COUR EUROPÉENNE DES DROITS DE L'HOMME
EUROPEAN COURT OF HUMAN RIGHTS

SECOND SECTION

CASE OF SOCIÉTÉ COLAS EST AND OTHERS v. FRANCE

(Application no. 37971/97)

JUDGMENT

STRASBOURG

16 April 2002

FINAL

16/07/2002

In the case of Société Colas Est and Others v. France,

The European Court of Human Rights (Second Section), sitting as a Chamber composed of:

Mr L. LOUCAIDES, *President*,
Mr J.-P. COSTA,
Mr C. BÎRSAN,
Mr K. JUNGWIERT,
Mr V. BUTKEVYCH,
Mrs W. THOMASSEN,
Mrs A. MULARONI, *judges*,
and Mrs S. DOLLÉ, *Section Registrar*,

Having deliberated in private on 19 June 2001 and 12 March 2002,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case originated in an application (no. 37971/97) against the French Republic lodged with the European Commission of Human Rights ("the Commission") under former Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by three French companies, Colas Est, Colas Sud-Ouest and Sacer ("the applicant companies"), based in Colmar, Mérignac and Boulogne-Billancourt respectively, on 2 December 1996. The applicant companies were represented before the Court by Mr F. Goguel, of the Paris Bar. The French Government ("the Government") were represented by their Agent, Mr R. Abraham, Director of Legal Affairs at the Ministry of Foreign Affairs.

2. The applicant companies alleged a violation of their right to respect for their home, relying on Article 8 of the Convention.

3. The Commission declared the application partly inadmissible on 21 October 1998 and adjourned the examination of the remainder of the complaints. The application was transmitted to the Court on 1 November 1998, when Protocol No. 11 to the Convention came into force (Article 5 § 2 of Protocol No. 11).

4. The application was allocated to the Third Section of the Court (Rule 52 § 1 of the Rules of Court). Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1.

5. By a decision of 19 June 2001 the Chamber declared the application admissible [*Note by the Registry*. The Court's decision is obtainable from the Registry].

6. The applicant companies and the Government each filed observations on the merits (Rule 59 § 1).

7. On 1 November 2001 the Court changed the composition of its Sections (Rule 25 § 1). This case was assigned to the newly composed Second Section (Rule 52 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

8. Following complaints from the National Union of Finishing Contractors (*Syndicat national des entreprises de second œuvre*) that large construction firms were engaging in certain illegal practices, France's central government authorities instructed the National Investigations Office to carry out a large-scale administrative investigation into the conduct of public-works contractors.

9. In a memorandum dated 9 October 1985 the head of the National Investigations Office – a body attached to the Competition and Consumer Affairs Department, which on 5 November 1985 became the Department for Competition, Consumer Affairs and Fraud Prevention ("the DGCCRF") – provided the officials responsible at inter-*département* level with details of the planned investigation into the conduct of roadworks contractors in local tendering procedures. Appended to the memorandum was a list of companies to be inspected, either at their head office or at local branch offices, in seventeen *départements*. The list included the three applicant companies.

10. On 19 November 1985 inspectors from the DGCCRF carried out simultaneous raids on fifty-six companies without authorisation from the companies' management and seized several thousand documents. At a later date, on 15 October 1986, they conducted further inquiries with a view to obtaining statements.

11. On each occasion the inspectors entered the applicant companies' premises under the provisions of Ordinance no. 45-1484 of 30 June 1945, which did not require any judicial authorisation. While carrying out the raids, the inspectors seized various documents containing evidence of unlawful agreements relating to certain contracts that did not appear in the list of contracts concerned by the investigation.

12. On 14 November 1986, on the basis of those documents, the Minister for Economic Affairs, Finance and Privatisation asked the Competition Commission (which became the Competition Council after the entry into force of Ordinance no. 86-1243 of 1 December 1986) to investigate certain acts which, in his opinion, amounted to collusion between separate firms, artificial competition between firms belonging to

one and the same group in local tendering procedures for roadworks contracts, and agreements restricting competition in the operation of mixing plants.

13. On 30 July 1987 the Competition Council was additionally asked by the head of the DGCCRF to investigate acts of a similar nature. That request concerned fifty-five companies, including the applicant companies.

14. In a decision of 25 October 1989, published in the Official Bulletin on Competition, Consumer Affairs and Fraud Prevention (*Bulletin officiel de la concurrence, de la consommation et de la répression des fraudes* – "the BOCCRF"), the Competition Council, finding evidence of practices outlawed by the ordinance of 30 June 1945 and the ordinance of 1 December 1986, fined the first applicant company 12,000,000 French francs (FRF), the second FRF 4,000,000 and the third FRF 6,000,000.

15. In a judgment of 4 July 1990 published in the BOCCRF, the Paris Court of Appeal upheld all those penalties. The applicant companies appealed on points of law.

16. In a judgment of 6 October 1992, likewise published in the BOCCRF, the Commercial Division of the Court of Cassation quashed the judgment of the Paris Court of Appeal, on the ground that its calculation of turnover and its assessment of the amount of the fines had had no basis in law. It remitted the case to the Paris Court of Appeal sitting with different judges.

17. At the retrial in the Court of Appeal, the applicant companies contested the lawfulness of the searches and seizures carried out by the inspectors, without any judicial authorisation, under the 1945 ordinance. They relied on Article 8 of the Convention.

18. On 8 April 1994 the head of the Competition and Planning Section of the DGCCRF submitted additional observations on behalf of the Minister for Economic Affairs, stating, *inter alia*:

> "... I will consider two points concerning the investigation procedure ... :
>
> (a) The inspections carried out under the 1945 ordinance should have been judicially authorised in advance, in accordance with the European Convention on Human Rights ...
>
> (b) Secondly, the seizures carried out by the DGCCRF officials went beyond the actual purpose of the inspections, in that documents not expressly referred to in the application for the investigation were taken from several companies' head offices.
>
> ... section 15 of Ordinance no. 45-1484 of 30 June 1945 is worded in very explicit terms, as it states that in the course of their investigations, inspectors may require the production of, and seize, documents of any kind that are likely to facilitate the accomplishment of their tasks, irrespective of whose hands the documents are in. The distinctive feature of this procedure was that, in contrast to the provisions now in force, which were introduced by section 48 of the ordinance of 1 December 1986, the inspections were not carried out under constant judicial supervision. In the absence of any provisions on the matter, it is hard to see what supervisory procedure should have been followed.

> ... it appears from the provisions of the 1945 ordinances that the inspectors were vested with powers of search and seizure which they exercised when carrying out their general task of obtaining evidence. The aforementioned section 15 must be interpreted in the light of section 16 of the same ordinance, by which inspectors were granted unrestricted access to premises ..."

19. On 4 July 1994 the differently constituted Paris Court of Appeal held, *inter alia*:

> "... the administrative investigation was carried out in accordance with section 15 of the aforementioned ordinance. By virtue of that provision, inspectors are authorised to require the production of, and to seize, documents of any kind that are likely to facilitate the accomplishment of their task, irrespective of whose hands the documents are in. They have a general right to inspect documents, reinforced by a power of seizure. Since no search took place in the course of the administrative investigation, the firms have no grounds for arguing that there has been interference with their private life or home in breach of Article 8 of the Convention ..."

20. The Court of Appeal fined the first applicant company FRF 5,000,000, the second FRF 3,000,000 and the third FRF 6,000,000. The applicant companies again appealed on points of law.

21. In a judgment of 4 June 1996 published in the BOCCRF, the Court of Cassation dismissed their appeal. In particular, it dismissed their complaint under Article 8 of the Convention, holding that "the administrative investigation ... [had] not give[n] rise to any searches or coercive measures".

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. The rules applicable at the material time

22. At the time of the impugned inspections (19 November 1985 and 15 October 1986), sections 15 and 16 of Ordinance no. 45-1484 of 30 June 1945 on the detection, prosecution and punishment of offences against legislation on trade and industry provided:

Book II: Detection of offences and seizure

Section 15

> "The officials referred to in section 6 (subsections (1) and (2)) may require the production of, and may seize, documents of any kind ... that are likely to facilitate the accomplishment of their task, irrespective of whose hands the documents are in. They shall be entitled to take samples.
>
> Officials from the Department of Internal Trade and Prices, the Revenue, Customs and Excise, the Fraud Office and the Weights and Measures Office may also, notwithstanding professional confidentiality, consult any documents kept by State, *département* and municipal authorities or offices, by public and quasi-public corporations, by institutions and bodies under State supervision and by firms and services granted a concession by the State, *départements* and municipal authorities."

Section 16

"... The officials referred to in section 6 shall have unrestricted access to shops if the latter do not constitute the trader's residence, in which case the search may only take place in accordance with the provisions of subsection 5, and to back-shops, offices, annexes, warehouses, premises used for processing, production, sales, dispatch or storage and, in general, to any premises, subject, in the case of residential premises, to the provisions of the fifth subsection of this section ..."

B. The rules applicable later

23. The relevant provisions of Ordinance no. 86-1243 of 1 December 1986 on free prices and competition, repealing Ordinance no. 45-1484 of 30 June 1945, read as follows:

Section 47

"Inspectors may enter any premises, land or means of transport used for occupational purposes, may require the production of books, invoices and any other business documents and make copies thereof, and may obtain information and explanations by means of a summons or at the scene.

They may request the authority to which they are answerable to appoint an expert to draw up any necessary reports with the participation of all the parties."

Section 48

"Inspectors may make searches of any premises and seize documents solely in the context of investigations requested by the Minister for Economic Affairs or the Competition Council, and subject to judicial authorisation by an order of the President of the *tribunal de grande instance* within whose territorial jurisdiction the premises to be searched are situated, or a judge delegated by him. Where the premises are situated within the territorial jurisdiction of several courts and are all to be searched simultaneously, a single order may be issued by one of the relevant presidents.

The judge shall check that each application for leave made to him is well-founded; each request shall contain all information that may justify the search.

Searches and seizures shall be carried out under the authority and supervision of the judge who has authorised them. He shall designate one or more senior police officers [*officiers de police judiciaire*] with responsibility for being present at the operations and keeping him informed of their progress. Where they take place outside the territorial jurisdiction of his *tribunal de grande instance*, he shall issue a rogatory letter, for the purposes of such supervision, to the President of the *tribunal de grande instance* within whose jurisdiction the search is being made.

The judge may go to the scene during the operation. He may decide at any time to suspend or halt the search.

Against an order referred to in the first subsection of this section there shall lie only an appeal on points of law as provided in the Code of Criminal Procedure. Such an appeal shall not have suspensive effect.

Searches may not be commenced before 6 a.m. or after 9 p.m. They shall be made in the presence of the occupier of the premises or his representative.

Only the inspectors, the occupier of the premises or his representative and the senior police officer may inspect documents before they are seized.

Inventories shall be made and documents placed under seal, in accordance with Article 56 of the Code of Criminal Procedure.

The originals of the report and of the inventory shall be forwarded to the judge who ordered the search.

Items and documents that are no longer useful for establishing the truth shall be returned to the occupier of the premises."

C. Case-law

24. The domestic case-law at the material time may be summarised as follows.

1. Decision of 29 December 1983 by the Constitutional Council

In the field of taxation the Constitutional Council rejected section 89 of the Budget Act for 1984, concerning the investigation of income-tax and turnover-tax offences, holding, *inter alia*:

"While the needs of the Revenue's work may dictate that tax officials should be authorised to make investigations in private places, such investigations can only be conducted in accordance with Article 66 of the Constitution, which makes the judiciary responsible for protecting the liberty of the individual in all its aspects, in particular the inviolability of the home. Provision must be made for judicial participation in order that the judiciary's responsibility and supervisory power may be maintained in their entirety ..."

*2. Commentary by Mr R. Drago and Mr A. Decocq (*Juris-Classeur périodique *1984, J. no. 20160)*

"...

I

With regard to the provisions referred to the Council, the significance of its decision is clear from a constitutional point of view ...

... the decision of 29 December 1983 must be examined ... in relation to recognition of the inviolability of the home as a constitutional principle.

... The question on which the Council was asked to give a ruling was not whether sections 7, 15, 16 and 17 of the 1945 ordinance were constitutional but whether the powers conferred by those provisions could be extended to tax officials in matters concerning direct taxation and VAT [value-added tax].

...

The issue under consideration was therefore wholly extraneous to the subject matter of the 1945 ordinance and there was no necessary link between the two types of instrument.

Obviously, that does not mean that the Constitutional Council indirectly, by implication, acknowledged the constitutionality of the 1945 ordinance. It merely ignored the question. But the principles it set forth in the rest of the decision show that certain rules laid down in the 1945 ordinance ... have become incompatible with constitutional law under the 1958 Constitution (see section II A. below).

...

II

The Constitutional Council's decision has had the effect of highlighting the fact that several provisions of existing statutes providing for purely administrative searches are incompatible with the constitutional principles it has laid down ...

A. The existing provisions for purely administrative searches are incompatible with the constitutional principles set out in the decision in issue.

(1) Such provisions, which are exceptions to the general law governing searches, are fairly numerous.

...

Article 64 of the Customs Code ... And Article 454 of the same Code ...

Articles L. 26 and L. 38 of the new Tax Code (Code of Tax Procedure) ...

Among the most recent provisions, particular mention should be made of those in the two ordinances of 30 June 1945, which serve as the foundation of the economic branch of the criminal law inherited from the Vichy regime.

...

Sections 5, 15 and 16 (referred to above) of Ordinance no. 45-1484 allow searches to be made, with a view to detecting economic offences, ... of any premises save residential ones, by numerous categories of officials acting alone, ... and of residential premises by any such officials who have been given special authorisation to that end by the Director-General of Competition and Consumer Affairs, and who must be

accompanied by a local council officer or a senior police officer and operate during daytime hours only.

...

(2) It is quite obvious that all the provisions examined above are incompatible with the principles laid down in the Constitutional Council's decision.

In the great majority of cases there is no provision for any review by the ordinary courts (for example, in the Customs Code, the Code of Tax Procedure as regards searches of premises other than exclusively residential ones, the ordinance of 30 June 1945 in the same circumstances ...).”

D. Court of Cassation's 1988 report

25. A 1988 report by the Court of Cassation gives the following analysis of the relevant domestic law after the events in issue:

“The right of tax, customs and competition officials to make searches and seizures” (Study by Bernard Hatoux, judge of the Court of Cassation)

“... (b) The effect of the decision of 29 December 1983 is clarified by the provisions that were declared invalid.

... The Council's decision has another effect, as all legal writers have observed. The provisions of the 1945 ordinance ... would all have fallen foul of the Council if it had existed when they were promulgated. It was therefore implicitly established that they were incompatible with the Constitution. Although they could not be retrospectively declared invalid, it was no longer possible for them to be used as a reference in future.

That is all the truer as the government has seen in the Council's decision the same implication of invalidity, again noted by legal writers, with regard to the provisions creating the right to make searches in relation to indirect taxation, customs and economic offences, which have now been repealed and replaced by new ones designed to conform to the Council's requirements ...”

III. CASE-LAW OF THE COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES AND OF THE COURT OF FIRST INSTANCE

26. In its judgment of 21 September 1989 in *Hoechst v. Commission* (Joined Cases 46/87 and 227/88 [1989] European Court Reports (ECR) 2859), the Court of Justice of the European Communities (CJEC) held:

“17. Since the applicant has also relied on the requirements stemming from the fundamental right to the inviolability of the home, it should be observed that, although the existence of such a right must be recognised in the Community legal order as a principle common to the laws of the Member States in regard to the private dwellings of natural persons, the same is not true in regard to undertakings, because there are not inconsiderable divergences between the legal systems of the Member States in regard to the nature and degree of protection afforded to business premises against intervention by the public authorities.

18. No other inference is to be drawn from Article 8 ... of the ... Convention ... The protective scope of that article is concerned with the development of man's personal

freedom and may not therefore be extended to business premises. Furthermore, it should be noted that there is no case-law of the European Court of Human Rights on that subject.

19. None the less, in all the legal systems of the Member States, any intervention by the public authorities in the sphere of private activities of any person, whether natural or legal, must have a legal basis and be justified on the grounds laid down by law, and, consequently, those systems provide, albeit in different forms, protection against arbitrary or disproportionate intervention. The need for such protection must be recognised as a general principle of Community law. In that regard, it should be pointed out that the Court has held that it has the power to determine whether measures of investigation taken by the Commission under the ECSC Treaty are excessive (judgment of 14 December 1962 in Joined Cases 5 to 11 and 13 to 15/62, *San Michele and Others v. Commission* [1962] ECR 449)."

The CJEC reaffirmed that position in two judgments of 17 October 1989, *Dow Benelux v. Commission* (Case 85/87 [1989] ECR 3137, paragraphs 28-30) and *Dow Chemical Ibérica and Others v. Commission* (Joined Cases 97-99/87 [1989] ECR 3165, paragraphs 14-16).

27. In its judgment of 20 April 1999 in *Limburgse Vinyl Maatschappij NV and Others v. Commission* (Joined Cases T-305/94, T-307/94, T-313/94 to T-316/94, T-318/94, T-325/94, T-328/94, T-329/94 and T-335/94), the Court of First Instance of the European Communities held:

"398. ... the applicants argue that in the course of its investigations the Commission infringed the principle of inviolability of the home within the meaning of Article 8 of the ECHR as interpreted in the case-law of the European Court of Human Rights (*Niemietz v. Germany*, judgment of 16 December 1992, Series A no. 251-B), whose review is more extensive than that performed in the context of Community law ...

403. The Commission begins by arguing that the ECHR does not apply to Community competition procedures. ...

404. As to the merits of the plea, the Commission considers that the relevance of the case-law of the Court of Justice (*Hoechst* and *Dow Benelux*, cited above) is not affected by Article 8 of the ECHR as interpreted by the European Court of Human Rights.

Findings of the Court

...

(ii) The merits of the plea

417. For the reasons set out above ..., the plea must be understood as alleging infringement of the general principle of Community law ensuring protection against intervention by the public authorities in the sphere of private activities of any person, whether natural or legal, which are disproportionate or arbitrary (*Hoechst*, paragraph 19; *Dow Benelux*, paragraph 30; Joined Cases 97/87, 98/87 and 99/87 *Dow Chemical Ibérica v. Commission* [1989] ECR 3165, paragraph 16). ...

– The first part of the plea, concerning the validity of the formal acts relating to the investigations

419. ... In so far as the pleas and arguments put forward today by LVM and DSM are identical or similar to those put forward at that time by *Hoechst*, the Court sees no reason to depart from the case-law of the Court of Justice.

420. That case-law is, moreover, based on the existence of a general principle of Community law, as referred to above, which applies to legal persons. The fact that the case-law of the European Court of Human Rights concerning the applicability of Article 8 of the ECHR to legal persons has evolved since [the judgments cited above] therefore has no direct impact on the merits of the solutions adopted in those cases."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

28. The applicant companies considered that the raids carried out by official inspectors on 19 November 1985 and 15 October 1986, without any supervision or restrictions, had infringed their right to respect for their home. They relied on Article 8 of the Convention, the relevant parts of which provide:

"1. Everyone has the right to respect for ... 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 ... for the prevention of ... crime ... or for the protection of the rights and freedoms of others."

29. The Government submitted that the 1945 ordinance had conferred on inspectors a general right of inspection, supplemented, where necessary, by a power of seizure. Although the exercise of those powers was not subject to prior authorisation by a judge, *ex post facto* review had been possible in the ordinary or administrative courts. The Government pointed out that, although the investigations in the instant case had been governed by the provisions of the 1945 ordinance, the new procedural arrangements laid down in the ordinance of 1 December 1986 had been applied, so that the applicant companies had been able to avail themselves of the newly established judicial remedies to complain of the manner in which the inspections had been conducted. They argued that the current rules distinguished between ordinary investigative powers and powers requiring prior authorisation by a judge. It followed from sections 47 and 48 of the 1986 ordinance, taken together, that the inspectors' right of unannounced access could be exercised only in respect of business premises, and for the sole purpose of inspecting documents. The DGCCRF officials' power to enter business premises and seize documents was subject to authorisation in the form of an order by a judge of the ordinary courts, against which an appeal lay to the Court of Cassation. Such operations were supervised by the judge.

30. The Government pointed out that, although the Court had made clear that professional or business addresses were protected by Article 8, all the cases in which it had made that finding had concerned premises where a

natural person had carried on an occupation. Relying on *Niemietz v. Germany* (judgment of 16 December 1992, Series A no. 251-B), they considered that in the instant case, which concerned the business premises of public limited companies, the entitlement to interfere "might well be more far-reaching". They submitted that, while juristic persons could enjoy similar rights under the Convention to those afforded to natural persons, they could not claim a right to the protection of their professional or business premises with as much force as an individual could in relation to his professional or business address.

31. The Government further considered that the operations in issue could not be treated as a general search (*perquisition*) within the meaning of the Code of Criminal Procedure or as a house search (*visite domiciliaire*) within the meaning of the Customs Code. Their nature, purpose and effect had been different. Thus, they had not been carried out by senior police officers or sworn officials with a view to establishing criminal or customs offences for which individuals could be imprisoned, as in *Funke v. France*, *Crémieux v. France* and *Miailhe v. France (no. 1)* (judgments of 25 February 1993, Series A nos. 256-A, 256-B and 256-C, respectively). The inspectors in the instant case had gone to the applicant companies' premises and had exercised a general right to inspect documents in accordance with the provisions of section 15 of Ordinance no. 45-1484 of 30 June 1945. The aim had been to obtain documents in connection with an administrative investigation into anti-competitive practices for which only fines and not criminal penalties could be imposed. Determining what action to take in the light of the DGCCRF's investigations and imposing fines had been entrusted to an independent administrative authority, the Competition Council, which was responsible for monitoring compliance with legislation on trade and industry. The procedure was a special one, even though it complied with the adversarial principle and remained subject to review by the judges of the Court of Appeal. In the instant case both the Paris Court of Appeal and the Court of Cassation had taken the view that the administrative investigation had not given rise to any searches or coercive measures.

32. The Government accepted, however, that the exercise of the right to inspect documents had amounted to interference with the applicant companies' right to respect for their home within the meaning of Article 8 of the Convention.

They submitted that the inspections had been carried out in accordance with section 15 of the ordinance of 30 June 1945, which laid down the scope and manner of exercise of the power conferred on the DGCCRF's inspectors, thereby eliminating any risk of arbitrariness. Admittedly, the courts' review took place *ex post facto*, but it was effective and genuine. The interference had therefore been in accordance with the law. The Government argued that the interference had sought to establish whether any anti-competitive practices were occurring. It had therefore pursued legitimate aims for the purposes of the second paragraph of Article 8, as the

inspections had been carried out in the interests of both "economic well-being" and "the prevention of crime" (see, *mutatis mutandis*, *Funke*, cited above, p. 24, § 52).

33. The Government considered that the interference with the applicant companies' rights did not appear disproportionate, regard being had to the scale of the operations conducted simultaneously in order to prevent the disappearance or concealment of evidence whose production had been necessary for the prosecution of offences. They also relied on the margin of appreciation left to States in assessing the need for interference. It was accepted that the entitlement to interfere was more far-reaching where business premises or professional activities were concerned. In the instant case, the right of inspection had been exercised on juristic persons' business premises, which were not always at the official address of their registered office, and had not been accompanied by "intrusive" measures such as searches or coercion. In any event, the Government submitted that the applicant companies could not claim to have sustained any obvious damage as a result of the interference, as they had not alleged a violation of their right until many years after the impugned measures had been taken.

34. Accordingly, the Government considered that the inspectors' exercise of their right to have documents made available had not breached Article 8 of the Convention. In conclusion, they argued that the complaint was manifestly ill-founded and asked the Court to dismiss the application.

35. The applicant companies contended that a house search most certainly had been carried out on their premises. Ordinance no. 45-1484 of 30 June 1945 afforded officials the possibility of unrestricted access to all premises other than residential ones. The interference had therefore been in accordance with the law.

They pointed out that the ordinance of 1 December 1986 had been issued more than a year after the events in question. The safeguards laid down in the ordinance in relation to searches and seizures had therefore not existed in the legislation applicable at the time of the events. They submitted that if the Court considered that it did not have to express its opinion on the legislative reforms carried out after the material time, the fact that the ordinance of 1 December 1986 had introduced a judicial authorisation procedure, together with guarantees of judicial supervision in the course of inspections, showed that the legislation applicable at the material time had made no provision for any such authorisation or supervision.

36. The aim pursued by the interference did not call for any observations on the part of the applicant companies.

They disputed the Government's submission that the inspectors had done no more than have documents made available for inspection. Relying on the additional observations submitted by the Minister for Economic Affairs in reply to their pleadings alleging a violation of Article 8 of the Convention, they inferred that the minister made no distinction between the right of inspection and the right of search, since he had referred to the judicial

supervision introduced by section 48 of the ordinance of 1 December 1986, which applied solely to "searches of any premises" – that is to say, either house searches or general searches. They concluded that both the minister and his department, to which the inspectors were answerable, regarded the right of inspection (section 15) and the right of search (section 16) as an indivisible whole. Besides, the fact that the precise nature of the operations was in question showed that the inspectors' powers were not subject to any safeguards or limits whatsoever. The inspectors' reports had described the "seizure" of documents without indicating whether the documents had been obtained by exercising the right of inspection or the right of search; no safeguards had been in place in either case. They observed that in the absence of any judicial supervision of the operations, it had been possible for the inspectors to switch at any time from exercising the right of inspection to exercising the right of search. Lastly, they argued that the reference in the judgments of the Paris Court of Appeal and the Court of Cassation to the absence of coercion was purely theoretical. Since inspectors had the power and the practical opportunity to make searches, even where they merely availed themselves of their right of inspection, they did so with the underlying threat of a possible search.

37. Referring to *Funke*, *Crémieux* and *Miailhe (no. 1)*, the applicant companies pointed out that although the state of competition law had at the material time been similar to that of customs law, the absence of any safeguards had been even more blatant in competition law. They considered that the Government could not rely on the argument that the measures in question had "not been carried out by senior police officers".

The applicant companies submitted that the argument that the procedural arrangements laid down in the 1986 ordinance had been applied in the investigations already under way could not be accepted, since the measures in issue had been carried out on 19 November 1985, more than a year before the ordinance of 1 December 1986 had been issued. The new supervisory measures laid down in the ordinance were linked to the requirement of prior judicial authorisation in the form of an order. In the instant case, in the absence of any judicial authorisation, no judge had been able to supervise the search and the seizure. The possibility of *ex post facto* review stemmed from a court order which could be challenged by means of an appeal on points of law to the Court of Cassation. In practice, however, the applicant companies had not had any specific judicial remedy at the material time in respect of the measures in issue. They had been able to challenge them solely in the proceedings on the merits many years afterwards.

38. Consequently, the applicant companies considered that a balance had not been struck between the aims pursued and the measures available. Even if the Court were to construe the judgment in *Niemietz* as permitting greater interference with the right to respect for professional or business premises, such interference could not be regarded as lawful where it was not attended by supervision or by any constraints on investigative powers. They further

submitted that the argument that the measures could have resulted only in fines and not in criminal penalties properly speaking did not carry as much weight as the Government had maintained. Lastly, the fact that the applicants were companies was particularly irrelevant as the items seized in the instant case had included not only business documents but also employees' personal papers (handwritten notes and extracts from diaries recording personal appointments). The total number of documents seized was unknown because no complete inventory had been drawn up covering all the firms concerned; the volume of the documents submitted to the courts had amounted to several cubic metres.

39. The applicant companies accordingly submitted that there had been a violation of Article 8 of the Convention.

A. Principles established under Article 8 of the Convention and their applicability to the "homes" of juristic persons

40. The Court notes at the outset that the present case differs from those in *Funke*, *Crémieux* and *Miailhe (no; 1)*, cited above, in that the applicants are juristic persons alleging a violation of their right to respect for their "home" under Article 8 of the Convention. However, the Court would point out that, as it has previously held, the word "*domicile*" (in the French version of Article 8) has a broader connotation than the word "home" and may extend, for example, to a professional person's office (see *Niemietz*, cited above, p. 34, § 30).

In *Chappell v. the United Kingdom* (judgment of 30 March 1989, Series A no. 152-A, pp. 12-13, § 26, and p. 26, § 63), the Court considered that a search conducted at a private individual's home which was also the registered office of a company run by him had amounted to interference with his right to respect for his home within the meaning of Article 8 of the Convention.

41. The Court reiterates that the Convention is a living instrument which must be interpreted in the light of present-day conditions (see, *mutatis mutandis*, *Cossey v. the United Kingdom*, judgment of 27 September 1990, Series A no. 184, p. 14, § 35 *in fine*). As regards the rights secured to companies by the Convention, it should be pointed out that the Court has already recognised a company's right under Article 41 to compensation for non-pecuniary damage sustained as a result of a violation of Article 6 § 1 of the Convention (see *Comingersoll v. Portugal* [GC], no. 35382/97, §§ 33-35, ECHR 2000-IV). Building on its dynamic interpretation of the Convention, the Court considers that the time has come to hold that in certain circumstances the rights guaranteed by Article 8 of the Convention may be construed as including the right to respect for a company's registered office, branches or other business premises (see, *mutatis mutandis*, *Niemietz*, cited above, p. 34, § 30).

42. In the instant case, the Court observes that during a large-scale administrative investigation, officials from the DGCCRF went to the applicant companies' head offices and branches in order to seize several thousand documents. It notes that the Government did not dispute that there had been interference with the applicant companies' right to respect for their home (see paragraph 32 above), although they argued that the companies could not claim a right to the protection of their business premises "with as much force as an individual could in relation to his professional or business address" (see paragraph 30 above) and that, consequently, the entitlement to interfere "might well be more far-reaching".

The Court must therefore determine whether the interference with the applicant companies' right to respect for their home satisfied the requirements of paragraph 2 of Article 8.

B. Requirement of a measure "in accordance with the law"

43. The Court reiterates that an interference cannot be regarded as "in accordance with the law" unless, first of all, it has some basis in domestic law (see, *mutatis mutandis*, *Chappell*, cited above, p. 22, § 52). In accordance with the case-law of the Convention institutions, in relation to paragraph 2 of Article 8 of the Convention, the term "law" is to be understood in its "substantive" sense, not its "formal" one. In a sphere covered by the written law, the "law" is the enactment in force as the competent courts have interpreted it (see, *mutatis mutandis*, *Kruslin v. France* and *Huvig v. France*, judgments of 24 April 1990, Series A nos. 176-A and 176-B, pp. 21-22, § 29, and p. 53-54, § 28, respectively).

In the instant case, the searches and seizures of documents by DGCCRF inspectors fell within the scope of the powers granted to them by sections 15 and 16(2) of the ordinance of 30 June 1945 governing their investigative powers for the detection of economic offences relating to competition. The Court therefore concludes that the interference was "in accordance with the law".

C. Legitimate aim

44. The purpose of the interference with the applicant companies' right to respect for their premises was to obtain evidence of unlawful agreements between public-works contractors in the award of roadworks contracts. The interference was manifestly in the interests of both "the economic well-being of the country" and "the prevention of crime".

It remains to be determined whether the interference appears proportionate and may be regarded as necessary for achieving those aims.

D. "Necessary in a democratic society"

45. The Court notes that the Government submitted that, in accordance with the 1945 ordinance, the officials had exercised only a general right of inspection, supplemented by a power of seizure, and that no "house searches" or "general searches" had been carried out. Although the exercise of the inspectors' powers had not been subject to prior authorisation by a judge, it had been reviewed *ex post facto* by the courts. The Government considered that the interference did not appear disproportionate, and they relied on the State's margin of appreciation, which could be more far-reaching where business premises or professional activities were concerned.

The applicant companies considered that a house search had been carried out on their premises and pointed out that sections 15 and 16(2) of the 1945 ordinance empowered officials to make such searches and seizures without any prior judicial authorisation or any supervision in the course of such operations. The safeguards laid down in the 1986 ordinance in relation to searches and seizures had not existed in the legislation applicable at the material time. The applicant companies accordingly submitted that the interference had not been proportionate to the aims pursued.

46. The Court notes that the inspections ordered by the authorities were carried out simultaneously at the applicant companies' head offices and branches included in a "list of companies to be inspected" (see paragraph 9 above). The inspectors entered the premises of the applicant companies' head or branch offices, without judicial authorisation, in order to obtain and seize numerous documents containing evidence of unlawful agreements. It therefore appears to the Court that the operations in issue, on account of the manner in which they were carried out, constituted intrusions into the applicant companies' "homes" (see paragraph 11 above). The Court considers that although the Ministry of Economic Affairs, to which the authority responsible for ordering investigations was attached at the material time, made no distinction between the power of inspection and the power of search or entry, as the applicant companies pointed out (see paragraph 18 above), it is not necessary to determine this issue, as at all events "the interference complained of is incompatible with Article 8 in other respects" (see, *mutatis mutandis*, *Funke*, *Crémieux* and *Miailhe (no. 1)*, cited above, p. 23, § 51, p. 61, § 34, and p. 88, § 32, respectively).

47. Admittedly, the Court has consistently held that the Contracting States have a certain margin of appreciation in assessing the need for interference, but it goes hand in hand with European supervision. The exceptions provided for in paragraph 2 of Article 8 are to be interpreted narrowly (see *Klass and Others v. Germany*, judgment of 6 September 1978, Series A no. 28, p. 21, § 42), and the need for them in a given case must be convincingly established (see *Funke*, *Crémieux* and *Miailhe (no. 1)*, cited above, p. 24, § 55, p. 62, § 38, and p. 89, § 36, respectively).

48. The Court considers that although the scale of the operations that were conducted – as the Government pointed out – in order to prevent the disappearance or concealment of evidence of anti-competitive practices

justified the impugned interference with the applicant companies' right to respect for their premises, the relevant legislation and practice should nevertheless have afforded adequate and effective safeguards against abuse (ibid., *mutatis mutandis*, pp. 24-25, § 56, p. 62, § 39, and pp. 89-90, § 37, respectively).

49. The Court observes, however, that that was not so in the instant case. At the material time – and the Court does not have to express an opinion on the legislative reforms of 1986, whereby inspectors' investigative powers became subject to prior authorisation by a judge – the relevant authorities had very wide powers which, pursuant to the 1945 ordinance, gave them exclusive competence to determine the expediency, number, length and scale of inspections. Moreover, the inspections in issue took place without any prior warrant being issued by a judge and without a senior police officer being present (ibid., *mutatis mutandis*, p. 25, § 57, p. 63, § 40, and p. 90, § 38, respectively). That being so, even supposing that the entitlement to interfere may be more far-reaching where the business premises of a juristic person are concerned (see, *mutatis mutandis*, *Niemietz*, cited above, p. 34, § 31), the Court considers, having regard to the manner of proceeding outlined above, that the impugned operations in the competition field cannot be regarded as strictly proportionate to the legitimate aims pursued (see *Funke*, *Crémieux* and *Miailhe (no. 1)*, cited above, p. 25, § 57, p. 63, § 40, and p. 90, § 38, respectively).

50. In conclusion, there has been a violation of Article 8 of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

51. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the decision of the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

52. The applicant companies pointed out that the Government had taken nearly three years, following the Constitutional Council's decision of 29 December 1983, to repeal the 1945 ordinance and that the administrative authorities had in the meantime continued to implement regulations which they must have known to be contrary to the Constitution and to the principles enshrined in Article 8 of the Convention. It had been during that very period that the inspections in issue had been carried out. The applicant companies further stated that no advice had been issued to the inspectors to exercise a minimum of caution. Having regard to the proceedings after the

case had been remitted to the Paris Court of Appeal, the applicant companies argued that that court had not drawn the necessary inferences from the observations submitted by the minister in reply to their pleadings alleging a violation of Article 8 of the Convention. In their submission, the minister's reasoning should logically have led the court to find, in the light of *Funke*, *Crémieux* and *Miailhe (no. 1)*, that there had been a violation of Article 8 and therefore to set aside the investigation proceedings. The Paris Court of Appeal's finding that only the right of inspection had been exercised in the instant case had therefore been made *proprio motu* and was a statement of principle which did not follow from any of the material before it. The applicant companies considered that the judicial authorities had "salvaged" the proceedings in disregard of the Court's case-law. In practical terms, the actions complained of had resulted in the following fines for the applicant companies: 5,000,000 French francs (FRF) for Colas Est, FRF 3,000,000 for Colas Sud-Ouest and FRF 6,000,000 for Sacer.

The applicant companies submitted that the award of just satisfaction should compensate for the unfairness of having had to pay fines that would not have been payable if the documents seized in breach of Article 8 had not been made available to the courts dealing with the case and used by them.

They consequently asked the Court to award them reimbursement of the fines they had paid in compensation for the damage sustained.

53. The Government considered that the applicant companies' claim for reimbursement of the fines they had been ordered to pay – amounting to FRF 14,000,000 – was wholly disproportionate. In their submission, the fines had been intended to punish proven anti-competitive practices and there was no evidence to suggest that if the inspections carried out at the applicant companies' offices had taken place within a different legal framework, the outcome of the proceedings would not have been exactly the same and a penalty would not have been imposed. They therefore argued that the applicant companies' claims under this head must be dismissed as no causal link had been established between the alleged violation, the circumstances in which the inspection of the companies' offices had been carried out and the damage complained of. Accordingly, they submitted that the finding of a violation would be sufficient to make good any damage sustained by the applicant companies. They pointed out that in *Crémieux*, which had been relied on by the applicant companies and had concerned a similar complaint, the Court had held that the finding of a violation constituted in itself sufficient just satisfaction.

54. The Court notes that the applicant companies' claim in respect of the alleged damage corresponds to the amount of the fines they were ordered to pay as a result of the domestic courts' judgments. Admittedly, the Court cannot speculate as to what the outcome of the inspectors' operations would have been if the procedure had complied with Article 8 of the Convention. It would point out, however, that it has found a violation of Article 8 on the

ground that the investigation proceedings did not satisfy the requirements of that provision.

55. It therefore concludes that the applicant companies certainly sustained non-pecuniary damage and, accordingly, making its assessment on an equitable basis as required by Article 41, awards each of the applicant companies 5,000 euros (EUR) under that head.

B. Costs and expenses

56. The applicant companies claimed the legal costs incurred during the domestic proceedings as a whole, submitting invoices in support of their claim.

The Court reiterates that if it finds that there has been a violation of the Convention, it may award the applicant the costs and expenses incurred before the national courts for the prevention or redress of the violation (see *Zimmermann and Steiner v. Switzerland*, judgment of 13 July 1983, Series A no. 66, p. 14, § 36, and *Hertel v. Switzerland*, judgment of 25 August 1998, *Reports of Judgments and Decisions* 1998-VI, p. 2334, § 63).

In the instant case the Court notes that the point at which the applicant companies first relied on their right to respect for their home – the right which it has found to have been violated – was when the case was remitted by the Court of Cassation to the Paris Court of Appeal. It further notes that they supported their claims by submitting invoices for the costs incurred from that time onwards and that the amounts concerned are broken down between the applicant companies as follows: FRF 91,700 for Colas Est, FRF 184,100 for Colas Sud-Ouest, and FRF 31,700 for Sacer. However, the Court also considers that not all of those costs were "necessarily" incurred in order to remedy the violation it has found and that the claim cannot be considered "reasonable" as to quantum. Accordingly, the Court, making its assessment on an equitable basis, awards the applicant companies the following amounts: EUR 3,500 to Colas Est, EUR 7,000 to Colas Sud-Ouest, and EUR 1,200 to Sacer, together with any value-added tax (VAT) that may be chargeable.

As regards the costs incurred before the Convention institutions, the Court awards each of the applicant companies EUR 3,200, together with any VAT that may be chargeable.

C. Default interest

57. According to the information available to the Court, the statutory rate of interest applicable in France at the date of adoption of the present judgment is 4.26% per annum.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Holds* that there has been a violation of Article 8 of the Convention;

2. *Holds*
   (a) that the respondent State is to pay the applicant companies, within three months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention, the following amounts:
      (i) for non-pecuniary damage, EUR 5,000 (five thousand euros) to each company;
      (ii) for costs and expenses, EUR 6,700 (six thousand seven hundred euros) to the Colas Est company, EUR 10,200 (ten thousand two hundred euros) to the Colas Sud-Ouest company and EUR 4,400 (four thousand four hundred euros) to the Sacer company, together with any value-added tax that may be chargeable;
   (b) that simple interest at an annual rate of 4.26% shall be payable on these sums from the expiry of the above-mentioned three months until settlement;

3. *Dismisses* the remainder of the applicant companies' claims for just satisfaction.

Done in French, and notified in writing on 16 April 2002, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

S. DOLLÉ
Registrar

L. LOUCAIDES
President