PROCEDURE (GENERAL): THE ROQUETTE CASE

Subject: Procedure
Investigations
National authorities
European Convention on Human Rights

Industry: All industries

Parties: Roquette Frères SA
Directeur général de la concurrence, de la consommation et de la répression des frauds
Commission of the European Communities (intervener)

Source: Judgment of the Court of Justice of the European Communities, dated 22 October 2002, in Case C-94/00, *Roquette Frères SA v Directeur général de la concurrence, de la consommation et de la répression des fraudes*

(Note. One of the tenets of the rules on competition is the necessity for cooperation between the Commission and national authorities in the investigation of alleged infringements. The general principles of cooperation were laid down in the Hoechst case in 1989; but the question has arisen in the present case, how far there should be protection against arbitrary or disproportionate intervention by public authorities in the private activities of a legal person. The question was prompted in part by the impact of the European Convention for the Protection of Human Rights and Fundamental Freedoms and case law in the Court of Human Rights and partly by consideration of the scope of the review which a competent national court is required to carry out for the purposes of authorising coercive measures against undertakings. The Court's ruling is slightly complicated but is an essential part of the interpretation of the procedural regulations.)

Judgment

1. By judgment of 7 March 2000, received at the Court on 13 March 2000, the French Court of Appeal (Cour de Cassation) referred to the Court for a preliminary ruling under Article 234 of the EC Treaty two questions on the interpretation of Article 14 of Council Regulation No 17 of 1962 and of the judgment in Joined Cases 46/87 and 227/88 *Hoechst* v *Commission*.

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

Legal framework

Regulation No 17

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

> 1. ...
> ... the officials authorised by the Commission are empowered:
> (a) to examine the books and other business records;
> (b) to take copies of or extracts from the books and business records;
> (c) to ask for oral explanations on the spot;
> (d) to enter any premises, land and means of transport of undertakings.
> ...
> 3. Undertakings and associations of undertakings shall submit to investigations ordered by decision of the Commission. The decision shall specify the subject- matter and purpose of the investigation, appoint the date on which it is to begin and indicate the penalties provided for in Article 15(1)(c) and Article 16(1)(d) and the right to have the decision reviewed by the Court of Justice...
> 6. Where an undertaking opposes an investigation ordered pursuant to this Article, the Member State concerned shall afford the necessary assistance to the officials authorised by the Commission to enable them to make their investigation. Member States shall, after consultation with the Commission, take the necessary measures to this end before 1 October 1962.

National law

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

5. Article 48 of the Competition Order provides:

> Investigators may enter any premises and seize documents only within the framework of investigations requested by the Ministre chargé de l'économie (Minister for Economic Affairs) or the Conseil de la concurrence (Competition Council), and upon judicial authorisation being granted by order of the President of the Tribunal de grande instance... The judge must verify whether the request for authorisation before him is justified; that request must contain all such information as may justify the entry... He shall appoint one or more senior law enforcement officers to assist in those operations and to keep him informed of their progress...

[The Commission applied to the French authorities, as required by Regulation 17 of 1962, for their cooperation.]

14. The President of the Regional Court of Lille granted that application by order likewise dated 14 September 1998 (the authorisation order).

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

16. In its appeal against the authorisation order, Roquette Frères asserts that it was not open to the President of the Regional Court of Lille to order entry onto private premises without first satisfying himself, in the light of the documents which the administrative authority was required to provide to him, that there were indeed reasonable grounds for suspecting the existence of anti-competitive practices such as to justify the grant of coercive powers.

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

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

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

20. However, the Court of Appeal notes in that connection that, in the judgment of the European Court of Human Rights, judgment of 16 December 1992, in *Niemietz v. Germany*, postdating *Hoechst*, the European Court of Human Rights held that Article 8 of the ECHR may apply to certain professional or business activities or premises. The Court of Appeal also refers to Article 6(2) of the Treaty on European Union, which requires the European Union to respect as general principles of Community law the fundamental rights guaranteed by the ECHR,

and to Article 46(d) of the Treaty on European Union, which provides that Article 6(2) falls within the jurisdiction of the Court of Justice.

Questions for Preliminary Ruling

21. In those circumstances, the Court of Appeal stayed proceedings and referred the following questions to the Court for a preliminary ruling:
whether,
(1) having regard to the fundamental rights recognised by the Community legal order and to Article 8 of the European Convention for the Protection of Human Rights, the judgment in *Hoechst* of 21 September 1989 must be interpreted as meaning that a national court having jurisdiction under national law in competition matters to order entry upon premises and seizures there by officers of the administration, may not refuse to grant the authorisation requested where it considers that the information or evidence presented to it as providing grounds for suspecting the existence of anti-competitive practices on the part of the undertakings mentioned in the Commission's decision ordering an investigation is not sufficient to authorise such a measure or where, as in the present case, no information or evidence has been put before it;
(2) in the event that the Court of Justice declines to accept that the Commission is required to put before the competent national court the evidence or information in its possession which gives rise to a suspicion of anti-competitive practices, the national court is none the less empowered, given the abovementioned fundamental rights, to refuse to grant the application for entry and seizure if it considers, as in the present case, that the Commission decision does not state sufficient reasons and does not enable it to verify, in the specific circumstances, whether the application before it is justified, thereby making it impossible for it to carry out the review required by its national constitutional law.

Court's Ruling

The Court, in answer to the questions referred to it by the Court of Appeal by judgment of 7 March 2000, hereby rules:

1. In accordance with the general principle of Community law affording protection against arbitrary or disproportionate intervention by public authorities in the sphere of the private activities of any person, whether natural or legal, a national court having jurisdiction under domestic law to authorise entry upon and seizures at the premises of undertakings suspected of having infringed the competition rules is required to verify that the coercive measures sought in pursuance of a request by the Commission for assistance under Article 14(6) of Council Regulation 17 of 1962 are not arbitrary or disproportionate to the subject-matter of the investigation ordered. Without prejudice to any rules of domestic law governing the implementation of coercive measures, Community law precludes review by the national court of the justification of those measures beyond what is required by the foregoing general principle.

2. Community law requires the Commission to ensure that the national court in question has at its disposal all the information which it needs in order to carry out

the review which it is required to undertake. In that regard, the information supplied by the Commission must in principle include:
- a description of the essential features of the suspected infringement, that is to say, at the very least, an indication of the market thought to be affected and of the nature of the suspected restrictions of competition;
- explanations concerning the manner in which the undertaking at which the coercive measures are aimed is thought to be involved in the infringement in question;
- detailed explanations showing that the Commission possesses solid factual information and evidence providing grounds for suspecting such infringement on the part of the undertaking concerned;
- as precise as possible an indication of the evidence sought, of the matters to which the investigation must relate and of the powers conferred on the Community investigators; and
- in the event that the assistance of the national authorities is requested by the Commission as a precautionary measure, in order to overcome any opposition on the part of the undertaking concerned, explanations enabling the national court to satisfy itself that, if authorisation for the coercive measures were not granted on precautionary grounds, it would be impossible, or very difficult, to establish the facts amounting to the infringement.

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

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

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

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