OPINION OF ADVOCATE GENERAL SIR GORDON SLYNN DELIVERED ON 30 SEPTEMBER 1981

My Lords,

By a letter dated 19 December 1980, the Commission's Director-General for Competition informed International Business Machines Corporation of Armonk, New York, ("IBM"), that the Commission had initiated on 10 December 1980 a proceeding against IBM pursuant to Article 3 of Council Regulation No 17 of 6 February 1962, OJ 204/62, page 87. The letter stated that after considering information resulting from its own investigations, and complaints from five companies including Memorex SA, ("Memorex"), the Commission concluded on the basis of the information in its possession, that IBM held a dominant position in relation to certain products supplied within the common market or within a substantial part of it and that certain of its practices were abuses of that dominant position within the meaning of Article 86 of the EEC Treaty. Accordingly, the letter stated, the Commission was considering adopting a decision finding that Article 86 had been infringed and requiring the infringements to be brought to an end. The Commission would also consider imposing on IBM a fine in respect of the infringements found and periodic penalty payments. The letter continued as follows:

"Before taking a decision, the Commission wishes to take account of any observations which you may wish to make. Accordingly, and in accordance with Article 19 (1) of Council Regulation No 17/62 and with the provisions of Council Regulation No 99/63 (OJ Special Edition 1963/64, p. 47). The Commission now invites you to put to it, in writing and orally, your opinion on the objections raised."

The Commission gave IBM until 30 April 1981 to make its observations. There was enclosed with the letter a statement of objections of the kind described in Article 2 of Regulation 99/63. Together with its appendices, this runs to 1150 pages.

It is unnecessary to set out in detail the substance of the Commission's objections at this stage. It is sufficient to say by way of summary that IBM is an important manufacturer of electronic data-processing equipment, including central processing units for computers and the associated software; and that the Commission charges IBM with conduct said to amount to an abuse of a dominant position in four respects. The first two abuses are said to consist in IBM's alleged policy of supplying, together with computer systems in certain ranges, software products called Systems Control Programming, or a fixed quantity of main memory, with the effect (according to the Commission) of excluding competitors from a considerable part of the market in the

software or main memory compatible with IBM's machines. The third abuse is alleged to consist in IBM's policy of not disclosing to its competitors any changes to the interfaces forming part of the existing architecture of the IBM line of computer systems in advance of their delivery, thereby placing at a disadvantage manufacturers of equipment compatible with IBM's machines. The fourth is said to consist in IBM's alleged policy of refusing to supply a service known as an Installation Productivity Option to users of central processing units compatible with IBM systems but produced by other manufacturers.

On receipt of this letter and the statement of objections IBM asked for particulars of the acts authorizing the initiation of the proceedings and the delivery of the statement of objections. IBM's representatives subsequently explained that one of their reasons for seeking this information was to discover what consideration, if any, was given by those who adopted these acts to the Commission's duty to act in conformity with international law. In its reply, the Commission maintained that both the initiation of the proceedings and the authorization to send a statement of objections in cases under Articles 85 and 86 of the EEC Treaty are internal decisions of the Commission, acting as a college, or the Commissioner responsible for competition policy, acting under the delegation of the Commission. "Although the initiation of proceedings and the approval of the statement of objections may be the subject of two internal decisions taken at different dates, they are coupled together whenever feasible, for the sake of simplification. Internal decisions of the Commission are not 'decisions' within the meaning of Article 189 EEC and are not communicated outside the Commission."

On 20 February 1981, IBM's representatives wrote to the Commission drawing attention to what they called "defects" in the statement of objections — "so serious as to vitiate the legal validity of the statement of objections and of the initiation of proceedings". In particular, they complained of a passage in the statement of objections in which the Commission reserved the right to make further objections in respect of matters arising from facts disclosed in that document; and they maintained that the statement of objections was so obscure and inconsistent in its language as to call for the most detailed clarification before IBM should be called upon to submit its defence. They called on the Commission to withdraw the statement of objections and to terminate what they called "the present proceedings", alternatively to supply further and better particulars of the statement of objections, in response to a series of general and specific requests extending over 100 pages.

No reply to that letter was dispatched before the date on which IBM made the present application to the Court. On 13 April 1981, however, the Commission responded to the letter dated 20 February 1981, refusing to withdraw the statement of objections or the decision to initiate proceedings against IBM, and

supplying answers to those requests for further and better particulars which the Commission considered necessary for IBM's reply to the statement of objections. It added: "if any of your requests for information or clarification has not been met, but on further reflection you believe it is genuinely necessary for your client, please specify in writing which request you would like fulfilled and the reasons for believing it necessary".

IBM's representatives accepted this invitation. They also sought a substantial extension of the time for making observations on the statement of objections. The Commission granted extensions, although for shorter periods than had been asked.

The present application to the Court was lodged by IBM on 18 March 1981, under Article 173 of the EEC Treaty. By it IBM, seeks the annulment of the act or acts of the Commission by which a proceeding was initiated against IBM pursuant to Article 3 of Regulation 17/62 and by which a statement of objections was addressed and/or notified to IBM and also the annulment of the statement of objections itself insofar as it constitutes an act of the Commission.

This application is based on three grounds. The first is the Commission's alleged failure to meet minimum legal criteria in relation to the statement of objections, in particular, by failing to state the whole of the objections with which it proposes to deal in its decision, and to state with sufficient clarity the essential facts and legal considerations relevant to the proposed decision, and to fix an adequate time for IBM to submit its observations in reply to the statement of objections. The second ground is the alleged unlawful exercise of power by the Commission, insofar as the acts in question were authorized or decided upon by any person other than the Commission acting as a college. The third ground is the Commission's alleged failure to take due account of the principles of international comity applicable to the case, in view of the fact, in particular, that the objections raised by the Commission against IBM relate primarily to acts or omissions said to have taken place outside the Community and especially in the United States of America where IBM's activities have been considered by many courts and, in those cases in which decisions have been reached, they have been essentially in IBM's favour.

The Commission's reponse to this application took the form of an objection to its admissibility, on the ground that the measures in dispute were not "decisions" of the kind mentioned in the second paragraph of Article 173 of the EEC Treaty.

The instant proceedings are concerned exclusively with the question whether that objection is well-founded. They are not concerned with the merits of IBM's arguments for impugning the contested acts; nor with IBM's application, lodged simultaneously with the main action, for an order directing the Commission to disclose particulars of the contested acts; nor with a parallel application, based on Articles 173, 175, 178 and 215 of the

EEC Treaty, lodged on 20 June 1981, registered under Case No 190/81.

With the Court's leave, issued in accordance with Article 93 (3) of the Rules of Procedure, Memorex intervened in support of the Commission's submissions. An application for interim measures of relief, lodged on 28 May 1981, was rejected by the President of the Court on 7 July 1981.

The arguments which have been put forward by both sides, in writing and orally, have been both on general principles and on the detailed wording of the Treaty and the regulations. IBM has submitted that it really cannot be right that the Court should be powerless to rule at once on acts of the Commission or its staff which can clearly be shown to be unlawful. A defective act or proceeding ("a wounded beast") should not be allowed to limp to a futile conclusion. The Commission replies that it would be equally intolerable that its administrative procedures should be subject to review as they occur.

As a general proposition there is, in my view, force in the argument of IBM that the Court should be able to exercise at whatever stage a supervisory jurisdiction over the institutions and officers of the Community, where acts are clearly shown to have been unlawful. There is little merit in unlawful procedures being continued at great expense both to the Community and to those affected by such procedures. Contrary to the Commission's argument, such a power of review does not interfere with proper administration: it is a support to and a safeguard of it.

That, however, is not the question in this application. The Court is concerned only with the question whether "the acts" of the Commission by which the procedure was initiated against the applicant and a statement of objections addressed to it, or the statement of objections itself, constitute "a decision" addressed to IBM within the meaning of Article 173 of the Treaty. The Court is not concerned with other articles of the Treaty, or other powers of the Court.

I do not accept the Commission's general arguments based on the novelty of the objections raised in this case or the argument *in terrorem* that if IBM succeeds in showing that the contested acts are "decisions", the flood-gates will be opened, and every administrative act of the Commission could be challenged before the Court. Whatever is the meaning of "a decision" for the purposes of Article 173, it seems plain beyond argument that there are many steps or acts in the course of procedures under Regulations 17 and 99 which cannot possibly constitute decisions. I also reject the submissions which have been made by Memorex that this application is in some way an abuse of the process of the Court. In the light of the provisions of the regulations and of the reported cases, the question raised, whatever the outcome, is one which the applicants were entitled to ventilate.

Article 173 of the EEC Treaty begins as follows:

"The Court of Justice shall review the legality of acts of the Council and the Commission other than recommen-

dations or opinions. It shall for this purpose have jurisdiction in actions brought by a Member State, the Council or the Commission on grounds of lack of competence, infringement of an essential procedural requirement, infringement of this Treaty or of any rule of law relating to its application or misuse of powers.

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

The Court has been concerned with the scope of the word "decision" in other contexts on many occasions. It has throughout avoided giving the word its everyday, extensive meaning. Whilst consistently accepting that the substance of what is done, rather than the name by which the process is described, is to be considered, it has indicated the factors which may be necessary or sufficient to constitute the process "a decision" for the purposes of the Treaty. Thus, by way of example, in Joined Cases 1 and 14/57 *Usines à Tubes de la Sarre* v *The High Authority* [1957 and 1958] ECR 105 at p. 114, it was said that:

"an act of the High Authority constitutes a decision when it lays down a rule capable of being applied, in other words, when by the said act the High Authority unequivocally determines the position which it decides to adopt if certain conditions are fulfilled".

In Joined Cases 23, 24 and 52/63 *Usines Henricot* v *High Authority* [1963] ECR 217 at p. 224 it was said that:

"A decision must appear as a measure taken by the High Authority, acting as a body, intended to produce legal effects and constituting the culmination of procedure within the High Authority, whereby the High Authority gives its final ruling in a form from which its nature can be identified."

In Case 54/65 *Forges de Châtillon* v *The High Authority* [1966] ECR 185 at p. 195:

"A decision must in fact appear as a measure emanating from the competent authority intended to produce legal effects and constituting the culmination of a procedure within that authority, whereby the latter gives its final ruling in a form from which its nature can be identified."

In Case 22/70 *Commission* v *Council* [1971] ECR 263 at p. 277, it was said that in order to amount to a decision a measure must produce legal effects.

In these and many other cases when the question arose, the words used have to be read in the context of the measure being considered. The precise words used in one context do not necessarily have to be applied rigidly in another. As Mr Advocate General Roemer pointed out in Joined Cases 8 to 11/66 *Cimenteries* v *Commission* [1967] ECR

75 at p. 103 — it is not correct merely to ask if there are legal effects;

"not every kind of legal effect is sufficient ... one must take a narrower view and see whether the legal effects are capable of adversely affecting substantial interests".

Moreover, one should not examine too minutely whether a step marked the culmination of an administrative procedure.

"It is not the preliminary or definitive nature of the examination which matters in all these cases, but only the question whether the concrete legal effects intended by the measures in question are provisional ones". (Ibid. at p. 105)

Treating the factors indicated as guides rather than rigid statutory rules, the substance of what is done must thus be considered.

The first act contested here is that by which a procedure was initiated under Article 3 of Regulation 17. The "statement of objections" attacked is a notice under Article 2 of Regulation 99.

The preamble to Regulation 17 recognizes that it may be in the interests of undertakings to know whether any agreements may lead to action on the part of the Commission pursuant to Article 85 (1) or Article 86 of the Treaty; that the Commission must be empowered throughout the common market to require information to be supplied and to undertake such investigations as are necessary to bring to light any prohibited agreement or practice or any abuse of a dominant position and at the same time that undertakings must be given the right to be heard by the Commission.

No specific act is laid down as being "the initiation of a procedure". Article 9 merely says:

"As long as the Commission has not initiated any procedure under Articles 2, 3 or 6, the authorities of the Member States shall remain competent to apply Articles 85 (1) and 86".

Here the Commission's letter of 19 December 1980 refers to the fact that on 10 December 1980 the Commission "initiated a procedure pursuant to Article 3". Article 3 provides that:

"Where the Commission upon application or upon its own initiative finds that there is an infringement ... it may by decision require the undertakings ... concerned to bring such infringements to an end".

However, by Article 19:

"Before taking decisions under Article ... 3 ..., the Commission shall give the undertakings ... concerned the opportunities of being heard on the matters to which the Commission has taken objection".

Article 2 of Regulation No 99/63 obliges the Commission to inform undertakings ... in writing of the objections raised against them. The notice must specify a time for the recipient's views to be given, and fines may only be imposed if objections have been notified in the manner provided for in paragraph 1 of Article 2. By Article 4:

"The Commission shall in its decision deal only with objections against the undertaking ... in respect of which they

have been afforded the opportunity of making known their views".

IBM, whilst not accepting that the Court is limited by the criteria put forward by the Commission (namely, firstly that an act should be definitive and final; secondly, that it should be the end of a procedure or a separate and clearly defined stage of a procedure; and thirdly, that the act must have legal effect for the undertakings) contends that they are here satisfied.

It is said that the initiation of a procedure and/or the serving of a notice are the culmination of the investigative stage: they represent the final definitive position of the Commission which in its letter sets out "conclusions" and intentions based on the investigation. The statement of objections can only be served on the conclusion of the inquiry and is "the measure stating the final attitude of the Commission" or "l'acte fixant la position de la Commission" (Case 48/69 *ICI* v *Commission* [1972] ECR 619 at p. 650, 1972 Recueil at p. 652, and Case 54/69 *Francolor* v *Commission* [1972] ECR 857 at p. 871, 1972 Receuil at p. 872). It is, moreover, the dividing line between the "internal" and the "external" procedure.

In some ways it seems to me artificial to divide up the "investigative" stage of the procedure from the so-called "formal" stage. The whole is one process, beginning with enquiries, when tentative views are formed on information given which crystallize into the statement of objections, and which itself leads to a final decision as to whether or not there has been an infringement. If that is right, the procedure is initiated in a real sense at a much earlier stage than the decision to serve a statement of objections and flows step by step to the final decision. There is no real culmination in that event when the formal notice or statement is served.

However, in Case No 48/72 *Brasserie de Haecht* v *Wilkin-Janssen* No 2 [1973] ECR 77 at p. 88, the reference in Article 9 to the initiation of a procedure has been described as obviously concerning "an authoritative act of the Commission evidencing its intention of taking a decision under" *inter alia* Article 13 of Regulation No 17. If this is right, then the "conclusion" that the procedure provided for by the regulation should be set in motion, and that a statement of objections should be served, seems to me to be more properly categorized as the opening of a stage of procedure rather than the culmination of a stage of the procedure.

Moreover, whilst accepting that certain limitations are placed on the Commission by reason of what is said in the statement of objections, I do not consider that the statement is to be regarded as "final" or definitive in the sense intended in the cases to which I have referred.

It is true that conclusions as to infringement are set out both in the letter of 19 December 1980 and in the statement of objections, but the object of this is to put the recipients "in a position

before the decision is issued to present their observations on the complaints which the Commission considers must be upheld against them" (Joined Cases 56 and 58/64 *Consten and Grundig* v *Commission* [1966] ECR 299 at p. 338.

The letter seems to me to express the reality of the position.

"The Commission *is considering* adopting a decision finding that Article 86 has been infringed and requiring the infringements to be brought to an end.

The Commission *will also consider* imposing on your undertaking a fine".

"*Before taking a decision* the Commission wishes to take account of any observations which you may wish to make".

It is plainly right that any decision must take into account any such observations so that at most the "conclusions" stated are provisional.

There remains the question whether there are "legal effects capable of adversely affecting substantial interests". Plainly there are many effects in fact, and in a sense in law, which flow both from the initiation of the procedure and the serving of the statement of objections. IBM has suggested 13 in its answer to the objection as to admissibility. So far as these refer to the steps which IBM must or may decide to take in the procedure, such as the need to answer objections or to risk an adverse decision, costly though preparation of an answer may be, these are not in my view to be regarded as legal effects adversely affecting substantial interests within the meaning of the cases cited. Nor does the fact that the statement of objections imposes a limit on the Commission's future decision amount to such an effect. It is true that the statement of objections is an essential preliminary to the imposing of a fine. It does not in itself impose the fine. The only effect mentioned in Regulation 17 itself is the suspension of the Member States' power to apply Articles 85 (1) and 86 of the Treaty. That consequence, which as as I understand it, is drawn with the object of avoiding the duplication of proceedings by the Commission and national authorities, cannot be characterized as one that affects an undertaking adversely, at least in normal circumstances, since it relieves the undertaking, albeit temporarily, from the risk of one form of legal process. No special circumstances are suggested here which show any particular adverse effects flowing from the suspension of a Member State's power to act such as that referred to by IBM as a theoretical possibility. I do not underestimate the practical consequences for the business of the undertaking which may flow from the service of a statement of objections which are referred to by IBM, particularly where proceedings are still current in other countries, but they do not in my view amount to legal consequences of the kind which I understand the Court to have referred to on previous occasions.

The interruption of the limitation period which flows from the initiation of proceedings by virtue of Article 2 (1) (c) of Council Regulation No 2988/74 of 26 November 1974 (OJ 1974, L 319/1) is a legal consequence and obviously an important one. Despite initial doubts,

however, it seems to me that this provision, obviously introduced in order to prevent an inquiry from being stultified by the passage of time, should be regarded as an integral part of the procedure which should not be treated as falling within the category of consequences which the Court has so far defined.

IBM relies strongly on what it says is a similarity between Article 6 of Regulation No 99 and Article 2 of that Regulation, and in particular on what was said by Mr Advocate General Capotorti in Case 125/78 *GEMA* v *Commission* [1979] ECR 3173 at p. 3200. Article 6 provides that when the Commission considers that there are insufficient grounds for granting an application made under Article 3 (2) of Regulation No 17,

"It shall inform the applicants of its reasons and fix a time for them to submit any further comments in writing".

It is contended that Mr Advocate General Capotorti gave his opinion that an Article 6 communication can be challenged within the proper time by an application to the Court under Article 173 of the Treaty.

It seems to me important to bear in mind that that case was brought under Article 175 of the Treaty and that the relevant question was whether there had been a failure to address an act other than a recommendation or an opinion.

It is true that in analysing generally the relationship between Article 173 and Article 175, Mr Advocate General Capotorti accepted that, where a decision had been adopted by the Commission, a person directly affected by it might be able to challenge it by means of an application under Article 173, even if the decision was not addressed to him. Regarding the letter from the Commission, which gave the reasons under Article 6, as "an implied decision to shelve the proceedings initiated", he considered that the applicant could have requested the annulment of the decision on the basis of the lines laid down in Case No 26/76 *Metro* v *Commission* [1977] ECR 1875. On the other hand it is also clear that he did not consider that the communication of information required by Article 6 of Regulation No 99 was a "decision" even though it implied that the Commission had completed its appraisal of the information supplied by the applicant and that which it had obtained during its inquiry, and even though the sending of a communication might be one of those measures adopted by the Commission which "nevertheless affect the legal position of the persons to whom they are addressed". (See page 3196.) This view seems to be supported by the opinion of Mr Advocate General Roemer in *Cimenteries* v *Commission* (supra).

Mr Advocate General Capotorti's opinion as to what could be attacked under Article 173 is therefore to be read in the context of the *Metro* decision. In that case it seems to have been accepted that there was a "decision" not to proceed. The relevant issue there was whether the applicants, whose request for a finding pursuant to Article 3 (2) of Regulation 17 that Saba's distribution system violated Articles 85 and 86 of the Treaty, was not complied with, could say that the decision not to proceed was of direct and individual concern to Metro.

The Court took the view that it was "in the interests of a satisfactory administration of justice and of the

proper application of Articles 85 and 86 that natural or legal persons who are entitled, pursuant to Article 3 (2) (b) of Regulation No 17, to request the Commission to find an infringement of Articles 85 and 86, should be able, if their request is not complied with either wholly or in part, to institute proceedings in order to protect their legitimate interests". The applicant "must be considered to be directly and individually concerned" by the contested decision.

The Court in paragraph 17 of its judgment in the *GEMA* case appears to treat the notice under Article 6 as a "communication" rather than a decision. It proceeded to deal with the case on the assumption, though without ruling, that the communication was in the nature of a decision and held that there was no right to compel the Commission to come to "a final decision" as to whether or not there had been an infringement of Articles 85 and 86.

It seems to me that insofar as the giving of information under Article 6 and under Article 2 are concerned, the opinion of Mr Advocate General Capotorti is against IBM's contention, since he clearly treated the giving of information as not being a decision. Insofar as the giving of information under Article 6 follows, "implies" or is evidence of a "decision", it does not seem to me that the two situations are in *pari materia.* Unless further comments are made pursuant to Article 6, or the Commission reopens the inquiry, either after such comments or for other reasons, the application terminates. There will be no subsequent step or any decision which the applicants can attack. In that sense the decision is final. Under Article 2 further steps must follow: a further decision one way or the other must be taken. I am accordingly of the view that the opinion of Mr Advocate General Capotorti and the decision in the *Metro* case do not answer the question in the present case. The same is true of the opinion of Mr Advocate General Mayras in Joined Cases 109 and 114/75 *NCC* v *Commission* [1977] ECR 381, which is relied upon to the same effect by IBM.

Mutatis mutandis the same applies to the provisions of Article 11 of Regulation No 17. Although at first sight it may seem strange that a formal requirement to provide information amounts to a decision which can be challenged, if a decision to initiate the procedure and to serve a statement of objections does not, the distinction appears to lie in the fact that if the information is not given there is an immediate liability to a fine under Articles 15 (1) (b) or 16.

IBM also relies on what is said to be a striking similarity between a statement of objections under Article 2 and a notice under Article 15 (6) of Regulation No 17, which it has been held in *Cimenteries* v *Commission* (supra), discloses "a decision" within the meaning of Article 189, and which may be challenged under Article 173. Article 15 (6) removes the exemption from liability to a fine under that article, where agreements have been notified, "where the Commission has informed the undertakings concerned

that after preliminary examination it is of the opinion that Article 85 (1) of the Treaty applies, and that application of 85 (3) is not justified". It is contended that both an Article 15 (6) notice and an Article 2 notice expose the recipient to the possibility of a fine, but no more; that each affects adversely the substantial interests of the recipient, and is equally binding on it. Each notice follows an assessment by the Commission, and must give reason for the conclusion reached. Each is a distinct watershed in the procedure, laying upon the recipient the need to decide whether to modify its conduct or to run the risk of a fine.

The basis of the Court's decision was that the measure adopted, "by exposing the companies to fines", deprived them of the advantages of a legal situation which Article 15 (5) attached to the notification of the agreement, and exposed them to a grave financial risk. "Thus the said measure affected the interests of the undertaking by bringing about a distinct change in their legal position. It is unequivocally a measure which produces legal effects ... Notwithstanding its preliminary nature the measure by which the Commission takes a decision constitutes the culmination of a special procedure which is distinct from the procedure under which after Article 19 has been applied a decision on the substance of the case can be taken" (pages 91 and 92).

Mr Advocate General Roemer at p. 104 reached the same conclusion. It was his view that an Article 15 (6) notice "brought about the possibility which did not exist before of imposing fines on the cartels declared" and thus introduced "a new element into the legal relationship existing between the Commission and the undertaking". He thought this could not be compared with other procedural measures concerning cartels. "This is because the latter (for instance the initiating of the procedure laid down by Article 9 and the statement of objections provided for by Article 4 of Regulation No 99) only have the legal effect of defining powers in relation to the authorities of Member States, or of prescribing, in a non-binding manner, the extent of the terms of reference of a procedure concerning cartels. But these other procedural measures do not have any influence on the substantive behaviour of the undertakings or third parties."

I accept that there are similarities between the notice under Article 2 and that under Article 15 (6) as the applicant has shown. There is, however, a difference to my mind which is crucial. An Article 15 (6) notice with immediate effect removes the exemption and thereby exposes the undertaking to the procedure whereby a fine may be imposed. An Article 2 notice, though it has the effect to which I have referred, does not remove any exemption. It may be a precondition of the decision to impose a fine that such a notice should be served. The decision still has to be taken and can only be taken after there is a finding following the prescribed procedure, that there is an infringement, and that the undertaking should be required to bring such infringement to an end. Accordingly here too I do not consider that the article relied on by the

applicants, Article 15 (6) of Regulation 17, is on all fours with Article 2.

Whilst accepting that it is right to examine the law of Member States, as has been said, I do not gain great assistance from it in the present case. There are obvious distinctions between the extent of the powers of review in common law and civil law countries, and the statements produced show that in the investigation of competition cases, the latter do not apply a uniform approach. Here the Treaty has provided for review: the extent of it is a matter of interpretation, in this case solely under Article 173.

The staff cases relied on by IBM do not seem to me of assistance either in deciding an application under Article 173.

If the question had been free from authority I would, for my own part, have had much greater doubt as to whether these acts ought not to be treated as amounting to "a decision" in order that the Court under Article 173 should be able to consider a case where it was plain that the proceedings were vitiated from the outset, as for example where someone who could not possibly be authorized to send a statement of objections had done so.

In the circumstances, however, I am of the opinion that the jurisprudence of the Court is correctly summarized by Dr Korah in (1981) 6 EL Review 14 at p. 32:

"The action for annulment lies only against a final measure that alters the rights of the citizen and not against the procedural measures that lead up to the final measure".

In the circumstances it does not seem necessary or right in this opinion to consider whether in any event the criticisms made by IBM of the statement of objections would justify intervention by the Court at this stage; or whether the principle described by Professor Meesen applies at this early stage of the procedure rather than when, after consideration of all the facts and arguments, the Commission gives its final decision; or whether the Commission cannot delegate to its members and act through its officials (as opposed to outside bodies with which the cases cited were concerned) in its activities under Articles 85 and 86, or the question whether the *maximum omnia praesumuntur rite esse acta* does not apply in this situation.

Accordingly, on the basis of the jurisprudence of the Court, I am of the opinion that the contested acts do not amount to "decisions" within the meaning of Article 173 of the Treaty and that this application is inadmissible.