implemented at the time when the action was brought. The annulment of such a decision is of itself capable of having legal consequences, in particular by preventing a repetition by the Commission of the improper communication of confidential documents and by rendering unlawful the use by the third party who has made the complaint of any documents improperly communicated to it.

2. Although certain provisions of Regulation No 17 make it possible, in connection with the procedure for the application of the rules on competition, to mitigate in certain circumstances the obligation of professional secrecy laid down in Article 214 of the EEC Treaty, especially in regard to a third party who has made a complaint, where communication of certain information covered by professional secrecy is necessary for the proper conduct of the investigation, regard must be had to the legitimate interest of undertakings in the protection of their business secrets. It would be contrary to the general principle which applies during the course of the administrative procedure as a whole to give a third party who has submitted a complaint access to documents containing business secrets.

3. It is for the Commission, in connection with the procedure for the application of the rules on competition, to assess whether or not a particular document contains business secrets. After giving the undertaking an opportunity to state its views, the Commission is required to adopt a decision in that connection which contains an adequate statement of the reasons on which it is based and which must be notified to the undertaking concerned. Having regard to the extremely serious damage which could result from improper communication of documents to a competitor, the Commission must, before implementing its decision, give the undertaking an opportunity to bring an action before the Court with a view to having the assessments made reviewed by it and to preventing, by the means of redress provided by Article 173 in conjunction with Article 185 of the EEC Treaty, the disclosure of the documents in question.

OPINION OF MR ADVOCATE GENERAL LENZ
delivered on 22 January 1986 *

Mr President,
Members of the Court,

A — The case in which I am to deliver my Opinion today concerns the limits placed on the powers and legal position of the Commission of the European Communities, the undertakings which are being investigated on suspicion that they abused their dominant position on the market, and the persons and groups of persons who have a legitimate interest in a finding that there has been a breach of Article 86 of the EEC Treaty. In particular, the case is concerned with the question of the extent to which the Commission may permit a complainant under Article 3 (2) (b) of Regulation No

* Translated from the German.

17 [1] to examine commercial documents belonging to an undertaking which the Commission is investigating on suspicion that it is acting in breach of Article 86 of the EEC Treaty.

I — 1. The applicants, AKZO Chemie BV and AKZO Chemie UK Ltd, are part of the AKZO Group, which is the largest supplier in the Community of benzoyl peroxide, a chemical product which is used in the making of plastics and as a bleach for the treatment of flour.

Engineering & Chemical Supplies (Epsom & Gloucester) Ltd (hereinafter referred to as 'ECS'), the intervener, is a small company whose business, since it was set up in 1969, consisted initially in selling benzoyl peroxide purchased from AKZO UK to the British milling industry and later, in addition, in producing that substance. In 1979, the intervener extended its activity to the plastics sector, first in the United Kingdom and later in Germany.

2. On 15 June 1982, ECS requested the Commission of the European Communities, the defendant in this case, to institute proceedings against the applicants on the ground that they had infringed Article 86 of the EEC Treaty by pursuing a policy of predatory pricing designed to force ECS from the market.

In December 1982, Commission officials carried out investigations without prior notice at the premises of both applicants in accordance with Article 14 (3) of Regulation No 17.

Furthermore, on 10 October 1983, the intervener commenced an action against AKZO in the High Court of Justice claiming damages for breach of Article 86 of the EEC Treaty. Those proceedings are currently stayed pending the Commission's decision.

3. By a decision of 29 July 1983 [2] the Commission ordered AKZO Chemie UK Ltd, subject to a periodic penalty payment for failure to comply and pending the adoption of a decision concluding the Commission proceeding, to:

inter alia, refrain from offering benzoyl peroxide to any flour milling undertaking in the United Kingdom at prices below those fixed by the Commission or at prices below those offered by AKZO Chemie UK Ltd to other comparable buyers;

refrain from granting any terms of credit or conditions of supply which directly or indirectly cause or are likely to cause the effective delivered price of any of the said products to be below the price determined by the Commission;

supply the Commission, each month as from 15 August 1983, with a copy of every offer, order, invoice and credit note and other equivalent document in respect of any offer or sale of any of the said products to any buyer in the United Kingdom issued in the preceding month.

Notwithstanding those requirements, the Commission authorized AKZO Chemie UK Ltd to offer the said products at lower prices where it was necessary in good faith to do so to in order to meet a lower price shown to be offered by another supplier.

1 — Regulation No 17 — First Regulation implementing Articles 85 and 86 of the Treaty (Official Journal, English Special Edition 1959-62, p. 87.)

2 — Official Journal 1983, L 252, p. 13.

4. On 3 September 1984, the Commission issued a statement of objections addressed to the applicants, in which it alleged in particular that they had abused their dominant position on the market by threatening to sell to ECS's customers at particularly low, discriminatory and uneconomic prices and by actually selling or offering products on those conditions in order to take customers away from ECS and thereby do serious damage to the viability of its business. The statement of objections was accompanied by 127 annexes.

On the same date, the Commission sent the statement of objections to ECS, but without including the above-mentioned annexes. In its accompanying letter, the Commission drew ECS's attention to that fact and referred to the possibility that ECS might apply for access to the annexes if it needed to do so in order to formulate its observations. At the same time, the Commission emphasized that if ECS were granted access to the annexes, they could be used only for the purposes of the Commission's proceedings in the case.

The applicants replied to the statement of objections by letters of 22 October and 16 November 1984, both of which were also forwarded by the Commission to ECS.

5. In order to exercise fully its right under Article 19 (2) of Regulation No 17 to be heard during the administrative procedure, ECS applied, by letter of 19 November 1984, for access to the annexes to the statement of objections.

By letter of 29 November 1984, the Commission informed the applicants of ECS's application. The Commission stated that it was prepared to disclose to ECS only such documents or parts thereof as were annexed to the statement of objections and were not covered by 'genuine business secrecy'. It did however emphasize in that connection that direct evidence of an infringement of Article 86 could not constitute a business secret which required protection.

Finally, the Commission informed the applicants that it considered it appropriate, before deciding on ECS's application, to give them 10 days in which to make known their views.

In their reply of 7 December 1984, the applicants stated first that it was premature to speak of direct evidence of an infringement of Article 86 of the EEC Treaty. At that stage of the procedure the Commission had merely alleged that such an infringement had been committed. In those circumstances, it was unnecessary to express a view on the Commission's contention that it was entitled to disclose business secrets and other confidential information which it had obtained during the investigation before making a formal finding that Article 86 of the EEC Treaty had actually been infringed.

Further, the applicants complained of the fact that the Commission had communicated their answer to the statement of objections in its entirety to ECS without asking them whether certain passages in that answer were confidential.

With regard to ECS's application for access to the annexes, the applicants offered to summarize the annexes or to render confidential passages therein illegible. The applicants thus sought to find out from ECS first and foremost which particular passages in their answer required further explanation. The annexes to the statement of objections, referred to in the annex to the applicants' letter, could not, because of their confidential nature, in any circumstances be made available to ECS. The applicants had relied on the fact that the said annexes would not be passed on to any other person.

By letter of 18 December 1984, the Commission informed the applicants that on 14 December it had given ECS's legal advisers access to the relevant documentation. The decision which documents to disclose was one for the Commission but the applicants' list had been carefully considered and was followed with a few exceptions where the Commission did not think the document or passage was in fact subject to protection as a business secret.

The Commission stated that it considered it necessary to give ECS access to the evidence both for the proper examination of the case by the Commission itself and to enable ECS to exercise its right to make known its views pursuant to Article 5 of Regulation No 99/63.[3]

The Commission enclosed with its letter copies of the annexes to the statement of objections which, contrary to the applicants' wishes, it had made available to ECS, showing the form in which access was given.

With regard to Annex 21,[4] the Commission stated that it did not regard that document as a matter of business secrecy, since it was a crucial piece of evidence. In Tables A to C, details of the applicants' costs were deleted and ECS's legal advisers were instructed not to show those tables to their clients.

Documents relating to the Diaflex company were removed from the annexes but ECS's legal advisers were permitted to note the prices quoted by that firm, again subject to their not being disclosed to their clients.

By application of 22 February 1985, the applicants brought the present action. By a decision of 10 July 1985, the Court of Justice granted ECS leave to intervene in the proceedings in support of the defendant.

On 14 December 1985 the Commission adopted a decision on the substance of the case and imposed a fine of 10 million ECU on the applicants *inter alia* for abuse of a dominant position on the market.[5]

II — *Conclusions of the parties*

1. The applicants claim that the Court should:

declare the application admissible and well founded;

declare void the decision of the Commission communicated to the applicants by letter of 18 December 1984;

3 — Regulation No 99/63/EEC of the Commission of 25 July 1963 on the hearings provided for in Article 19 (1) and (2) of Council Regulation No 17 (Official Journal, English Special Edition 1963-64, p. 47).

4 — An internal memorandum of the applicants concerning business relations with ECS.

5 — Official Journal 1985, L 374, p. 1.

order the Commission to demand that ECS return the confidential documents transmitted to it;

order the Commission to pay the costs.

2. The Commission contends that the Court should:

declare the application inadmissible;

in the alternative, dismiss it as unfounded;

in either case, order the applicants to pay the costs.

3. The intervener contends that the Court should:

dismiss the application as inadmissible;

alternatively, declare the application to be unfounded;

in either case, order the applicants to pay the intervener's costs.

B — My opinion on this case is as follows:

I — *Admissibility*

1. The *Commission* and the *intervener* regard the application for annulment as inadmissible since there is no decision against which proceedings may be instituted under Article 173 of the EEC Treaty.

In their view, it is necessary, according to the Court's case-law, to look at the substance of the contested measures in order to ascertain whether they are acts within the meaning of Article 173 of the EEC Treaty. The Court has held that any measure the legal effects of which are binding on, and capable of affecting the interests of, the applicant by bringing about a distinct change in his legal position is an act or decision which may be the subject of an action under Article 173 of the EEC Treaty for a declaration that it is void.[6] Those conditions are not fulfilled because, in this case, there has been no change in the applicants' legal position. Should the procedure in this case lead to a decision being adopted by the Commission, the applicants could challenge that decision and then rely on a possible procedural defect, namely breach of the obligation not to disclose confidential information.

In the defendant's view, its conduct constitutes merely a step preparatory to its final decision. The transmission of documents to the intervener was intended to make it easier for the defendant to determine whether an infringement of Article 86 of the EEC Treaty had been committed. It is therefore an inseparable part of the procedure preparatory to its final decision, and not the 'culmination of a special procedure distinct from the main procedure'. Having regard to the complexity of the subject-matter in this case, the transmission of the relevant documents to the intervener and the latter's observations thereon had advanced and accelerated the investigation of the case. The defendant's suspicions had been confirmed. It therefore considered it appropriate to hear the two interested parties even though in the result the information supplied by the intervener did not elucidate the situation any further.

If the application were declared admissible at the present stage, it would create confusion between the administrative procedure and the judicial proceedings. The applicants' arguments in regard to admissibility are closely related to the question

6 — Judgment of 11 November 1981 in Case 60/81 *IBM* v *Commission* [1981] ECR 2639, paragraph 9 of the decision.

whether the documents were covered by the obligation of professional secrecy. It would be premature, however, to undertake a judicial review in that respect as the administrative procedure is still in progress. That would be incompatible with the division of powers between the Commission and the Court of Justice.

The *intervener* also refers to the need to distinguish between a possible infringement of the applicants' rights and a change in the applicants' legal position. A mere breach of rights does not by any means necessarily presuppose the adoption of a measure the legal effects of which are binding on, and affect the interests of, the applicant by bringing about a change in his legal position.

The *applicants*, however, are very clearly of the opinion that the measure adopted by the Commission is an act against which proceedings may be instituted under Article 173 of the EEC Treaty. They also rely on the aforementioned judgment of 11 November 1981 in Case 60/81 but draw the opposite conclusion from it. As a result of its conduct, the defendant removed the protection guaranteed by the EEC Treaty against disclosure of information of the kind covered by the obligation of professional secrecy. Furthermore, the applicants' interests were adversely affected by that conduct because the intervener was able to use the confidential information that it had obtained from the defendant in other proceedings.

Having regard to those legal consequences, the defendant cannot, in their view, argue that its conduct constituted merely a preparatory step. That conduct prevented the documents submitted by the applicants from receiving the protection appropriate to confidential information. That constitutes a definitive expression of intent on the part of the Commission. Furthermore, it is the culmination of a special procedure which should be distinguished from competition proceedings themselves which are terminated by the Commission's decision on the substance of the case. Moreover, the contested decision is addressed to both applicants since it establishes, so far as they are concerned, that certain information is not covered by the obligation of professional secrecy.

The applicants maintain that an action for annulment should be available against such a measure before the procedure in the case is brought to a close. That procedure may last for some time and may even end without a decision on the substance of the case. It should therefore be possible for the parties to assert their claim to legal redress when their right to protection in respect of their business secrets has been deliberately trampled underfoot.

2. In my view, several groups of problems must be distinguished in considering the question of the admissibility of the application for annulment:

the question whether the defendant's contested measure is a purely factual step or a decision;

the question whether the defendant's conduct constitutes a definitive decision for the purposes of Article 173 of the EEC Treaty or merely a provisional measure intended to pave the way for a final decision;

the question whether the applicants have an interest which the law protects and, in particular, whether the application has become devoid of purpose in that regard inasmuch as the defendant has actually given the intervener access to the documents

and the applicants should thus seek redress by bringing an action for damages.

(a) In the first place, a decision must be distinguished from a purely factual step. In that respect, the intervener is correct in arguing that infringement of a right protected by law must be distinguished from a change in legal position.

The question whether an application for access to documents calls for a decision cannot be answered in general terms, either in the affirmative or in the negative, in particular where access has already been granted by the actual handover of the documents. In that regard, the crucial factor is whether the application for access to documents is automatically granted by a mere physical act or whether the authorities responsible for granting such access are required to take other factors into consideration.

In order to make the necessary distinction, the individual parts of the procedure at issue in this case must be described by reference to their legal context.

In the present case, the intervener applied for access to documents which the defendant had obtained in competition proceedings and which were therefore covered by the obligation of professional secrecy under Article 214 of the EEC Treaty and Article 20 (2) of Regulation No 17. The defendant invited the applicants to state their views on the intervener's application. After considering their views, the defendant decided which documents were to be transmitted to the intervener in their entirety, which were to be transmitted in part and which were not to be transmitted at all.

The conclusion to be drawn from this is that the Commission weighed various interests against one another: the protection of professional secrecy, the applicants' interest in protecting their business secrets, the intervener's need for information for the purposes of the hearing and the duty of effective supervision to ensure compliance with the competition rules of the EEC Treaty. Having weighed those interests, the defendant finally decided which of the applicants' internal business documents were to be disclosed to the intervener for the purposes of the competition proceedings that were pending, that is to say, it determined the extent to which the applicants' interest in the protection of their business and professional secrets had to be overridden by the effective implementation of the competition rules of the EEC Treaty.

The defendant thereby drew a distinction between the legal position of the applicants and that of the intervener, and at the same time determined the extent to which it could depart from the obligation of professional secrecy in the interests of the implementation of Community competition law. Hence, from a legal point of view, the essential aspect of the Commission's measure is not the actual handover of the documents to the intervener but the legal assessment of the extent to which access could be granted to such documents. The defendant took a decision, which was binding, as to which of the applicants' documents could be made available to the intervener. In law, therefore, it drew the dividing line between the intervener's right to information and the applicants' right to protection in respect of the confidentiality of their business documents. It therefore adopted a measure the legal effects of which were binding on, and which affected the interests of, the applicants by bringing about a change in their legal position. Hence that measure constitutes a decision. The fact that the decision was not drawn up in writing and that its terms were notified to the applicants four days after the intervener had

actually been granted access to the documents does not alter the fact that it is a decision, because the form in which a decision is cast is immaterial. [7]

(b) It must also be considered whether that decision can be contested separately by an action before the Court. It has been held by the Court that in the case of acts or decisions adopted by a procedure involving several stages, in particular where they are the culmination of an internal procedure, an act is open to review only if it is a measure definitively laying down the position of the authorities on the conclusion of that procedure, and not a provisional measure intended to pave the way for the final decision. [8]

Doubts as to whether the defendant's decision can be contested separately before the Court may arise inasmuch as that decision marked off the limits of business and professional secrecy from the need to implement the rules of competition, that is to say it defined the Commission's own powers of investigation. In that regard, it may be argued that the measure in question is intended to pave the way for the final decision and that it is therefore comparable to the initiation of competition proceedings or communication of the statement of objections, as the Court held in its judgment of 11 November 1981. [9]

Those objections cannot be upheld, however, because the decision adopted by the defendant has several aspects. In addition to deciding the extent to which the protection of business secrets is overridden by the defendant's duty to carry out an investigation, it also defines, as has been shown, the legal position of the applicants and the intervener. In that respect, there is an associated, and legally autonomous, aspect of the defendant's decision which differs from those aspects with which the decision on the substance is concerned in competition proceedings. It involves not just paving the way for the Commission's final decision but also defining the legal position of the undertakings involved in the case. For that reason, that part of the defendant's decision cannot be compared with a decision initiating a procedure or communicating a statement of objections.

However, since the various aspects of a single measure are inseparable, the defendant's decision granting the intervener access to certain of the applicants' business documents is a decision which may be contested separately under Article 173 of the EEC Treaty.

The general scheme of Regulation No 17 also supports the conclusion that the measure adopted by the defendant is a decision within the meaning of Article 173 of the EEC Treaty. In all cases in which the defendant cannot count on the voluntary cooperation of the undertakings concerned and must apply coercive measures, such measures are to take the form of a decision which must indicate *inter alia* that the undertakings concerned are entitled to have the decision reviewed by the Court of Justice. That is required by Article 11 (5) of Regulation No 17 with regard to requests for information and by Article 14 (3) with regard to investigations.

That principle was upheld by the Court in its judgment of 17 January 1980 in which it held that the Commission had the power, not expressly provided for in Regulation No 17, to adopt interim protective measures

7 — Judgment of 11 November 1981 in Case 60/81 *IBM* v *Commission* [1981] ECR 2639.

8 — Judgment of 11 November 1981 in Case 60/81 *supra* paragraph 10 of the decision.

9 — Judgment of 11 November 1981 in Case 60/81 *supra*.

during the administrative procedure. Such decisions 'must be made in such a form that an action may be brought upon them before the Court of Justice by any party who considers he has been injured'. [10]

(c) At the hearing a further problem was raised, namely whether the application had been disposed of by the fact that the intervener had actually been granted access to the documents and the knowledge thereby acquired could not be erased by declaring the defendant's decision void, with the result that the only course which might possibly still be open to the applicants was an action for damages.

I do not agree with that argument for two reasons.

The very fact that some of the applicants' business documents were actually made available to the intervener and are still in its possession must be regarded as having an adverse effect on the applicants' legal position, which can be remedied only by a declaration that the defendant's decision is void. It is true that in these proceedings the Court cannot directly order the intervener to return the applicants' documents to the defendant. The latter would, however, be required, under Article 176 of the EEC Treaty, to endeavour to secure the return of those documents. That would remedy the adverse effect of the handover of the documents on the applicants' legal position.

A further consequence of an annulment of the defendant's decision would be that the intervener would no longer be able to rely, either in the proceedings before the High Court of Justice or at the hearing organized by the Commission, on information unlawfully communicated to it. Since it cannot be ruled out that that would affect the legal position of the applicants in the competition proceedings, I am of opinion that the application is not disposed of by the fact that access to the documents was actually granted.

I therefore consider the application for annulment admissible.

3. However, that does not apply to the applicants' claim that the defendant should be ordered to demand the return of the confidential documents transmitted to the intervener.

There is no basis for such a claim in the system of remedies provided for in Community law. It is true that, according to Article 176 of the EEC Treaty, the institution whose act has been declared void is required to take the necessary measures to comply with the judgment of the Court of Justice. However, it is primarily for the institution concerned to decide, subject to the Court's power of review, which measures are appropriate for that purpose. A separate application for compliance with legal obligations that might result from a judgment of the Court of Justice, such as that which the applicants expressly persisted in maintaining even at the hearing, is not provided for in the Treaty, however, and must therefore be dismissed as inadmissible.

II — *Substance*

The applicants have based their application on three grounds:

Breach of the obligation of professional secrecy laid down in Article 214 of the EEC Treaty and Article 20 (2) of Regulation No 17;

10 — Judgment of 17 January 1980 in Case 792/79 R *Camera Care* v *Commission* [1980] ECR 119, paragraph 19 of the decision.

Infringement of Article 20 (1) of Regulation No 17, according to which information acquired in the course of competition proceedings may be used only for the purposes of those proceedings;

Infringement of Article 185 of the EEC Treaty, which provides for an institutional balance between the Commission and the Court of Justice, and limitation of the applicants' possibilities of obtaining legal protection.

1. Breach of the obligation of professional secrecy.

(a) According to the *applicants*, Article 214 of the EEC Treaty, which has been implemented in the field of competition by Article 20 of Regulation No 17, expressly provides that the Commission must not disclose information of the kind covered by the obligation of professional secrecy. That duty includes, *inter alia*, a prohibition on passing on information the confidential nature of which has been emphasized, as in this case, either to a complainant under Article 3 (2) of Regulation No 17 or to any other person within the meaning of Article 19 (2) of the same regulation. If information has to be communicated to a complainant, the manner of disclosure must be compatible with the protection of confidential information. Moreover, the applicants maintain that they made appropriate suggestions in that regard to the defendant, which were not taken up.

In the applicants' view, the principle of the protection of confidential information also applies to documents which may make it possible, in certain circumstances, to establish the existence of an infringement of Article 86 of the EEC Treaty. Until such time as the defendant reaches the conclusion that Article 86 of the EEC Treaty has actually been infringed, it is premature to assume that the documents in question constitute proof of such an infringement.

Moreover, they maintain, no distinction is drawn in the provisions of the EEC Treaty between decisions establishing an infringement and other decisions. The obligation of professional secrecy is laid down in Article 214 in general terms and without exception. According to Article 21 of Regulation No 17, the publication of decisions by the Commission establishing that the competition rules of the EEC Treaty have been infringed must have regard to the legitimate interest of undertakings in the protection of their business secrets. That is also expressly applicable to a finding that Article 86 of the EEC Treaty has been infringed.

In reply, the *defendant* contends that in order to determine with care the facts and circumstances of the case, it was necessary to hear the views of the complainant, that is to say the intervener. Furthermore, the documents made available to the intervener did not contain any protected business secrets.

In any event, the defendant maintains, the obligation not to disclose business secrets does not apply in relation to documents which, by virtue of their nature or content, constitute evidence of an infringement of either Article 85 or Article 86 of the EEC Treaty. The fact that certain documents were described as confidential by the undertaking concerned is not binding on the defendant. Similarly, the fact that publication of certain documents might be embarrassing for the undertakings concerned does not mean that those documents constitute, on that ground alone, business secrets which qualify for protection.

The defendant also refers to the rules applicable in anti-dumping proceedings, which, in its view, are comparable. According to Article 7 (4) (a) of Regulation

No 3017/79,[11] a complainant may inspect all information made available to the Commission by any party to an investigation, provided that it is relevant to the defence of his interests and not confidential. In regard to that provision, the Court held, in its judgment of 20 March 1985,[12] that although the Community institutions are bound by Article 214 of the EEC Treaty to respect the principle of confidential treatment of information, that obligation must be interpreted in such a way that the rights provided by Article 7 (4) (a) of Regulation No 3017/79 are not deprived of their substance.

The complainant is thus entitled to defend his point of view in the appropriate manner, and that is possible only if certain documents are made available to him. Although confidential information is not to be disclosed, that duty was discharged with regard to the documents transmitted to the intervener.

The *intervener* emphasizes that it is entitled under Article 19 (2) of Regulation No 17 to express its views both orally and in writing. It could not have exercised fully its right to be heard without access to the documents on which the statement of objections was based.

In its view, the protection of business secrets does not automatically take precedence over the right to be heard. A balance should be struck between the interest of the undertaking concerned in the protection of its business secrets and the complainant's right to be heard. The right balance was struck by the defendant. The documents in dispute are mainly of historical interest and contain information which is no different from other information which the applicants themselves did not regard as confidential. They were transmitted to the intervener solely for the purposes of the administrative procedure and were of no commercial value to it. Finally, they constitute *prima facie* evidence of an infringement of Article 86 of the EEC Treaty. In such a case, the confidentiality of business secrets is no longer protected.

(b) Before examining this submission, I consider it appropriate to refer to the relevant provisions of Community law concerning confidentiality and official secrecy.

Article 214 of the EEC Treaty reads as follows:

'The members of the institutions of the Community, the members of committees, and the officials and other servants of the Community shall be required, even after their duties have ceased, not to disclose information of the kind covered by the obligation of professional secrecy, in particular information about undertakings, their business relations or their cost components.'

Article 20 (2) of Regulation No 17 provides that:

'Without prejudice to the provisions of Articles 19 and 21, the Commission and the competent authorities of the Member States, their officials and other servants shall not disclose information acquired by them as a result of the application of this regulation and of the kind covered by the obligation of professional secrecy.'

Finally, Article 21 of Regulation No 17 provides as follows:

11 — Regulation (EEC) No 3017/79 of 20 December 1979 on protection against dumped or subsidized imports from countries not members of the European Economic Community (OJ L 339, p. 1); since replaced by Regulation (EEC) No 2176/84 of 23 July 1984 (OJ L 201, p. 1).

12 — Case 264/82 *Timex Corporation and Others* v *Council and Commission* [1985] ECR 849.

'(1) The Commission shall publish the decisions which it takes pursuant to Articles 2, 3, 6, 7 and 8.

(2) The publication shall state the names of the parties and the main content of the decision; it shall have regard to the legitimate interest of undertakings in the protection of their business secrets.'

(aa) The duty of confidentiality therefore applies to information of the kind covered by the obligation of professional secrecy. In that connection Article 214 of the EEC Treaty refers in particular to 'information about undertakings, their business relations or their cost components'. It is immediately apparent from those words that the Community legislature did not lay down an exhaustive definition of the expression 'professional secrecy'. Its meaning must therefore be elicited from the terms of the relevant provisions, particularly those of Regulation No 17.

Regulation No 17 imposes extensive obligations on undertakings with regard to information and publication. Those obligations have their counterpart in the aforementioned provisions which are intended to guarantee protection of the legitimate interest of undertakings in the confidentiality of their internal business operations.

However, the range of information covered by the obligation of professional secrecy goes beyond the business secrets of undertakings. All information acquired by officials and other servants of the Commission in the exercise of their duties is covered by the obligation of professional secrecy, regardless of whether they obtained it in the course of a formal investigation or merely informally. That does not apply, however, to any information available to the general public. [13]

In conceptual terms, the expression 'professional secrecy' is in any case too narrow since, in Germany at least, it covers only the obligation of secrecy imposed on the 'liberal' professions by their own professional rules. This notion should thus be designated by the more general expression 'official secrecy'. [14]

Information which is 'of the kind' covered by official secrecy includes, *inter alia*, not only undertakings' industrial and business secrets but also other operations carried out by undertakings which are confidential and are inaccessible to the general public. [15] That is so whatever the nature of the industrial or business secret or other confidential operation involved.

Since such internal documents or operations must be 'of the kind' covered by official secrecy, they can only concern matters which are of some importance to the undertaking and which may be withheld without placing third parties at a disadvantage. Not all the information that an undertaking may wish not to disclose can objectively be regarded, for that reason alone, as a business secret. The opinion of the undertaking which is the source of the information is thus not of itself decisive but is generally an important consideration. [16]

13 — See Pernice in: Grabitz, Kommentar zum EWG-Vertrag, note 8 on Article 20 of Regulation No 17; Hummer in: Grabitz, Kommentar zum EWG-Vertrag, note 14 on Article 214.

14 — See Hummer, op. cit., Gleiss/Hirsch, Kommentar zum EWG-Kartellrecht, note 9 on Article 20 of Regulation No 17.

15 — Gleiss/Hirsch, op. cit., note 13

16 — See Pernice, op. cit., note 24 on Article 19 of Regulation No 17; Gleiss/Hirsch, op. cit., note 11 on Article 20 of Regulation No 17

Such information may not be disclosed, that is to say, it must not be communicated to persons who are not authorized to receive it.[17] That includes not merely third parties but also, so far as business secrets are concerned, persons who have the right to be heard under Article 19 (2) of Regulation No 17 and, in particular, complainants under Article 3 (2) (b) of that regulation. This was made clear by the Court in its judgment of 29 October 1980 in Joined Cases 209 to 215 and 218/78,[18] in which it held as follows:

'Information in the nature of a trade secret given to a trade or professional association by its members and thus having lost its confidential nature *vis-à-vis* them does not lose it *with regard to third parties.* Where such an association forwards such information to the Commission in proceedings commenced under Regulation No 17, the Commission cannot rely on the provisions of Articles 19 and 20 of that regulation to justify passing on the information to third parties who are making complaints. *Article 19 (2) gives the latter a right to be heard and not a right to receive confidential information.*'

That interpretation is absolutely binding. The opposite interpretation could lead to a situation in which undertakings sought access to other undertakings' business secrets by way of an application under Article 3 or the second sentence of Article 19 (2) of Regulation No 17.

(bb) Clearly, therefore, the Commission is not authorized, in proceedings under Article 19 of Regulation No 17, to pass on confidential information to a complainant under Article 3 (2) of Regulation No 17. Nor does the Court's judgment of 20 March 1985 in Case 264/82[19] detract from that interpretation. In that judgment the Court stated:

'The defendants are mistaken in claiming that the information in question was confidential and could not therefore be disclosed to the complainant. The Community institutions are bound by Article 214 of the EEC Treaty to respect the principle of confidential treatment of information about undertakings, particularly about undertakings in non-member countries which have expressed their readiness to cooperate with the Commission, even if no express request for such treatment is received . . . That obligation, however, must be interpreted in such a way that the rights provided by Article 7 (4) (a) of . . . Regulation [No 3017/79] are not deprived of their substance.

It follows that in the present case the Commission ought to have made every effort, as far as was compatible with the obligation not to disclose business secrets, to provide the applicant with information relevant to the defence of its interests, choosing, if necessary on its own initiative, the appropriate means of providing such information . . . '

In that judgment, too, the Court held that the right to disclose confidential documents was limited by the obligation to protect the business secrets of the undertakings concerned.

Moreover, reference should be made to the significant differences that exist between Regulation No 17 and Regulation No

17 — Deringer, op. cit., note 9 on Article 20 of Regulation No 17; Pernice, op. cit., note 9 on Article 20 of Regulation No 17.

18 — Judgment of 29 October 1980 in Joined Cases 209 to 215 and 218/78 *Van Landewyck and Others* v *Commission* [1980] ECR 3125, paragraph 46 of the decision; my italics.

19 — Judgment of 20 March 1985 in Case 264/82 *Timex Corporation and Others* v *Council and Commission* [1985] ECR 849, paragraph 29 *et seq.* of the decision.

3017/79 on protection against dumped or subsidized imports from countries not members of the European Economic Community, as regards the legal position of the parties in proceedings under those two regulations.

Unlike Regulation No 17, Regulation No 3017/79 expressly provides in Article 7 (4) that the complainant may inspect all information made available to the Commission by any party to the investigation, provided that it is relevant to the defence of his interests and not confidential within the meaning of Article 8 of the regulation. Article 8 of Regulation No 3017/79 provides that any information of a confidential nature or any information provided on a confidential basis by a party to an investigation may not be revealed without specific permission from the party submitting such information. Furthermore, information is ordinarily considered to be confidential if its disclosure is likely to have a significantly adverse effect upon the supplier or the source of such information.

There is no basis whatever in Regulation No 17 for a comparable right of access to documents. A complainant under Article 3 (2) (b) of Regulation No 17 is not legally entitled to be heard under Article 19 of that regulation. Like other third parties, he must, according to Article 19 (2), be able to show a sufficient interest in order to be heard. He will generally be able to do so if he has been affected by the conduct of the undertaking against which competition proceedings have been initiated. Under Regulation No 17, however, he is not automatically entitled to take part in the proceedings but must make an application to do so. Only if the Commission takes the view that the circumstances which it has found to exist as a result of its investigation do not justify granting an application submitted under Article 3 (2) of Regulation No 17 is it required under Article 5 of Regulation No 99/63 to inform the complainant of its reasons and to fix a time-limit for him to submit any further comments in writing. Competition proceedings before the Commission are therefore not to be regarded as adversary proceedings between the complainant and the undertaking concerned. The complainant is limited to a role which corresponds to the position, under criminal procedure, of a person who reports a matter to the authorities. The competition proceedings themselves are conducted by the Commission.

However, it is the following distinction between the two regulations that seems to me to be crucial: in competition proceedings the Commission has powerful means of coercion at its disposal in order to carry out its investigation. For instance, where a request for information is refused, the Commission may, under Article 11 (5) of Regulation No 17, enforce its request by imposing or threatening to impose fines or periodic penalty payments, and Article 14 of Regulation No 17 empowers it to carry out investigations even against the wishes of the undertakings concerned and without prior notice. As has already been stated, those powers of investigation and means of coercion are counterbalanced by the protection of confidential information.

None of those coercive measures is provided for in the anti-dumping regulation which empowers the Commission to carry out investigations and inspections only with the voluntary cooperation of the undertakings concerned, with the result that confidential information does not need to be protected to the same degree since the undertakings may quite simply refuse to provide any.

We are thus left with the principle that the Commission may not as a rule disclose business secrets to complainants, even in the context of a hearing under Article 19 (2) of Regulation No 17.

(cc) An exception to that principle could conceivably be made only if it were impossible to determine whether or not the competition rules of the EEC Treaty had been infringed without gaining access to the business secrets of the undertakings concerned. In such a case, it should be noted that the rules governing professional or official secrecy are set out in Article 214 of the EEC Treaty. The substantive provisions of Community competition law and the Commission's basic powers of investigation are laid down in Article 85 *et seq.* The protection of confidential information on the one hand, and the determination of the content of competition law and the form in which the Commission implements that law or ensures its observance, on the other, are thus based on provisions of primary Community law which are of equal rank. In exceptional cases, therefore, it appears to me that a balance may have to be struck between the legal interests embodied in Article 214 of the EEC Treaty and those embodied in Article 85 *et seq.* of the Treaty, where the substantive rules of Community competition law could not otherwise be implemented. Let me emphasize once again, however, that such a situation could conceivably arise only in a few exceptional cases as it should be possible for the Commission, on the basis of its powers of intervention under Regulation No 17, to expose commercial practices in restraint of competition even without passing on business secrets to third parties, particularly since it can in any event demand access to such secrets.

However, the defendant cannot override the requirement of confidentiality merely in order to simplify or accelerate its investigations.

In this case, there was no need in December 1984 to bring to a swift conclusion competition proceedings which had been pending since 15 July 1982, since a possible abuse of a dominant position on the market by the applicants had been forestalled by the defendant's interim measure of 29 July 1983.

(dd) I will now examine *in concreto* the first submission. In this connection the following points must be borne in mind:

First of all the defendant made the statement of objections (excluding documentation) and the full text of the applicants' answer thereto available to the intervener. There is no need to decide here whether that was permissible since the applicants have not complained of that conduct to the Court. Prompted by the defendant, the intervener applied for access to certain of the applicants' business documents which, according to the intervener, had come into the defendant's possession as a result of a coercive measure, namely an investigation without prior notice, under Article 14 (3) of Regulation No 17. When the applicants discovered that the intervener had applied for access to the documents, they drew attention to the protection of business secrets and, at the same time, offered to provide non-confidential extracts from those documents. The defendant did not accept that offer but made some of those documents available to the intervener either in abbreviated form, or exclusively for use by the intervener's legal representative, or only for inspection by the latter.

(ee) The question now arises whether the Court should examine whether the documents at issue actually constitute business secrets of the applicants, even though very little of substance has been said on that question by the parties in the proceedings before the Court.

It would certainly be possible for the Court to undertake such an examination but I am of the opinion that there is no need to do so in order to give a decision in this case.

In its letter of 18 December 1984 notifying the applicants of its decision to transmit certain documents to the intervener, the defendant merely stated that it did not regard a number of documents as constituting business secrets. With the exception of a few brief references to Annex 21 to the statement of objections, the defendant did not state on what grounds it had disregarded the suggestions made by the applicants concerning the confidential nature of those documents. Only in the case of Annex 21 did the defendant state that the document could not be covered by business secrecy because it constituted important evidence of an infringement of Article 86 of the EEC Treaty.

(aaa) The defendant's view that Annex 21 to the statement of objections could not be treated as confidential because it constituted documentary evidence of an infringement of Article 86 cannot be accepted at this stage of the proceedings.

It is true that in academic legal writing it is accepted that infringements of Articles 85 and 86 of the EEC Treaty of the kind which must be the subject of decisions whose publication is required by Article 21 may also be covered by business secrecy; in such a case there is no legitimate interest in non-disclosure and thus it does not constitute an obstacle to publication.[20]

That view appears to be correct with regard to publication of the Commission's *final* decision. However, according to Article 21 (2), even that decision must be published in a way which has regard to the legitimate interest of undertakings in the protection of their business secrets. It may be argued that the interest in the protection of business secrets can no longer be regarded as legitimate once there has been a finding in the administrative procedure that the competition rules of the Treaty have been infringed.

In this case, access to the applicants' documents has already been granted before the official hearing of the undertakings concerned under Article 19 (1) of Regulation No 17. It is quite possible that at such a hearing and in the subsequent consultation of the Advisory Committee on Restrictive Practices and Monopolies required by Article 10 (3) of Regulation No 17, factors may emerge which show the conduct of the undertakings concerned in a different light. It is only when those two further stages of the procedure have been completed and if the Commission has found that the competition rules of the Treaty have been infringed that it would seem proper to override the interest of the undertakings concerned in the protection of their business secrets. However, until the completion of those two stages, which provide a certain degree of protection also for the undertakings concerned, the Commission may not as a rule reveal the business secrets of those undertakings.

20 — See, for example, Gleiss/Hirsch, note 6 on Article 21 of Regulation No 17.

(bbb) Thus, since reliance on the fact that a particular business document constitutes evidence of an infringement of Article 86 of the EEC Treaty is not sufficient to justify setting aside the requirement of confidentiality at the stage of the procedure at which this was done, then the only remaining ground on which the transmission of the documents to the intervener can be explained is the defendant's general assertion that they did not constitute business secrets.

However, that laconic statement is not sufficient to satisfy the obligation imposed on the Commission by Article 190 of the EEC Treaty to state the reasons on which its decisions are based.

The extent of the duty to provide a statement of reasons which is laid down in Article 190 of the EEC Treaty depends on the nature of the measure in question. [21] The Commission is required to set out the matters of law and of fact which form the legal basis of the measure and the considerations which led it to adopt its decision. That provision does not take mere formal considerations into account but seeks to give an opportunity to the parties of defending their rights and to the Court of exercising its supervisory functions. To attain those objectives, it is sufficient for the decision to set out the principal issues of law and of fact upon which it is based and which are necessary in order that the reasoning which has led the Commission to its decision may be understood. They may be set out concisely as long as that is done in a clear and relevant manner. [22]

In the present case, the defendant did not satisfy those criteria. This may have something to do with the fact that it did not regard the actual communication of the documents to the applicants as a decision.

21 — Judgment of 13 November 1978 in Case 87/78 *Welding* v *Hauptzollamt Hamburg-Waltershof* [1978] ECR 2457.

22 — See judgment of 4 July 1963 in Case 24/62 *Germany* v *Commission* [1963] ECR 63.

(ff) Even on the assumption that it was necessary for the intervener to have access to the applicants' business documents, it is clear that the way in which access was granted was contrary to the principle of proportionality.

The applicants had offered to make their documents available, if necessary, in the form of summaries or versions containing no confidential information. The defendant, however, did not accept that offer and decided on its own responsibility which documents were to be regarded as confidential.

That procedure was clearly premature at the time since the defendant could not yet have known whether the documents offered by the applicants would be sufficient to meet the information requirements of the intervener.

I therefore regard the applicants' first submission as well founded.

(gg) However, should the Court take the view that the question whether the documents transmitted to the intervener constituted genuine business secrets still needs to be considered, I would ask the Court to allow me to take this matter up again during the oral procedure since the parties have not yet expressed their views on the matter in detail. I would ask at least to be given an opportunity to deliver a supplementary opinion in that regard.

2. (a) In their second submission, the *applicants* complain that the defendant has infringed Article 20 (1) of Regulation No 17 which provides that information acquired during the investigation may be used only for the purpose for which it was obtained. By transmitting the documents to the

intervener, the defendant infringed that provision since there is a serious risk that those documents may be used by the intervener against the applicants in legal proceedings in the United Kingdom. Moreover, it has not been established that the intervener gave an undertaking to use the documents in question only in the administrative procedure.

The *defendant* contends that it was given an undertaking by the intervener's legal representatives that they would use the documents transmitted to them only in the administrative procedure. Moreover, with regard to the legal proceedings in the United Kingdom, the applicants are in any event required, under the rules of the English law of procedure to produce documents in their possession.

The *intervener* maintains that it was given access to the documents in question only on condition that it undertook not to use them except for the purposes of the administrative procedure and that it has honoured that undertaking. Moreover, each party to legal proceedings in the United Kingdom is under a duty to disclose to the other party a list of the documents in its possession relating to any matter in question between them in the action and must allow the other party to inspect the documents referred to in the list. Accordingly, there has been no change in the applicants' position as a result of the defendant's disclosure of the documents to the intervener.

(b) It follows from the general scheme of Article 20 of Regulation No 17 that paragraph (1) refers only to the *use* of the information acquired and not to disclosure thereof, which is dealt with in paragraph (2). That makes it quite clear that the applicants' argument in that connection is not conclusive since they do not actually contend that the defendant made improper use of the information acquired. Moreover, since the the defendant obtained from the intervener an undertaking that the information made available to it would be used only in the administrative procedure, and it has not been established at this stage of the proceedings that the intervener has failed to honour that undertaking, there is no need to consider the basic question whether the intervener comes within the class of persons to whom Article 20 (1) of Regulation No 17 applies and whether the defendant may have contributed to any misuse of that information by the intervener.

The submission alleging an infringement of Article 20 (1) of Regulation No 17 cannot therefore be upheld.

3. (a) In their third submission, the *applicants* allege an infringement of Article 185 of the EEC Treaty. They object that the defendant decided to give the intervener access to the documents and irreversibly implemented its decision before informing the applicants thereof. If the confidential nature of certain documents is in dispute, the Commission should take a decision on the matter, but subject to review by the Court of Justice which must be able to exercise its powers under Articles 185 and 186 of the EEC Treaty and order suspension of the operation of the decision in question or adopt any other interim measure. By its conduct, the defendant deprived the applicants of any opportunity of seeking to have the operation of the contested decision suspended.

The *defendant* merely states that there can be no infringement of Article 185 since no decision was adopted in this case. In the alternative, it argues that it is not obliged to suspend the operation of a decision until the persons concerned by it have had an opportunity to apply to the Court of Justice for the adoption of interim measures.

The *intervener* also emphasizes that the Commission adopted no formal decision to which Article 185 of the EEC Treaty might have applied. Furthermore, any requirement to adopt a formal decision that is open to challenge would impose unacceptable delays in the administrative procedure.

(b) Although there is much to be said for the argument that, in view of the irreversible nature of the disclosure of the applicants' business documents, the defendant should, before implementing its decision, have taken the exceptional measure of giving the applicants an opportunity of obtaining the legal protection afforded by Article 185 of the EEC Treaty, I am none the less of the opinion that there is no need to deal with that argument in any further detail. This submission is concerned solely with the *implementation* of the defendant's decision to give the intervener access to the documents, and not with the decision itself. The question whether the original decision to grant access to the documents was lawful cannot depend on the way in which it was subsequently implemented.

If the decision was already unlawful, the fact that it may have been implemented incorrectly adds nothing to that finding. If, however, contrary to the view expressed here, it was lawful, it will remain so even if it was unlawfully implemented. Unlawful implementation would then amount to a separate infringement of the legal interests concerned which should be pleaded separately from the challenge to the decision itself; however, that was not done in this case.

Accordingly, this submission must also be rejected.

4. Costs

Since in my view the applicants should succeed in their main submissions and fail only in their claim concerning the consequences which the defendant should draw from a declaration by the Court that its decision is void, I consider that the defendant should be ordered to pay the costs pursuant to Article 69 of the Rules of Procedure, excluding the costs of the intervener. The intervener should be ordered to bear its own costs.

In conclusion, I propose that in Case 53/85 the Court should:

(1) Declare that the defendant's decision communicated to the applicants by letter of 18 December 1984 is void;

(2) For the rest, dismiss the application;

(3) Order the defendant to pay the costs, excluding the costs of the intervener;

(4) Order the intervener to bear its own costs.

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