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EEC Commission Investigation Procedures in Competition Cases

The legal powers of the Commission of the European Economic Community in competition cases have in recent years increasingly come under public scrutiny. A striking feature of this increase in interest is that it is not the substantive application of the law, the Commission's interpretation of Articles 85 and 86 of the EEC Treaty, that has been the focus of attention, but rather the Commission's procedural powers and practices that have been the subject of criticism. In particular, members of the European Parliament have entered into an active dialogue with the Commission on this subject by means of written and oral questions.

The Damseaux Report¹ drawn up on behalf of the European Parliament, emphasized the fundamental role which competition policy can play in ensuring the Community's economic and social well-being. However, in paragraph 20, it also put forward recommendations aimed at simplifying procedures on restrictive practices so as to preserve the credibility and effectiveness of competition policy.

In the debate on the Parliament's resolution of the report, Mr. Hopper deplored the fact that the rules governing the Commission's powers of investigation were not in all cases fair and comprehensible. He called for a strengthening of the safeguards available to the businesses being investigated. Criticizing the fact that the Commission combined the role of investigator, prosecutor and judge, he argued that a special appeals procedure should be established which would allow a check on "whether the Commission has conducted a proper investigation and taken proper account of all factual matters."²

Lady Elles raised the matter of the procedures for implementing Article

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¹Report by the European Parliament Committee on Economic and Monetary Affairs. Rapporteur: Mr. A. Damseaux, Document 1-625/79, Jan. 14, 1980.

²Debates of the European Parliament, No. 1-253, March 1980, at 34.

14 of Council Regulation No. 17/62³ in a Written Question to the Commission in October 1979,⁴ and asked further questions on this matter in January 1980.⁵ In February 1980, Mr. Newton Dunn asked the Commission to list the investigations which it was presently making into restrictive practices and abuse of dominant positions within the Community.⁶

At the European Parliament's session on May 19, 1980 Mr. Ansquer put an oral question to the Commission. He wanted to know the Commission's view of the position taken by Community industrialists that the procedures followed in the matter of agreements and dominant positions should be reviewed.⁷ This question was obviously a reference to a memorandum to the Commission drawn up by the Union of Industries of the European Community (UNICE) in February 1980 on "EEC Procedures in Competition Cases," in which Commission procedures were strongly criticized.

Similar criticism also came from other quarters. In addition to UNICE, the International Chamber of Commerce (ICC), the International Bar Association (IBA), the Consultative Committee of Bar Associations of the European Community (CCBE) and professional associations representing legal advisers in the United Kingdom, such as the Law Society, addressed memoranda to the Commission on questions relating to procedures in competition cases. These memoranda and the UNICE memorandum are all broadly similar in the points they make: the Commission and the Court of Justice have wrongly affirmed the administrative character of competition case procedures, too little attention is given to accuracy and fairness, investigative activities and consultative procedures in the Directorate General for Competition are inadequate, and improvements must therefore be made in the procedural rules. The UNICE memorandum also proposed that an administrative board should be set up, consisting of officials who, while technically belonging to the Commission, would as far as possible be independent of the commission and of the Directorate General for Competition in particular, and whose job it would be to act in an advisory capacity so as to ensure that the procedures pursued by the Directorate General for Competition were subject to some degree of monitoring and achieved a higher degree of objectivity.

In July 1980, Mrs. Walz, referring to the UNICE memorandum, asked which of industry's proposals to change current practices were compatible with Community Law and what the Commission's assessment was of the suggestion that the results of inquiries by the Directorate General for Competition should be reviewed by an independent agency.⁸ The Commission rejected the criticism made of its administrative practice. In its comments

³OJ No. 13, Feb. 21, 1962, at 204; Article 14 sets out the Commission's powers to carry out investigations into businesses. This question will have to be looked at more closely below.

⁴Written Question No. 677/79, OJ C 310, Dec. 10, 1979, at 30.

⁵Written Question No. 1474/79, OJ C 98, Apr. 21, 1980, at 31.

⁶Written Question No. 1740/79, OJ C 140, June 10, 1980, at 14.

⁷Debates of the European Parliament, No. 1-256, May 1980, at 35.

⁸Written Question No. 840/80, OJ C 283, Nov. 3, 1980, at 41.

on the Damseaux Report, it stated that the procedures laid down by Council Regulation No. 17 were just and balanced. The proposal for a separation between the power to establish the facts and the power to formulate a legal assessment of such facts could not be implemented without changes in the institutional system and in Community Law.⁹

In its answers to various Parliamentary questions, the Commission reiterated this position and argued against efforts to bring about fundamental changes in the nature of the administrative procedure by means of measures to delay proceedings or curtail powers to carry out investigations. The Commission declared that it would, on the other hand, continue its efforts to improve the practical application of its procedural rules wherever this was possible and desirable, particularly in light of the views of the Court of Justice and the suggestions by interested parties.¹⁰

There are various possible causes of the criticism of the Commission's administrative practices and of the associated proposals for changes in the procedural rules. There is reason to suspect that interested parties may be endeavoring to weaken the Commission's powers and thus to make it difficult to act against violations of the competition rules. This would be a good time for such a campaign, since it is in periods of persistent economic recession that doubts as to the sense and purpose of competition policy most readily find an audience. However, since such critics can have little hope of success in questioning the basic provisions of the Treaty, among which the competition rules set out in Articles 85 and 86 must be included, their aim must be to set up obstacles to the actual implementation of such provisions, *i.e.*, in the area of investigations and fact-finding activities. The negative impact on effective action against competition violations would then essentially be the same. At least some of the proposals put forward by industry and the legal profession would—intentionally or unintentionally—encourage such a situation.

Another possible cause, which must be taken considerably more seriously, lies in the fundamental differences in legal thinking among Member States. It is surely no coincidence that most of the criticism, and the harshest criticism, comes from countries whose tradition is based on the common law. Their criticisms may derive from a strong feeling for fairness, legal protection and legal certainty in public or official intervention measures—a feeling which has traditionally developed along different lines from that in most of the continental European countries. However, criticism based on such considerations would be justified only if the Commission's powers were too far-reaching, were not subject to any effective control, and were exercised inappropriately. The Commission's practice in carrying out investigations shows, however, that this is not the case.

⁹Debates of the European Parliament, No. 1-253, at 57.

¹⁰Debates of the European Parliament (Question by Mr. Ansquer), No. 1-256, at 39 and OJC 283, Nov. 3, 1980, at 41 (Question by Mrs. Walz).

Lastly, a problem which must not be underestimated and a possible cause of some of the criticism is the lack of general public knowledge of the Commission's tasks, powers and procedures. The position may be different in individual Member States, such as the Federal Republic of Germany, where the Federal Cartel Office¹¹ and a specialized section of the legal profession have ensured that there is a large degree of awareness on the part of businesses.¹² However, this is much less the case in most of the other Member States. This lack of knowledge and understanding sometimes leads people to overreact, to misinterpret and to give vent to excessive criticism. Although the procedural rules laid down by Council Regulation No. 17 have been in force for more than twenty years, and although the Directorate General for Competition has carried out numerous investigations in all the Member States of the Community, this lack of familiarity is nonetheless understandable. Investigation procedures must as a matter of principle avoid the glare of publicity, since no one should be publicly accused of a violation of the law so long as no proof or reliable evidence is available. In carrying out its investigations, the Commission is obliged to safeguard the justified interests and business secrets of the businesses being investigated and to protect other firms that have lodged informal complaints or may be involved in quasiwitnesses¹³ against possible reprisals by their competitors or suppliers. Consequently, most of the investigation procedures are carried out under cover of confidentiality and secrecy, and a lack of public information must therefore be accepted as inevitable.

At the same time, it cannot be denied that the more the general public knows about investigations, the greater will be its understanding of the investigative power of the antitrust authority. This is true not only at the national level, but even more so in the case of an international authority which, because of economic, social and linguistic differences among the Member States—differences which are in some cases considerable—has to rely on achieving the broadest possible consensus on the part of the persons affected by its actions. Without this consensus, which must be derived from knowledge and understanding, the Community's competition policy cannot work in the long run.

The following sections will accordingly outline the legal bases for the Commission's powers of investigation, the main problems arising in practice in carrying out investigation procedures, and the questions involved in cooperation with the Member States.

¹¹Mention should be made here of the Federal Cartel Office's reports on its activities.

¹²See GRUTZNER, *RICHTIGES VERHALTEN BEI KARTELLAMTS-ERMITTLUNGEN IM UNTERNEHMEN*, 2d ed. 1978 (EEC procedures, points 212 *et seq.*); HERMANN, *DIE ERMITTLUNGSBEFUGNISSE DER KARTELLBEHORDEN NACH DEUTSCHEM UND EUROPÄISCHEM RECHT* 1978 (EEC procedures, at 121 *et seq.*)

¹³The Commission has no legal power to examine witnesses.

I. The Legal Bases for Commission Investigative Powers

Article 213 of the Treaty provides that "the Commission may, within the limits and under the conditions laid down by the Council in accordance with the provisions of this Treaty, collect any information and carry out any checks required for the performance of the tasks entrusted to it." Article 87(1) of the Treaty gives the Council, as the Community's legislative authority, the task of adopting "any appropriate regulations or directives to give effect to the principles set out in Articles 85 and 86."

On February 6, 1962, the Council, acting on the basis of this authorization, adopted the "First Regulation implementing Articles 85 and 86 of the Treaty," otherwise known as Regulation No. 17.¹⁴ This regulation has remained substantially unchanged since it became effective on March 13, 1962.¹⁵

The Preamble to Regulation No. 17 provides as follows:

[I]n order to secure uniform application of Articles 85 and 86 in the common market, rules must be made under which the Commission, acting in close and constant liaison with the competent authorities of the Member States, may take the requisite measures for applying those Articles; for this purpose the Commission must have the cooperation of the competent authorities of the Member States and be empowered, throughout the common market, to require such information to be supplied and to undertake such investigations as are necessary to bring to light any agreement, decision or concerted practice prohibited by Article 85(1) or any abuse of a dominant position prohibited by Article 86; compliance with Articles 85 and 86 and the fulfillment of obligations imposed on undertakings and associations of undertakings under this Regulation must be enforceable by means of fines and periodic penalty payments. . . .

The key provisions regarding the Commission's powers of investigation are contained in Articles 11, 12, 13, 14 and 20 of Regulation No. 17. The investigating powers of the Commission (Article 14) and its right to information (Article 11) have proved to be by far the most important means of inquiry, with the right of investigation, which constitutes the most direct means of intervention in the business and industrial world, also proving to be the one most fraught with problems.

The power to carry out inquiries into sectors of the economy (sectoral inquiries, Article 12) and the Commission's right to have investigations carried out at its request by the authorities of the Member States (Article 13) have so far been of no practical significance, since the Commission has not made, or has not been able to make, very much use of them. This issue will be discussed further below. The protection of businesses involved in investigations is covered by the provisions of Article 20 of Regulation No. 17. Under this Article, information which the Commission has acquired in the

¹⁴OJ No. 13, Feb. 21, 1962, at 204; English Special Edition 1959-1962; at 87.

¹⁵Such changes as have been made do not affect the provisions concerning powers of investigation. On this question, and on the background to the adoption of the Regulation, see GROEBEN, BOECKH & THIESING, EWG-VERTRAG, 2d ed., preliminary remarks on Regulation No. 17, at 813 *et seq.*

exercise of its powers of investigation may be used only for the purposes of the investigation and may not be disclosed if it is covered by the obligation of professional secrecy. The enforceability of the investigating powers vested in the Commission is ensured by the provisions regarding fines and periodic penalty payments (Article 15 and 16 of Regulation No. 17). Fines may be imposed in particular where businesses supply incorrect information, produce books or other business records in incomplete form, or refuse to submit to an investigation ordered by Commission decision.

The Commission is also entitled to impose periodic penalty payments in order to compel businesses to supply information which it has requested by decision and to submit to an investigation which it has similarly ordered by decision. Commission decisions on investigation measures may be contested through the institution of proceedings before the Court of Justice of the European Communities (Article 173 of the EEC Treaty). The Court of Justice also has unlimited jurisdiction within the meaning of Article 172 of the EEC Treaty to review Commission decisions on fines or periodic penalty payments (Article 17 of Regulation No. 17).

II. Investigative Practices of the Commission

A. *Initiation of Procedure and Initial Measures*

Basically, the initiation of an investigation procedure by the Commission is not required to follow any particular lines.¹⁶ Generally speaking, the procedure is initiated when Directorate A (which is responsible for investigations and inspections) in the Directorate General for Competition asks one or more of its officials to undertake inquiries into a particular case. The possible reasons for initiating an investigation vary enormously and may be listed roughly as follows, in order of importance:

1. Questions by members of the European Parliament. In accordance with its own house rules, the Commission normally answers these within five days. If the question relates to a case requiring lengthy investigations, a preliminary answer is given to the member and the final information made known after the investigations have been concluded.
2. Applications for termination of infringements under Article 3 of Regulation No. 17. These give applicants (Member States or persons who claim a legitimate interest) a legal right to action by the Community. If the Commission does not take action, the applicant may lodge a complaint to the Court of Justice in accordance with the third paragraph of Article 175 of the EEC Treaty.¹⁷
3. Notifications or informal complaints concerning distortions of competition, particularly in cases where those making the notification or

¹⁶The only exception is inquiries into sectors of the economy (sectoral inquiries) pursuant to Article 12 of Regulation No. 17. In such cases, a Commission decision is required.

¹⁷See GROEBEN, BOECKH & THIESING, at 856 *et seq.* with further bibliographical references.

complaint could suffer substantial damage through competition infringements committed by others unless the Commission took rapid action.

4. Applications for negative clearance under Article 2 of Regulation No. 17 and for exemption decisions pursuant to Article 85(3) of the EEC Treaty in conjunction with Article 6 of Regulation No. 17.
5. The Commission acting on its own initiative to start a procedure.
6. Suggestions, notifications or recommendations made by authorities in the Member States, by other Commission departments or by any other party.

If the reasons for instigating investigation procedures are reclassified by frequency, the picture is different. Up to the end of 1981, a total of 4365 cases involving procedures under Articles 85 and 86 of the EEC Treaty had been dealt with by the Commission. Of these, 3882 concerned notifications (with the object of exemption, predominantly licensing agreements), 250 related to formal or informal complaints addressed to the Commission and 233 concerned proceedings on the Commission's own initiative.¹⁸ There has been little if any change in this pattern since then.

The first steps taken in connection with an investigation procedure are usually purely internal matters within the Commission. The Commission official responsible for the case will initially attempt to clarify the facts without making use of the powers available under Regulation No. 17. For this purpose, use may be made of the documentation department operating in the Directorate General for Competition, market studies carried out on behalf of the Commission, documentation on notifications of existing agreements, decisions and practices of individual undertakings and the results and findings produced by other investigation procedures, whether completed or uncompleted. It may also be useful to contact other Commission departments, national authorities and non-Community countries. If after assessment of the information thus obtained it is still suspected that a violation of the competition rules is involved, consideration is given to the means of inquiry appropriate to clarify the facts. The Commission is legally free here to make use of whichever powers it wishes for this purpose. In particular, it is not obliged to begin by sending a request for information and to continue its inquiries by means of investigations only if its requests for information have not produced the necessary data.¹⁹ This view was confirmed by the Court of Justice in its judgment of June 26, 1980 in Case 136/79 (*National Panasonic (UK) Ltd. v. Commission*). The Court held that the right to information and the power to carry out investigations involved two

¹⁸See Eleventh Report on Competition Policy (1981) point 69.

¹⁹This argument may be found in GROEBEN, BOECKH & THIESING, *op. cit.*, at 949 with further bibliographical references. A different view is taken by Wohlfarth, Everling, Glaesner & Sprung, Art. 213, note 3, by THOMA, *EUROPAISCHE WIRTSCHAFT*, 1960, at 423, 430, and by LIETZMANN, *WuW* 1957, at 368, all of whom assume that the right of investigation is subsidiary to the request for information.

mutually independent procedures serving different purposes. The choice between the two methods of inquiry should be made in the light of the circumstances of each individual case.²⁰

However, where the purpose of the inquiry permits, and in particular where immediate action in the form of an investigation does not appear to be called for in the light of the facts of the case, the Commission will begin by requesting information. In so doing, it is acting in accordance with the legal principle of keeping intervention to a minimum, since requests for information are usually the mildest form of intervention in the business and industrial sphere.

B. Requests for Information

Article 11(1) of Regulation No. 17 states that, in carrying out the duties assigned to it by Article 89 and by provisions adopted under Article 87 of the Treaty, the Commission may obtain all necessary information from the Governments and competent authorities of the Member States and from businesses and associations of businesses. In its request for information, the Commission must state the legal basis and the purpose of the request, as well as the penalties which may be imposed for supplying incorrect information (Article 11(3) of Regulation No. 17).

1. THOSE REQUIRED TO SUPPLY INFORMATION

The first point to be borne in mind is that the obligation to supply information applies to all businesses and associations of businesses. It therefore also applies to businesses that are not considered to have infringed the competition rules.²¹ This rule is justified and necessary, since practice has shown that information obtained from third parties (mostly competitors, suppliers or customers of the businesses that are under suspicion) is an important source of evidence in uncovering or proving violations of Articles 85 and 86 of the EEC Treaty.

2. PURPOSE AND NECESSITY

Problems sometimes arise in connection with requests for information where the purpose and necessity of the information have not been made sufficiently clear.

The purpose of the information requested is determined by the tasks assigned to the Commission, namely, to ensure that the competition rules laid down in the Treaty are implemented and observed. The Commission can accordingly obtain information for the purpose of exercising all the powers which Community law in competition cases has vested in it.²² In the request for information, it must therefore be made clear that the Commis-

²⁰See publication in 29 COMMON MARKET LAW REPORTS, Part 258, at 182 *et seq.*

²¹General view; see GROEBEN, BOECKH & THIESING, at 925 with further references.

²²See Mestmacker, *Europaisches Wettbewerbsrecht*, 1974, at 598.

sion is acting in the exercise of one of these powers. These may be proceedings on suspicion of violations of Articles 85 and 86 of the EEC Treaty, proceedings to examine whether conditions are such as to allow negative clearance or an exemption decision, or proceedings in connection with the imposition of fines or periodic penalty payments. The main point is that the information requested must relate to a specific set of facts. The Commission must therefore have sufficient evidence to support its supposition that a violation has been committed; this means that applications for negative clearance or an exemption decision must have been submitted or there must be a presumption of actions liable to fines or periodic penalty payments.

Requests for information that are purely precautionary or solely for documentary purposes would be improper.²³ It is not necessary for the Commission, by way of explanation of the purpose of its request for information, to disclose what facts and information it already possesses and why this particular information is therefore being requested from this particular business. Otherwise the Commission would in most cases be forced to break the rule of confidentiality applying in investigation procedures and thus to damage the interests of businesses that are under suspicion or other businesses indirectly involved.

A further question is whether the information requested is necessary to achieve the purpose pursued. The two criteria of "purpose" and "necessity" are closely linked since the purpose pursued serves as the criterion in determining necessity. The Commission must be allowed a wide discretion in assessing this link.²⁴

A request for information cannot therefore be regarded as improper simply because the relevant business considers the information requested to be irrelevant to the purpose pursued or because it believes the information does not lend itself to the drawing of certain factual conclusions or the deduction of certain legal consequences. If the purpose of the request falls within the framework of existing powers, the necessity of the request cannot be denied by reference to an *a priori* assessment of the results expected, since these may change—precisely as a result of the information obtained.²⁵ In addition, the principle of proportionality of means, a principle which also governs the Commission's administrative activities, is reflected in the "necessity" criterion. The Court of Justice accordingly looks to see whether, having regard to the circumstances, requests for information are "excessive and disproportionate to the aim in view." Despite the broad measure of discretion available to the High Authority, measures have to be examined to see whether they have exceeded the boundaries of what is

²³General view; see GROEBEN, BOECKH & THIESING, *op cit.*, at 923 with further references.

²⁴Judgment of Apr. 4, 1960, Case 31/59, *Acciaieria de Brescia v. High Authority* [1960] ECR on the application of Article 47 of the ECSC [European Coal and Steel Community] Treaty; these principles may also be applied in interpreting Art. 11 of Regulation No. 17.

²⁵[1960] ECR, *op. cit.*

permitted.²⁶

That leaves open the question of whether the boundaries of a justified end-means relationship are exceeded. The question of whether the nature and extent of the request for information are proportionate to the aim in view can probably be answered only in the light of circumstances in each individual case, taking into consideration the expense caused to those required to provide the information, the disruption of business, etc.²⁷

At any rate, the Commission should always take care to state the grounds for its requests for information as thoroughly as possible and to pinpoint the information requested precisely. This will ease the task of supplying the information, and also allow the business no excuse for providing evasive answers that would only require additional measures.

The time limits should be determined after considering the urgency of the case and the anticipated expenditure. Experience has shown that an investigation whose inherent justification is not immediately obvious merely tends to reinforce businesses' latent reluctance to accept the Commission's powers. Lastly, careful drafting of the request for information and adequate statement of the relevant grounds are matters of some legal significance, because the requests more or less predetermine any decision requiring the information to be supplied under the terms of Article 11(5) of Regulation No. 17. Because of the two-stage nature of the procedure, only such information can be required by decision as has already been specified in the initial request.

If the request does not comply with the legal requirements, its shortcomings cannot be made good by any subsequent mandatory decision.²⁸ So far, the Commission seems for the most part to have met these requirements, since information decisions under Article 11(5) of Regulation No. 17 have been necessary in only eleven cases.²⁹

3. REQUESTS FOR DOCUMENTS

The Commission's practice has increasingly been not only to request information as such, but at the same time to ask that the relevant docu-

²⁶Judgment of Dec. 14, 1962 joined cases 5 to 11 and 13 to 15/62, *Acciaieria San Michele v. High Authority*, [1962] ECR.

²⁷This view is also taken by Mestmacker, *op. cit.*, at 601.

²⁸See Mestmacker, *op. cit.*, at 597; GROEBEN, BOECKH & THIESING, *op. cit.*, at 930; Deringer, *Das Wettbewerbsrecht der Europäischen Wirtschaftsgemeinschaft*, Regulation No. 17, Art. 11, note 17.

²⁹Decision of Feb. 23, 1966 (unpublished); Decision of Feb. 1, 1971 (CICG-ZVEI/ZPU), OJ L 34, Feb. 11, 1971; three Decisions of June 18, 1971 (*Brasserie Esperance*, *Union des Brasseries and Brasserie Maes*) OJ L 161, July 19, 1971; Decision of July 2, 1971 (*Asphaltoid-Keller*), OJ L 161, July 19, 1971; Decision of Nov. 9, 1971 (*Societa Italiana degli Autori ed Editori*), OJ L 254, Nov. 17, 1971; two Decisions of Sept. 28, 1972 (*Rodenstock and Misal*), OJ L 267, Nov. 18, 1972; Decision of June 25, 1976 (CSV), OJ L 192, July 16, 1976; Decision of May 26, 1978 (RAI/Unitel) OJ L 157, June 15, 1978.

ments be handed over.³⁰

This can take on considerable proportions in individual cases. The question arises whether such requests on the part of the Commission are covered by Article 11 of Regulation No. 17.

In the literature, ordering documents to be handed over is regarded as unlawful.³¹ The wording of the provision does not stipulate what type or nature of information may be requested, *i.e.*, whether it must be supplied in the form of a statement or whether it must also involve, where appropriate, the handing over of documents. However, no problems have arisen so far in this area. There is no known instance of a business refusing to hand over documents to the Commission in connection with information requested. The evident acquiescence of businesses in the Commission's practice here is no doubt based on the realization that simultaneous requests for documents can obviate the need for investigations of the business and are therefore in the interests of both parties in simplifying the procedure.

4. REFUSAL TO SUPPLY INFORMATION

So far, the Commission has not recognized that businesses have a right to refuse to supply the information requested. The European Parliament did propose that businesses should have the right to refuse to supply information where there was a danger of self-incrimination, but this was not included in Regulation No. 17.³² Some authors take the view that such a right forms part of the common historical and legal tradition on which the constitutions of the Member States are founded, and must therefore be taken into account irrespective of any actual legal provisions to this effect.³³

Where reference is made in this context to Section 46(5) of the German Law prohibiting Restraints of Competition (*Gesetz gegen Wettbewerbsbeschränkungen*),³⁴ opinions differ as to whether the wording of this provision is such as to allow businesses to invoke it.³⁵

At all events, no comparable rule can be found elsewhere in commercial law of the Member States. Consequently, any reference to national law

³⁰*E.g.*, Decision of July 2, 1971 (Asphaltoid-Keller), OJ L 161, July 19, 1971; Decision of June 25, 1976 (CSV), OJ L 192, July 16, 1976.

³¹GLEISS & HIRSCH, KOMMENTAR ZUM EWG-KARTELLRECHT, 3d ed. 1978, at 489, point 22.

³²This proposal stated that persons required to supply information should be able to refuse to do so where answering the questions would expose them, or a person connected with them and entitled under the national code of procedure to refuse to give evidence, or the business or business associations represented by them, to the danger of criminal prosecution. *See* opinion of the European Parliament, Oct. 19, 1961, art. 9 (4).

³³*See* EVERLING, BB 1961, at 423, and Deringer, Regulation No. 17, Art. 11, Note 13.

³⁴Section 46(5) of the law prohibiting restrictions on competition states that persons required to supply information may refuse to do so where answering the questions would expose them, or a person connected with them and specified in section 383(1) to (3) of the Code of Civil Procedure, to the danger of criminal prosecution or proceedings under the Law concerning Administrative Irregularities.

³⁵This view is taken in JUNGE GEMEINSCHAFTSKOMMENTAR, 3d ed., point 46, note 10 and by Hermanns, *op. cit.*, at 121 *et seq.* A different interpretation is given by, *e.g.*, Langen, *GWB*, paragraph 46, point 10.

would entail discrimination on the grounds of nationality.³⁶ These differences in the legal position of the Member States thus invalidate the assumption of a general principle of Community Law from which an unwritten right of refusal might be inferred.

In the literature, the view is taken that other private-law rights to refuse to supply information must be admitted, for example in order to protect commercial and industrial secrets³⁷ or on the ground that the party concerned cannot reasonably be expected to supply the information.³⁸ In England, the Law Society and the Senate of the Inns of Court and the Bar proposed in 1976 that Articles 11, 12 and 14 of Regulation No. 17 should provide for a right to refuse to supply information or to release documents where "the documents, or part of the documents, or the information requested, would disclose technical or commercial secrets, the disclosure of which to any source (even with the protection of Article 20) would cause great harm to the business, and the Commission has failed to show that they are sufficiently material to justify disclosure."³⁹ These views are not supported in existing Community law.

Article 214 of the EEC Treaty states that the officials and other servants of the Community shall be required, even after their duties have ceased, not to disclose information of the kind covered by the obligation of professional secrecy, in particular information about businesses, their activities or their cost components. This requirement was restated in Article 20 of Regulation No. 17 in respect of information acquired as a result of the application of the Regulation. It follows that even commercial and professional secrets are subject to the obligation to supply information, since their secrecy is ensured by the legal obligations incumbent upon the Commission's staff.⁴⁰ The same obligation applies to refusals based on professional secrecy imposed by contractual secrecy requirements, as in the case of trust companies.⁴¹

In one instance, a business refused to hand over the documents the Commission asked for in a request for information, on the ground that this could be regarded by the Swiss authorities as a punishable act under Article 273 of the Swiss Penal Code. The Commission determined that this was not a reason for refusal, since the information was available within the community and since the Commission's officials were bound by professional secrecy. In addition, the information requested had already been made accessible to an international cartel established in Switzerland and

³⁶See Thiesing in Wurdinger/ Wohlfarth, at 68 *et seq.*

³⁷See THOMA, *EUROPAISCHE WIRTSCHAFT*, 1960, at 423.

³⁸See Deringer, Regulation No. 17, Art. 11, note 11.

³⁹Unpublished memorandum by the Law Reform Committees of the Council of the Law Society and the Senate of the Inns of Court and the Bar on Investigatory Procedures of the Commission under Articles 11, 12, 13 and 14 of Regulation No. 17, March 1976, figure 25(c).

⁴⁰See Mestmacker, *op. cit.*, at 603; GROEBEN, BOECKH & THIESING, at 927.

⁴¹See Commission Decision of Jan. 31, 1979 (Fides), OJ L 57, Mar. 8, 1979, at 33.

could not be exempted from the Commission's right of information.⁴²

III. Investigations

Article 14(1) of Regulation No. 17 states: "In carrying out the duties assigned to it by Article 89 and by provisions adopted under Article 87 of the Treaty, the Commission may undertake all necessary investigations into businesses and business associations. To this end the officials authorized by the Commission are empowered:

1. to examine the books and other business records;
2. to take copies of or extracts from the books and business records;
3. to ask for oral explanations on the spot;
4. to enter any premises, land and means of transport of businesses."

A. General Problems

The right to carry out investigations is probably the most fraught with problems and also the most frequently criticized of the Commission's powers of investigation. There are several reasons for this. Direct interventions by the State in business and industrial affairs, even at the national level, are felt to be irksome and are often regarded as an encroachment of State power. This must be assumed to be even more the case when it comes to accepting investigations by officials of the Commission, since people feel the authority of an international body to be much more remote than that of their national institutions.

Too little knowledge of the tasks and powers of the Commission and of the rights and duties of businesses is also a factor. Even today, there are still industrialized regions in the Community and indeed fairly large firms which have only a vague idea of the Commission's powers and tasks with regard to competition policy. This applies particularly to countries in which competition policy and the antitrust authorities play a relatively low-key role in the area of government activities.

A further consideration is that investigations frequently represent a business' first direct and, in most cases, unwelcome contact with representatives of the Brussels authorities. It is therefore understandable that the Commission's authority is initially measured in terms of the manner and behavior of its officials. However, an equally understandable aspect is the inclination of some firms, at any rate those suspected of having violated the rules of competition, to frustrate the success of the investigation as far as possible.

Although it is relatively rare for businesses thus to try to evade their duty to cooperate in investigations, as provided for in Article 14 of Regulation No. 17, this does show that investigations differ from requests for information in the way they are regarded by those concerned. This places a special responsibility on the officials of the Directorate-General for Competition

⁴²See Decision of June 25, 1976 (CSV), OJ L 192, July 16, 1976.

who are charged with carrying out investigations. Through their responsibility to carry out checks, they exercise extensive powers in the name of the Commission and must do so with tact, fairness, patience and persistence. Since the Commission's investigative procedures involve at least two Community countries, and indeed frequently involve all of them, language barriers must be overcome and differences in the organization of businesses, in commercial and company law and in the economic structure of the individual Member States must be taken into account. These are factors which play little if any role in investigations at the national level. The task of reacting appropriately during an investigation to these not always foreseeable differences in the conditions relating to businesses imposes additional demands on the professional experience and skills of the Commission's officials. Meeting these demands is a basic precondition governing the extent to which: (1) investigations are successfully carried out, and (2) the Commission is supplied with objective and reliable findings enabling it to exercise its powers properly and appropriately.

B. Investigations Backed by Authorization in Writing

Article 14(2) of Regulation No. 17 provides as follows: "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."

1. FORMAL REQUIREMENTS

A prerequisite for carrying out investigations is the approval of the Commission Member responsible for competition questions. This is a formal requirement, since for the purposes of implementation in individual instances, the Commission's powers under Article 14 are transferred directly and in a personal capacity to an official.

If Directorate A, which is responsible for inspections, considers that an investigation is necessary, it proposes to the Director-General that one should be carried out, giving the reasons for its proposal. The Director-General informs the Commissioner responsible for competition, who authorizes the Director-General to sign the inspection orders. Directorate A then informs the relevant antitrust authority or authorities in whose territory investigations are to be carried out.

In so doing, it briefly describes the reasons for the intended investigation and provides other relevant information (time and place of the investigation, Commission official or officials who will carry it out). In general, it is left to the discretion of the national antitrust authorities to decide whether

they wish to send their own officials to accompany the Commission officials; some Member States always do so, others do so occasionally and others almost never. More will be said on this below.

2. PRIOR NOTIFICATION

Businesses are usually notified in advance, mostly by telephone, of investigations involving authorizations. There are practical reasons for this. Since businesses are not obliged to submit to ordinary investigations, advance notification prevents a situation where Commission officials arrive to find no responsible representative of the businesses on hand to decide whether the business is prepared to submit to the investigation. Even if, as in the case of many large businesses, there is normally no reason to anticipate such a situation, it ensures that the business is enabled to make the necessary preparations to minimize the length and scope of the investigation.

Consequently, the Commission official responsible for the inquiry will, in notifying the business, outline the basic purpose of the inspection. However, it is scarcely possible at this stage to provide more detailed information, since the nature and number of the documents to be checked can only rarely be specified in advance. Frequently, it is only during the investigation that it emerges which documents are important and which (perhaps contrary to previous assumptions) can be dispensed with. The fact that the information given in the notification is mostly rather scanty does not mean therefore that businesses are deliberately being kept in the dark.

3. AUTHORIZATIONS

The officials charged with the inspection must produce their written authorization upon arrival, normally to a person authorized to represent the business (member of the board, manager, or authorized signatory). While authorization to represent the business is not a legal prerequisite for the lawfulness of an investigation, in practice, in most cases it is essential in order to ensure that consent to the investigation is not given by a person who is not authorized to do so.

The drafting of the authorizations is sometimes criticized by businesses and lawyers. The main criticism has been that the authorization did not state clearly enough of what the relevant business was being accused. A further criticism is that the object and purpose of the inquiry were not described sufficiently precisely. Lastly, it has been asked that the nature of the documents to be checked should be described in enough detail to allow them to be traced without difficulty.⁴³

In the literature,⁴⁴ it is suggested that details should be given of the books

⁴³See Law Society Memorandum, March 1976, figure 24.

⁴⁴See GLEISS & HIRSCH, KOMMENTAR ZUM EWG-KARTELLRECHT, 3d ed. 1978, Article 14 of Regulation No. 17, point 9.

and business records to be examined. This, it is argued, is because businesses must know exactly which records are to be checked, since, if the drafting is vague or too general, businesses run the risk of violating the requirement that records to be produced in complete form, an offense which renders them liable to a fine. It is argued that it is up to the Commission to decide precisely which documents it wishes to check and then to specify these in the authorization. At the very least, the authorization should make clear the period and the subject matter to which the documents to be checked relate. Where authorizations are drafted in vague terms, no fine should be imposed (it is argued) for violation of the requirement that books and records be produced in complete form. Those making such demands do, however, misinterpret a number of the basic practical aspects of investigations.

Article 14(2) of Regulation No. 17 states that the officials of the Commission authorized for the purpose of investigations shall exercise their powers upon production of an authorization in writing specifying the subject matter and purpose of the investigation. It further stipulates that, in good time before the investigation, the Commission shall inform the competent national authority of the intended investigation and of the identity of the authorized officials. Since the authorization is issued personally to a particular official, it states expressly that he is authorized to exercise the powers set out in Article 14(1) of Council Regulation No. 17 of February 6, 1962.

Thus, the authorization shows that the official is entitled to carry out investigation activities pursuant to Article 14, and is therefore primarily in the nature of an evidence of authority. The criticism that authorizations do not state clearly enough what the relevant business is accused of is probably based in practice not so much on a feeling that the Commission is carrying out investigations without sufficient grounds for suspicion, but rather on the objection that the business cannot perceive clearly enough exactly why it is to be investigated.

However, it must be borne in mind that, at the investigation stage, there is basically as yet no charge of any violation of the law. This can be seen most clearly in cases where a third party, *i.e.*, a business that is not involved in any agreements or concerted practices, or that is not in a dominant position, is affected by the investigation. It also applies in other instances, however. The purpose of investigative procedures is to provide the Commission with objective knowledge of the facts. The aim is to explore all the circumstances, both those which tend to corroborate the suspicion that a violation has been committed and those which might invalidate it. Otherwise, the Commission would not be able to form an opinion, based on facts, as to whether it should initiate, continue or terminate a procedure. To that extent, investigative actions must be unbiased. At the most, therefore, the authorization to investigate, in the sense of seeking confirmation, can be based on a generally formulated suspicion, whose validity can be proved only on the basis of the results of the investigation. With regard to the

question of what purpose the investigation may pursue, the criteria are the same as in the case of requests for information. The authorization must therefore make it clear that the investigation is being carried out within the framework or with the objective of exercising one of the powers vested in the Commission in competition matters. In most cases, this will be an inquiry because of suspected violations of Articles 85 and 86 of the EEC Treaty, but it may also involve one of the other procedures provided for in Regulation No. 17.⁴⁵

It is sufficient therefore to refer in the authorization to the rules whose applicability is being considered.

Criticism that the authorizations do not define the object of the investigation clearly enough must be appraised on a case-by-case basis. In principle, the business has a justified interest in being able to see from the written authorization which of its economic and entrepreneurial activities are to be subject to an investigation. This means that there must be as precise as possible a description of the market, products or services and of the associated activities (manufacture, marketing, supply of a particular market or particular group of customers, cooperation with competitors, export organizations, *etc.*).

At the same time, there are limits to the information which can be provided. It must not jeopardize the purpose of the investigation or the maintenance of confidentiality vis-à-vis competitors or other third parties. Giving details in the authorization on the nature or number of the documents to be examined is neither necessary on legal grounds nor possible on practical grounds.

The right of examination under Article 14(1)(a) is in substance more comprehensive than the right to take copies under Article 14(1)(b) or the right of information under Article 11 of Regulation No. 17. This is because the Commission's investigating officials are often not able to judge the need for a document for the purposes of the inquiry until they have actually seen what it contains. The nature and number of the documents examined are in practice never the same as the documents from which copies are taken. It is therefore once again impossible to specify in the authorization which individual documents will be required for the purpose of the inquiry without prior knowledge of their nature and number. If these were already known, the need for an investigation would in most cases not arise, because the documents could be asked for at the same time as the request for information was sent. In addition, it is not appropriate to expect the authorizations to provide a great deal of detail, since the Commission officials, before beginning the investigation, give the business the opportunity to request explanations on the object of the investigation.⁴⁶

⁴⁵This view is also taken by GLEISS & HIRSCH, *op. cit.*, point 6.

⁴⁶This is also the argument adopted by GLEISS & HIRSCH, *op. cit.*, point 12; see also Eleventh Report on Competition Policy, point 19.

Such explanations should neither get bogged down in general discussion of the applicability of Articles 85 and 86 of the EEC Treaty to the particular case, nor should they result in the Commission officials as it were laying their cards on the table, in a way that could jeopardize the purpose of the investigation, before business decides whether or not it is prepared for the investigation.

Rather, the explanations are intended to clarify questions put by the representative of the business concerning procedural technicalities and to avoid any misunderstandings as to the object and purpose of the investigation. If, following the explanation, the business still maintains its doubts as to the lawfulness of the authorization, it can refuse the investigation without any further statement of grounds; this is because the authorization does not impose any obligation to submit to the investigation. Thus, consideration is given to the interests of both sides. These points answer the objection sometimes made that, since the Commission, in adopting an investigation decision, must specify the reason and which documents it wishes to check, it could just as easily do the same in the authorization. In contrast to requests for information, the authorization does not entail any legal consequences.

It neither obliges the business to submit to the investigation nor binds the Commission with regard to a subsequent decision, as in the case of Article 11 of Regulation No. 17. If the business refuses to submit to the investigation, this does not, once again in contrast to the situation with requests for information, constitute the legal precondition for the adoption of a decision. It is therefore neither legally necessary nor practically appropriate to treat authorizations as prior decisions.

4. REFUSAL TO SUBMIT TO THE INVESTIGATION

In the case of a refusal to submit to an investigation, a distinction must be made among the following eventualities:

- (a) the business refuses to submit to the investigation, with or without a statement of its reasons for doing so. The only option then left open to the Commission is to consider whether it should order the investigation by decision under Article 14(3) of Regulation No. 17.
- (b) the business declares that it is prepared to submit to the investigation, but makes the proviso that it will not produce certain documents or parts of documents on the grounds that they are not relevant to the investigation. This is equivalent to a refusal since the Commission is not bound to tolerate limited acceptance of its powers of investigation.⁴⁷ In one such instance, the Commission declared that, subject to review by the Court of Justice, it had the right to decide which documents were important for its inquiries. Otherwise, the nature and extent of the inquiries being made as part of an investigation

⁴⁷This is the point of view also taken by GLEISS & HIRSCH, *op. cit.*, point 14.

would no longer be determined by the Commission, but by the business involved in the investigation. For the purpose of an investigation within the meaning of Article 14 of Regulation No. 17, it is essential that all documents relating to the subject of the inquiry can be checked without any omission or exception.⁴⁸

- (c) the business declares itself willing to submit to the investigation without restrictions, but later does not permit the investigation to continue. This amounts to a retrospective refusal. The question then is whether the Commission should regard the investigation as a total or only a partial failure and, accordingly, how far a decision pursuant to Article 14(3) should extend. This depends on the circumstances in each individual case. As a rule, however, for reasons of clarity and legal certainty, it will be necessary in the decision to order a full-scale investigation.
- (d) the business submits to the investigation without any reservations, but later changes its attitude and is not willing to produce individual business records or categories of business records, although it states at the same time that it is prepared to submit to the continuation of the rest of the investigation. The question here is whether this should be regarded once again as a refusal—in this instance a retrospective and partial one.

In one specific instance, after weighing all the circumstances, the Commission did regard such a situation as amounting to a refusal. The business concerned had initially declared that it was prepared to submit to the investigation, but subsequently stated that it would produce only business records relating to the present, without specifying what period that covered. The Commission officials rejected this, since their authorization did not provide for such a restriction.

The business then dropped its objection, enabling the investigation to be started and the business records to be examined. The next morning, the business raised its objection again, stating that the examination could be continued, but that it must be restricted to documents relating to the present. The Commission officials then broke off the investigation on the grounds that it was nonfeasible. The Commission later by decision ordered the business to submit to the investigation, pursuant to Article 14(3) of Regulation No. 17.⁴⁹ However, one could also interpret this sort of behavior as a violation of Article 15(1)(c) of Regulation No. 17. Under this provision, the Commission can impose fines where businesses intentionally or negligently produce the required books or other business records in incomplete form during investigations under Article 14. If the business declares that it is willing to submit to the investigation, but then withholds parts of the required documents on the grounds that they are in its opinion not relevant

⁴⁸ See Decision of July 6, 1979 (AM & S Europe Ltd), OJ L 199, Aug. 7, 1979, at 31.

⁴⁹ See Decision of July 6, 1979 (AM & S Europe Ltd), *op. cit.*

by reason of their date or their subject matter, it is failing in its duty to provide complete information, a duty which arises based on its declared willingness to submit to the investigation and the express reference in the authorization to the penalties provided for in Article 15 of Regulation No. 17. It is irrelevant whether or not the business is acting in good faith. Consequently, the Commission would have the right in such cases to impose a fine and by decision to require the business to submit to an investigation.

5. POWERS OF INVESTIGATION

If the investigation is accepted, the Commission officials are authorized:

- (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 businesses;

(A) The expression "books and other business records" covers all the records which a business keeps for business purposes. The argument that it applies only to documents covered by the obligation incumbent upon businesses to preserve business records is untenable. If that were the case, pieces of evidence such as minutes, correspondence or internal memos on restrictive practices could not be checked, since they are certainly not covered by any obligation to preserve them for a fixed period. In addition, in view of the differences in Member States' national law, this criterion is inappropriate since it would inevitably lead to discrimination on grounds of nationality.

The records kept for business purposes in the above definition include not only photographs, slides and films, but also magnetic tapes, other types of sound recording media and computer programs.⁵⁰

Otherwise, in view of the increasing use of electronic data processing, microfilm, sound recording media, etc. in modern companies, the Commission's investigative powers would very soon be confined within such narrow limits that the purpose of the investigations, i.e., to reach a comprehensive clarification of the relevant subject matter, would be permanently affected. In addition, there is no obvious reason why a tape recording should not be regarded as a business record simply because it is not a written record. This is true not only of the recording of business discussions, but also, for example, of tape recordings which are sometimes made, at the request of the business involved, during the investigations themselves.

In all these cases, a record open to investigation exists, even if it has not yet been transcribed into written form. Examination of such records, particularly those produced through electronic data processing, would of

⁵⁰A different view is given by GLEISS & HIRSCH, *op. cit.*, point 17, who consider that these are not written records and therefore argue that they cannot be considered to be business records.

course require special technical knowledge on the part of the Commission officials responsible for carrying out the investigation.

(B) In the literature,⁵¹ the view is taken that the right of investigation extends only to the business records to be found on the business premises of the business concerned. Papers kept outside the business premises in places not covered by the Commission's powers of investigation, it is argued, do not have to be brought to the business premises for examination. The requirement that records be produced in complete form does not, it is claimed, conflict with this view. If the Commission finds that documents are missing, it can then request information as to whether and why such documents are kept outside the business premises and what they contain.⁵² This interpretation must be rejected. It is not supported in law, since Article 14 does not draw any distinction based on where the books and business records are kept, but merely specifies the business premises as the places where examination of the documents is carried out.

Consequently, even documents which at the time of the investigation, whether by chance or intentionally, are outside the business premises are subject to the power of investigation. If this were not the case, businesses suspected of violating the competition rules could all too easily remove incriminating papers temporarily so as not to have to produce them. This could be done either by removing the papers before the commencement of an investigation which had been announced, or by refusing to allow an investigation to continue once it threatened to become "dangerous," thus allowing the papers to be removed in good time before a decision. The Commission's right of investigation would then be in danger of being undermined.⁵³ The fact that the Commission could request information concerning the documents removed would be of no help. For that would mean that the Commission could in practice carry out investigations only with the assistance of requests for information, although both means of inquiry are designed to meet different situations and are independent of one another.

(C) Commission officials are authorized to ask for oral explanations on the spot. This authority is of considerable practical importance, since investigations cannot be carried out where businesses remain "silent." In a case dealt with in 1974, a business allowed the Commission officials unrestricted access to its premises and also produced documents, but at the same time categorically refused to answer any of the questions put by the Commission officials. The Commission interpreted this as a refusal to submit to the investigation and, in its decision, required the business, upon request, to give oral explanations on the spot relating to the subject matter of the

⁵¹See GLEISS & HIRSCH, *op. cit.*, point 20.

⁵²See note 51.

⁵³This is the conclusion reached by GROEBEN, BOECK & THIESING, at 950.

investigation.⁵⁴

The Commission confirmed this point of view in a number of further decisions containing orders worded in substantially the same terms.⁵⁵

In its judgment of June 26, 1980,⁵⁶ the Court of Justice gave a ruling on the relationship between the right to information under Article 11 and the right to explanations under Article 14, stating: "The fact that the officials authorized by the Commission, in carrying out an investigation, have the power to request during that investigation information on specific questions arising from the books and business records which they examine is not sufficient to conclude that an investigation is identical to a procedure intended only to obtain information within the meaning of Article 11 of the regulation."

Although this was only an incidental question in the judgment, this ruling by the Court of Justice has given a more precise definition of what the right to ask for oral explanations entails. In the Commission Decisions referred to (see footnote 55) mentioned above, this is merely expressed in more concise terms, but terms which amount to the same thing, since it is only books or business records which form the object of the investigation. However, it would be wrong and would run counter to both the letter and the spirit of Article 14, and to the experience built up during investigations, if the Commission officials were not allowed to ask for explanations on, for example, the organization of the business, the products in question, the identity of certain persons involved in the work, the nature of the book-keeping or storage of business papers, before it had examined the documents to be checked. These are questions which must as a rule be settled before a proper investigation (i.e., an investigation of the relevant documents within an appropriate time period and without avoidable disruption of the business operations) can be carried out. Experience shows that investigations that do not include a fair dialogue between representatives of the business and the Commission's officials seldom lead to objectively useful results. Some businesses may think it fit to provide as few explanations as possible. On the other hand, it must not be forgotten that most of the investigative procedures involve complex economic facts and circumstances whose implications are not immediately obvious to outsiders. Examples here include questions of market definition within the meaning of Article 86 of the EEC Treaty, the marketing mechanisms for commodities that are internationally dealt in or internationally quoted, the sales channels for high-grade capital goods and consumer articles, etc. In most of these cases,

⁵⁴Unpublished Decision of Apr. 29, 1974, IV/AF 256.

⁵⁵See, for example, the unpublished Decisions of June 22, 1979, IV/AF 420 (Article 1, " . . . und die von den genannten Beamten verlangten Erklärungen zum Gegenstand der Nachprüfung abzugeben"); Dec. 11, 1979 IV/28.627 (Article 1, " . . . ainsi que de donner sur place toutes les explications orales nécessaires à la vérification"); Nov. 26, 1980, IV/AF 465 (Article 1, " . . . and they shall give such immediate explanations relating to the subject matter of the investigation as may be required").

⁵⁶Case 136/79 (*National Panasonic*).

the Commission is confronted with economic facts and circumstances which cannot be fully elucidated by requesting information.

Where businesses behave in the above manner during investigations, this not only results in delays, but also poses the danger of misunderstandings and misinterpretations, which impair the objectivity and reliability of the findings. This is in the interests neither of businesses nor of the authorities. Consequently, the right of Commission officials to ask for oral explanations should be put to greater use by the businesses concerned in order to help ensure the objectivity of the inquiries.

The question of who should give the requested explanations can be decided by the business itself. Since Commission officials do not have any power to hear witnesses, they cannot restrict their requests for explanations to certain persons. The persons they talk with will usually be managerial staff authorized to represent the business. If such persons feel that they are unable to give the explanations requested, the Commission officials will ask them to call in employees with the relevant expert knowledge. However, if this is refused and if a proper and correct explanation cannot therefore be provided, this would have to be regarded as a refusal to submit to the investigation.

The explanations given by the business may sometimes be of considerable importance and must in such cases be recorded in writing. For this purpose, the Commission officials draw up minutes in which the question is repeated and the business is given the opportunity to state its answer or position. The minutes are signed by the Commission officials and counter-signed by the national official who thereby, as a neutral third party, confirms their accuracy. The business can refuse to sign the minutes. It then receives a copy of them if it so wishes and if it acknowledges receipt. This ensures that it has taken note of its explanation as recorded by the Commission officials in the minutes. If it refuses to accept even a copy, this fact is also recorded. The questions of what evidential value the Court of Justice would attach to such a document may for the time being be left open here. In cases of doubt, however, minutes should always be taken so as to prevent subsequent disagreements on the course actually taken by the investigation. The fact that the business may not have signed the minutes does not affect the objectivity of the statements contained in them and confirmed by the counter-signature of the national official.

In investigations based on a written authorization, the business is free to decide whether or not it wishes to express its views; there is no legal obligation for it to make any statement. If it refuses to do so, this is noted in the minutes and, depending on individual circumstances, may result in the investigation being discontinued.

A point of controversy, however, is whether the business may "lie" once it has decided to give an explanation. One view taken in the literature is that oral explanations given on the spot are always voluntary and cannot be threatened with sanctions even where the investigation has been ordered by

decision. If a requested explanation is not given or if there is reason to suppose that it is false or incomplete, the Commission, it is argued, must proceed by way of requests for information pursuant to Article 11.⁵⁷

This view cannot be accepted. The fact of the matter is that, under Article 15(1)(c), fines may be imposed if the required books or other business records are not produced in complete form or if the business refuses to submit to an investigation ordered by decision. There are no explicit provisions covering instances where oral explanations given on the spot are refused or false or incomplete explanations. However, it cannot be concluded from this that, though Article 14 gives the Commission the right to ask for oral explanations, there is no corresponding obligation of businesses to provide such explanations. If this were the case, Article 14 would be completely without meaning.

This view is evidently not accepted by Gleiss/Hirsch either, since they refer the Commission in this regard to the requests-for-information procedure laid down in Article 11.⁵⁸ However, if it were true that the provision of oral explanations on the spot was always—even for investigations ordered by Commission decision—merely voluntary and thus entirely up to the business concerned, this voluntariness could not be abrogated simply by the fact that the Commission uses the requests-for-information procedure provided for in Article 11, even though it did not wish to request information but merely wished to investigate documents. The conclusion must be that this voluntariness does not exist. The business is therefore obliged, on the basis of Article 14 alone, to provide oral explanations during the investigation. If it declines to do so, this would have to be regarded as noncompliance and as a refusal to submit within the meaning of Article 15(1)(c) of Regulation No. 17, where the investigation has been ordered by decision.⁵⁹ It also follows from this, however, that the explanations given by the business must be complete and correct. For, if the business explanations can be ordered, it would be illogical if the business were then allowed to “lie,” since this would mean that the Regulation was virtually inviting businesses to avoid refusals by giving incomplete or false information. Once the business has decided to cooperate in the investigation, or if it is required by decision to submit to one, its explanations concerning the business records must be as correct and complete as such records themselves.

This leaves the question of what happens if the business nevertheless gives false or incomplete explanations. If the Commission officials were misled by such explanations and as a result did not request the submission

⁵⁷See GLEISS & HIRSCH, *op. cit.*, Article 14, point 33; what amounts to the same view is taken by GRUTZNER, *RICHTIGES VERHALTEN BEI KARTELLAMTS-ERMITTLUNGEN IM UNTERNEHMEN*, 2d ed., at 117, fig. 223; HERMANN, *DIE ERMITTLUNGSBEFUGNISSE DER KARTELLBEHÖRDEN NACH DEUTSCHEM UND EUROPÄISCHEM RECHT* *op. cit.*

⁵⁸See GLEISS & HIRSCH *op. cit.*

⁵⁹See GROEBEN, BOECKH & THIESING, at 960; Mestmacker, *op. cit.*, at 607; Ellis-Van den Heuvel, at 484; MAILANDER, in *GEMEINSCHAFTSKOMMENTAR* 3d ed., Regulation No. 17, Art. 13/14, point 88; a different view is given in Deringer, Regulation No. 17, Art. 14, note 9.

of certain business documents important to the investigation, this would have to be regarded as tantamount to producing the records in incomplete form within the meaning of Article 15(1)(c) of Regulation No. 17. The situation is different where all the relevant documents have been produced, but incorrect or incomplete explanations are given concerning the contents or meaning of individual documents. Fines cannot be imposed in this sort of situation; for, although Article 15(4) expressly states that decisions to impose fines are not of a criminal law nature, such measures on the part of the Commission are nevertheless in the nature of sanctions, and the principle that sanctions cannot be imposed by analogy would have to be observed in favor of the businesses concerned. Here there is a lacuna in the system of sanctions laid down in the Regulation.

(D) Under Article 14(1)(d) of Regulation No. 17, Commission officials are authorized to enter any premises, land and means of transport of businesses. The question of whether this gives the Commission a right of search is disputed in the literature. The answer to the question depends on whether investigation requires a business merely to submit passively or to cooperate in some degree. The argument that Article 14 merely requires businesses to submit passively but that it does not grant any right of search⁶⁰ takes account of the interests of businesses alone and is self-contradictory. If it were valid, the authorities would be virtually unable to investigate anything at all, since on the one hand the documents would not be produced for them and on the other hand they would not be allowed to search for them. According to another argument, an investigation can achieve its purpose only if a search is carried out, since businesses, though required to submit to investigations, are not required to collaborate actively in them and Article 14 does not rule out the power to carry out searches.⁶¹ However, this would place too wide a meaning on the word *submit*, a meaning which it does not have in the other Community languages.⁶²

In addition, the term *submit* is used in the Regulation only where compliance with an investigation ordered by decision is involved.⁶³ Its use makes it clear that the business cannot then refuse the investigation, but must accept it. Nevertheless, this does not clarify the question of whether a search may be carried out. However, a clear pointer to the duty to cooperate is contained in Article 14(2), which stipulates that the books, etc., requested must be produced in complete form, thus requiring active collaboration; and in Article 14(1)(c), since oral explanations cannot be provided

⁶⁰See Grutzner, *op. cit.*, at 117, point 222.

⁶¹See Deringer, *op. cit.*, note 9; VAN DAMME, *EUROPEES KARTELRECHT*, 1969, at 262 *et seq.*; WEYER, *WRP*, 1961, at 61, 65 *et seq.*

⁶²These use the expressions "se soumettre," "Duldung," "sottoporsi," "zich te onderwerpen" and "pligt til at underkaste sig."

⁶³See Article 14(3), Article 15(1)(c) and Article 16(1)(d).

unless there is cooperation on the part of the business.⁶⁴

The Commission confirmed this view (that Article 14 requires businesses to cooperate in investigations) in its Decision of December 20, 1976.⁶⁵ In this case, a fine was imposed pursuant to Article 15(1)(c) because, in an investigation based on written authorization, the business did not produce the required records in complete form. The business argued in its defense that it had fulfilled the obligation to produce records in complete form, since its representative had stated that all of the company's books and business records were available to the Commission officials but that these same officials had then failed to examine the administrative archives.

The Commission rejected this argument. It pointed out that the obligation to produce documents must be taken to mean not merely the granting of access to all the records, but rather the obligation to actually produce all the requested documents and records. The objection that the Commission officials had omitted to examine the administrative archives was not accepted because none of the business' representatives had pointed out that the records requested were kept in a place not immediately obvious as a place for storing papers of this kind. The question of the duty to cooperate may be of lesser importance where investigations based on written authorization are involved, since here the consent of the business in the investigation procedure must first have been given and it can therefore be anticipated that the business will not evade its duty to cooperate. But it does become a question of considerable practical importance in cases where the investigation has been ordered by decision in the face of opposition by the business and where, for example, the business records are kept in numerous premises, possibly covering several stories of an office block. Clearly, searches could not, at any rate in such cases, ensure that the purpose of the investigation was attained since the Commission has no auxiliary officials available and no right of seizure.

Nevertheless, the fact that the Commission does not have a right of search cannot mean that the Commission officials must sit waiting in some conference room in the business to see whether any of the documents requested are going to be produced to them and, if so, which ones.

Rather, in order to attain the purpose of the investigation, it may be necessary for the Commission officials, in accordance with their right of entry, to see for themselves whether certain records are available. The broadly worded terms of Article 14(1)(d) of Regulation No. 17 make it clear that Commission officials have right of access to all parts of a business in which business records are usually or actually kept.⁶⁶ The manner in which this

⁶⁴This view is also taken by Mestmacker, *op. cit.*, at 607; GLEISS & HIRSCH, *op. cit.*, at 512, point 35; GROEBEN, BOECKH & THIESING, at 951; MAILANDER, in GEMEINSCHAFTSKOMMENTARY, *op. cit.*, note 88. With regard to the duty to cooperate in the context of the right of investigation pursuant to Article 47 of the ECSC Treaty, see judgment of Dec. 16, 1963, Case 18/62, Barge v. High Authority, [ECR] 1963 at 278: "It is for the business concerned to enable the High Authority to carry out its duties by voluntarily furnishing it with the information it needs."

⁶⁵See OJ L 75, Mar. 21, 1980 (Fabbrica Pisana).

⁶⁶See GLEISS & HIRSCH, *op. cit.*, at 512, point 36.

occurs depends on the circumstances in each individual case. As a rule, the access demanded by the officials is confined to certain premises where records which it is necessary to check are presumed to be kept. Since the completeness of the business records to be examined must not be jeopardized through intentional or unintentional removal or indeed the destruction of individual documents of particular importance, it is in certain circumstances essential that the Commission's officials should be present on the relevant business premises until the conclusion of the inspection.

C. Investigations Ordered by Decision

Article 14(3) of Regulation No. 17 states that businesses and business associations shall submit to investigations ordered by decision of the Commission.

1. Investigations ordered by decision represent the most severe form of intervention in the business and industrial world since businesses no longer have the right to refuse to cooperate in investigations and, if they do refuse, they can be compelled to fulfill their legal obligations either with the assistance of the Member States as provided for in Article 14(6) or through the imposition of periodic penalty payments as provided for in Article 16(1)(d) of Regulation No. 17.

Although the decision can be contested by instituting proceedings under Article 173 of the EEC Treaty, such proceedings do not have suspensory effect, as the first sentence of Article 185 of the EEC Treaty makes clear, with the result that the business must initially accept the investigation. The Court of Justice can of course order that application of the contested decision be suspended "if it considers that circumstances so require" (second sentence of Article 185 of the EEC Treaty). However, so far there have been no decisions by the Court of Justice on the question of suspension in cases under Article 14(3) of Regulation No. 17.⁶⁷

2. Up to 1978, the Commission only rarely exercised its power to order investigations by decision.⁶⁸ This situation has changed since 1979. In that year, thirty decisions were made.⁶⁹ Of these, no less than twenty-one investigations related to inquiries in one particular case; the other nine related to three other investigative procedures.⁷⁰ In 1980, twenty decisions⁷¹ were

⁶⁷The Court of Justice dealt with the question of suspension in connection with a procedure under the ECSC Treaty; see the President's decision not to grant a suspension, June 26, 1959, in Case 31/59/ R (*Brescia*), [1960] ECR 98.

⁶⁸See unpublished Decisions of July 3, 1967, (IV/6), June 10, 1970 (IV/26.811-815) and Apr. 29, 1974 (IV/AF 256) and Decision of Dec. 8, 1977 (Freiformschmieden), OJ L 10 Jan. 13, 1978.

⁶⁹See Written Question No. 677/79 of Oct. 4, 1979, OJ C 310, Dec. 10, 1979, at 30 *et seq.*

⁷⁰See unpublished Decisions of June 22, 1979 (IV/AF 420), Dec. 11, 1979 (IV/28.627), Feb. 23, 1979 (IV/AF 379) and Mar. 13, 1979 (IV/AF 407) and the Decisions of Jan. 31, 1979 (*Fides*), OJ L 57, Mar. 8, 1979, and of July 6, 1979 (*AM & S Europe Ltd*), OJ L 199, Aug. 7, 1979.

⁷¹See unpublished Decisions of June 17, 1980 (IV/29.895), June 24, 1980 (IV/30.064), Nov. 26, 1980 (IV/AF 465), Nov. 27, 1980 (IV/AF 468) and Nov. 28, 1980 (IV/AF 457).

made, relating to five different investigations. In 1981 five decisions were made, related to one particular case.⁷² However, the increase since 1979 in the exercise of these powers provided for in Article 14(3) is probably due not so much to a change in the legal attitude toward this means of investigation as to other reasons.

The case law of the Court of Justice shows what strict requirements are imposed upon the Commission to provide sufficient evidence. Up to the end of 1981, the Court of Justice had to deal with 28 cases in which actions had been brought to have Commission decisions pursuant to Articles 85 and 86 of the EEC Treaty declared void. In 7 cases, insufficient findings of fact or lack of proper evidence led either to annulment of the decision (as in the *Continental Can*⁷³ and *Kali*⁷⁴ cases), cancellation of the fines imposed by the Commission (as in the *Papiers Peints De Belgique* case,⁷⁵ or a reduction in fines (as in the *International Quinine Agreement*,⁷⁶ *European Sugar Industry*,⁷⁷ *United Brands*,⁷⁸ and *Hoffman La Roche-Vitamins*⁷⁹ cases). This shows that the outcome of Court proceedings is largely dependent on the thoroughness with which the relevant facts of the case have been established. Thus, in many important cases, the chances of success of any procedure which the Commission wishes to pursue are determined at the investigation stage. However, it would be wrong to conclude from this that the scale and duration of investigations are all that matter.

In practice, investigations serve primarily to uncover violations of the competition law. The success of an investigation frequently depends on rapid and unexpected access to the evidence available, access which the right to information does not guarantee.⁸⁰ Such access is ensured by decisions ordering investigations. These decisions do not depend on whether the Commission has already gathered information or has unsuccessfully attempted to carry out an ordinary investigation. Nor must the investigation be announced in advance.⁸¹ The use of surprise is a legitimate means of achieving success in investigating a business. Surprise is always essential where the possibility exists that the business concerned will attempt to thwart the purpose of the inquiry by removing or destroying records. Possi-

⁷² See unpublished Decisions of Feb. 13, 1981 (IV/AF 487).

⁷³ Judgment of Feb. 21, 1973, Case 6/72 [1975] ECR 215, 247 *et seq.*

⁷⁴ Judgment of May 14, 1975, Joined Cases 19 and 20/74 [1975] ECR, 499, 519 *et seq.*

⁷⁵ Judgment of May 26, 1975 Case 73/74 [1975] ECR, 1491, 1515 *et seq.*

⁷⁶ Judgments of July 15, 1970, Cases 41, 44 and 45/69 [1970] ECR, 661, 698 *et seq.*; 733, 759 *et seq.* and 769, 805 *et seq.*

⁷⁷ Judgment of Dec. 16, 1975, Joined Cases 40-48, 50, 54-66, 111, 113 and 114/73 [1975] ECR, 1663, 1669 *et seq.*, 1985 *et seq.*, 2004 *et seq.*

⁷⁸ Judgment of Feb. 14, 1978, Case 27/76 [1978] ECR, 208, 303 *et seq.*

⁷⁹ Judgment of Feb. 13, 1979, Case 85/76 [1979] ECR, 461, 557.

⁸⁰ See GROEBEN, BOECKH & THIESING, at 949.

⁸¹ See Judgment of June 26, 1980 (*National Panasonic*) *supra*.

ble grounds for this sort of approach might include the duration and gravity of a suspected violation, the extent to which agreements are kept secret, or the suspicion that existing agreements have been notified to the Commission wrongly or incompletely or that unfair practices which had already been the subject of an inquiry have been resumed. Experience during recent years has shown that businesses have developed more refined ways of restricting competition. The classic form of cartel agreement is becoming less and less common. It has been replaced by other arrangements and procedures for achieving the desired objective, such as telephone conversations in which code words are used, encoded memos, the practice of ensuring that only a few middle management employees have knowledge of the scheme, communicating via third parties in countries inside or outside the Community, hotel meetings, so-called penthouse conversations, *etc.* Similarly, ways have been developed of filing incriminating documents inconspicuously and of "laundering" business papers if there is time to do so. The number of documents used is at the same time kept as small as possible. In all these instances, investigations, however long and thorough, bring little or nothing to light if the initial measures have proved unsuccessful.

What is important, therefore, is not to increase the quantity of investigations, but to improve the effectiveness of specific measures taken in individual cases. In certain circumstances, therefore, only a mandatory investigation ordered by decision will achieve what is desired. In such cases, preliminary inquiries involving a simple authorization would either jeopardize the purpose of the investigation or would actually thwart it.

3. Decisions ordering investigations must specify the subject matter and purpose of the investigation, assign the date on which it is to begin, and indicate the possible penalties provided for in Article 15(1)(c) and Article 16(1)(d) of Regulation No. 17 and the right to have the decision reviewed by the Court of Justice (second sentence of Article 14(3) of Regulation No. 17).

The decision is generally notified by being handed over immediately before the investigation is to begin to the business concerned by the Commission officials authorized to carry out the investigation. Minutes are taken of this. The Commission officials prove their identity by producing a written authorization to implement the decision. The business is free to decide whether or not it wishes to call in lawyers. Problems could arise where the business asks that the investigation be postponed until its lawyer is present. However, the legality of the investigation does not depend on whether the business has its lawyer present.⁸² Consequently, the Commission officials will agree to such a request only if it appears possible that a lawyer can be summoned within a reasonable period of time and if there is no reason to fear that the purpose of the investigation will be jeopardized by waiting. In other respects, investigations ordered by decision follow the

⁸² See Case 136/79 (*National Panasonic*) [1980] ECR.

same course as those based on written authorization, (see the description given above.)

IV. Relations with the Member States

Commission investigations are carried out in constant contact with the relevant national authorities.⁸³ This is laid down in Regulation No. 17 and has proved to be not only necessary, but useful.

A closer look at the rules laid down in Regulation No. 17 shows that none of the Commission's investigative procedures is carried out without the participation, or at least information of the national authorities.

A. Requests for Information

When sending a request for information to a business or a business association, the Commission must at the same time forward a copy of the request to the competent authority in whose territory the seat of the business or business association is situated (Article 11(2)). The same applies where the Commission requests information by decision (Article 11(6)).

B. Investigation by the Commission

Whenever the Commission intends to carry out an investigation, it must inform the competent national authority of the Member State in whose territory the investigation is to be made of the business in question and the main grounds for suspicion. In good time before the investigation, the Commission must outline the necessary details of the investigation and must name the officials responsible for carrying it out (Article 14(2)). Before the Commission orders an investigation by decision pursuant to Article 14(3), it must consult the competent national authorities (Article 14(4)).

The usual procedure is to send the draft of the decision to the relevant national authority for comment. The Commission is not bound by the authority's opinion, since decisions to order investigations must be made after consultation, but not necessarily in agreement, with the national authority; the Commission will, however, take due account of any misgivings or objections expressed. This is necessary if only because any such decision must be implemented in collaboration with the national authority.

This requirement derives basically from Article 14(5), which provides that officials of the national authority may, at the Commission's request or at the national authority's own initiative, assist Commission officials in carrying out their duties. National officials may be present at both investigations involving authorizations and those ordered by decision. In the case of investigations ordered by decision, most Member States make use of the

⁸³The relevant national authorities for this purpose are the "competent authorities of the Member States" designated by the governments to the Commission pursuant to Article 10.

right to have their own officials accompany the Commission officials. For investigations involving authorizations, some Member States do so only where the national authority considers the case to be particularly important or where the Directorate-General for Competition has requested the participation of national officials.

The presence of national officials frequently provides valuable assistance to the Commission officials. It also reassures the business concerned that domestic laws and customs are being observed, and allows the national authority to have direct knowledge of the course and findings of the investigation.

In the case of investigations ordered by decision, the participation of national officials is particularly important where business opposes the investigation. In such instances, the Member State must afford the Commission officials the necessary assistance to enable them to make their investigation (first sentence of Article 14(6)). The key factor is whether and to what extent the Member States have made arrangements for applying direct enforcement so as to compel a business to submit immediately to an investigation ordered by the Commission. The legal situation in the Member States in this respect is not uniform. In the Federal Republic of Germany, France, Italy, Luxembourg and The Netherlands, the law makes express reference to the possibility of calling the police.⁸⁴

In Belgium, there is no such express provision;⁸⁵ however, it must be borne in mind that the officials of the "Inspection generale economique," which is the body responsible for assisting the Commission pursuant to Article 14(6), themselves have police powers. In Denmark, the situation is different. The Danish implementing law⁸⁶ provides that business must submit to an investigation ordered by Commission decision.

If they refuse, direct enforcement may be applied only on the basis of a court order. However, the necessary order is issued without further ado where there has been violation of a requirement, clearly formulated in the law, to submit to an investigation.

For this purpose, the Danish implementing law expressly states that businesses must submit to investigation decisions taken by the Commission.

Notwithstanding Article 25(9) of Regulation No. 17, which sets a time limit of six months from the date of accession, the United Kingdom and Ireland have not yet taken any measures to implement Article 14(6). The argument advanced so far is that it is sufficient to rely on the courts in enforcing investigation decisions, since the courts can order any uncoopera-

⁸⁴Federal Republic of Germany: Section 3 of the *Gesetz zur Ausführung der Verordnung Nr. 17* of Aug. 17, 1967 as amended up to March 2, 1974 (BGBI. I. p. 469); France: Article 4 of Decret No. 72-151 of Feb. 18, 1972 (Journal Officiel, 2.25/72); Italy: Article 8 of *Decreto del Presidente della Repubblica No. 1884* of Sept. 22, 1963 (Giornale Ufficiale, Jan. 11, 1964); Luxembourg: Article 3 of the *Règlement grand-ducal* of May 26, 1965 (Memorial A No. 31, June 15, 1965); Netherlands: Article 4 of the *Wet van July 10, 1968* (Stblid. at 395).

⁸⁵Belgium, "Arrête Royal" of Jan. 18, 1966 (Moniteur belge No. 16, Jan. 22, 1966 at 759).

⁸⁶Denmark: Article 2.3 of *Lov Nr 505* of Nov. 29, 1972.

tive business to refrain from removing or destroying documents or to submit to the investigation. Though this does not give the authorities the right to apply direct enforcement, any failure by a business to comply with a court order would be a punishable offense (contempt of court). The procedures in this respect are the same in England and Wales; similar procedures apply in Scotland and Northern Ireland. The consultations on this matter between the Commission on the one hand and the United Kingdom and Ireland on the other have not yet been concluded. Greece became a Member State of the European Community in 1981 but has not yet taken the necessary measures to implement Article 14(6).

C. Investigations by the Authorities of the Member States

Article 13 of Regulation No. 17 provides that the Commission may request the competent authorities of the Member States to undertake investigations which it considers to be necessary under Article 14(1), or which it has ordered by decision pursuant to Article 14(3). This provision is a clear illustration of the principle of cooperation between the Commission and the Member States in investigative procedures. The argument that the Commission, pursuant to Article 13, should have investigations carried out primarily by the Member States⁸⁷ cannot be accepted, since neither the wording of, nor the relationship between, Articles 13 and 14 indicate that either is subsidiary to the other; they offer two different powers of investigation of which the Commission can make equal use. Of course, since the Directorate-General for competition has only a small number of staff available,⁸⁸ it would make sense for the Commission to avail itself more of this power. Yet Article 13 has not attained any practical significance. The necessary legal and technical arrangements are available, for at least the original six Member States, in the legislation introduced in implementation of Article 14(6), have made provisions giving them the necessary power of examination in the event a request is made pursuant to Article 13.⁸⁹ The same is also true of Denmark. Only in the United Kingdom, Ireland and Greece is the situation different. The problems are therefore not so much of a legal as of a practical nature.

In the great majority of cases, Commission investigative procedures are international in scope, at least where it is suspected that trade between Member States is being affected. This means that investigations must be carried out in two or more Member States, so that several national authorities would have to be involved since their powers are confined to their respective territories. It must be borne in mind here that the staffing arrangements and structures of the individual national authorities differ

⁸⁷ See SCHLIEDER, BB 1962, at 305; Deringer, Regulation No. 17, Article 13, Note 2 and Article 14, Note 2.

⁸⁸ Approximately 20 officials in Directorate A, which is responsible for inspection and documentation, spend most of their time working on investigations pursuant to Regulation No. 17.

⁸⁹ See the above mentioned national laws (footnotes 84-86).

widely. Larger authorities such as the Federal Cartel Office in Germany or the United Kingdom Office of Fair Trading (including the Department of Prices and Consumer Protection) have over 200 officials; while other authorities, such as the French "Direction Nationale d'Enquete" or the Belgian "Inspection Generale Economique," have much fewer staff. Obviously, the less well staffed authorities would be much less able to provide official assistance.

Inevitably, therefore, the application of Article 13 would be uneven. There are in any case grounds for fearing that the results of any such investigations would differ according to the competition policy of the individual Member States. This could result in discrimination. For example, in the case of multinational companies it would inevitably provoke opposition on the part of the businesses concerned and would create legal uncertainty. The applicability of Article 13 therefore remains restricted to exceptional cases and does not afford the Commission any noticeable relief in the fulfillment of its tasks.

D. Inquiries into Sectors of the Economy

Inquiries into sectors of the economy pursuant to Article 12 of Regulation No. 17 are similarly based on the principle of close and constant collaboration with the Member States. This is not only because the provisions concerning requests to supply information and concerning investigations apply to those inquiries, but also because before adopting its decision to initiate an inquiry, the Commission must obtain the opinion of the Advisory Committee Restrictive Practices and Monopolies (Article 12(4), in conjunction with Article 10(3) to (6) of Regulation No. 17).

So far, Article 12 has been applied in only two cases⁹⁰ and has therefore similarly proved to be of little practical importance in investigations.

E. Advisory Committee

Important instances in which collaboration of the national authorities is specifically required are those where the Commission must impose sanctions in connection with investigative procedures. This applies both to the provisions concerning fines (Article 15) and to those concerning periodic penalty payments (Article 16). In both cases, Commission decisions may be taken only if the Advisory Committee on Restrictive Practices and Monopolies⁹¹ has been consulted (Article 15(3) and Article 16(3) in conjunction

⁹⁰See the inquiry in the margarine sector, Fourth General Report 1970, at 320, and the inquiry into the market for beer, *e.g.*, information decisions of June 18, 1971 OJ L 161, July 19, 1971 at 2, 6 and 32.

⁹¹The Advisory Committee is composed of officials competent in the matter of restrictive practices and monopolies. Each Member State appoints an official, usually high ranking (often the head of the competent national cartel authority), to represent it. If that official is prevented from attending, he may be replaced by another official (Article 10(4) of Regulation No. 17).

with Article 10(3) to (6)). The Commission has rarely had occasion to impose fines for violations against its investigative powers;⁹² no decisions have yet been made imposing periodic penalty payments. The reason for this is probably that businesses as a rule have fulfilled their duty to supply information and to cooperate. On the other hand, there is no denying the fact that violations have been suspected in many cases, though they could not be proved.

Since, on the one hand, the Commission has powers of sanction only against businesses and not against the natural persons acting on their behalf, and since, on the other hand, it has no right to examine witnesses, either on oath or otherwise, the figure for unprovable violations is probably relatively high. Lastly, it must not be forgotten that Article 15 provides only a modest range of fines.⁹³ In the Decision of July 28, 1971 the Commission imposed a fine of 4.000 units of account. In the seven other decisions taken since then, *e.g.*, on December 20, 1979 (*Fabbrica Pisana and Fabbrica Lastre di Vetro Pietro Sciarra*), on November 17, 1981 (*C.C.I.*), on November 25, 1981 (*Telos*). On December 11, 1981 (*National Panasonic Belgium and N.P. France*) and October 27, 1982 (*I.N.I.C.F.*) it imposed the maximum fine of 5.000 units of account. Since Article 15 provides for a range of possible sanctions and since, according to general legal principles, the maximum fine should apply only to the most serious cases, very much lower fines should frequently be imposed when decisions are made. It goes without saying that such sanctions would scarcely be felt by the large businesses that are mostly involved in Commission procedures. Sensitivity to sanctions could be extended to the sphere of procedural violations only if significantly higher fines could be imposed. In these circumstances, it is doubtful whether, from the point of view of either retribution or prevention, the threat of fines under Article 15 is at all an appropriate means of getting businesses to fulfill their duty to cooperate.

F. *Information from the Member States*

An important practical aspect of investigation is the question of the extent to which the Commission can request information from the Member States. Article 223(1)(a) of the EEC Treaty lays down the right under Community law to refuse to provide information. It stipulates that no Member State shall be obliged to supply information the disclosure of which it considers contrary to the essential interests of its security. This right of refusal, however, is unlikely to prove of any practical significance, since the Com-

⁹²See unpublished Decision of July 29, 1971 (IV/26.918 bis); Decisions of Dec. 20, 1979 (*Fabbrica Pisana and Fabbrica Lastre de Vetro Pietro Sciarra*), OJ L 75, Mar. 21, 1980; Decision of Nov. 17, 1981 (*Comptoirs Commercial d'Importation-C.C.I.*) OJ L 27, Feb. 4, 1982; Decision of Nov. 25, 1981 (*Telos*), OJ L 58, Mar. 2, 1982; unpublished Decisions of Dec. 11, 1981 (IV/AF 511 and 512).

⁹³Under Article 15(1), the Commission may impose on businesses or business associations fines of 100 to 5.000 units of account where they fail to comply with their duty to cooperate pursuant to Articles 11, 12, 13 or 14.

mission will not undertake any investigation liable to damage the essential interests of a Member State's security.

However, a question of practical importance is whether there is a conflict between the Commission's right to information on the one hand and national laws on the protection of secrets on the other, such a conflict could restrict the Commission's investigative powers in competition cases.

Most Member States have provisions governing the protection of secrets by persons in public office.

In the Federal Republic of Germany, Section 203 of the "Strafgesetzbuch" (Penal Code) was amended on January 1, 1975. It now stipulates that it is a punishable offense for a person holding public office to disclose without authorization a secret of a third party, in particular an industrial or business secret, which has been entrusted to him or has otherwise come to his knowledge. For the purpose of this provision, secrets include personal or factual information that has been obtained in an official capacity.

However, the law does not prevent such information from being passed on to other authorities.

In France, Article 10(1) of "Ordonnance No. 59-244" of February 4, 1959, in conjunction with Article 578 of the "Code Penal," prohibits civil servants from passing on information and documents which they have obtained in the pursuit of their duties.

In Italy, Article 621 of the "Codice Penale" stipulates that disclosing secrets contained in public or private documents of third parties is a punishable offense where knowledge of them was obtained without authorization and where the secrets were disclosed without due reason. The same applies, pursuant to Article 326 of the "Codice Penale," where official secrets were involved.

In The Netherlands, Article 272(1) of the "Wetboek van Strafrecht" in quite general terms prohibits civil servants from revealing secrets.

In Belgium and Luxembourg, similar rules apply under Article 458 of the "Code Penal." This stipulates that it is a punishable offense for the State or the persons charged by it with the safeguarding of secrets to reveal the secrets entrusted to them.

In the United Kingdom, Section 1(2) of the Official Secrets Act of 1920 requires civil servants to safeguard secrets, though it does allow that there might be grounds for justifying disclosure of a secret.

In Denmark, Section 264(b) of the Penal Code prohibits persons in public office from disclosing secrets. This rule is supplemented by a number of administrative provisions. In Greece Art. 252 of the Penal Code (Act No. 1492 of 1950) stipulates that it is a punishable offense if a civil servant discloses information or documents which has been obtained in an official capacity and if this disclosure is from selfish motives or against the interest of the State or a third party.

In the light of the Member States' legal provisions concerning the protection of secrets, it must be asked whether the governments and the competent national authorities may refuse to supply information and documents which the Commission requests in the exercise of its investigative powers pursuant to Article 11 of Regulation No. 17. The answer to this question is of major significance, since the officials of national authorities cannot be expected to provide the Commission with knowledge obtained officially unless they are sure of sufficient legal protection against the possible charge of having violated national penal provisions.

The basic principle in such cases should be the proper correlation between Community law and national law. The focus should be not so much on the aspect of possible conflict, but rather on the method to be developed to ensure effective interaction of Community law with national legal systems for the purposes of applying, enforcing and implementing Community law.⁹⁴

Examining the ranking of national rules (for example, in accordance with hierarchical criteria or the criterion of *lex posterior*) in relation to Community law would not be of any help. Rather, the key consideration should be that the Community's responsibilities in the area in question could not be fulfilled without unrestricted mutual cooperation with the Member States.

Article 5 of the EEC Treaty states the following:

Member States shall take all appropriate measures, whether general or particular, to ensure fulfillment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community. They shall facilitate the achievement of the Community's tasks. They shall abstain from any measures which could jeopardize the attainment of the objectives of this Treaty.

Article 3(f) of the EEC Treaty provides that the Community's tasks include the institution of a system ensuring that competition in the common market is not distorted.

This principle is reflected in Article 87 and in Regulation No. 17 adopted pursuant to it. In order to ensure that the Commission could carry out the tasks thus allotted to it, the Regulation accorded the Commission the right to obtain information from the Member States, a right which can be refused only in instances covered by Article 223 of the EEC Treaty.

Otherwise, the Member States should provide information on all facts of which they have in an official capacity obtained knowledge, even if they are bound to secrecy under domestic law. This is because the cooperation requirement laid down in Article 11 of Regulation No. 17 is matched by the secrecy requirement specifically imposed on the Commission and its officials by Article 214 of the EEC Treaty and, in the area of competition law, by Article 20 of Regulation No. 17. Both these requirements complement

⁹⁴See Justice Pescatore, *Das Zusammenwirken der Gemeinschaftsrechtsordnung mit den nationalen Rechtsordnungen* (concluding lecture at the FIDE Congress in Berlin 1970), EUR 1970, at 307.

one another and thus give effect to the principle of joint operation between Community law and national legal systems.

If differently formulated national rights of refusal were accepted, this would contradict the direct and uniform application of Community law and would inevitably lead to discrimination in the Commission's exercise of its investigative powers.⁹⁵

V. Criticism

The criticisms expressed in public are directed at the Commission's procedures as a whole; that is to say, their targets include hearings on matters to which the Commission has taken objection, hearings which, pursuant to Article 19 of Regulation No. 17, must precede any decisions taken. The following comment⁹⁶ however, will be confined to the question of whether the criticism of the investigative procedures is justified.

A. Lack of Legal Protection

It is argued that the provisions governing the powers of inquiry, in particular the right of investigation, are unbalanced, unfair and sometimes incomprehensible. At the same time, greater legal protection is demanded for businesses involved in inquiries and investigations.

Like other provisions of Community law, Regulation No. 17 represents a compromise solution. It cannot equal national legal systems in all its provisions. The procedures laid down in Regulation No. 17 do not have the force of criminal law. This can be seen from the wording of Article 15(4), which states that decisions imposing fines are not of a criminal nature. This provision makes it quite clear that the intention in adopting the Regulation was to give proceedings in competition cases an administrative character and to keep them out of the area of criminal law.⁹⁶

The purpose of the powers of investigation laid down in Regulation No. 17 is to allow the Commission to acquire objective and reliable knowledge of the facts in order to enable it to carry out the tasks allotted to it in the area of competition policy. These powers do not include the rights of search⁹⁷ or seizure; nor can the Commission examine witnesses, on oath or otherwise. It thus has substantially fewer investigative powers than most of the cartel authorities in Member States of the Community or in other democratic countries.

⁹⁵This conclusion is also reached by Mestmacker, *op. cit.*, at 601; GROBEN, BOECKH & THIESING, at 926; a different view is given by Wohlfarth, in Wurdinger & Wohlfarth at 32; Deringer, *op. cit.*, note 14; GLEISS & HIRSCH, *op. cit.*, art. 11, note 5 takes the purpose of the domestic protective provisions as the key criterion and, in cases of doubt, allows the right to refuse to supply information.

⁹⁶See Van der Esch, *Due Process in the Administrative Application of European Communities' Competition Rules*, in REVUE INTERNATIONALE DE LA CONCURRENCE NO. 141, February 1980, at 9.

⁹⁷See the comments above under III(2)(e)(4).

Investigation and inquiry procedures are based primarily on the voluntary cooperation of the businesses concerned. This is evident from the provisions governing requests for information and investigations based on written authorization. To argue that the voluntary nature of such cooperation is limited since the Commission can circumvent refusals would be to forget that investigations carried out on a voluntary basis are already subject to strict legal requirements which the Commission cannot evade by attempting to impose mandatory orders.

Where the Commission considers it appropriate to order an investigation by decision, numerous legal guarantees are provided on behalf of the businesses concerned:

1. Commission officials may not carry out inquiries without written authorization;
2. businesses are required to submit to investigations only on the basis of a formal Commission decision;
3. such decisions may not be made until the competent national authority of the relevant Member State has been consulted; the decisions must be properly substantiated and must inform the parties of the legal possibilities of contesting the decision;
4. if the decision is successfully contested, any records which the Commission has obtained during the investigation may not be used;
5. the Court of Justice may suspend the application of a contested decision, if it considers that circumstances so require; and
6. fines or periodic penalty payments where the relevant business fails to cooperate may be imposed only in a further formal Commission decision, prior to which the business and the Advisory Committee must be heard.

In view of this legal situation, the relationship between public power and private interests seems balanced and appropriate to the requirements of the rule of law. In this context, it should not be forgotten that, of the sixty-nine investigation decisions adopted by the Commission up to December 1982, only two were contested on the grounds that the investigative procedure did not take due account of the requirements of the rule of law.⁹⁸

It is difficult to see how demands for additional guarantees of legal protection could be met without diluting the Commission's powers in this area and ultimately making them ineffective. This would not be in the Community's interest, which is to ensure that the system of competition laid down in the Treaty is maintained.

⁹⁸In the *National Panasonic* case, the Court of Justice rejected the appeal. In the *AM & S Europe Ltd.* case, the question at issue is legal privilege. See judgment of May 18, 1982 (case 155/79).

B. Additional Monitoring Agency

The Damseaux Report recommended that the competition procedures followed by the Commission should be simplified in order to maintain the credibility and effectiveness of competition policy.⁹⁹ This recommendation reflects the general awareness that the discovery of violations of the law may have a preventive effect not so much through Draconian measures as through speedy action by the administrative authorities. The same is true for Community competition policy.

The Commission will be all the more effective the more rapidly it is able to react to distortions of competition. Establishing the relevant facts plays an important role here. If the Commission were enabled to reach reliable findings more rapidly, this would also serve the interests of the businesses concerned, not only in cases involving, for example, plans to set up Joint Ventures, but also in cases involving the prohibition of unfair practices or the imposition of fines. The undue length of procedures is disadvantageous to the businesses concerned, and from other perspectives as well, because it causes legal uncertainty and entails avoidable costs.¹⁰⁰

The suggestion that the results of inquiries by the Directorate-General for Competition should be checked once again by an independent agency¹⁰¹ seems to contradict the recommendation of the European Parliament. It is difficult to see how Commission procedures could be speeded up by involving an additional agency. We may leave aside here the question of whether the agency should be in the form of a newly created court (possibly for the purpose of relieving the burden on the Court of Justice), an independent administrative authority, or another Commission department independent of the Directorate-General for Competition. This would be a legal and political question requiring changes in the EEC Treaty or in the regulations adopted pursuant to it. Rather, the key question is whether an additional instance might be necessary to control investigative procedures in the light of the requirements of the rule of law and to protect the businesses affected.

In this connection the judgment of the Court of Justice in the case of *International Business Machines Corp. (IBM) v. Commission of 11 November 1981* should not be overlooked,¹⁰² though the main issues of this case were not questions of the investigatory powers of the Commission, since IBM claimed in its application that the act of the Commission by which a proceeding was initiated against IBM pursuant to Article 3 of Regulation No. 17 and the statement of objections pursuant to Article 19 of the said Regulation should be declared void.

⁹⁹See *supra* note 1.

¹⁰⁰As an extreme example, see the six-year dispute between the U.S. Justice Department and the American Telephone and Telegraph Corporation (costing U.S. \$350-\$500 million) or the IBM case; see *BUSINESS WEEK*, Jan. 12, 1981, at 63.

¹⁰¹See note 8.

¹⁰²Case 60/81 IBM v. Commission, Nov. 11, 1981 (not yet reported).

The application was founded on (but not limited to) the submission that the statement of objections signals the termination, by an authoritative act which determines the Commission attitude, of the internal administrative phase of the preliminary inquiry, and thus amounts to a decision within the meaning of Article 173 of the Treaty.

In support of its submission IBM relied further on the special circumstances of the case, claiming that a judicial review ought to be made available at an early stage in this case both in accordance with the principles of international law in such matters and pursuant to general principles flowing from the laws of the Member States.

With regard to this argument, the Court said, that it was not necessary for the purposes of this case to decide "whether, in exceptional circumstances, where the measures concerned lack even the appearance of legality, a judicial review at an early stage such as that envisaged by IBM may be considered compatible with the system of remedies provided for in the Treaty."

In this instance, the Court said, adequate legal protection for IBM did not require that the measures in question, e.g. the initiation of a formal procedure and the statement of objections, be subject to immediate review. If the Commission were to adopt a decision which affects IBM's interest, that decision would, in accordance with Article 173 of the Treaty, be subject to judicial review. It would then be for the Court to decide whether anything unlawful has been done in the course of the administrative procedure.

The application therefore was dismissed as inadmissible. With regard to the investigative procedures the conclusion could be drawn from this judgment of the Court in the IBM case, that the Court would consider early judicial review of investigation measures as compatible with the legal system established by the Treaty and Regulation No. 17 only in exceptional circumstances, especially where the measures concerned lack even the appearance of legality.

It follows that the question of necessity or even utility of additional administrative stages to control investigative procedures has not been answered. Considerations of that kind are prompted by the criticism that the Commission should not simultaneously play the role of investigator, prosecutor and judge. This sort of criticism, however, is too facile and is not borne out by the actual legal situation and by the practice followed in competition procedures.

The Commission is not a judge in its own cause, because, in its formal activities, it is always subject to control by the Court of Justice.¹⁰³ Furthermore, it must not be forgotten that it is entirely within the continental European legal tradition for an administrative authority to combine investigative and decision-making powers. As far as competition law is

¹⁰³ See also the Judgment of the Court of Justice of Oct. 29, 1980 (Fedetab), Joined Cases 209-215/78 and 218/78, OJ C 320, Dec. 9, 1980. Here the Court of Justice underlined the administrative character of Commission procedures in competition cases and confirmed that the Commission is not a court.

concerned, the Federal Cartel Office in Germany is a good example of this. The wide-ranging nature of the Commission's powers does not seem to be questioned in the matter of agreements, decisions and practices for which the relevant businesses wish to obtain an exemption under Article 85(3) of the EEC Treaty, even though in this case also investigative and decision-making powers are combined in one body. In point of fact, accusations of undue accumulation of powers are probably more a reflection of the fear of overweening bureaucracy and arbitrariness. Many critics obviously presume that the Commission officials charged with competition cases carry out their duties without the necessary objectivity and that they are not subject to sufficient control in the exercise of their powers.

However, this is not borne out by the procedures actually followed by the Commission. It is true that, in formal legal terms, there is no distinction between investigative and decision-making procedures, since it is the Commission or the Directorate-General for Competition itself which carries out these tasks. In point of fact, however, there are so many dividing lines and checks and balances within the Commission that the lack of formal distinction is of no practical significance.

Within the Directorate-General for Competition, responsibility for investigative procedures lies with Directorate A. Functionally and in terms of staff, Directorate A is separate from Directorates B and C, which are responsible for hearings and decision-making procedures. Directorates B and C have little influence on Directorate A's investigative procedures and are equally little bound by its assessment of the factual findings. The officials responsible for establishing the facts of each case are therefore not the same as those responsible for decisions.¹⁰⁴

On all formal investigation measures and questions of principle, an opinion is given by the department responsible for general competition policy, which is directly attached to the Director-General and independent of the other Directorates.

If Directorate A wishes to carry out investigations in a particular case, it must obtain the prior authorization of the appropriate Member of the Commission.

It is thus ensured, even at this stage, that investigative measures cannot be carried out without the knowledge and consent of the Commission.

Before any decision is taken pursuant to Regulation No. 17, the Commission's Legal Service must be consulted, this applies both to investigative measures and to the imposition of fines or periodic penalty payments.

The Legal Service is completely independent of the Commission's other departments in the exercise of its duties. If it does not agree with the measures proposed by the Directorate-General for Competition, only the Commission itself can settle the conflict.

¹⁰⁴This leaves aside the question of whether this is in fact an advantage, since it does not make for greater speed in Commission procedures.

This, together with the fact that the Legal Service represents the Commission where appeals are made to the Court of Justice against Commission decisions, further ensures the objectivity and legality of investigative procedures.

The relevant Member States participate directly in investigations or must be consulted before they are carried out.

All these measures are not mere formalities, but are carried out with careful and detailed consideration of the sometimes controversial points of view involved.

This is done under the political control of the Member of the Commission responsible for competition questions—control which covers all aspects of each case. The Commission in turn is answerable to the European Parliament.¹⁰⁵

Thus, as far as the legal protection of businesses involved in investigative procedures is concerned, there seems to be no need for additional monitoring agencies.

¹⁰⁵ See also answer to written question No. 814/82, given by Commissioner Andriessen, OJ C 259, Oct. 4, 1982 at 26.