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NOTE

National Panasonic (U.K.) Ltd. v. Commission of the European Communities: The Common Market's First Look at Warrantless Searches in Antitrust Investigations

*National Panasonic (U.K.) Ltd. v. Commission of the European Communities*¹ is the first decision of the European Court of Justice² delineating the powers of the European Commission (Commission)³ to conduct evidentiary searches on the premises of firms suspected of violating the European Economic Community's antitrust laws.⁴ The Court held that the Commission may conduct on-the-spot searches of

¹ [1980] E. Comm. Ct. J. Rep. 2033, [1980] 3 Comm. Mkt. L.R. 169.

² The Court of Justice of the European Communities is the ultimate reviewing body of decisions rendered by the Commission. The Court has two principal types of jurisdiction: 1) review of formal decisions of the European Commission and 2) review of questions of Community law on reference from the Member States' national courts. B. HAWK, UNITED STATES, COMMON MARKET AND INTERNATIONAL ANTITRUST: A COMPARATIVE GUIDE 412 (1979).

³ The Commission in Brussels serves as the administrative organ of the Common Market. It consists of thirteen Commissioners, with two appointed by each of the four largest Member States. In addition, the Commission has a sizeable administrative staff. See Graupner, *Commission Decision-Making on Competition Questions*, 10 COMM. MKT. L. REV. 291 (1973), for a description of the internal procedures of the Commission in applying general anticompetition policies.

⁴ The primary competition rules in the Common Market applicable to private firms are Articles 85 and 86 of the Rome Treaty. Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11 (*entered in force* Jan. 1, 1958 [hereinafter cited as EEC Treaty]). Article 85 is similar to section 1 of the Sherman Act. Article 85(1) prohibits "all agreements between undertakings, decisions by associations of undertakings and any concerted practices which are likely to affect trade between the Member States and which have as their object or result the prevention, restriction or distortion of competition within the Common Market . . ." *Id.* at art. 85(1). Article 86 prohibits abuse of an undertaking's "dominant position" within the Common Market. *Id.* at art. 86.

firms without prior notification.⁵ The Court's decision greatly expands the investigatory powers of the Commission at the expense of significant privacy and due process rights for firms operating within the European Community. This note will examine the extent to which the Court's decision departs from both the language and intent of the Community's statutory grant of investigatory powers to the Commission, and will explore safeguards that the Community's legislative authorities should introduce to protect a firm's rights while affording the Commission maximum discretionary power.

The Commission is empowered to enforce the European Community's antitrust laws pursuant to Regulation 17.⁶ Articles 11 through 14 of this Regulation enumerate the Commission's general investigatory powers. Article 11 establishes a two-step procedure under which the Commission may request and obtain information from commercial enterprises.⁷ The Commission must first request the firm to tender the desired information voluntarily. If the firm does not comply, the Commission may formally demand submission of the requested information. Non-compliance may expose the firm to high financial penalties.⁸

⁵ [1980] E. Comm. Ct. J. Rep. at 2054-55, [1980] 3 Comm. Mkt. L.R. at 185.

⁶ The Council of Ministers in 1962, acting pursuant to Article 87 of the E.E.C. Treaty, issued Regulation 17/62 which provided that the Commission play the major role in the enforcement of the E.E.C. competition law and policy. Article 9(3) of Regulation 17 limited the responsibility of the Member States to enforce certain E.E.C. competition rules. Article 9(3) of Regulation 17 states:

As long as the Commission has not initiated any procedure under Articles 2 [negative clearance], 3 [cease and desist order] or 6 [exemption], the authorities of the Member States shall remain competent to apply Article 85(1) and Article 86 in accordance with Article 88 of the Treaty

Regulation 17/62, O. J. EUR. COMM. 87 (Spec. Ed. 1959-62) [hereinafter cited as Regulation 17]. See generally B. HAWK, *supra* note 2, at 415.

⁷ Article 11(2), (3) and (5) sets forth the two-stage procedure as follows:

(2) When sending a request for information to an undertaking or association of undertakings, the Commission shall at the same time forward a copy of the request to the competent authority of the Member State in whose territory the seat of the undertakings or associations of undertakings is situated.

(3) In its request the Commission shall state the legal basis and the purpose of the request and also the penalties provided for in Article 15(1)(b) for supplying incorrect information.

(5) Where an undertaking or association of undertakings 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. The decision shall specify what information is required, fix an appropriate time-limit within which it is to be supplied and indicate the penalties provided for in Article 15(1)(b) and Article 16(1)(c) and the right to have the decision reviewed by the Court of Justice.

Regulation 17, *supra* note 6, at art. 11.

⁸ Article 15(1)(b):

1. The Commission may by decision impose on undertakings or associations of undertakings fines of from 100 to 5000 units of account where, intentionally or negligently: . . .

(b) They supply incorrect information in response to a request made pursuant to Arti-

Since an enterprise may deny the initial informal request for information, the two-step procedure may be seen as a *de facto* safeguard, protecting firms from unnecessary investigations.⁹

Article 14 empowers the Commission to conduct evidentiary searches of a firm's premises.¹⁰ Under Article 14(1), the Commission is granted the right of access to a firm's premises, land and vehicles and is authorized to examine books and other business documents, to make copies of these documents, and to request on-the-spot verbal explanations.¹¹ Two procedures for the exercise of these powers are impliedly provided in Article 14(1) and (2). According to the Commission's es-

cle 11(3), or to Article 12, or do not supply information within the time limit fixed by a decision taken under Article 11(5);

Article 16(1)(c):

1. The Commission may by decision impose on undertakings or associations of undertakings periodic penalty payments of from 50 to 1000 units of account per day, calculated from the date appointed by the decision, in order to compel them: . . .

(c) to supply complete and correct information which it has requested by decision taken pursuant to Article 11(5). . . .

Regulation 17, *supra* note 6, at arts. 15, 16.

⁹ For a discussion of safeguards in the two-step procedure, *see* text accompanying notes 80-83 *infra*.

¹⁰ Article 14 of Regulation 17/62 states:

1. 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 undertakings and associations of undertakings. To this end the officials authorised by the Commission are empowered:

- a) to examine the books and other business records;
- b) to take copies of or extracts from the books and business records;
- c) to ask for oral explanations on the spot;
- d) to enter any premises, land and means of transport of undertakings.

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

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

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

6. Where an undertaking opposes an investigation ordered pursuant to this Article, the Member State concerned shall afford the necessary assistance to the officials authorised by the Commission to enable them to make their investigation. Member States shall, after consultation with the Commission, take the necessary measures to this end before 1 October 1962.

Regulation 17/62, *supra* note 6, at art. 14.

¹¹ Regulation 17, *supra* note 6, at art. 14(1)(a)-(d). For the text of Article 14, *see* note 10 *supra*.

tablished practice, as reflected in the Court's opinion in this case, these sections provide an informal procedure through which the Commission may request in writing the voluntary submission of desired documents.¹² Under Article 14(3), the Commission may compel a search of a firm's records by adopting a formal decision. Non-compliance with an Article 14(3) search warrant may expose a firm to severe economic penalties.¹³

In *National Panasonic*, the issue was whether the procedures provided for in Article 14 *must* be exercised sequentially as a two-step procedure, similar to the process under Article 11. The *de facto* procedural safeguards inherent in a two-step investigatory procedure are significant for two reasons. First, there is no private right to appeal a Commission search warrant decision prior to the Article 14(3) search.¹⁴ Second, there is no independent judicial review of the Commission's search decision upon the warrant's issuance.¹⁵ In *National Panasonic*, the European Court of Justice held that Article 14 did not mandate a two-step procedure.¹⁶

BACKGROUND

The Commission reached a formal decision on June 22, 1979, pursuant to Article 14(3), to search the business records of National Panasonic (U.K.), stating that the Commission had obtained documentary evidence and other information that Panasonic was operating an

¹² See text accompanying note 33 *infra*.

¹³ Article 15(1)(c):

1. The Commission may by decision impose on undertakings or associations of undertakings fines of from 100 to 5000 units of account where, intentionally or negligently: . . .

(c) they produce the required books or other business records in incomplete form during investigations under Article 13 or 14 or refuse to submit to an investigation ordered by decision issued in implementation of Article 14(3).

Article 16(1)(d):

1. The Commission may by decision impose on undertakings or associations of undertakings periodic penalty payments of from 50 to 1000 units of account per day, calculated from the date appointed by the decision, in order to compel them: . . .

(d) to submit to an investigation which it has ordered by decision taken pursuant to Article 14(3).

Regulation 17, *supra* note 6, at arts. 15, 16.

¹⁴ [1980] E. Comm. Ct. J. Rep. at 2058, [1980] 3 Comm. Mkt. L.R. at 187-88.

¹⁵ *Id.*, [1980] 3 Comm. Mkt. L.R. at 187-88. In a report by Arved Deringer, a proposal for independent judicial review was made (§ 121). However, this suggestion was not adopted by the Parliament. Report in the name of the Internal Commission for Consultation of the European Parliament by the Council of the European Community, concerning a first implementing regulation to Articles 85 and 86 of the E.E.C. Treaty (Doc. No. 104/1960-01), [1961-62] PARL. EUR. Doc. (No. 57) (1961). [Hereinafter cited as Deringer Report.]

¹⁶ [1980] E. Comm. Ct. J. Rep. at 2055-56, [1980] 3 Comm. Mkt. L.R. at 185-86. For the text of Article 14, see note 10 *supra*.

export ban from the U.K. to Germany in violation of Article 85.¹⁷ This decision was unpublished, and Panasonic was not notified of the proceedings. Following the investigation of June 27, 1979,¹⁸ Panasonic appealed the Commission's action to the European Court of Justice,¹⁹ requesting the return or destruction of all documents obtained in the investigation and requesting assurances that these documents would not be used in future proceedings.²⁰

Panasonic contested the validity of the investigation on four grounds. First, Panasonic alleged that the Commission violated Article 14 of Regulation 17 by investigating without first requesting voluntary cooperation.²¹ Second, Panasonic claimed that the Commission infringed its fundamental right to privacy and its right to a pre-investigatory review of the decision to search.²² Third, Panasonic claimed that the Commission violated the principle of proportionality, infringing its rights beyond the degree necessary for the Commission to perform its function.²³ Finally, Panasonic claimed that the Commission's decision was based on inadequate reasoning.²⁴

¹⁷ National Panasonic (U.K.) is a wholly-owned subsidiary of a Japanese company, the Matsushita Electrical Industrial Co., Ltd., and is the exclusive distributor in the U.K. of electronic and electrical goods for Matsushita. A German subsidiary of the Matsushita Group requested a negative clearance or exemption under Article 85(3) of the EEC Treaty relating to an agreement for the distribution of Panasonic equipment in Germany. This notification did not suggest that the agreement was supported by an export ban. Nevertheless, the Commission suspected that export bans were being imposed within the Common Market. *Id.* at 2052, [1980] 3 Comm. Mkt. L.R. at 182.

¹⁸ The investigation was conducted by two Commission officials and one official from the Office of Fair Trading (the U.K. enforcement agency for competition laws). The investigation lasted approximately seven hours with the Commission officials taking copies of a number of documents. *Id.*, [1980] 3 Comm. Mkt. L.R. at 183.

¹⁹ Panasonic appealed pursuant to Article 173 of the EEC Treaty, which 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 the actions brought by a Member State, the Council or the Commission on grounds of lack of competence, 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 or against a decision which, although in the form of a regulation or a decision addressed to another person, is of direct and individual concern to the former.

EEC Treaty, *supra* note 4, at art. 173.

²⁰ [1980] E. Comm. Ct. J. Rep. at 2051, [1980] 3 Comm. Mkt. L.R. at 182.

²¹ See text accompanying notes 28-33 *infra*.

²² See text accompanying notes 36-40 *infra*.

²³ See text accompanying notes 46-49 *infra*.

²⁴ See text accompanying note 50 *infra*.

I. OPINION OF THE COURT

A. Interpretation of Article 14

National Panasonic maintained that Article 14 required Commission officials to follow a two-step search procedure, similar in structure and purpose to Article 11 procedures for obtaining answers to written questions.²⁵ In support of its interpretation, Panasonic relied on the legislative history of Regulation 17,²⁶ and the Commission's past practice in applying Article 14(3), which effectively demonstrated that the Commission utilized Article 14 as a two-step procedure.²⁷ Panasonic also relied on the language of Article 13(1), which permits the Commission to call upon the authorities of the member states to undertake "investigations which [the Commission] considers to be necessary under Article 14(1) or which the Commission has ordered by decision pursuant to Article 14(3)."²⁸

Panasonic further claimed that to interpret Article 14 differently from Article 11 would grant the Commission investigatory powers similar to those available under Article 11, but without the safeguards embodied in the Article 11 two-step process. While Article 14 principally provides for the procurement of specific documentary records, Article 14(1)(c) does empower the Commission to compel on-the-spot verbal explanations.²⁹ Such a power arguably could be used to compel firm

²⁵ [1980] E. Comm. Ct. J. Rep. at 2053, [1980] 3 Comm. Mkt. L.R. at 183. For the text of Article 14, see note 10 *supra*. For the text of Article 11, see note 7 *supra*.

²⁶ Opinion of Advocate General Warner, *id.* at 2066, [1980] 3 Comm. Mkt. L.R. at 177-78. For a discussion of the legislative history, see text accompanying notes 53-58 *infra*.

²⁷ The Commission has carried out 24 searches pursuant to Article 14(3) without first giving prior notice to the enterprise. Answer to Question No. 677/79, submitted by Lady Elles, [1979] COMM. MKT. REP. (CCH) 110, 192. Of these, 18 searches were conducted in or about 1979. Preliminary (unofficial) text of *National Panasonic* decision at 12. The Commission explained that this increased use of the investigatory power emerged as business intensified the concealment of these questionable practices as the requirements of Community law became clearer. Opinion of Advocate General Warner, [1980] E. Comm. Ct. J. Rep. at 2067, [1980] 3 Comm. Mkt. L.R. at 178-79.

²⁸ Article 13(1) states:

At the request of the Commission, the competent authorities of the Member States shall undertake the investigations which the Commission considers to be necessary under Article 14(1), or which it has ordered by decision pursuant to Article 14(3) . . .

Regulation 17, *supra* note 6, at art. 13(1) (emphasis added).

Both the applicant and the Commission appear to inconsistently specify the source of the Commission's procedure for requesting informal searches. In examining the applicant's Article 13(1) argument both parties and the Court recognized Article 14(1) as the source of this procedure. [1980] E. Comm. Ct. J. Rep. at 2055, [1980] 3 Comm. Mkt. L.R. at 185. In discussing the applicant's contention that failure to recognize a two-step procedure under Article 14 would undermine the safeguards of Article 11, however, both parties and the Court apparently recognized this informal power as originating in Article 14(2).

²⁹ For text of Article 14, see note 10 *supra*.

employees to answer questions on-the-spot, if properly posed in written form under Article 11, with the opportunity available under Article 11 of refusing to respond to an initial informal request.³⁰

The Court of Justice rejected Panasonic's reliance on legislative history and instead distinguished Article 14 from Article 11 on statutory grounds, noting that the language of Article 11 expressly provides for a two-step process, whereas Article 14 includes no such express preliminary condition.³¹ Furthermore, the Court determined that Articles 11 and 14 established different procedures because the provisions address the Commission's different enforcement needs. Article 14 primarily addresses the procurement of specific documentary records and evidence from the premises of commercial enterprises, presupposing to some extent the prior possession by the Commission of evidence requiring documentary verification. Article 11, however, envisions commercial enterprises' voluntary preparation of responses to inquiries from the Commission.³² The Court also dismissed Panasonic's reliance on the language in Article 13(1), holding that the Article's use of the word "or" supported an interpretation that the investigatory procedures of Sections 14(1) and 14(3) were alternative methods, not cumulative requirements.³³

Finally, the Court rejected Panasonic's claim that the Article 11 guarantee would be circumvented by the Commission's utilization of Article 14 when demanding oral explanations during searches. The Court reasoned that the power to request information on specific items during a search was distinct from the power to request information pursuant to Article 11.³⁴ The Court did not explain the distinction between a request for information pursuant to Article 11, and the request for an oral explanation pursuant to Article 14(1)(c), except to conclude that the procedures are not necessarily identical.³⁵

B. Fundamental Rights

Panasonic contested the validity of the search, claiming that it in-

³⁰ See text accompanying note 79 *infra*.

³¹ [1980] E. Comm. Ct. J. Rep. at 2055-56, [1980] 3 Comm. Mkt. L.R. at 185.

³² *Id.*, [1980] 3 Comm. Mkt. L.R. at 185.

³³ *Id.* at 2055, [1980] 3 Comm. Mkt. L.R. at 185. For the text of Article 13(1), see note 28 *supra*.

³⁴ *Id.*, [1980] 3 Comm. Mkt. L.R. at 185.

³⁵ Advocate General, Jean-Pierre Warner suggested that the scope of examination under Article 14(1)(c) is narrower than an Article 11 request for information in that, under Article 14(1)(c), the only explanation that can be sought must relate to the "books and records under examination or their contents." *Id.* at 2066, [1980] 3 Comm. Mkt. L.R. at 177.

fringed its “fundamental rights,” specifically its right to privacy and its right to be heard.³⁶ To demonstrate the origin of a right to privacy, Panasonic relied on Article 8 of the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms, which states:³⁷

- 1) Everyone has the right to respect for his private and family life, his home and his correspondence.
- 2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.³⁸

Panasonic maintained that the right to privacy recognized by the Convention applies to legal entities as well as to individuals. Furthermore, Panasonic argued that “in the absence of clear words relieving the Commission from any obligation to give prior notice of an investigation,” Article 14 should be interpreted to lessen the infringement of the firm’s fundamental right to privacy by requiring prior notice.³⁹

The Court did not fully examine the extent, if any, to which a legal entity has a right to privacy. Instead, it noted that “in so far as it [Article 8] applies to legal persons,” Article 8(2) of the Human Rights Convention acknowledges that the right of privacy may be infringed by a public authority.⁴⁰ The Court found that the Commission’s investigative powers under Regulation 17 contributed to the maintenance of a competitive market system. Without examining the bounds within

³⁶ Panasonic also asserted a “right to prepare for the investigation” and the right to appeal from the Commission to the Court of Justice and seek a stay from the appeal. The Court did not address the right to prepare for an investigation. Regarding the right to a stay from the appeal, the Court maintained that an Article 185 request for a stay presupposes that a decision be made. In this case, National Panasonic wanted the right to appeal to the Court of Justice on the basis of an informal request (Article 14(1)) prior to a formal decision by the Commission. *Id.* at 2058, [1980] 3 Comm. Mkt. L.R. at 187-88.

³⁷ Nov. 4, 1950, 213 U.N.T.S. 221. The European Court of Justice in *Nold, Kohlen und Baustoffgrosshandlung v. European Commission*, [1974] E. Comm. Ct. J. Rep. 491, [1974] 2 Comm. Mkt. L.R. 338, held that the Court will ensure that fundamental rights, an integral part of the general principles of law, will be applied. Furthermore, in safeguarding these rights, the Court stated that it would look to the constitutional traditions of the member states and the international treaties protecting human rights signed by the member states, such as the European Human Rights Convention. *Id.* at 501, [1974] 2 Comm. Mkt. L.R. at 351.

³⁸ 213 U.N.T.S. 221, at art. 8. For a discussion of the right to privacy regarding legal entities, see text accompanying notes 59-70 *supra*.

³⁹ Opinion of Advocate General Warner, [1980] E. Comm. Ct. J. Rep. at 2067, [1980] 3 Comm. Mkt. L.R. at 179.

⁴⁰ *Id.* at 2057, [1980] 3 Comm. Mkt. L.R. at 186. For complete text of Article 8, see text accompanying note 37 *supra*.

which the exercise of such powers "is necessary" and thus proper, the Court concluded that the Commission's power to conduct an on-the-spot search under Article 14 did not infringe Panasonic's right of privacy.⁴¹

Panasonic also asserted that it was denied the right to a hearing prior to an administrative agency's adverse decision.⁴² Supporting Panasonic's claim is a general administrative rule requiring an agency to provide a party whose interests may be adversely affected with an opportunity to be heard prior to the agency's decision.⁴³

The Court rejected this claim, stating that the right to a hearing provided in Article 19 of Regulation 17 is applicable only when the administrative agency declares that an agreement or other business practice is incompatible with the antitrust laws.⁴⁴ The Court held that a search under Article 14 does not infringe upon or constitute an adverse decision to a firm, because the sole objective of the search is to gather information. A firm's right to be heard must be recognized only if the information collected leads to the initiation of a proceeding to determine whether a business practice is incompatible with Article 85.⁴⁵

C. Principle of Proportionality and Specificity Requirements

In proceeding immediately by means of an on-the-spot search rather than by first requesting the documents informally, Panasonic asserted that the Commission violated the principle of proportionality. As established in the case law of the European Court, this principle mandates that administrative agencies refrain from infringing an individual's freedoms beyond the degree necessary to perform governmental functions.⁴⁶ Panasonic asserted that a decision to investigate without prior notification and review is justified only if "the situation is very grave and where there is the greatest urgency and need for com-

⁴¹ *Id.* at 2057, [1980] 3 Comm. Mkt. L.R. at 187.

⁴² *Id.*, [1980] 3 Comm. Mkt. L.R. at 187.

⁴³ Article 19 of Regulation 17 provides for the hearings of parties before the Commission acts on a competition matter in Articles 2, 3, 6, 7, 8, 15 and 16. Articles 11 and 14 are excluded from the requirements of Article 19. Regulation 17, *supra* note 6, at art. 19.

⁴⁴ [1980] E. Comm. Ct. J. Rep. at 2058, [1980] 3 Comm. Mkt. L.R. at 187.

⁴⁵ *Id.*, [1980] 3 Comm. Mkt. L.R. at 187. Regulation 99/63 implements Article 19. *See* note 43 *supra*.

⁴⁶ *Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle Für Getreide und Futtermittel*, [1970] E. Comm. Ct. J. Rep. 1125, 1136, [1972] Comm. Mkt. L.R. 225, 285.

In fact, the fundamental right invoked here—that the individual should not have his freedom of action limited beyond the degree necessary for the general interest—is already guaranteed both by the general principle of Community law, the principle of proportionality, the compliance with which is ensured by the Court and by an express provision of the Treaty! Opinion of Advocate General Dutheillet De Lamothe, *id.* at 1147, [1972] Comm. Mkt. L.R. at 271.

plete secrecy.”⁴⁷ Therefore, the Commission’s written decision to investigate violated this principle by not incorporating in its statement of reasons that an emergency in fact existed.⁴⁸ The Court rejected this contention, holding that the Commission’s choice between an informal request for documents and an unannounced search depended “on the need for an appropriate inquiry,” and not upon a demonstration by the Commission of a special emergency.⁴⁹

Finally, Panasonic contested the Commission’s decision to investigate pursuant to Article 14(3), claiming that the Commission’s decision failed to specify the reasons for selecting an Article 14 investigation without first conducting an informal inquiry. The Court of Justice dismissed this contention as well, noting that the Commission satisfied the elements of the statement required in Article 14(3) by specifying the subject matter, the purpose and date of the investigation, the penalties for non-compliance and the right to have the decision reviewed by the Court of Justice.⁵⁰

II. DISCUSSION

Unlike Article 11, Article 14 does not contain an express provision requiring the Commission to initiate investigations by requesting voluntary submission of desired documents before mandating such submissions by a formal decision. The Court held that, in the absence of a clear and express provision, the Article 14(2) and 14(3) procedures were alternative means for conducting an investigation.⁵¹ Since it was interpreting an ambiguous statute, the Court should have examined both the drafters’ intent, as ascertainable from the legislative history, and other legal principles within the Common Market. Such an examination suggests that the Court’s decision is at variance with both of these factors. The legislative history supports a two-stage procedure. Furthermore, fundamental principles and rights recognized in the laws of the Common Market Member States support an interpretation requiring a two-step procedure.⁵²

The plain language of the statute is not dispositive as to whether a two-step procedure is required. Arved Deringer, one of the principal drafters of Regulation 17 stated a number of years after the proposal

⁴⁷ [1980] E. Comm. Ct. J. Rep. at 2059-60, [1980] 3 Comm. Mkt. L.R. at 188.

⁴⁸ *Id.*, [1980] 3 Comm. Mkt. L.R. at 188.

⁴⁹ *Id.* at 2060, [1980] 3 Comm. Mkt. L.R. at 189.

⁵⁰ *Id.* at 2059, [1980] 3 Comm. Mkt. L.R. at 188. For the text of Article 14, see note 10 *supra*.

⁵¹ *Id.* at 2055, [1980] 3 Comm. Mkt. L.R. at 185. See text accompanying notes 31-32 *supra*.

⁵² EEC Treaty, *supra* note 4, at art. 164.

was passed that "it is impossible to conclude either from the Treaty or from the text of the regulation that there is any difference in rank, that is, that the right to investigate is secondary to the right to request information."⁵³ The drafters of Regulation 17, however, and officials of the Commission at the time the proposals were passed envisioned Article 14 as establishing a two-step procedure.⁵⁴ The Report of the European Parliament's Internal Market Committee (the Deringer Report), ultimately adopted as Regulation 17, stated that the procedures for Article 11 and Article 14 were similar, thus implying an obligatory two-step procedure.

These two articles [Articles 11 and 14, which were then 9 and 11, respectively] distinguish two stages: in the first stage, the enterprises or associations of enterprises can elect whether to answer a simple request for information or for an investigation from the Commission; if they do answer they are required to give complete and accurate information. If the enterprises, or associations of enterprises do not give that information, the Commission demands the information of the second stage through a formal decision, which can be appealed to the Court of Justice.⁵⁵

The drafters of Article 14, including Arved Deringer, envisioned both Article 11 and Article 14 as two-step procedures. Dr. Hans von der Groeben, a member of the Commission for competition policy, stated in a speech before the European Parliament on October 19, 1961:

We must distinguish between two things: on one hand information, on the other, verification. We have foreseen two stages: first the stage of voluntary declarations; as to this regard one should hardly have objections. In the event the party in question does not voluntarily furnish the information or does not voluntarily submit to a verification, the Commission must under the terms of our recommendation render a formal motivated decision. This [formal] decision must be appealable before the Court of Justice having full competence to proceed with a verification. Besides, the possibility has been foreseen that the Commission not render

⁵³ A. DERINGER, THE COMPETITION LAW OF THE EUROPEAN ECONOMIC COMMUNITY 333 (1968), [1968] COMM. MKT. REP. (CCH) ¶ 2251.

⁵⁴ See Deringer Report, *supra* note 15, at 30, 120-22. The Deringer Report was the proposal that ultimately became Regulation 17, note 6 *supra*. In the Deringer Report, Articles 11 and 14 of Regulation 17 were then known as Articles 9 and 11, respectively.

⁵⁵ Unofficial translation. The original French text is as follows:

L'article 9 donne à la Commission pour remplir sa tâche certains droits d'information à l'égard des gouvernements et des autorités responsables des États membres et à l'égard des entreprises et des associations d'entreprises. L'article 11 règle les pouvoirs de vérification de la Commission. Les deux prescriptions distinguent deux stades: au premier stade, les entreprises ou les associations d'entreprises peuvent répondre ou non à la simple demande de renseignements ou de vérification de la Commission; si elles répondent, elles sont tenues de fournir des renseignements complets et exacts. Si les entreprises et les associations d'entreprises ne donnent pas ces renseignements, la Commission exige les renseignements du second stade par une décision formelle, susceptible de recours devant la Cour de justice.

Deringer Report, *supra* note 15, at 30, ¶ 120.

a decision in cases where this decision would carry with it serious dangers for the enterprise.⁵⁶

Thus, when the recommendation for Article 14 was formed, both drafters and Commission officials envisioned a two-step procedure.

Subsequent reaction to Article 14 supports this view. Dr. W. Schlieder, then Commission Director General for Competition, explained in an article published after the adoption of Regulation 17 that the Commission would follow a two-step procedure in the implementation of Article 14.⁵⁷ Several other commentators viewed the Article 14 procedures as similar to the procedures in Article 11, requiring the Commission to first request voluntary cooperation.⁵⁸

In addition to consulting the legislative intent of the drafters, the Court of Justice should have made a determination as to which construction of Article 14 was most consistent with the fundamental rights and principles reflected in the laws of the Member States and the Court's prior decisions. Two fundamental rights in particular were at issue in *National Panasonic*: the right to privacy and the right to be heard prior to a search.

A. Right to Privacy

The right to privacy, guaranteed by the European Convention on Human Rights, has been incorporated into Community law.⁵⁹ At issue is the extent, if any, to which the right to privacy guaranteed under Article 8 of the Convention applies to legal persons.⁶⁰ The Article recognizes three spheres of privacy, namely, respect for an individual's

⁵⁶ Unofficial translation. The original French text is as follows:

Nous devons distinguer entre deux choses: d'une part, les renseignements et, d'autre part, la vérification. Nous avons prévu deux stades: d'abord le stade de la déclaration spontanée; à ce propos, il ne doit guère y avoir d'objections. Au cas où l'intéressé ne fournirait pas spontanément le renseignement ou s'il ne se soumettait pas spontanément à une vérification, la Commission devra, aux termes de notre projet, rendre une décision motivée. Cette décision doit pouvoir faire l'objet d'un recours devant la Cour de justice laquelle a pleinement compétence pour procéder à la vérification. En outre, on a prévu la possibilité que la Commission ne prenne pas de décision au cas où cette décision entraînerait de sérieux dangers pour l'entreprise.

[1961-1962] EUR. PARL. DEB. 233 (Oct. 19, 1961).

⁵⁷ Schlieder, *Die Anwendung der Artikel 85 und 86 des EWG-Vertrages nach dem Erlass der ersten Durchführungsverordnung*, BETRIEBS-BERATER 305, 311 (1962).

⁵⁸ C. OBERDORFER, A. GLEISS & M. HIRSCH, COMMON MARKET CARTEL LAW 148 (1963), [1963] COMM. MKT. REP. (CCH) ¶ 443, stating that "[l]ike the procedure for obtaining information (See Article 11 . . .), that governing inspections [Article 14] and examination has two stages." See also, V. KORAH, EEC COMPETITION LAW AND PRACTICE 31 (1978).

⁵⁹ Nold, Kohlen und Baustoffgrosshandlung v. Commission of the European Communities, [1974] E. Comm. Ct. J. Rep. at 501, [1974] 2 Comm. Mkt. L.R. at 351.

⁶⁰ The European Commission of Human Rights has held that legal persons are incapable of exercising the right of freedom of thought and conscience (Article 9(1) of the Human Rights Convention) and the right to education (Article 2 of the First Protocol). PRIVACY AND HUMAN

family life, his home and his correspondence.⁶¹ Whether a corporate entity has a right to respect for its private life is a question beyond the scope of this note.⁶² The Court of Justice in *Acciaieria e Tubificio di Brescia v. High Authority of the ECSC*, however, has extended the right of privacy to business premises.⁶³ Thus, the guarantee of respect for the privacy of the home has been extended to include a business premise.⁶⁴ Although the Court has yet to directly recognize a right of privacy regarding business correspondence, such an extension to legal persons should follow by implication.⁶⁵

The right to privacy guaranteed in Article 8 of the Human Rights Convention, however, is not absolute. Section 2 of that Article outlines the limited conditions under which the right may be infringed. The Article provides that this right should be infringed only "in accordance with the law" and then only "as . . . is necessary in a democratic society."⁶⁶ Individuals and legal entities are therefore protected from *unnecessary* invasions of their right to privacy.

In examining the Commission's justification for allegedly infringing the privacy right, the Court in *National Panasonic* noted that the preamble to Regulation 17 vested the Commission with the task of enforcing the competition laws.⁶⁷ Specifically, the Court relied on Preamble 8, which permits the Commission "to undertake such investigations

RIGHTS, COLLECTION OF DECISIONS NO. 29 at 70 (Commission Application 3798/68) (Dec. 17, 1968) (A. Robertson ed. 1973) [hereinafter cited as Robertson].

⁶¹ See text accompanying note 37 *supra*.

⁶² For the assertion that a legal entity does have a right to private life, see Robertson, note 60 *supra*. In the U.S., the Supreme Court has held that the right to respect for private life does not apply to a corporation. *United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950).

⁶³ [1960] E. Comm. Ct. J. Rep. 71, 80. In *Acciaieria* the Court of Justice was interpreting Article 86(4) of the Treaty establishing the European Coal and Steel Community (ECSC) which empowers the High Authority (which has since been merged into the Commission) to carry out checks of businesses. The Court recognized that there was a right of privacy regarding the business premises. The Court gave the High Authority all the rights and powers to make direct checks that are at the disposal of the national tax authorities.

⁶⁴ According to Robertson, the legal definition of the term home "is applied to any building, whatever its purpose, together with its curtilage, whether built on or not, access to which is restricted to the persons having the right to exclusive occupation and to persons whom they have authorised to enter or establish themselves there." Robertson, *supra* note 60, at 19.

⁶⁵ Robertson concludes that a legal entity has a right to respect for correspondence. Robertson, *supra* note 60, at 20.

⁶⁶ See text accompanying note 37 *supra*. This guarantee would seem comparable to the U.S. 4th Amendment guarantee against unreasonable search and seizure. U.S. CONST. amend. IV:

The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures shall not be violated, and no warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

⁶⁷ Regulation 17, *supra* note 6, at Preamble 7 and 8.

as are necessary.”⁶⁸ Since the Commission may perform any “necessary” investigations to enforce the competition law, and since Article 8(2) permits “necessary” infringements, the Court concluded that a search without previous notification would not violate Article 8(2).⁶⁹

The Court’s analysis is questionable on several grounds. Article 8(2), while recognizing the power of public authorities to infringe upon the right of privacy, also limits the exercise of that power. Article 8(2) could be interpreted to require an independent determination by the Court regarding whether the Regulation 17 grant of investigatory powers to the Commission was “necessary,” and whether the particular exercise of such powers in *National Panasonic* was “necessary” on the facts of the case. The Court failed to examine the validity under Article 8(2) of the European Parliament’s creation and delegation of investigatory powers in Regulation 17. Even if the Court were correct in deferring to the Parliament in this determination, it is not clear that the delegation of powers to the Commission includes in Article 14 the power to conduct searches without prior notification.⁷⁰ The available legislative history suggests that the Commission does not have the power to conduct searches without prior notice to the firm.⁷¹

Even if the power to conduct searches without prior notice has been delegated to the Commission, it is not clear that the actual full exercise of this power automatically renders it “necessary” and thus proper. Therefore, while the Commission may have been justified in searching Panasonic’s business records, the Court should have inquired whether the facts of the case required prior notification and an opportunity for a hearing prior to such search. Preamble 8 and Article 14, in expressly authorizing only “necessary” investigations, indicate that the Commission’s power to investigate and its discretion to determine what is “necessary” are not absolute.⁷² In failing to examine the extent to

⁶⁸ Preamble 8:

Whereas 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.

Regulation 17, *supra* note 6, at Preamble 8.

⁶⁹ [1980] E. Comm. Ct. J. Rep. at 2057, [1980] 3 Comm. Mkt. L.R. at 187.

⁷⁰ This assumes that all parliamentary acts are valid under Article 8(2) of the Convention.

⁷¹ For a discussion of the legislative history, see text accompanying notes 53-56 *supra*.

⁷² Article 14(1) states: “[t]he Commission may conduct all necessary investigations. . . .” Regulation 17, *supra* note 6, at art. 14(1). Thus the Commission is presently limited by a requirement that the investigation be “necessary” in order to accomplish their tasks. No definition of a “necessary” investigation has emerged from the case law of the Court of Justice. A. DERINGER, *THE COMPETITION LAW OF THE EUROPEAN ECONOMIC COMMUNITY*, *supra* note 53, at 334, ¶

which a legal entity's right to privacy may be infringed, the Court neglected to address an admittedly difficult and significant issue in the case.

B. Right to be Heard

Embodied within the national laws of the Member States⁷³ is the principle that a person has a right to be heard prior to an administrative action detrimental to his interests "even if the statute does not expressly require it."⁷⁴ This principle was recognized by the Court in *Transocean Marine Paint Association v. Commission*.⁷⁵ In this case, the Commission claimed that it was under no duty to provide a hearing to an applicant filing for renewal of an Article 85(3) exemption, under circumstances where the Commission had imposed a new condition on exemption renewal.⁷⁶ This added condition would have required the applicant to file prospective reports with the Commission.⁷⁷ The Commission claimed authority for the change from the fact that it could

2252, suggested that since the right to investigate was a greater infringement into the individual sphere than a request for information, a stricter standard of what was necessary should be applied in the case of an investigation. This same principle would apply to the question of whether an investigation without prior notice is necessary.

Additionally, the Court's reasoning ignores the requirement in Article 8(a) of the European Human Rights Convention which states that the infringement of the right to privacy must be in "accordance with the law . . . in a democratic society." 213 U.N.T.S. 221, at art. 8(a). The Court should have construed the Article 14 investigatory power in accordance with general principles of law within the Member States. Specifically, the Court should have examined the right to a pre-investigatory hearing.

⁷³ *Transocean Marine Paint Association v. Commission of the European Communities*, Opinion of Advocate General Warner, [1974] E. Comm. Ct. J. Rep. 1063, 1088, [1974] 2 Comm. Mkt. L.R. 459, 469.

⁷⁴ Thus the right to a hearing prior to an administrative decision was recognized in England, Scotland, Ireland, Denmark, Germany, Belgium, Luxemburg and questionably in France. Opinion of Advocate General Warner, *id.* at 1088-89, [1974] 2 Comm. Mkt. L.R. at 470-71.

⁷⁵ *Id.*, [1974] 2 Comm. Mkt. L.R. at 470-71. In *Transocean Marine*, the Commission had previously granted to the association an Article 85(3) exemption. The association applied for a renewal of the exemption for a ten year period. Following hearings on the renewal request, the Commission ruled that, because of changing economic circumstances, stricter conditions would be applied to the request. *Transocean* claimed that it was denied the right to a hearing on this additional condition. Furthermore, *Transocean* claimed that the additional condition imposed on it a duty to provide certain information to the Commission, prior to the receipt of any requests for information from the Commission under Article 11. The Court held that there was a general rule requiring that persons whose interests are perceptibly affected by a decision be given the opportunity to make their point of view known. *Id.* at 1080, [1974] 2 Comm. Mkt. L.R. at 477. Thus, the Commission should have given *Transocean* a hearing prior to the imposition of the additional condition. *Id.* at 1081, [1974] 2 Comm. Mkt. L.R. at 478. *Transocean* had argued that the Commission could not satisfy its informational needs by imposing ongoing reporting requirements obviating the need for Article 11 informal requests. *Id.* at 1070.

⁷⁶ See note 75 *supra*.

⁷⁷ Arguments of the parties, [1974] E. Comm. Ct. J. Rep. at 1070.

have compelled submission of the desired information at a future date under Article 11, which expressly provides for a formal hearing.⁷⁸ Advocate General Warner, in addressing the Commission's interpretation of Article 11, contended that even though Article 11 did not include an explicit right to notice and hearing, the existence of a two-step procedure arguably indicated the drafters' intention to protect this right. As he asked:

What possible purpose can this two-stage procedure serve, unless it be to afford an opportunity for any observations of the "undertaking 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 reaches a final decision [to investigate]?⁷⁹

The request for voluntary submission of information presents the subject firm with an opportunity to either submit additional information or its reasons for non-compliance prior to the Commission's formal demand for the information. The Court in *Transocean Marine* supported Warner's interpretation, thereby recognizing a general right to be heard prior to administrative action.⁸⁰

In *National Panasonic*, the Court found that the Commission's decision to search did not detrimentally affect Panasonic's interests. The Court distinguished between a decision to terminate an agreement or practice as incompatible with Article 85 and a decision to search, concluding that until a substantive decision to terminate an agreement or practice is at issue, there is no right to a hearing.⁸¹ This conclusion directly contradicts the Court's holding in *Transocean Marine*, and furthermore, is inconsistent with generally accepted principles of law within the Member States.⁸²

The Court's holding in *National Panasonic* presupposes that a post-investigative appeal is sufficient to remedy any damage suffered through the infringement of fundamental rights. The intangible nature of liberty and privacy rights, however, renders the efficacy of post-investigative review illusory. An appeal after an improper search cannot adequately remedy the injury already suffered.⁸³

In addition, a subsequent appeal cannot afford adequate safeguards against administrative harassment. Not only is the right to privacy abridged when an improper search occurs, but also at stake is the

⁷⁸ *Id.*

⁷⁹ Opinion of Advocate General Warner, *id.* at 1090, [1974] 2 Comm. Mkt. L.R. at 472.

⁸⁰ *Id.* at 1080, [1974] 2 Comm. Mkt. L.R. at 477.

⁸¹ See text accompanying notes 42-45 *supra*.

⁸² See text accompanying notes 66-75 *supra*.

⁸³ See Deringer Report *supra* note 15, at 30, ¶ 121.

possible public exposure of privileged trade secrets and other important proprietary information.⁸⁴ After *National Panasonic*, there is no requirement of prior notice, no right to prior appeal, nor any independent check on the Commission's discretion to conduct on-the-spot searches, thus increasing the potential for "fishing expeditions" on scantily based suspicions to find alleged antitrust violations.

In practice, the Commission has followed a two-step procedure. Only since 1978 has the Commission increasingly utilized the procedure in Article 14(3) without first requesting voluntary compliance.⁸⁵ The Commission has justified its increasing use of Article 14(3) by noting that businesses, now more aware of the specific prohibitions of the antitrust laws, are attempting to conceal questionable practices.⁸⁶ The Commission maintains that on-the-spot searches are necessary to enforce antitrust policies, and therefore justify serious infringement of the right to privacy.⁸⁷ A two-step procedure renders it impossible to conduct surprise investigations, therefore granting company management

⁸⁴ There are presently no provisions to guarantee professional secrets under Article 11 and 14. Article 14(a) permits the Commission to investigate and copy "books and other business records." Recommendations in the Deringer Report, note 15 *supra*, which suggested that any person required to supply information should have the right to refuse to testify regarding professional secrets, were not adopted. COMMON MARKET AND AMERICAN ANTITRUST 143 (J. Rahl ed. 1970).

In *AM and S Europe Limited v. Commission*, Case 155/79, 22 O.J. EUR. COMM. (No. C 304) 1 (1979) (yet to be decided by the European Court), an English company has challenged the Commission's right to determine if a given document should be protected on the grounds of professional privacy. The Commission has stated that it will not use evidence of "any strictly legal papers written with a view to seeking or giving opinions on points of law . . . or relating to preparation of the defence" but that it was for the Commission to determine the nature of a document. Commission's Answer of June 2, 1978 to Written Question No. 63/78 by Mr. Couste, 21 O.J. EUR. COMM. (No. C 188) 30-31 (1978).

In *AM and S Europe*, the Commission carried out an investigation on the applicant's premises for alleged breaches of Article 85 of the EEC Treaty, note 4 *supra*. The Commission requested further documents following the search, but the firm refused to comply in full, believing some of the requested documents to be legally privileged. The Commission did not accept the claim of professional privilege and made a formal decision demanding the documents. 22 O.J. EUR. COMM. (No. L 199) 31 (1979), [1979] 3 Comm. Mkt. L.R. 376. AM and S Europe appealed the Commission's decision to the Court of Justice. [1980] 1 EUR. COMPETITION L. REV. 346. Advocate General J.P. Warner has taken the position that there is a recognized right of privilege regarding documents passing between lawyer and client. According to Warner, the allocation of the power of inspection to a Commission official could prejudice the rights of a party claiming the privilege. The Advocate General recommended that national courts determine if the contents of the requested documents ought to be privileged. The national courts, he maintained, could apply the relevant Community law and, if in doubt, refer the matter to the Court of Justice pursuant to Article 177 of the EEC Treaty, note 4 *supra*. Whether the Court of Justice will adopt Advocate General Warner's proposal remains to be seen. [1981] 2 EUR. COMPETITION L. REV. 27.

⁸⁵ See note 27 *supra*.

⁸⁶ Opinion of Advocate General Warner, [1980] E. Comm. Ct. J. Rep. at 2067, [1980] 3 Comm. Mkt. L.R. at 178.

⁸⁷ *Id.* at 2068, [1980] 3 Comm. Mkt. L.R. at 180.

the opportunity to remove, destroy or alter documents.⁸⁸ This change in the enforcement environment does not, however, justify judicial recognition of a broader investigatory power than is granted in Article 14. The legislative history suggests that the drafters provided a two-stage procedure.⁸⁹ This is consistent with the Court's prior recognition of the right to privacy⁹⁰ and the right to be heard.⁹¹ The determination that the Commission must have the power to perform surprise searches in order to effectively enforce the antitrust laws should be left to the Community's legislative authorities.

III. RECOMMENDATIONS

The European Economic Community's legislative authorities should seek to provide the European Commission with effective means to enforce the Community's antitrust laws, while at the same time protecting firms from unnecessary official invasion of their fundamental rights. The two-step procedure arguably provided by Article 14, and previously practiced by the Commission, no longer adequately satisfies both goals. The Commission's increasing departure from the utilization of a two-step procedure underscores the lack of any formal process to effectively guard against potential administrative abuse. Under the two-step procedure, the only pre-investigatory check against the Commission's discretion is a party's non-compliance with an initial informal request for information. The Court in *National Panasonic* removed this safeguard, allowing the Commission to by-pass the first step of the two-step procedure, without offering any other safeguard in its place.

Although the two-step procedure alone may be inadequate to meet the Commission's current investigatory needs, other solutions are available. Independent *ex parte* review by a judicial magistrate of the reasons for issuance of a search warrant would provide the Commission the secrecy it desires, yet would also serve to guard against unnecessary searches.⁹² The Deringer Report recommended that independent judi-

⁸⁸ *Id.*, [1980] 3 Comm. Mkt. L.R. at 180.

⁸⁹ See text accompanying notes 54-58 *supra*.

⁹⁰ See text accompanying notes 59-66 *supra*.

⁹¹ See text accompanying notes 74-80 *supra*.

⁹² Deringer Report, *supra* note 15, at 30, ¶ 121. The Court of Justice is the only judicial branch in the EEC. Thus, independent judicial review would have to be provided in the national courts of the Member States. The judicial authorities would be required to interpret Community law and thus meet the specificity requirements as laid down in Article 14(3) of Regulation 17. EEC Treaty, *supra* note 4, at art. 5. The Court of Justice does not have jurisdiction to review national court decisions, EEC Treaty, *supra* note 4, at art. 177, it only has jurisdiction to render a ruling on Community law after the national court requests a preliminary decision. The legislators may deem it necessary to establish a lower court, or judicial system to authorize these search warrants.

cial review of the search warrant be required *in addition* to the two-step procedure.⁹³ The Report expressly points out that the German Constitution requires that a search warrant be authorized by a judge.⁹⁴ A number of other Member States also require search warrants to be issued by a judicial magistrate.⁹⁵ If neither the two-step procedure nor independent judicial review of a Commission search warrant is followed, then the constitutional safeguards established within the Member State are being violated by present Commission procedure.

To mandate independent judicial review *in addition* to requiring the Commission to follow a two-step procedure, however, would deprive the Commission of the secrecy and surprise of unannounced searches which, on occasion, it may justifiably need. For those special occasions, the Commission should have discretion to conduct a surprise search, reviewable by an independent judicial authority. The Commission should be required to present before the judicial magistrate its reasons for the search, as well as its grounds for the surprise.⁹⁶ Since an *ex parte* search warrant proceeding would deprive the subject firm of its right to be heard before the search, the Commission should be held to a strong burden of proof in establishing that a surprise search is "necessary" under the circumstances. The two-step procedure should still be utilized in all other investigations, with the added requirement of independent judicial review upon the issuance of a formal search warrant decision.

The Court's decision in *National Panasonic* calls for, at a minimum, a reassertion of the sequential two-step procedure in Article 14

The Commission would then not be subject to the national court and an appeal of the magistrate's decision could be made directly to the Court of Justice. But a complete examination of the means to provide for independent judicial review is beyond the scope of this article.

⁹³ In the case of searches, one should provide the intervention of a judicial authority because, for example, under the German constitutional law, searches cannot be conducted except under a search warrant of a judge. The possibility for the concerned party to introduce an appeal before the Court of Justice against the decision of the Commission doesn't replace the search warrant of a judge because of the reversal of the burden of the petition restricts inadmissibly the protection of the party concerned. Unofficial translation. The original French text is as follows:

En cas de perquisition, il faut prévoir l'intervention du tribunal du fait que d'après la loi fondamentale allemande, par exemple, des perquisitions ne peuvent être faites que sur mandat du juge. La possibilité pour l'intéressé d'introduire un recours devant la Cour de justice contre la décision de la Commission ne remplace pas le mandat de perquisition du juge, car le renversement de la charge de la demande restreint d'une façon inadmissible la défense de l'intéressé.

Deringer Report, *supra* note 15, at 30, ¶ 121.

⁹⁴ *Id.*

⁹⁵ A search warrant must be authorized by a judicial magistrate in Belgium, Germany, France and the Netherlands. See generally G. MUELLER & F. LE POOLE-GRIFFITHS, *COMPARATIVE CRIMINAL PROCEDURES* 19 (1962); Robertson, *supra* note 60, at 20.

⁹⁶ For a discussion of Deringer's standards for "necessary" investigations, see note 72 *supra*.

by the Community's legislative authorities. Although this solution does not provide the needed formal independent check on Commission decisions, it lessens possible infringements on a firm's fundamental rights. Enactment of an additional procedure for *ex parte* judicial review of Commission search warrant decisions would not only provide the desired additional safeguard against potential abuse of administrative discretion, but could also be modified to allow unannounced 14(3) searches on occasions when surprise is deemed necessary in order to ensure the preservation of desired documentary evidence.

CONCLUSION

The European Court of Justice in *National Panasonic v. Commission* interpreted Article 14 so as to empower the Commission to conduct on-the-spot investigations of businesses suspected of violating the Community's antitrust laws. A firm's only recourse after this decision is an appeal to the Court of Justice *after* the search. The Court rejected Panasonic's comparison of the investigatory procedures in Article 14 with the two-step requirement in the Article 11 power to request information. Article 11 requires the Commission to seek voluntary assistance from the firm before making a formal decision compelling the production of information. The Court interpreted Article 14 to provide alternative methods of investigation—a voluntary request and an on-the-spot investigation. Discretionary authority as to the choice of methods ultimately rests with the Commission.

The *National Panasonic* decision subjects firms operating in the Common Market to potentially severe invasions of privacy and potential administrative harassment. Since a formal decision by the Commission to search a firm can only be appealed after the search, firms may be subjected to "fishing expeditions" to discover alleged antitrust violations. Not only are these searches potentially disruptive of the normal conduct of business and an infringement on the right to privacy, there is also the risk of public exposure of important trade secrets and other proprietary information. The potential for administrative abuse is exacerbated by the absence of any independent judicial review of Commission decisions to search a firm's records pursuant to Article 14(3).

In light of *National Panasonic*, the European Economic Community's legislative authorities should reconsider the procedures established by Regulation 17 empowering the Commission to conduct on-the-spot investigations. The legislators should reassert a two-stage procedure in Article 14, or consider providing an independent review of

warrants to investigate firms, as either an alternative or additional safeguard.

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