required to respect that general principle when they are called upon to act in response to a request for assistance made by the Commission pursuant to Article 14(6) of Regulation No 17 (see *Hoechst*, paragraphs 19 and 33).

29 For the purposes of determining the scope of that principle in relation to the protection of business premises, regard must be had to the case-law of the European Court of Human Rights subsequent to the judgment in *Hoechst*. According to that case-law, first, the protection of the home provided for in Article 8 of the ECHR may in certain circumstances be extended to cover such premises (see, in particular, the judgment of 16 April 2002 in *Colas Est and Others v. France*, No 37971/97 in the *Reports of Judgments and Decisions*, § 41) and, second, the right of interference established by Article 8(2) of the ECHR 'might well be more far-reaching where professional or business activities or premises were involved than would otherwise be the case' (Niemietz v. Germany, cited above, § 31).

The duty to cooperate in good faith

30 For the purposes of giving a helpful answer to the referring court, it is necessary to take into account the requirements flowing from the duty to cooperate in good faith as enshrined in Article 5 of the EC Treaty (now Article 10 EC).

31 As is apparent from the case-law of the Court of Justice, an obligation to cooperate in good faith is incumbent both on the judicial authorities of the Member States acting within the scope of their jurisdiction (see, in particular, Case 14/83 *Von Colson and Kamann* [1984] ECR 1891, paragraph 26, and Case 80/86 *Kolpinghuis Nijmegen* [1987] ECR 3969, paragraph 12) and on the Community institutions, which have a reciprocal obligation to afford such cooperation to the Member States (see, in particular, Case 230/81 *Luxembourg* v *Parliament* [1983] ECR 255, paragraph 38, and the order of 13 July 1990 in Case C-2/88 IMM *Zwartveld and Others* [1990] ECR I-3365, paragraph 17).

32 In that regard, it should be noted that where, as in the present case, the Community authorities and national authorities are called upon to assist in the attainment of the objectives of the Treaty by the coordinated exercise of their respective powers, such cooperation is particularly crucial.

The questions referred for a preliminary ruling

33 By its two questions, which should be considered together, the referring court is asking, in essence, whether, under Community law, it is open to a national court having jurisdiction under domestic law to authorise entry upon and seizures at the premises of undertakings suspected of having infringed the competition rules, when confronted with a request by the Commission for assistance based on Article 14(6) of Regulation No 17:

— to refuse to grant leave to enter on the ground that it has not been presented with the information or evidence in the Commission's file on which the latter's suspicions are based or that such information or evidence is not adequate to justify the measure thus sought;

— or — if that court is not entitled to call for the submission of such information or evidence — to refuse to grant such leave on the ground that the reasons contained in the Commission's decision ordering an investigation are not sufficiently informative to enable that court to verify, in the specific circumstances, whether the measures sought are justified, as it is required to do under national law.

34 For the purposes of answering those questions, it should be noted, as a preliminary point, that, as is apparent from Article 14(6) of Regulation No 17, it is for each Member State to determine the conditions under which the national authorities will afford assistance to the Commission's officials. It follows from that provision, in particular, that where the Commission intends, with the

assistance of the national authorities, to carry out an investigation otherwise than with the cooperation of the undertakings concerned, it is required to respect the relevant procedural guarantees laid down by national law (*Hoechst*, paragraphs 33 and 34).

35 According to the Court's case-law, however, the Member States, when exercising that power, are subject to a twofold obligation imposed on them by Community law. They are required to ensure that the Commission's action is effective, while respecting various general principles of Community law (*Hoechst*, paragraph 33).

36 Precisely with a view to ensuring observance of the general principle referred to in paragraph 27 of this judgment, the Court has ruled that it is for the competent national body to consider whether the coercive measures envisaged are arbitrary or excessive having regard to the subject-matter of the investigation (*Hoechst*, paragraph 35).

37 The Court has likewise held that the Commission is for its part obliged to make sure that the national body in question has all that it needs to perform that supervisory task and to ensure that, in the implementation of the coercive measures, the national rules are respected (*Hoechst*, paragraphs 34 and 35).

38 The questions referred in the present case concern the scope of the review which may need to be undertaken by a national court having jurisdiction under domestic law to authorise entry onto the premises of undertakings suspected of having infringed the competition rules where that court is seised of an application pursuant to a request by the Commission for assistance made under Article 14(6)

of Regulation No 17, and the nature of the information which the Commission must provide to that court to enable it to carry out such review.

The purpose of the review to be carried out by the competent national court

39 It should be noted, as a preliminary point, that, according to the case-law of the Court, the competent national court, when considering the matter, may not substitute its own assessment of the need for the investigations ordered for that of the Commission, the lawfulness of whose assessments of fact and law is subject only to review by the Community judicature (*Hoechst*, paragraph 35).

40 The review carried out by the competent national court, which must concern itself only with the coercive measures applied for, may not go beyond an examination, as required by Community law, to establish that the coercive measures in question are not arbitrary and that they are proportionate to the subject-matter of the investigation. Such an examination exhausts the jurisdiction of that court as regards the review of the justification of the coercive measures applied for in pursuance of a request by the Commission for assistance under Article 14(6) of Regulation No 17.

The scope of the review to be carried out by the competent national court

41 To determine the scope of the review thus required by Community law to be carried out by the competent national court, it is necessary at the outset to recall the context surrounding the coercive measures to which that review relates.

42 First, it should be borne in mind that the powers conferred on the Commission by Article 14(1) of Regulation No 17 are designed to enable it to perform its task of ensuring that the competition rules are applied in the common market, the function of those rules being to prevent competition from being distorted to the detriment of the public interest, individual undertakings and consumers (*Hoechst*, paragraph 25), thereby ensuring economic well-being in the Community.

43 Second, it should be noted that Community law provides a range of guarantees.

44 First of all, the coercive measures for which application may be made to national authorities in the implementation of Article 14(6) of Regulation No 17 are intended solely to enable Commission officials to exercise the investigatory powers vested in that institution. Those powers, which are listed in Article 14(1) of that regulation, are themselves clearly circumscribed.

45 Thus, the scope of the Commission's investigatory powers does not extend to cover, in particular, documents of a non-business nature, that is to say, documents not relating to the market activities of the undertaking (Case 155/79 *AM & S Europe* v *Commission* [1982] ECR 1575, paragraph 16).

46 Next, without prejudice to the guarantees under domestic law governing the implementation of coercive measures, undertakings under investigation are protected by various Community guarantees, including, in particular, the right to legal representation and the privileged nature of correspondence between lawyer

and client (*AM & S Europe* v *Commission*, cited above, paragraphs 18 to 27; *Hoechst*, paragraph 16; Case 85/87 *Dow Benelux* v *Commission* [1989] ECR 3137, paragraph 27).

47 Lastly, Article 14(3) of Regulation No 17 requires the Commission to state reasons for the decision ordering an investigation by specifying its subject-matter and purpose. As the Court has held, this is a fundamental requirement, designed not merely to show that the proposed entry onto the premises of the undertakings concerned is justified but also to enable those undertakings to assess the scope of their duty to cooperate whilst at the same time safeguarding their rights of defence (*Hoechst*, paragraph 29).

48 The Commission is likewise obliged to state in that decision, as precisely as possible, what it is looking for and the matters to which the investigation must relate (Case 136/79 *National Panasonic* v *Commission* [1980] ECR 2033, paragraphs 26 and 27). As the Court has held, that requirement is intended to protect the rights of defence of the undertakings concerned, which would be seriously compromised if the Commission could rely on evidence against undertakings which was obtained during an investigation but was not related to the subject-matter or purpose thereof (*Dow Benelux* v *Commission*, cited above, paragraph 18).

49 Third, an undertaking against which the Commission has ordered an investigation may bring an action against that decision before the Community judicature under the fourth paragraph of Article 173 of the EC Treaty (now, after amendment, the fourth paragraph of Article 230 EC). If the decision in question were annulled by the Community judicature, the Commission would in that event be prevented from using, for the purposes of proceeding in respect of an infringement of the Community competition rules, any documents or evidence which it might have obtained in the course of that investigation, as otherwise the

decision on the infringement might, in so far as it was based on such evidence, be annulled by the Community judicature (see the orders of 26 March 1987 in Case 46/87 R *Hoechst* v *Commission* [1987] ECR 1549, paragraph 34, and of 28 October 1987 in Case 85/87 R *Dow Chemical Nederland* v *Commission* [1987] ECR 4367, paragraph 17).

50 Clearly, the existence of the power of judicial review so conferred on the Community judicature and the detailed rules, particularly those referred to in paragraphs 43 to 48 above, governing the exercise by the Commission of its investigatory powers, help to protect undertakings against arbitrary measures and to keep such measures within the limits of what is necessary in order to pursue the legitimate interests specified in paragraph 42 of this judgment.

51 Fourth, as emerges from paragraphs 35 and 39 of this judgment, the competent national court is required to ensure that the Commission's action is effective and to refrain from substituting its own assessment of the need for the investigations ordered for that of the Commission, the lawfulness of whose assessments of fact and law may be reviewed only by the Community judicature.

52 Although the national court with jurisdiction to authorise coercive measures must take into account the particular context in which its jurisdiction has been invoked, as well as the considerations set out in paragraphs 42 to 51 above, those requirements cannot prevent or absolve it from performing its obligation to ensure, in the specific circumstances of each individual case, that the coercive measure envisaged is not arbitrary or disproportionate to the subject-matter of the investigation ordered (see, by analogy, Eur. Court HR, Funke v. France judgment of 25 February 1993, Series A No 256-A, § 55, Camenzind v. Switzerland judgment of 16 December 1997, *Reports of Judgments and Decisions* 1997-VIII, § 45, and in *Colas Est and Others v. France*, cited above, § 47).

53 In the light of the foregoing considerations, it is necessary to determine more precisely what is involved in carrying out such a review and the nature of the information which the national court in question must have at its disposal. A distinction must be drawn in that regard between review to ensure that the coercive measures envisaged are not arbitrary and review of their proportionality to the subject-matter of the investigation.

Review to ensure that the coercive measures are not arbitrary and the information which the Commission may be required to provide to that end

54 First, when conducting its review to ensure that there is nothing arbitrary about a coercive measure designed to permit implementation of an investigation ordered by the Commission, the competent national court is required, in essence, to satisfy itself that there exist reasonable grounds for suspecting an infringement of the competition rules by the undertaking concerned.

55 It is true that there is no fundamental difference between that review and the review which the Community judicature may be called upon to carry out for the purposes of ensuring that the investigation decision itself is in no way arbitrary, that is to say, that it has not been adopted in the absence of facts capable of justifying the investigation (Joined Cases 97/87 to 99/87 *Dow Chemical Ibérica and Others* v *Commission* [1989] ECR 3165, paragraph 52). It must be borne in mind in that regard that the investigations carried out by the Commission are intended to enable it to gather the necessary documentary evidence to check the actual existence and scope of a given factual and legal situation concerning which the Commission already possesses certain information (*National Panasonic* v *Commission*, cited above, paragraphs 13 and 21).

56 However, that similarity in the nature of the review carried out by the Community judicature and that undertaken by the competent national body must not obscure the distinction between the objectives which those two types of review respectively seek to attain.

57 The investigatory powers conferred on the Commission by Article 14(1) of Regulation No 17 are limited to authorising its officials to enter such premises as they choose and to have shown to them the documents they request and the contents of any piece of furniture which they indicate (*Hoechst*, paragraph 31).

58 For their part, the coercive measures falling within the competence of the national authorities entail the power to gain access to premises or furniture by force or to oblige the staff of the undertaking to give them such access, and to carry out searches without the permission of the management of the undertaking (*Hoechst*, paragraph 31).

59 Having regard to the invasion of privacy which they entail, recourse to such coercive measures necessitates the ability of the competent national body autonomously to satisfy itself that they are not arbitrary.

60 In particular, such an examination of possible arbitrariness cannot be precluded on the ground that, in satisfying itself as to the existence of reasonable grounds for suspecting an infringement of the competition rules, the competent national body might, in accordance with paragraph 35 of the judgment in *Hoechst*, substitute its own assessment of the need for the investigations ordered for that of the Commission and call in question the latter's assessments of fact and law.

61 It follows that, for the purposes of enabling the competent national court to satisfy itself that the coercive measures sought are not arbitrary, the Commission is required to provide that court with explanations showing, in a properly substantiated manner, that the Commission is in possession of information and evidence providing reasonable grounds for suspecting infringement of the competition rules by the undertaking concerned.

62 On the other hand, the competent national court may not demand that it be provided with the information and evidence in the Commission's file on which the latter's suspicions are based.

63 In that regard, it is necessary to take into consideration the obligation of the Member States, pointed out in paragraph 35 of this judgment, to ensure that the Commission's action is effective.

64 First, as the Commission and the German and United Kingdom Governments have rightly observed, the Commission's ability to guarantee the anonymity of certain of its sources of information is of crucial importance with a view to ensuring the effective prevention of prohibited anti-competitive practices.

65 Clearly, if the Commission were obliged to send to the various national competition authorities factual information and evidence revealing the identity of its sources of information, or enabling that identity to be deduced, that might well increase the risks to informants of disclosure of their identity to third parties, in view, particularly, of the procedural requirements of national law.

66 Second, it must also be borne in mind that the physical transmission to the competent national authorities of the various items of factual information and evidence held in the Commission's file could give rise to other risks as regards the effectiveness of the action taken by the Community, especially in cases involving parallel investigations to be carried out simultaneously in more than one Member

State. Account must be taken of the uncertainties and delays that may affect such transmission and the different procedural rules with which they may have to comply under the legal systems of the Member States concerned, as well as the time which the authorities in question may need to consider potentially complex and voluminous documents.

67 In the context of the allocation of competences in terms of Article 234 EC, it is in principle for the competent national court to assess whether, in a given case, the explanations referred to in paragraph 61 of this judgment have been properly provided and to carry out, on that basis, the review which it is required to undertake under Community law. In addition, where the national court is called upon to rule on a request for assistance submitted by the Commission pursuant to Article 14(6) of Regulation No 17, it must pay even greater heed to that allocation of competences, inasmuch as a reference for a preliminary ruling — unless made, as in the present case, after the investigations have been carried out — is apt to delay the decision of that court and may bring the request for assistance into the public domain, thereby creating a risk that the Commission's action may be paralysed and that any subsequent investigation may serve no useful purpose.

68 In the light of those considerations, the Court of Justice, when called upon to give a preliminary ruling, can provide the referring court with all the criteria of interpretation within the scope of Community law which may enable that court to determine the case before it.

69 As regards the main proceedings in the present case, it is clear from the reasons contained in the investigation decision of 10 September 1998, as reiterated in paragraph 11 of this judgment, that the Commission gave a very precise account of the suspicions harboured by it with regard to Roquette Frères and the other participants in the suspected cartel, providing detailed information as to the holding of regular secret meetings and as to what was discussed and agreed at those meetings.

70 Although the Commission has not indicated the nature of the evidence on which its suspicions are based, such as a complaint, testimony or documents exchanged between the participants in the suspected cartel, the mere fact that no such indication is given cannot suffice to cast doubt on the existence of reasonable grounds for those suspicions where, as in the main proceedings, the detailed account of the information held by the Commission concerning the specific subject-matter of the suspected cartel is such as to enable the competent national court to establish a firm basis for its conclusion that the Commission does indeed possess such evidence.

Review of the proportionality of the coercive measures to the subject-matter of the investigation and the information which the Commission may be required to provide to that end

71 Second, as regards the need to verify that the coercive measures are proportionate to the subject-matter of the investigation ordered by the Commission, it should be noted that this involves establishing that such measures are appropriate to ensure that the investigation can be carried out.

72 In that regard, it must be borne in mind, in particular, that Article 14(3) of Regulation No 17 requires the undertakings concerned to submit to investigations ordered by decision of the Commission and that Article 14(6) provides for Member States to afford assistance to the officials authorised by the Commission only in the event that an undertaking opposes such an investigation.

73 It is true that the Court has acknowledged that the assistance may be requested as a precautionary measure, in order to overcome any opposition on the part of the undertaking (*Hoechst*, paragraph 32).

74 However, coercive measures may be so requested on a precautionary basis only in so far as there are grounds for apprehending opposition to the investigation and/or attempts at concealing or disposing of evidence in the event that an investigation ordered pursuant to Article 14(3) of Regulation No 17 is notified to the undertaking concerned.

75 Consequently, it is for the Commission to provide the competent national court with the explanations needed by that court to satisfy itself that, if the Commission were unable to obtain, as a precautionary measure, the requisite assistance in order to overcome any opposition on the part of the undertaking, it would be impossible, or very difficult, to establish the facts amounting to the infringement.

76 In addition, review of the proportionality of the coercive measures envisaged to the subject-matter of the investigation involves establishing that such measures do not constitute, in relation to the aim pursued by the investigation in question, a disproportionate and intolerable interference (Case C-331/88 *Fedesa and Others* [1990] ECR I-4023, paragraph 13; Joined Cases C-143/88 and C-92/89 *Zuckerfabrik Süderdithmarschen and Zuckerfabrik Soest* [1991] ECR I-415, paragraph 73; Case C-233/94 *Germany* v *Parliament and Council* [1997] ECR I-2405, paragraph 57; and Case C-200/96 *Metronome Musik* [1998] ECR I-1953, paragraphs 21 and 26).

77 In that regard, it should certainly be kept in view that, in relation to the proportionality of the investigation measure itself, the Court has held that the Commission's choice between an investigation by straightforward authorisation and an investigation ordered by a decision does not depend on matters such as the particular seriousness of the situation, extreme urgency or the need for absolute discretion, but rather on the need for an appropriate inquiry, having regard to the special features of the case. The Court has concluded in that regard that, where an investigation decision is solely intended to enable the Commission to gather the information needed to assess whether the Treaty has been infringed, such a decision is not contrary to the principle of proportionality (*National Panasonic* v *Commission*, cited above, paragraphs 28 to 30).

78 Similarly, it is in principle for the Commission to decide whether a particular item of information is necessary to enable it to bring to light an infringement of the competition rules (*AM & S Europe* v *Commission*, paragraph 17; Case 374/87 *Orkem* v *Commission* [1989] ECR 3283, paragraph 15). Even if it already has evidence, or indeed proof, of the existence of an infringement, the Commission may legitimately take the view that it is necessary to order further investigations enabling it to better define the scope of the infringement, to determine its duration or to identify the circle of undertakings involved (see to that effect, in relation to requests for additional information, *Orkem* v *Commission*, cited above, paragraph 15).

79 However, if the scope of the review to be carried out by the competent national court is to be meaningful, and if proper account is to be taken of the invasion of privacy that recourse to law-enforcement authorities entails, it must be acknowledged, with regard to such a measure, that the national authority cannot carry out its review of proportionality without regard to factors such as the seriousness of the suspected infringement, the nature of the involvement of the undertaking concerned or the importance of the evidence sought.

80 Consequently, it must be open to the competent national court to refuse to grant the coercive measures applied for where the suspected impairment of competition is so minimal, the extent of the likely involvement of the undertaking concerned so limited, or the evidence sought so peripheral, that the intervention in the sphere of the private activities of a legal person which a search using law-enforcement authorities entails necessarily appears manifestly disproportionate and intolerable in the light of the objectives pursued by the investigation.

81 It follows that, in order for the competent national court to be able to carry out the review of proportionality which it is required to undertake, the Commission must in principle inform that court of the essential features of the suspected infringement, so as to enable it to assess their seriousness, by indicating the market thought to be affected, the nature of the suspected restrictions of competition and the supposed degree of involvement of the undertaking concerned.

82 On the other hand, as the Court has previously held in relation to the statement of reasons for investigation decisions themselves, it is not indispensable that the information communicated should precisely define the relevant market, set out the exact legal nature of the presumed infringements or indicate the period during which those infringements were committed (*Dow Benelux* v *Commission*, cited above, paragraph 10).

83 The Commission is also obliged to indicate as precisely as possible the evidence sought and the matters to which the investigation must relate (*National Panasonic* v *Commission*, cited above, paragraphs 26 and 27), as well as the powers conferred on the Community investigators.

84 However, the Commission cannot be required to limit its investigation to requesting the production of documents or files which it is able to identify precisely in advance. That would, in effect, render nugatory its right of access to such documents or files. On the contrary, as the Court has held, such a right implies the power to search for various items of information which are not already known or fully identified (*Hoechst*, paragraph 27).

85 As stated in paragraph 67 above, it is in principle for the competent national court to assess whether, in a given case, the information referred to in paragraphs 75, 81 and 83 above has been properly provided by the Commission and to carry out, on that basis, the review which it is required to undertake under Community law.

86 However, as is pointed out in paragraph 68 above, the Court of Justice is competent to provide all such criteria of interpretation within the scope of Community law as may enable the referring court to determine the case before it.

87 As regards the main proceedings in the present case, it is clear from the grounds of the investigation decision of 10 September 1998, as reiterated in paragraph 11 above, that the Commission gave a sufficient account of the features of the suspected cartel, indicated its seriousness and stated that Roquette Frères had participated in the meetings described.

88 Likewise, the Commission stated, first, that Roquette Frères might hold information which the Commission needed in order to pursue its inquiries. Second, it stated that the very nature of the suspected agreements suggested that they were being implemented by secret means, so that an investigation was the most appropriate way of gathering evidence of their existence, and that it was necessary to compel the undertaking, by a decision, to submit to an investigation pursuant to Article 14(3) of Regulation No 17. Those statements are, it would seem, such as to enable the competent national court to assess the need to grant, as a precautionary measure, the authorisation sought.

89 As to the subject-matter of the investigations to be carried out, it is apparent from the operative part and the grounds of the investigation decision of 10 September 1998, as reiterated in paragraphs 10 and 11 above respectively, that the Commission was concerned to discover all the facts concerning the suspected agreements and/or concerted practices and to establish whether Roquette Frères had participated therein. To that end, the decision orders that undertaking to give the officials authorised by the Commission access to its premises, to produce the books and other business records required by those officials, to allow them to inspect and copy those books and records and to provide the officials in question with any oral explanations they may request in connection with the subject-matter of the investigation. Those statements adequately indicate what the Commission was looking for and the powers to which recourse could be had for that purpose.

The approach to be adopted by the competent national court and by the Commission in the event that the information communicated by the latter proves to be insufficient

90 Where a national court having jurisdiction under domestic law to authorise entry onto premises considers that the information communicated by the Commission does not fulfil the requirements set out in paragraphs 75, 81 and 83 above, it cannot simply dismiss the application brought before it.

91 In such circumstances, the court in question and the Commission are required, in compliance with the obligation to cooperate in good faith referred to in paragraphs 30 to 32 above, to collaborate with each other with a view to overcoming the problems arising and to cooperate in the implementation of the investigation decision ordered by the Commission (see, by analogy, Case 52/84 *Commission* v *Belgium* [1986] ECR 89, paragraph 16, and Case C-217/88 *Commission* v *Germany* [1990] ECR I-2879, paragraph 33).

92 In order to comply fully with that obligation and to assist, as it must, in ensuring that the Commission's action is effective, the competent national court is therefore required as rapidly as possible to inform the Commission, or the national authority which has brought the latter's request before it, of the difficulties encountered, where necessary by asking for the additional information needed to enable it to carry out the review which it is to undertake. In such circumstances, that court must pay particular heed to the need for coordination, expedition and discretion needing to be fulfilled in order to ensure the effectiveness of parallel investigations as referred to in paragraph 66 of this judgment.

93 Similarly, the Commission's duty to cooperate in good faith is of particular importance *vis-à-vis* the judicial authorities of a Member State who are responsible for ensuring that Community law is applied and respected in the

national legal system (order in *Zwartfeld*, cited above, paragraph 18). The Commission must therefore provide, with the minimum of delay, any additional information thus requested by the competent national court which is such as to satisfy the requirements set out in paragraph 90 of this judgment.

94 Not until it is provided with such clarifications, if any, or the Commission fails to take any practical steps in response to its request, may the competent national court refuse to grant the assistance sought where it cannot be concluded, in the light of the information available to that court, that the coercive measures envisaged are not arbitrary or disproportionate to the subject-matter of those measures.

The manner in which information can be brought to the knowledge of the competent national court

95 As to the manner in which the requisite information can be brought to the knowledge of the competent national court, it should be observed that the main reason for which the referring court has asked the Court of Justice to give a ruling in relation to the adequacy of the statement of reasons for the investigation decision of 10 September 1998 is that, in the main proceedings, the only material submitted for assessment to the competent national court is the text of that decision.

96 However, as far as a national court is concerned, the relevance of the statement of reasons contained in such an investigation decision is to enable that court to satisfy itself that the coercive measure sought is neither arbitrary nor disproportionate to the subject-matter of the investigation. Review of the adequacy of the reasons given for any Commission decision ordering an investigation, as defined in Article 14(3) of Regulation No 17, falls within the exclusive competence of the Community judicature.

97 Whilst the matters which must feature in the investigation decision itself, particularly under Article 14(3) of Regulation No 17, correspond in part to the information which must be communicated to the competent national court so as to enable that court to carry out its review, that information may also emanate from other sources.

98 In that regard, Community law does not require information communicated to the competent national court to be in any particular form. Since the purpose is to enable that court to carry out the review which it is required to undertake, such information may be contained either in the investigation decision itself or in the request made to the national authorities under Article 14(6) of Regulation No 17, or indeed in an answer — even given orally — to a question put by that court.

99 Having regard to all the foregoing considerations, the answers to be given to the questions referred must be as follows:

— In accordance with the general principle of Community law affording protection against arbitrary or disproportionate intervention by public authorities in the sphere of the private activities of any person, whether natural or legal, a national court having jurisdiction under domestic law to authorise entry upon and seizures at the premises of undertakings suspected of having infringed the competition rules is required to verify that the coercive measures sought in pursuance of a request by the Commission for assistance under Article 14(6) of Regulation No 17 are not arbitrary or disproportionate to the subject-matter of the investigation ordered. Without

prejudice to any rules of domestic law governing the implementation of coercive measures, Community law precludes review by the national court of the justification of those measures beyond what is required by the foregoing general principle.

— Community law requires the Commission to ensure that the national court in question has at its disposal all the information which it needs in order to carry out the review which it is required to undertake. In that regard, the information supplied by the Commission must in principle include:

— a description of the essential features of the suspected infringement, that is to say, at the very least, an indication of the market thought to be affected and of the nature of the suspected restrictions of competition;

— explanations concerning the manner in which the undertaking at which the coercive measures are aimed is thought to be involved in the infringement in question;

— detailed explanations showing that the Commission possesses solid factual information and evidence providing grounds for suspecting such infringement on the part of the undertaking concerned;

— as precise as possible an indication of the evidence sought, of the matters to which the investigation must relate and of the powers conferred on the Community investigators; and

— in the event that the assistance of the national authorities is requested by the Commission as a precautionary measure, in order to overcome any opposition on the part of the undertaking concerned, explanations enabling the national court to satisfy itself that, if authorisation for the coercive measures were not granted on precautionary grounds, it would be impossible, or very difficult, to establish the facts amounting to the infringement.

— On the other hand, the national court may not demand that it be provided with the evidence in the Commission's file on which the latter's suspicions are based.

— Where the national court considers that the information communicated by the Commission does not fulfil the requirements set out above, it cannot, without violating Article 14(6) of Regulation No 17 and Article 5 of the Treaty, simply dismiss the application brought before it. In such circumstances, it is required as rapidly as possible to inform the Commission, or the national authority which has brought the latter's request before it, of the difficulties encountered, where necessary by asking for any clarification which it may need in order to carry out the review which it is to undertake. Not until any such clarification is forthcoming, or the Commission fails to take any practical steps in response to its request, may the national court refuse to grant the assistance sought on the ground that, in the light of the information available to it, it is unable to hold that the coercive measures envisaged are not arbitrary or disproportionate to the subject-matter of the investigation.

— The information to be provided by the Commission to the national court may be contained either in the investigation decision itself or in the request made to the national authorities under Article 14(6) of Regulation No 17, or indeed in an answer — even given orally — to a question put by that court.

Costs

100 The costs incurred by the French, German, Greek, Italian, Norwegian and United Kingdom Governments, which has submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT,

in answer to the questions referred to it by the Cour de cassation by judgment of 7 March 2000, hereby rules:

1. In accordance with the general principle of Community law affording protection against arbitrary or disproportionate intervention by public authorities in the sphere of the private activities of any person, whether natural or legal, a national court having jurisdiction under domestic law to authorise entry upon and seizures at the premises of undertakings suspected of having infringed the competition rules is required to verify that the coercive measures sought in pursuance of a request by the Commission for

assistance under Article 14(6) of Regulation No 17 of the Council of 6 February 1962: First Regulation implementing Articles 85 and 86 of the Treaty are not arbitrary or disproportionate to the subject-matter of the investigation ordered. Without prejudice to any rules of domestic law governing the implementation of coercive measures, Community law precludes review by the national court of the justification of those measures beyond what is required by the foregoing general principle.

2. Community law requires the Commission to ensure that the national court in question has at its disposal all the information which it needs in order to carry out the review which it is required to undertake. In that regard, the information supplied by the Commission must in principle include:

— a description of the essential features of the suspected infringement, that is to say, at the very least, an indication of the market thought to be affected and of the nature of the suspected restrictions of competition;

— explanations concerning the manner in which the undertaking at which the coercive measures are aimed is thought to be involved in the infringement in question;

— detailed explanations showing that the Commission possesses solid factual information and evidence providing grounds for suspecting such infringement on the part of the undertaking concerned;

— as precise as possible an indication of the evidence sought, of the matters to which the investigation must relate and of the powers conferred on the Community investigators; and

— in the event that the assistance of the national authorities is requested by the Commission as a precautionary measure, in order to overcome any opposition on the part of the undertaking concerned, explanations enabling the national court to satisfy itself that, if authorisation for the coercive measures were not granted on precautionary grounds, it would be impossible, or very difficult, to establish the facts amounting to the infringement.

3. On the other hand, the national court may not demand that it be provided with the evidence in the Commission's file on which the latter's suspicions are based.

4. Where the national court considers that the information communicated by the Commission does not fulfil the requirements referred to in point 2 of this operative part, it cannot, without violating Article 14(6) of Regulation No 17 and Article 5 of the EC Treaty (now Article 10 EC), simply dismiss the application brought before it. In such circumstances, it is required as rapidly as possible to inform the Commission, or the national authority which has brought the latter's request before it, of the difficulties encountered, where necessary by asking for any clarification which it may need in order to carry out the review which it is to undertake. Not until any such clarification is forthcoming, or the Commission fails to take any practical steps in response to its request, may the national court in question refuse to grant the assistance sought on the ground that, in the light of the information available to it, it is unable to hold that the coercive measures envisaged are not arbitrary or disproportionate to the subject-matter of the investigation.

5. **The information to be provided by the Commission to the national court may be contained either in the investigation decision itself or in the request made to the national authorities under Article 14(6) of Regulation No 17, or indeed in an answer — even one given orally — to a question put by that court.**

Rodríguez Iglesias Puissochet Wathelet

Schintgen Gulmann

Edward La Pergola Jann

Skouris Macken

Colneric von Bahr Cunha Rodrigues

Delivered in open court in Luxembourg on 22 October 2002.

R. Grass G.C. Rodríguez Iglesias

Registrar President