

RECENT DEVELOPMENTS

NATIONAL PANASONIC (U.K.) LTD. v. E.C. COMMISSION— ANTITRUST INVESTIGATIONS IN THE EUROPEAN ECONOMIC COMMUNITY: PRIOR NOTICE AND FUNDAMENTAL RIGHTS

National Panasonic challenged a decision adopted by the EEC Commission pursuant to article 14 of Regulation 17/62, which authorizes investigations of corporate headquarters in antitrust cases. The basis of the complaint was that the Commission did not provide National Panasonic with prior notice of a pending antitrust investigation of National Panasonic's business records. National Panasonic claimed that the decision constituted a violation of its fundamental rights, as well as a failure to comply with the spirit of the Regulation.

National Panasonic (UK) Ltd., a subsidiary of the Japanese Matsushita Electric Trading Company Ltd., is incorporated and doing business in the United Kingdom as the exclusive distributor of National Panasonic and Technics products. National Panasonic Vertriebsgesellschaft GmbH is also a subsidiary of the Japanese company and is the distributor of National Panasonic and Technics products in the Federal Republic of Germany. In 1977, National Panasonic Vertriebsgesellschaft provided the Commission of the European Economic Community (EEC) with notice of an agreement concerning distribution of National Panasonic products in Germany and requested a negative clearance or an exemption pursuant to article 85(3) of the EEC Treaty.¹ The information received by the Commission from the German Company led the Commission to suspect that the British Company was operating a ban on exports from the United Kingdom to West Germany in violation of the EEC Treaty. The Commission decided² to conduct an investigation of National Panasonic (UK) pursuant to article 14(3) of Regulation number 17³ of the Council to determine

¹ Treaty Establishing the European Economic Community, March 25, 1957, No. 4300, 298 U.N.T.S. 3 [hereinafter cited as the EEC Treaty]. Article 85 (3) provides that practices usually forbidden can be declared permissible if they contribute to improved production or distribution of goods or to technical or economic progress, while allowing consumers a fair share of the resulting benefit.

² The technical definition of decision refers to a formal proceeding undertaken by the Commission in which reasons in favor of an investigation are stated, including the subject matter to be examined, the purpose of the investigation, the date on which it is to begin, and the fines imposed for refusal to submit.

³ Regulation No. 17, 5 O.J. COMM. EUR. 205 (1962). The sections of Regulation 17/62 pertinent to this paper are listed below. Article 11 of the Regulation provides that:

- 1) In the execution of the duties assigned to it by Article 89 and by provisions pursuant to Article 87 of the Treaty, the Commission shall have power to seek all necessary information from the governments and competent authorities of the Member States as well as from enterprises and associations of enterprises.
- 2) When sending a request for information to an enterprise or association of enterprises, the Commission shall at the same time address a copy of this request to the competent authority in the Member State in the territory of which the principal place of business of the enterprise or association of enterprises is situated.
- 3) In its request, the Commission shall indicate the legal basis and the purpose of the same, and the penalties for supplying false information laid down in Article 15(1)(b) of this regulation.
- 4) Information must be supplied on request by the owners of the enterprises or by their representatives and, in the case of legal persons, of companies, or of associations without legal personalities, by the persons responsible for representing them according to the law or the memorandum or articles of association.
- 5) Where the enterprise or association of enterprises does not supply the information required within the time limit set by the Commission, or supplies incomplete information, the Commission's request for information shall be made by means of a decision. This decision shall specify the information requested, fix an appropriate time-limit within which it is to be supplied and specify the sanctions applicable under Article 15(1)(b) and under Article 16(1)(c) and shall indicate that there is a right to institute proceedings against the decision before the Court of Justice.
- 6) The Commission shall at the same time send a copy of its decision to the competent authorities of the Member State in the territory of which the principal place of business of the enterprise or association of enterprises is situated.

Article 14 of Regulation 17 provides that:

- 1) In execution of the duties assigned to it by Article 89 and by provisions laid down pursuant to Article 87 of the Treaty, the Commission may conduct all necessary investigations into the affairs of enterprises and associations of enterprises. To this end, the servants authorized by the Commission shall be vested with the following powers:
 - a) to examine the books and other business documents;
 - b) to make copies of, or extracts from the same;
 - c) to ask for verbal explanations on the spot;
 - d) to have access to all premises, land and vehicles of enterprises.
- 2) The servants authorized by the Commission for these investigations shall exercise their powers on production of a written warrant stating the nature and purpose of the inquiry and the fines provided for in Article 15(1)(c) in the event of incomplete submission of the books or other business documents required. The Commission shall in good time advise the competent authority of the Member State in the territory of which the investigation is to take place, of this investigation, stating the name and office of the authorized servant.
- 3) The enterprises and associations of enterprises must submit to the investigations ordered by a decision of the Commission. The decision shall state the subject and purpose of the inquiry, fix the date when it is to begin, and call attention to the sanctions provided for under Article 15(1)(c) and Article 16(1)(d), and shall indicate that there is a right to institute proceedings against the decision before the Court of Justice.
- 4) Before taking the decisions referred to in paragraph 3, the Commission shall consult the competent authorities of the Member State in the territory of which the investigation is to be carried out.
- 5) The servants of the competent authority of the Member State in the territory of which the investigation is to be carried out may, at the request of this author-

whether Article 85⁴ of the EEC Treaty was being violated.

The investigation was performed by two Commission officials and by an agent from the United Kingdom's Office of Fair Trading.⁵ No advance notification was given to National Panasonic before the investigators appeared at its offices. The investigation was initiated prior to the arrival of the company's lawyer and no explanation for the search was provided. National Panasonic received no prior request for information or for access to its premises. The company was not provided an opportunity either to affect the content of the decision or to question its legality before submitting to the investigation. National Panasonic challenged the validity of the decision to conduct the investigation and requested an annulment in accordance with articles 173⁶ and 174⁷ of the EEC

ity or of the Commission, lend assistance to the Commission's servants in their duties.

6) Where an enterprise resists an investigation ordered pursuant to the present Article, the Member State concerned shall lend the servants authorized by the Commission the assistance necessary to enable them to carry out the investigation. The Member State shall, after consulting the Commission, take the necessary measures for this purpose before October 1, 1962.

Id.

⁴ EEC Treaty article 85 prohibits the following arrangements as incompatible with the common market:

All agreements between undertakings, decision by associations of undertakings and concerted practices which may affect trade between Member States having as their object or effect, the prevention, distortion, or restriction of competition within the common market and in particular, those practices which:

- a) directly or indirectly fix purchase or selling prices or any other trading conditions;
- b) limit or control production, markets, technical developments, or investment;
- c) share markets or sources of supply;
- d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage.

Id.

⁵ The EEC Commission is instructed by the Treaty to work closely with the competent authorities of the Member States. Article 89 also provides that the Commission shall conduct its investigations in concert with the authorities of the Member States.

⁶ EEC Treaty article 173 states:

The Court of Justice shall review the legality of acts of the Council and the Commission other than recommendations or opinions. It shall for this purpose have jurisdiction in actions brought by a Member State, the Council or the Commission on grounds of lack of competence, infringement of an essential procedural requirement, infringement of this Treaty or of any rule of law relating to its application or misuse of powers.

Any natural or legal person may, under the same conditions, institute proceedings against a decision addressed to that person.

Id.

⁷ EEC Treaty article 174 states: "If the action is well founded the Court of Justice shall declare the act concerned to be void." *Id.*

Treaty. In addition, a plea was made for the return of all documents, for the destruction of any notes, and for the prohibition of any further use of the information reprinted by the investigators. National Panasonic argued, *inter alia*,⁸ that the decision to search was a violation of article 14 of Regulation 17⁹ and constituted an infringement of its fundamental rights. *Held*: Dismissed.¹⁰ The Court of Justice found that there was no infringement of Regulation 17 and that the search did not constitute a violation of National Panasonic's fundamental rights.

The EEC is based on a policy of fair competition and removal of trade barriers among Member States. Articles 85 and 86¹¹ contain the substantive antitrust provisions of the EEC Treaty while articles 87¹² and 89¹³ contain the implementation and enforcement mechanisms.¹⁴ The EEC accepts the premise that competition can effectuate economic integration and optimal use of resources more efficiently than can government planning.¹⁵ Articles 85 and 86 prohibit certain restrictive practices of enterprises as contrary to EEC objectives. Any activity that substantially affects the existence, nature, or flow of trade either directly or indirectly is prohibited.¹⁶

Articles 87 and 89 grant the Commission broad power to administer EEC competition laws. The power to grant exemptions¹⁷ has

⁸ National Panasonic also argued that the decision failed to include any foundation upon which it was based.

⁹ See note 3 *supra*. National Panasonic argued that the decision violated the spirit of the provision.

¹⁰ National Panasonic (UK) Ltd. v. E.C. Commission [1980] 3 COMM. MKT. L. R. (136/79).

¹¹ See article 85, *supra* note 4. EEC Treaty article 86 states that: "Any abuse by one or more undertakings of a dominant position within the common market . . . shall be prohibited . . . in so far as it may affect trade between member states." *Id.*

¹² EEC Treaty Article 87 states that "[w]ithin three years of the entry into force of this Treaty, the Council shall, acting unanimously on a proposal from the Commission and after consulting the Assembly, adopt any appropriate regulations or directives to give effect to the principles set out in Articles 85 and 86." *Id.*

¹³ Article 89 (1) states:

Without prejudice to article 88, the Commission shall . . . ensure the application of the principles laid down in articles 85 and 86. On application by a Member State or on its own initiative, and in cooperation with the competent authorities in the Member States, who shall give it their assistance, the Commission shall investigate cases of suspected infringements of these principles. If it finds that there has been an infringement, it shall propose appropriate measures to bring it to an end.

Id.

¹⁴ *Id.* R. GRAUPNER, THE RULES OF COMPETITION IN THE EUROPEAN ECONOMIC COMMUNITY 6 (1965).

¹⁵ See generally J. LANG, THE COMMON MARKET AND COMMON LAW (1966).

¹⁶ *Id.* at 392.

¹⁷ See note 1 *supra*.

been centralized in the Commission, "subject to review of its decisions by the European Court of Justice."¹⁸ The Council of the EEC established Regulation 17/62¹⁹ to implement the enforcement mechanisms envisioned within articles 87 and 89. This regulation provides two alternative investigation procedures, and procedure selection is left solely to the discretion of the Commission.²⁰ Article 11 of Regulation 17 authorizes the Commission to request information from officials of the Member States, as well as from the enterprises under investigation, both of which are obliged to comply. Article 14 empowers the Commission to conduct all necessary investigations into the affairs and associations of enterprises. Both of these powers are given equal weight in the treaties.²¹

When acting pursuant to article 11, the Commission conducts a two-step procedure. The Commission first requests information from the enterprise or Member State. If this request is not complied with, the Commission is authorized to issue a decision ordering compliance. Thus, non-compliance with a request for information is a condition precedent to the adoption of a decision.²² Unlike article 11, article 14 does not specifically mandate a two-step procedure for investigations. Although the structure of article 11 renders the request for information a condition precedent to the adoption of a Commission decision, article 14 contains no such preliminary requirement. The language of article 14(3) simply requires that businesses submit to investigations ordered by the Commission. The European Court of Justice had not decided whether the procedure of article 11 would also be required for investigations conducted pursuant to article 14. This absence of precedent left the matter open to speculation by legal commentators, who were equally divided on the issue.

Commentators who believed it unnecessary for the Commission to go through the process of requesting information, of having that request denied by the enterprise, and of adopting a decision for an "on the spot" inspection, generally emphasized the differences in the wording of articles 11 and 14, as well as the unnecessary duplication that would ensue if the two articles were construed identically.²³ Other commentators, although recognizing

¹⁸ EEC Treaty, *supra* note 1, art. 173.

¹⁹ See note 3 *supra*.

²⁰ A. DERINGER, THE COMPETITION LAW OF THE EEC 333 (1968).

²¹ *Id.*

²² See note 3 *supra*.

²³ Lang, *The Procedure of the Commission in Competition Cases*, 14 COMM. MKT. L. REV. 155 (1977).

the potential duplication argued that the procedure required by article 11 also should be required under article 14 to prevent the Commission from acting upon mere intuition.²⁴

Although no cases exist that are directly on point, similar questions have been resolved in other communities. The treaty forming the European Coal and Steel Community (ECSC)²⁵ establishes the power of the High Authority²⁶ to gather information. Without mentioning procedure, the first paragraph of article 47 provides that the High Authority may obtain information it requires and that any necessary checks may be made. In *Acciaieria di Brescia v. High Authority*,²⁷ it was argued that article 47 required the High Authority to seek information before an investigation was carried out. The European Court of Justice rejected that claim and held that there was "nothing in the letter, spirit or aim of . . . article 47 to prohibit information being obtained and a check being made at the same time."²⁸ In effect, the Court of Justice refused to read a two-stage procedure into article 47.

However, in *Transocean Marine Paint Association v. EC Commission*,²⁹ a case which arose under the EEC Treaty, the European Court of Justice rejected the contentions of the Commission that it was under no duty to inform applicants for exemptions under article 85(3) of "conditions or obligations" that it was considering attaching, pursuant to article 8(1)³⁰ of Regulation 17, to a decision

²⁴ J. CUNNINGHAM, *THE COMPETITION LAW OF THE EEC—A PRACTICAL GUIDE* 91 (1973); See generally A. DERINGER, *supra* note 20; and H. SMIT & P. HERZOG, *THE LAW OF THE EEC* (1973).

²⁵ Treaty instituting the European Coal and Steel Community, April 18, 1951, 261 U.N.T.S. 140 [hereinafter cited as ECSC Treaty].

²⁶ Prior to 1965, each community had its own organs; the Neiger Treaty of 1965 integrated the common institutions to create one council, one assembly, one judiciary, and one commission. Within the ECSC Treaty, the original terminology is retained.

²⁷ [1960] C.J. Comm. E. Rec. 71.

²⁸ *Id.* at 80.

²⁹ [1974] 2 COMM. MKT. L. R. 459.

³⁰ Article 8 of Regulation 17 states:

- 1) A decision to issue a declaration under article 85, paragraph 3 of the Treaty shall be valid for a specified period and may have certain conditions and stipulations attached.
- 2) The decision may be renewed on request provided that the conditions laid down in article 85, paragraph 3 of the Treaty continue to be fulfilled.
- 3) The Commission may revoke or alter its decision or prohibit those concerned from taking certain courses of action:
 - a) where the de facto situation has changed with respect to a factor essential in the granting of the decision;
 - b) where those concerned infringe a stipulation attached to the decision;
 - c) where the decision is based on false information or has been obtained fraudulently; or

in the applicant's favor. Instead, it claimed to be under a duty to inform only when there were "objections" that might lead to a decision unfavorable to the enterprise involved.³¹ The Advocate General, in his submission to the Court, surveyed the laws of the Member States and concluded:

My Lords, that review which I have sought to keep short, of the laws of the member states, must I think on balance, lead to the conclusion that the right to be heard forms part of these rights which 'the law' referred to in Article 164 of the Treaty upholds and of which, accordingly, it is the duty of the Court to ensure the observance.³²

The Commission sought to buttress its argument by pointing to article 11 of Regulation 17, which contains no express provisions entitling enterprises to submit their considerations as to compliance with Commission requests for information. In reply to this contention, the Advocate General asked:

What possible purpose can this two step procedure serve, unless it be to afford an opportunity for any observations of the undertakings or association of undertakings concerned, as well as of the competent authorities of the relevant member state or member states, to be made and considered before the Commission has reached a final decision?³³

The *Transocean Marine* case demonstrates that enterprises have a right to be heard before the Commission adopts a final decision. This right underlies the EEC Treaty. Absent a provision whereby enterprises could be heard prior to a final Commission decision, the European Convention on Human Rights, to which all the Member States of the European Communities are signatories, might be violated.

The Member States of the EEC are committed to the protection of fundamental rights. Yet, the Treaty establishing the EEC does not contain any general provisions concerning the protection of such rights. In *Costa v. Ente Nazionale*,³⁴ the Court of Justice pro-

d) where those concerned abuse the exemption from the provisions of article 85, paragraph 1, of the Treaty granted to them by the decision.

In the cases covered by sub-paragraphs (b), (c) and (d), the decision can also be revoked with retroactive effect.

³¹ [1974] 2 COMM. MKT. L. R. at 471.

³² *Id.*

³³ *Id.*

³⁴ [1964] 3 COMM. MKT. L. R. 425.

claimed the supremacy of community law over national law, but neglected the protection of fundamental rights. Later, in its reasoning in *Einfuhr-und Vorratsstelle für Getreide und Futtermittel v. Fa. Köster, Berodt & Co.*,³⁵ the Court acknowledged that the general principles of the common law comprise fundamental rights which the Court is obliged to safeguard.

Indeed, the Court has held repeatedly that fundamental rights constitute an integral part of community law. In *Nold v. Commission*,³⁶ the Commission, acting within the powers granted it by the ECSC Treaty, approved new marketing regulations for coal, which increased the purchase requirements needed to qualify an enterprise as a wholesaler. These requirements could not be met by Nold, who was thus excluded from this group. Nold appealed the decision claiming a violation of his property rights, as well as his right to freedom of business activity. Both of these rights were alleged by him to be protected by German national law, by the constitutions of other Member States, and by several international agreements, including the European Convention for the Protection of Human Rights. Property rights and the freedom of commerce and business were declared by the Court to be rights entitled to protection under Community law.³⁷ However, the appeal was dismissed by the Court because, with respect to business activity, protection guaranteed by national constitutions cannot be construed to extend to mere business interests or expectations (of an individual firm), the uncertainties of which are part of the nature of economic activity.³⁸ Thus, the Court concluded that Nold's grievance was actually initiated by new developments in the economy, which reflected the drop in coal production, and not with the Commission decision. The Court declared that no right of Nold to property or to freedom of business activity was infringed upon by the Commission.³⁹

Because all Member States of the EEC adhere to the European Convention of Human Rights, the convention can provide a model of what constitutes a fundamental right. Article 8 of the Convention guarantees respect for private and family life, and for home and correspondence. Several cases have been brought to the European Commission of Human Rights challenging interference with

³⁵ [1972] 11 COMM. MKT. L. R. 255.

³⁶ [1974] E. Comm. Ct. J. 491, [1974] 14 COMM. MKT. L. R. 338.

³⁷ *Id.* at 354.

³⁸ *Id.* at 355.

³⁹ *Id.*

the right to privacy for personal correspondence.⁴⁰ In all of these cases, the correspondence examined, detained, or otherwise interfered with belonged to a prisoner. In the *Golder Case*, the European Court of Human Rights hinted that the prevention of crime may justify more interference with correspondence of a prisoner than of a person at liberty.⁴¹ The Court did not state to what extent interference with the correspondence of enterprises and undertakings is permissible. However, in *Acciaieria di Brescia v. High Authority*,⁴² the European Court of Justice held that article 8(1) rights of the Convention were similarly applicable to legal persons. With the European Convention on Human Rights as a model and the activities of the European Court of Justice in the area of human rights as precedent, it is likely that the correspondence of an enterprise or undertaking is protected by Community law.

During the period of debate over the substance and similarities of articles 11 and 14 of Regulation 17, and over the question of fundamental rights, the Commission displayed no ambivalence. Between January 1973 and October 1979, the Commission, acting pursuant to its interpretation of article 14, adopted decisions ordering twenty-five investigations without first issuing written authorizations.⁴³ In *National Panasonic*, the Court of Justice ended the speculation surrounding article 14 of Regulation 17. The Court initially construed article 11(2), (3) and (5) and asserted that a two-stage procedure definitely was stipulated therein, concluding that "[a]rticle 11 expressly makes the adoption of a Commission decision subject to the condition that the [Commission] has previously asked for the necessary information. . . ."⁴⁴ The Court of Justice then focused on the language of article 14, noting that it was "different in structure" from the language of article 11. The Court stated:

[T]his provision does not of course prevent the Commission from carrying out an investigation solely pursuant to a written authorization given to its officials without adopting a decision, but in other respects it contains nothing to indicate that it may only adopt a decision within the meaning of Article 14(3) if it has previously attempted to carry out an investigation by mere authorization.⁴⁵

⁴⁰ Z. NEDJATI, HUMAN RIGHTS UNDER THE EUROPEAN CONVENTION 164 (1978).

⁴¹ [1975] Eur. Ct. H.R., Judgment of Feb. 21, 1975 (Series A., vol. 18), ¶ 45.

⁴² [1960] C.J. Comm. E. Rec. 71.

⁴³ EUROPEAN ECONOMIC COMMUNITY, NINTH REPORT ON COMPETITION POLICY [1980], at 83.

⁴⁴ *National Panasonic v. E.C. Commission* [1980] 3 COMM. MKT. L. R., 169, 185.

⁴⁵ *Id.*

In differentiating between the purposes of articles 11 and 14, the Court of Justice added:

The difference in the rules on this subject contained in Articles 11 and 14 is explained, moreover, by the diversity of the needs met by those two provisions. Whereas the information, which the Commission considers necessary to know, may not as a general rule be collected without the co-operation of the undertakings and associations of undertakings possessing this information, investigations, on the other hand, are not necessarily subject to the same condition. In general, they aim at checking, by measures such as those listed in the second subparagraph of Article 14(1) of Regulation 17, the actual existence and scope of information which the Commission already has and do not therefore necessarily presuppose previous cooperation by undertakings or associations of undertakings in possession of the information necessary for the check.⁴⁶

The Court refused to find a two-stage procedure requirement within article 14(3), especially in light of what it perceived to be the different purposes of articles 11 and 14. The Court viewed article 11 as a vehicle for gathering information, and article 14 as a means by which the Commission conducts an investigation.

National Panasonic argued that if the Court of Justice interpreted article 14 as not requiring that prior notice be given to the affected enterprise, it would always be possible for the Commission to adopt decisions to investigate without first requesting information or giving prior notice. Therefore, the Commission would be able to evade the protections and guarantees secured through article 11 by resorting to the investigatory procedure of article 14. In reply, the Court emphasized that such an argument did not "take into account the distinction made by the regulation itself between the 'information' referred to in Article 11 and the 'investigation' referred to in Article 14."⁴⁷ The fact that during an investigation under article 14 the Commission can engage in activities similar to those permitted under article 11 (*e.g.*, request information on specific questions concerning recordkeeping) "is not sufficient to conclude that an investigation is identical to a procedure intended only to obtain information within the measuring of Article 11 of the regulation."⁴⁸

⁴⁶ *Id.*

⁴⁷ *Id.* at 186.

⁴⁸ *Id.*

The Court of Justice also found that the lack of notice prior to the investigation constituted no infringement of National Panasonic's fundamental rights. The Court agreed that article 8(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms provided pervasive protection for privacy. However, the Court observed that the Convention, applicable to legal persons, acknowledges in article 8(2) that interference is

permissible to the extent to which it is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protections of the rights and freedom of others.⁴⁹

The Court determined that the aim of Regulation 17 was to implement the competition rules of the EEC. Article 3(f) and articles 85 and 86 prevent distortion of competition, which might prove detrimental to the public interest, to individual undertakings, and to consumers. Regulation 17 merely allows the Commission to maintain the system of competition envisioned by the EEC Treaty.⁵⁰ Therefore, the power to conduct investigations without previous notification was held not to infringe upon fundamental rights due to the need to protect the public interest.

Regarding the right to be heard before a decision to investigate is made, the Court stressed that the "right of defense is chiefly incorporated in legal or administrative procedures for the termination of an infringement or for a declaration that an agreement, decision, or concerted practice is incompatible with Article 85. . . ."⁵¹ The Court of Justice held that the investigation procedure of Regulation 17 does not constitute an infringement or render an agreement incompatible with article 85. "[I]ts sole objective is to enable the Commission to gather the necessary information to check the actual existence and scope of a given factual and legal situation."⁵² Because this was an investigation under article 14 and not a procedure to terminate an infringement or to declare an agreement incompatible with article 85, National Panasonic had no right to be heard before a decision to investigate was issued by the Commission.⁵³

⁴⁹ *Id.*

⁵⁰ *Id.* at 187.

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.* at 188.

Although the Court purported to validate the Commission's search under article 14 by differentiating between the functions of that article and article 11, the Court failed to consider adequately the practical ramifications of its decision. In prior interpretations of Regulation 17, the Court accorded the Commission full discretion in determining whether to use the investigatory procedure of article 11 or article 14.⁵⁴ The Court's holding in *National Panasonic* suggests that in addition to the Commission's full discretion to determine the applicable article, once article 14 has been selected, investigations may be conducted prior to requesting information from the enterprise being investigated.

Under this holding, there is little incentive for the Commission to conduct investigations under the procedure established pursuant to article 11. By using article 14, the Commission can obtain the same information it could obtain under article 11, with less expense, less time, and less trouble. No effective method exists for ensuring that the Commission will not evade the guarantees of article 11 by simply utilizing the procedure of article 14. The Court's distinction as to "gathering information" under article 11 and an "investigation" under article 14 becomes a hazy one in actual practice. As in the *National Panasonic* case, when the Commission possesses little or no information to verify prior to the investigation, the Commission is not checking the actual existence and scope of information that it already possesses, but rather is searching for additional information. Under such circumstances, it appears that the proper procedure is provided in article 11.

The Court's holding allows the Commission considerable discretion in deciding the appropriate procedure to utilize during an investigation. Giving the Commission the latitude of determining which procedure to utilize affords it the opportunity to centralize power within its command. Thus, the Commission is able to determine the extent of its own powers.

The Advocate General declared in his opinion that no legislation grants a party the right to a hearing prior to the adoption of an article 14 decision. Although the right to a hearing may exist based on the general rule "that a person whose rights are liable to be affected by an administrative decision is entitled to be heard by the authority concerned,"⁵⁵ this right is not absolute. One such exception is invoked where according the right to a hearing

⁵⁴ H. SMIT & P. HERZOG, *supra* note 24, at 332.

⁵⁵ *National Panasonic v. E.C. Commission* [1980] 3 COMM. MKT. L. R., 169, 180.

defeats the purpose of the decision.⁵⁶ The Advocate General claimed *National Panasonic* was such a case. Accordingly, if *National Panasonic* were afforded the opportunity to be heard, it would be provided an opportunity to destroy or conceal relevant documents. However, the Advocate General failed to recognize that this point could be argued under any circumstance where potentially incriminating information is requested. Neither the Advocate General nor the Commission cited any cases where information had been destroyed, although the Commission has consistently used article 11's two-stage investigatory procedure, which arguably gives an enterprise a chance to destroy or conceal relevant documents. If this argument is accepted, it would apply in every case, regardless of which article's investigatory powers are used. The "exception" could be expanded to consume the rule.

The possibility of expanding the scope of the exception did not appear to disturb the Advocate General, who was satisfied that *National Panasonic* was not left without a remedy as article 14 preserves the right of judicial review. However, this right may not be invoked until after the investigation. If the Court finds the Commission's decision unlawful, it may order the Commission to return all papers taken during the investigation, to destroy any notes, and to cease using any of the information. This remedy, however, is not always equitable. The rights of the individual or corporation are already infringed upon in that the enterprise has lost the use of business documents. Furthermore, an outside entity (the Commission) has seen important business papers. In addition, the Commission might have discovered detrimental information beyond that which it originally sought, which might provide the foundation for later investigations. Moreover, the right to judicial review by the European Court of Justice is not immediately available. Many months may pass before the contested decision reaches the Court. The *National Panasonic* case, for example, was initiated by the corporation's challenge to the Commission decision to investigate adopted on June 22, 1979. The case was not decided by the European Court of Justice until the following June. This remedy, therefore, is not an effective substitute for the right to be heard prior to a Commission decision.

The law of the EEC, being supranational in nature, may not be overridden by any national constitutional provision. The European Court of Justice has declared, however, that respect for fun-

⁵⁶ *Id.*

damental rights constitutes an integral part of Community law. Therefore, if infringement of a basic right is alleged, the Court must determine whether any right inherent in Community law has been violated. The basic rights emanate from the constitutional traditions of the Member States and the "general principles of law" valued in the political systems of Western Europe, including democracy, liberty, and respect for the individual.⁵⁷ Article 8 of the European Convention for the Protection of Human Rights provides various privacy rights. These rights to privacy extend to business premises of an individual or of a corporation.⁵⁸ However, in *National Panasonic*, the Court reiterated the principle that fundamental rights may be interfered with to protect interests of national security, public safety, or economic well-being, and for the prevention of crime, for the protection of health, or for the protection of the rights of others. In effect, article 8(2), under the Court's interpretation, provides a blanket exemption for the rights enumerated in its preceding paragraph. When deemed necessary, almost any presumed condition can be argued to constitute a threat to the interests of "national security, public safety, or the economic well-being of the country." The rights accorded by article 8(1), therefore, are meaningless, unless paragraph 2 is given a narrow construction, with only the most exceptional circumstances in mind. However, the European Court of Justice has not adopted a narrow construction.⁵⁹

The Commission was given vast rulemaking authority by the Rome Treaty. Its responsibilities also have been expanded notably

⁵⁷ Pescatore, *The Protection of Human Rights in the European Communities*, 9 COMM. MKT. L. REV., 78 (1972).

⁵⁸ *Acciaieria di Brescia v. High Auth.* [1960] C.J. Comm. E. Rec. 71.

⁵⁹ The Court also held that *National Panasonic's* claim that the decision was illegal due to insufficient reasons supporting it was unfounded. The Court declared that article 14 (3) of Regulation 17 requires that the decision "specify the subject-matter and the purpose of the investigation." The preamble to the decision stated that the purpose of the investigation was to "check facts which might show the existence of an export ban contrary to the Treaty." However, as has been shown previously, the Commission did not possess sufficient information to indicate the existence of this situation. The Commission's decision, therefore, may have been based on mere intuition. These reasons are not sufficient grounds on which to base a decision. The decision should include a clear, concise statement of the reasons to inform the parties of their rights, as well as to inform both the Court and the enterprise concerned that the Treaty provisions were correctly applied. *German Government v. E.C. Commission*, [1963] C.J. Comm. E. Rec. 63, 69; [1963], 2 COMM. MKT. L. R. 369.

If the statement of reasons is lacking or is insufficient, an essential procedural requirement has not been met. This alone may provide adequate grounds for annulment of the decision pursuant to article 173.

by powers conferred on it by the Council.⁶⁰ The proceedings of the Commission are, in theory, of an administrative nature, and are not judicial proceedings. A decision of the Commission, however, is binding on the party to whom it is addressed. The need for appropriate safeguards is especially evident, given the Court's interpretation of the Regulation and the latitude provided the Commission in determining which procedure to invoke. The right to investigate involves a much stronger infringement of the party's interests than the right to request information. Therefore, it is desirable that stricter standards be applied to prevent procedural abuse in antitrust investigations.

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⁶⁰ In addition to Regulation 17/62, giving the Commission more powers in regard to granting exemptions, Regulation 19/65 and 2821/71 have authorized the Commission to issue group exemptions under certain circumstances. The Council has also augmented the powers of the Commission by providing it with authority pursuant to article 155 of the Treaty.