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These reports are cited thus:

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REFERENCES

These reports contain references to the following major works of legal reference described in the manner indicated below.

Halsbury's Laws of England

The reference 35 Halsbury's Laws (3rd Edn) 366, para 524, refers to paragraph 524 on page 366 of volume 35 of the third edition, and the reference 26 Halsbury's Laws (4th Edn) para 577 refers to paragraph 577 on page 296 of volume 26 of the fourth edition of Halsbury's Laws of England.

Halsbury's Statutes of England

The reference 5 Halsbury's Statutes (3rd Edn) 302 refers to page 302 of volume 5 of the third edition of Halsbury's Statutes of England.

The Digest

References are to the replacement volumes (including reissue volumes) of The Digest (formerly the English and Empire Digest), and to the continuation volumes of the replacement volumes.

The reference 44 Digest (Repl) 144, 1240, refers to case number 1240 on page 144 of Digest Replacement Volume 44.

The reference 28(1) Digest (Reissue) 167, 507, refers to case number 507 on page 167 of Digest Replacement Volume 28(1) Reissue.

The reference Digest (Cont Vol D) 571, 678b, refers to case number 678b on page 571 of Digest Continuation Volume D.

Halsbury's Statutory Instruments

The reference 12 Halsbury's Statutory Instruments (Third Reissue) 125 refers to page 125 of the third reissue of volume 12 of Halsbury's Statutory Instruments; references to subsequent reissues are similar.

CORRIGENDA

[1981] 2 All ER

p 267. **Finnigan v Sandiford**. Line c 2 should read '... for the purpose of effecting the arrest ...'

p 458. **Lonrho Ltd v Shell Petroleum Co Ltd**. Counsel for Shell should read '*Peter Curry QC, Brian Davenport QC and Gordon Langley*'.

p 555. **Westminster City Council v Haymarket Publishing Ltd**. Line g 2 should read '... would indemnify the defendants ...'. Page 556, line b 5 should read '(2) On the true construction ...'

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National Panasonic (UK) Ltd v Commission of the European Communities (Case 136/79)

COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES

JUDGES KUTSCHER (PRESIDENT), O'KEEFFE, TOUFFAIT (PRESIDENTS OF CHAMBERS), MERTENS DE WILMARS, PESCATORE, LORD MACKENZIE STUART, BOSCO, KOOPMANS AND DUE

ADVOCATE-GENERAL J-P WARNER

18th MARCH, 30th APRIL, 26th JUNE 1980

European Economic Community – Restrictive trade practices – Investigation of undertakings – Investigation without previous notification – Powers of Commission – Whether undertaking may be investigated only after being asked for information – Whether investigation without previous notification interference with undertaking's right to privacy – EEC Treaty, art 85 – EEC Regulation No 17 of 6th February 1962, art 14 – European Convention for the Protection of Human Rights and Fundamental Freedoms 1950, art 8(2).

European Economic Community – Secondary legislation – Construction – Aids to interpretation – Whether statements made by Council members when adopting regulation may be looked at – Whether reference may be made to debates of European Parliament – Whether views of Commission staff may be referred to.

Acting under the authority of a decision adopted by the Commission of the European Communities under art 14^a of EEC Regulation No 17 of 6th February 1962, and without any prior warning to the applicant, two inspectors of the Commission, accompanied by an official from the Office of Fair Trading, arrived at the applicant's sales office in Slough for the purpose of examining the applicant's books and records, making any necessary copies and demanding oral explanations of documents. The decision specified that the Commission had evidence leading it to believe that, in breach of art 85^b of the EEC Treaty, the applicant was requiring from its trade customers a covenant not to export the applicant's products to the Federal Republic of Germany. A request by one of the applicant's directors that the inspectors await the arrival of the applicant's solicitor was refused. The inspectors then carried out the investigation and left on the same day taking with them copies of a number of documents and notes made during the investigation. The applicant applied to the Court of Justice of the European Communities seeking the annulment of the decision, the return of the copies of the documents, the

^a Article 14, so far as material, is set out at p 3 f to p 4 b, post

^b Article 85, so far as material, provides:

'1. The following shall be prohibited as incompatible with the common market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market, and in particular those which: (a) directly or indirectly fix . . . trading conditions; (b) limit or control . . . markets . . . (e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

'2. Any agreements or decisions prohibited pursuant to this Article shall be automatically void . . .'

destruction of the notes taken and an undertaking that the Commission would make no further use of the information that it had obtained during the course of the investigation. The applicant contended, inter alia, that the search was unlawful since on its true construction art 14, like art 11^c, required the Commission to make a request to an undertaking such as the applicant to provide the information required before issuing an investigation decision. The applicant also contended that the search was unlawful because it infringed the applicant's right to privacy, contrary to art 8^d of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950. a
b

Held – The application would be dismissed for the following reasons—

(1) Although art 11 of Regulation No 17 expressly provided for a two-stage procedure whereby an undertaking could be required to submit to an investigation only where the Commission had previously asked those concerned for the necessary information, art 14 of that regulation contained no such restriction. The difference in the procedures was explained by the diversity of the needs met by the two provisions: whereas the procedure contained in art 11 was to enable the Commission to collect information not already in its possession and which in general it could not collect without the co-operation of the undertaking concerned, the procedure contained in art 14 was in general designed to enable the Commission to check information already in its possession by means of an examination of the books and records of an undertaking (see p 12 c to g and j and p 15 a c, post). c
d

(2) Although the European Economic Community was bound to respect the constitutional traditions of member states and the fundamental rights embodied in the European Convention on Human Rights, art 8 of that convention, while upholding the right to privacy, also permitted an interference with that right if it was 'in accordance with law and [was] necessary in a democratic society in the interests of . . . the economic well-being of the country . . .' Since the aim of Regulation No 17 was to prevent competition from being distorted to the detriment of the public interest, individual undertakings and consumers and since the exercise of the powers given to the Commission by that regulation contributed to the maintenance of the system of competition intended by the EEC Treaty and which undertakings were absolutely bound to comply with, it could not be said that Regulation No 17, by giving the Commission the power to carry out investigation without previous notification, infringed any right of the applicants which was guaranteed by the European Convention on Human Rights (see p 13 c to g, p 14 c and p 15 a c, post). e
f

Per the Advocate-General. Since what members of the Council of the European Economic Community do when they adopt a regulation is to agree on the text and since they do not necessarily all have the same views as to its meaning, it is not permissible as an aid to interpretation of a regulation to look at what individual members of the Council said at the time, still less at the debates of the European Parliament or the views of the staff of the Commission of the European Communities (see p 7 d to g, post); *Stauder v City of Ulm* [1969] ECR 419 distinguished. g

Notes h

For investigation by the Commission of infringements of EEC rules on competition, see Supplement to 39A Halsbury's Laws (3rd Edn) para 180.

For the EEC Treaty, art 85, see 42A Halsbury's Statutes (3rd Edn) 1178.

For EEC Regulation No 17 of 6th February 1962, arts 11, 14, see *ibid* 1195, 1196.

Cases cited j

Acciaieria e Tubificio di Brescia v High Authority of the European Coal and Steel Community Case 31/59 [1960] ECR 71, CJEC.

^c Article 11, so far as material, is set out at p 11 f g, post

^d Article 8 is set out at p 8 c d, post

- Inland Revenue Comrs v Rossminster Ltd* [1980] 1 All ER 80, [1980] AC 952, [1980] 2 WLR 1, HL; *rvsg* [1979] 3 All ER 385, QBD and CA, Digest (Cont Vol E) 316, 2153f.
- Milac GmbH Gross- und Aussenhandel v Hauptzollamt Freiburg* Case 28/76 [1976] ECR 1639, CJEC.
- Nold (J), Kohlen- und Baustoffgrosshandlung v EC Commission* Case 4/73 [1974] ECR 491, [1974] 2 CMLR 338, CJEC.
- Stauder (Eric) v City of Ulm, Sozialamt* Case 29/69 [1969] ECR 419, [1970] CMLR 112, CJEC.
- Transocean Marine Paint Association v EC Commission* Case 17/74 [1974] ECR 1063, CJEC.

Application

- By an application dated 23rd August 1979 National Panasonic (UK) Ltd applied to the Court of Justice of the European Communities for, inter alia, (1) the annulment of the decision of the Commission of the European Communities of 22nd June 1979 concerning an investigation to be made at the applicant's premises at Slough, Berkshire, pursuant to art 14(3) of EEC Regulation No 17 of 6th February 1962, and (2) an order that the Commission (a) return to the applicant all its documents copied by the Commission's officials or destroy such copies, (b) destroy all notes made by the officials at the time of or subsequent to the investigation and in relation thereto, and (c) undertake not to make any further use of such documents, notes or information obtained during the course of the investigation. The language of the case was English. The facts are set out in the opinion of the Advocate-General.

David Vaughan for the applicant.

John Temple Lang, of the Commission's Legal Service, for the Commission.

- 30th April. **The Advocate-General (J-P Warner)** delivered the following opinion: My Lords, this action is brought under art 173 of the EEC Treaty by an English company, National Panasonic (UK) Ltd, to challenge a decision of the Commission dated 22nd June 1979 requiring it to submit to an investigation pursuant to art 14(3) of Regulation No 17 of 6th February 1962.

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

- Investigating powers of the Commission.*—1. In carrying out the duties assigned to it . . . by provisions adopted under Article 87 of the Treaty, the Commission may undertake all necessary investigations into undertakings . . . To this end the officials authorised by the Commission are empowered: (a) to examine books and other business records; (b) to take copies of or extracts from the books and business records; (c) to ask for oral explanations on the spot; (d) to enter any premises, land and means of transport of undertakings.

2. The officials of the Commission authorised for the purpose of these investigations shall exercise their powers upon production of an authorisation 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 authorised officials.

3. Undertakings . . . shall submit to investigations ordered by decision of the Commission. The decision shall specify the subject matter and purpose of the investigation, appoint the date on which it is to begin and indicate the penalties provided for in Article 15(1)(c) and Article 16(1)(d) and the right to have the decision reviewed by the Court of Justice.

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

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

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

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

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

Certain evidence that reached the Commission gave rise, however, to a suspicion in its mind that export bans were being imposed within the Community in respect of Panasonic equipment. In particular the Commission was led to suspect, rightly or wrongly, that the applicant was operating a ban on exports from the United Kingdom to Germany. Some particulars of that evidence were given to us by the Commission, but I need not, I think, go into it. e

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

'WHEREAS g

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

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

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

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

'If established, the foregoing would constitute a serious infringement of Article

a 85 of the EEC Treaty and would be relevant to the Commission's assessment of the selective distribution agreement notified by NATIONAL PANASONIC VERTRIEBSGESELLSCHAFT;

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

b Lastly the preamble summarised the effect of arts 15(1)(c) and 16(1)(d) of Regulation No 17, the full texts of which were annexed to the decision.

The operative part of the decision consisted of three articles.

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

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

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

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

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

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

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

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

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

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

The investigation ended at about 5.30 p.m. The Commission officials took with them copies of a number of documents from the applicant's files, according to the Commission 26, consisting of 50 pages in all, according to the applicant a greater number. They did not take, nor of course were they empowered to take, originals, which is one of the

features that distinguish this case from *Inland Revenue Comrs v Rossminster Ltd* [1980] 1 All ER 80, [1980] AC 952, to which some reference was made during the argument.

The applicant's case, as first put forward in its application, rested on four distinct grounds: (1) that art 14 of Regulation No 17, on its correct interpretation, did not permit the Commission to issue a decision requiring an undertaking to submit to an investigation without first requesting it to do so by 'the informal procedure'; (2) that the decision of the Commission was inadequately reasoned; (3) that in proceeding by way of decision instead of by way of informal request the Commission had infringed the principle of proportionality; and (4) that the Commission had infringed the applicant's fundamental rights.

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

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

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

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

First, it was pointed out that art 11 of Regulation No 17, on requests by the Commission for information, undoubtedly prescribes an obligatory two-stage procedure; and reference was made to what I said about that in *Transocean Marine Paint Association v Commission* [1974] ECR 1063 at 1089-1090. The same 'must' be true, it was submitted, of art 14. In my opinion that is not so, because neither the wording nor the purpose of the two articles is the same. As to the wording paras 2 to 4 of art 11 lay down a procedure under which the Commission may send to an undertaking a request for information. Then para 5 provides:

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

Thus failure to obtain a satisfactory answer to a request for information is, under art 11, expressly made a condition precedent to the adoption of a decision. There is no corresponding language in art 14. Given the proximity of the two provisions, their different language must, in my opinion, mean that they are intended to operate

a differently. As to purpose, art 11 enables the Commission to seek, and if necessary to compel, the co-operation of the undertaking concerned in providing information, which may or may not be contained in documents in the possession of the undertaking. Article 14 in contrast enables the Commission to take action to obtain evidence directly through its own officials.

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

c Third, it was argued on behalf of the applicant that support for its interpretation of art 14 was to be found in a passage in the Report of the European Parliament's Internal Market Committee on the proposal that ultimately became Regulation No 17, the 'Deringer Report' (European Parliament Document 57/1961), in a speech made to the European Parliament on 19th October 1961, during the debate on that proposal, by Dr Hans von der Groeben, the member of the Commission then responsible for competition policy, and in an article written by Dr W Schlieder, the Commission's Director General for Competition, in *Der Betriebs-Berater* (1962, p 311). Those passages do, I think, suggest that their authors regarded arts 11 and 14 (which were arts 9 and 11 respectively in the proposal) as laying down similar procedures. That, however, cannot, in my view, provide guidance as to the intentions of the Council when it enacted Regulation No 17. As I ventured to point out in *Milac v HZA Freiburg* [1976] ECR 1639 at 1664, what the members of the Council do when they adopt a regulation is to agree on a text. They do not necessarily all have the same views as to its meaning. That is to be sought, if necessary, by judicial interpretation of the text. It cannot be sought by inquiry from individual members of the Council. A fortiori can it not be sought by ascertaining the views of particular members of the Parliament or of the Commission, let alone of members of the Commission's staff, however eminent and however much they may have been concerned in the preparation of the text. The authority relied on on behalf of the applicant for the contrary view was the judgment of this court in *Stauder v City of Ulm* [1969] ECR 419. That case, however, was about a decision of the Commission adopted under the management committee procedure. It was discovered that, whilst the French and Italian texts of the decision accorded with what the management committee had agreed on, the German and Dutch texts did not. Not surprisingly the Court held that the French and Italian texts were to be preferred. That authority would only be in point here if the text of Regulation No 17 in one or more of the official languages of the Community were found not to accord with the text agreed on by the Council. It does not support the proposition for which it was relied on by the applicant. I ought to add that the Commission drew our attention to a passage in a book written by Dr Deringer in which he clearly expressed the view that art 14 did not impose an obligatory two-stage procedure (see *The Competition Law of the European Economic Community* (1968, p 335)). g Indeed the parties in their pleadings exhaustively reviewed the opinions of learned writers on that question and it is manifest that, on balance, they favour the view h contended for by the Commission.

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