Moreover, on the one hand, the complainants are not directly or individually concerned by the Commission's failure to act because withdrawal of immunity would not affect their legal position at all either in the context of the procedure before the Commission or in proceedings before the national courts and, on the other, they have no legitimate interest in that withdrawal.

ORDER OF THE COURT OF FIRST INSTANCE (First Chamber)
23 January 1991 *

In Case T-3/90,

Vereniging Prodifarma, whose registered office is in Amsterdam, represented by M. van Empel and A. J. H. W. M. Versteeg, of the Amsterdam Bar, with an address for service in Luxembourg at the Chambers of J. Loesch, 8 rue Zithe,

applicant,

v

Commission of the European Communities, represented by B. J. Drijber, a member of its Legal Department, acting as Agent, with an address for service in Luxembourg at the office of Guido Berardis, also a member of the Commission's Legal Department, Wagner Centre, Kirchberg,

defendant,

supported by

Nederlandse Associatie van de Farmaceutische Industrie 'Nefarma', whose registered office is in Utrecht, represented by B. H. ter Kuile, of the Hague Bar, and E. H. Pijnacker Hordijk, of the Amsterdam Bar, with an address for service in Luxembourg at the Chambers of J. Loesch, 8 rue Zithe,

intervener,

* Language of the case: Dutch.

APPLICATION for a declaration under Article 175 of the EEC Treaty that the Commission has infringed the Treaty by failing to take a decision on the application addressed to it by Prodifarma calling upon it to apply Article 15(6) of Regulation No 17 of the Council of 6 February 1962 with regard to the Omni-Partijen Akkoord concerning the supply of medicinal products in the Netherlands,

THE COURT OF FIRST INSTANCE (First Chamber)

composed of: J. L. Cruz Vilaça, President, H. Kirschner, R. Schintgen, R. García-Valdecasas and K. Lenaerts, Judges,

Registrar: H. Jung

makes the following

Order

Facts, procedure and forms of order sought

1 By an application lodged at the Registry of the Court of First Instance on 29 January 1990 Prodifarma, an association governed by Netherlands law, brought an action under the third paragraph of Article 175 of the Treaty for a declaration that the Commission has infringed the Treaty by not acting on the application made by Prodifarma requesting the Commission to apply Article 15(6) of Regulation No 17 of the Council of 6 February 1962, the first regulation implementing Articles 85 and 86 of the Treaty (Official Journal, English Special Edition 1959-62, p. 87) and withdraw from the parties to the Omni-Partijen Akkord (All Party Agreement, hereinafter referred to as 'the Agreement'), which is concerned with the supply of medicinal products in the Netherlands, the benefit of the immunity from fines provided for in Article 15(5) of Regulation No 17.

2 In pleadings lodged at the Registry of the Court of First Instance on 27 February 1990, the Commission raised an objection of inadmissibility pursuant to Article 91(1) of the Rules of Procedure of the Court of Justice, applicable *mutatis*

mutandis to the procedure before the Court of First Instance, and asked for a decision to be taken on admissibility without the merits of the case being examined.

3 This case must be seen in the context of the efforts made by the Netherlands public authorities since the 1970s to curb the cost of medicinal products supplied outside hospitals and other health care establishments. It is closely linked to Cases T-113/89 (*Nefarma* v *Commission* [1990] ECR II-797), T-114/89 (*VNZ* v *Commission* [1990] ECR II-827) and T-116/89 (*Prodifarma* v *Commission I* [1990] ECR II-843). In its examination of the facts giving rise to this application the Court has of its own motion taken account of the facts set out in the file in the connected Case T-116/89.

4 The Agreement was concluded on 18 August 1988 between the organizations which represent all the parties concerned in prescribing and supplying medicinal products in the Netherlands: producers and suppliers, doctors, chemists and the sickness insurance funds, with the exception, however, of the applicant, Vereniging Prodifarma. Prodifarma, which was founded in 1986 by Centrafarm BV, Medicalex BV, BV Pharbita, Pharmon BV, Aeramphic BV, Polyfarma BV, Pharmacis BV, Genfarma BV and BV Lagap BNL, is an association of smaller undertakings producing generic drugs or proprietary drugs or operating as parallel importers of generic drugs but not forming part of the branded drugs industry.

5 The parties to the Agreement undertook to make reductions in the price they charged chemists for pharmaceutical products in order to contribute to the efforts being made by the Netherlands public authorities to curb the costs of the supply of medicinal products in the Netherlands. Implementation of those price reductions was made conditional on various amendments to the national rules fixing the chemists' reimbursement system first being made, in order, in particular, to mitigate the effects of certain measures provided for in those rules aimed at encouraging the substitution of cheaper generic or parallel import drugs for proprietary drugs. Among the measures was a so-called incentive premium, which allowed chemists to retain 33% of the difference between the higher price of the proprietary drugs prescribed and the price of substitute products supplied. Under the Agreement, that premium was to be reduced to 15% of the difference. The Agreement was concluded for a period of two years. The Netherlands

Government, which was not a party to the Agreement either, declared that it was ready to make the amendments to the national rules sought by the parties. It was envisaged that those amendments, like the planned price reductions, would come into effect on 1 January 1989.

6 Two parallel procedures relating to the Agreement were set in motion before the Commission. First, on 2 December 1988 Prodifarma lodged a complaint and requested the Commission to find, in accordance with Article 3 of Regulation No 17, that the Agreement was incompatible with Article 85 of the Treaty. Secondly, on 9 December 1988 the Agreement was notified to the Commission in the name of all the signatories.

7 The Commission's first reaction to the Agreement was unfavourable. In a letter dated 14 December 1988 signed by Mr Rocca, a Director of the Directorate-General for Competition, the Commission informed the parties to the Agreement and the applicant that its departments were examining the possibility of opening a procedure under Article 15(6) of Regulation No 17.

8 Following representations made by the parties to the Agreement and the Netherlands Government which, in view of the Commission's negative attitude, had decided not to adopt the regulations on which implementation of the Agreement had been made conditional, the new Member of the Commission with responsibility for competition, Sir Leon Brittan, altered that position in a letter addressed to the Netherlands authorities on 6 March 1989. According to that letter, in which there was no longer any mention of applying Article 15(6) of Regulation No 17, the Agreement had to satisfy two conditions before the Commission could envisage giving a favourable decision, namely:

(i) first, the incentive premium for the supply of cheaper medicinal products should be reduced to 20% rather than to 15% of the difference in price between those products and the more expensive proprietary drugs;

(ii) secondly, the effects of the reduction in the premium should be evaluated for a period of one year by means of a monitoring system set up for the purpose.

9 The parties to the Agreement agreed to adapt it to take account of Sir Leon Brittan's proposals and, after the Netherlands Government had amended its national rules accordingly, the system provided for in the Agreement was implemented with effect from 1 April 1989. Since then the Commission's departments and the Netherlands authorities have been collecting the statistical data required under the said monitoring system.

10 In May 1989 several parties to the Agreement and Prodifarma, the applicant in the present case, brought three actions for annulment directed principally against Sir Leon Brittan's letter of 6 March 1989 which was at issue in Cases T-113/89, T-114/89 and T-116/89. While the parties to the Agreement complained that the Commission had adopted too negative an attitude with regard to their Agreement as it had been initially concluded, Prodifarma considered that the Commission's reaction to the Agreement was too favourable, given the anti-competitive effects which, in Prodifarma's view, were attached to it. Those applications were dismissed as inadmissible by three judgments of the Court of First Instance of 13 December 1990.

11 Without waiting for judgment on its action for annulment, on 28 September 1989 Prodifarma sent a letter calling upon the Commission to apply Article 15(6) of Regulation No 17 with regard to the parties to the Agreement within the time-limit laid down in the second paragraph of Article 175 of the Treaty. It alleged that the figures published in the mean time by the Netherlands authorities concerning the way the market in pharmaceutical products had developed in the Netherlands revealed that the provisions in the Agreement concerning price reductions had not been applied, but that implementation of the Agreement had, on the contrary, had the effect of reversing the tendency to substitute cheaper products for more expensive proprietary medicines.

12 By a letter of 21 November 1989 J. Mensching, a Head of Department in the Directorate-General for Competition, replied to the applicant that a complainant may not ask the Commission to withdraw the immunity from fines pursuant to Article 15(5) of Regulation No 17 which is enjoyed by undertakings which have notified an agreement. Even were the existence of such a right to be recognized, the Commission was not infringing Community law by refraining from applying

Article 15(6) of the regulation. He added that since the act requested by the applicant would have to be addressed to the parties to the Agreement, not to Prodifarma, the latter did not belong to the category of natural or legal persons who might bring an action before the Community court pursuant to the third paragraph of Article 175 of the Treaty and that it had been considered neither necessary nor expedient to propose to the Commission's departments responsible that they should adopt any formal position as a result of Prodifarma's request.

13 It was in those circumstances that the applicant brought the present action for failure to act, against which the Commission has raised an objection of inadmissibility. By an application lodged at the Registry of the Court of First Instance on 30 May 1990, Nefarma, a party to the Agreement and the applicant in Case T-113/89, sought leave to intervene in the present case in support of the defendant. By order of 5 July 1990 the Court of First Instance (First Chamber) granted Nefarma leave to intervene. The intervener did not submit any observations on the objection of inadmissibility.

14 The Commission claims that the Court should:

(i) declare the application inadmissible;

(ii) order the applicant to pay the costs.

15 Prodifarma contends that the Court should:

(i) examine the objection of inadmissibility raised by the Commission as soon as possible,

(ii) dismiss that objection of inadmissibility;

(iii) uphold Prodifarma's original application;

(iv) order the Commission to pay the costs.

16 By virtue of Article 91(3) of the Rules of Procedure of the Court of Justice, the remainder of the proceedings relating to the objection raised are oral, unless the Court decides otherwise. The Court of First Instance considers that, in the present case, having examined the documents before it, it is sufficiently well informed and there is no need to open the oral procedure.

Admissibility

17 In support of its objection of inadmissibility the Commission relies on three pleas in law, namely that, first, it is under no obligation to apply Article 15(6) of Regulation No 17; secondly, a complainant is not entitled to require that that provision be applied; and, thirdly, it has defined its position within the meaning of the second paragraph of Article 175 of the Treaty on the request to act addressed to it by the applicant.

18 Before setting out its arguments concerning those three pleas in law, the Commission points out that although a decision pursuant to Article 15(6) of Regulation No 17 is comparable, in view of its provisional character, to the adoption of interim measures pursuant to Article 3 of Regulation No 17, it differs in a number of respects. In the first place, the Commission points out that, as opposed to an interim measure, a decision pursuant to Article 15(6) is possible only where an agreement has been notified. Secondly, it explains that in principle it suffices for Article 15(6) to apply that the agreement notified should, after a preliminary assessment has been made, appear incompatible with Article 85(1) of the Treaty, whereas for the adoption of interim measures it is necessary that other conditions be satisfied, in particular that urgency and risk of irreparable harm should be established. Thirdly, it points out that the effect of a decision applying Article 15(6) is merely to lift immunity from fines, whereas interim measures generally take the form of an injunction to do or refrain from doing something. Fourthly and finally, it emphasizes that the procedure provided for in Article 15(6) concerns only the Commission and the notifying parties, whereas third parties who feel themselves harmed may play an important role in the procedure leading up to the adoption of interim measures.

19 As regards the first plea in law in support of its objection of inadmissibility, the Commission maintains that an action pursuant to Article 175 of the Treaty may only succeed if the defendant institution was bound to act by virtue of an obligation derived from Community law. It asserts that Article 15(6) of Regulation No 17 merely vested the Commission with a power and accordingly it is under no obligation to act in this case. It refers to the judgment of the Court of Justice in Case 125/78 *GEMA* v *Commission* [1979] ECR 3173, according to which the Commission is not bound to find, at the request of a complainant within the meaning of Article 3 of Regulation No 17, that there is an infringement.

20 In its second plea in law the Commission claims that, in the absence of any obligation on it to apply Article 15(6) of Regulation No 17, the complainant is not entitled to require that it apply those provisions. It points out that although undertakings are entitled to request the Commission, pursuant to Article 3(2) of Regulation No 17, to find that Articles 85 and 86 of the Treaty have been infringed, there are, however, no provisions allowing complainant undertakings to request it to impose a fine (or *a fortiori* to oblige it to do so) or to lift the immunity provided for in that respect by Article 15(5).

21 In the Commission's view, there is no compelling reason why complainant undertakings should nevertheless be allowed that possibility. In its view, the complainant cannot demonstrate any interest other than an 'indefinable psychological interest' in having Article 15(6) applied because the lifting of immunity from fines does not alter its own legal position and produces effects only with regard to the position of the notifying parties.

22 The Commission adds that a decision taken pursuant to Article 15(6) of Regulation No 17 does not have to be addressed to the complainant, so that the final condition in the third paragraph of Article 175 of the Treaty is not satisfied.

23 It maintains, furthermore, that the right of action available to the notifying parties against a decision pursuant to Article 15(6) (judgment of the Court of Justice in Joined Cases 8/66 to 11/66 *Cimenteries* v *Commission* [1967] ECR 75) certainly does not mean that a complainant also may challenge the Commission's refusal to

take such a decision. It claims that such a refusal is not based on a discretionary assessment of the case in question but on the absence of any legal basis for the complainant's request to the Commission to that effect. Finally, it points out at a more general level that the link formerly made between actions pursuant to Article 173 and actions pursuant to Article 175 of the Treaty seems to have been abandoned in the more recent case-law of the Court of Justice (Case 302/87 *Parliament* v *Council* [1988] ECR 5615).

24 In its third and final plea in law, the Commission claims that the letter sent to the applicant on 21 November 1989 by Mr Mensching, a Head of Department in the Directorate-General for Competition, constituted a definition of its position within the meaning of the second paragraph of Article 175 of the Treaty, rendering the action for failure to act inadmissible.

25 In order to show that its application is admissible, Prodifarma stresses in its application that the decision to apply Article 15(6) of Regulation No 17 is a decision open to challenge on the basis of Article 173 of the Treaty by the parties to whom it is addressed. It then points out that an action for annulment brought by a complainant within the meaning of Article 3 of Regulation No 17 against a decision taken by the Commission in the context of the procedure commenced as a result of the complaint is admissible, regardless of the content of the decision. Prodifarma concludes that the complainant may bring an action against any express decision of the Commission refusing to apply the provisions of Article 15(6) of Regulation No 17. It considers that its analysis is confirmed by the judgments of the Court of Justice in Joined Cases 8/66 to 11/66 *Cimenteries* v *Commission*, cited above, and Case 26/76 *Metro* v *Commission* [1977] ECR 1875, at p. 1902. The applicant finds further support in the judgment of the Court of Justice in Case 15/70 *Chevalley* v *Commission* [1970] ECR 975 for its assertion that an action may be brought not only against a decision of rejection but also against a refusal to take a decision. Prodifarma draws the conclusion that a complainant who did in fact have the opportunity of taking part in a procedure commenced by the Commission may bring an action against the latter's failure in the context of that procedure to take a decision pursuant to Article 15(6) of Regulation No 17.

26 The applicant considers that the judgment of the Court of Justice in Case 302/87 *Parliament* v *Council*, cited above, cannot be relied upon to argue that the concept of an act open to challenge is not identical in Articles 173 and 175. It concludes

from the parallelism between those legal remedies that an action under Article 175 lies not only when a Community institution fails to adopt an act which Community law obliges it to adopt but also in a case where the Commission has a discretionary power to act but misuses that power, as it were, by not acting.

27 Against the first plea in law relied upon by the Commission in support of its objection of inadmissibility, the applicant argues that in this case the Commission is indeed bound to apply the provisions of Article 15(6) of Regulation No 17 to the parties to the Agreement. It claims that in its Order in Case 792/79 R *Camera Care* v *Commission* [1980] ECR 119 the Court accepted that the Commission was empowered to adopt interim measures in the absence of any express legal basis in reliance on general considerations relating to the Commission's responsibility for supervising compliance with the competition rules of the Treaty. According to the applicant, those considerations apply *a fortiori* to the question of the implementation of Article 15(6) of Regulation No 17 inasmuch as the power is expressly envisaged.

28 The applicant concludes that the Commission may not use the power conferred on it by Article 15(6) as it chooses but must use it to ensure optimum implementation of the competition rules. It follows from the Order in Case 792/79 R cited above that the Commission must in particular avoid its power to make decisions under Article 3 of Regulation No 17 'becoming ineffectual or even illusory because of the action of certain undertakings'.

29 The applicant states that the Agreement was concluded for a period of only two years which means that when the Commission terminates the procedure by a definitive decision the Agreement will probably have applied for almost the entire period provided for. The applicant considers that if the parties to the Agreement continue to benefit from the immunity provided for in Article 15(5) of Regulation No 17 they will achieve all the ends pursued in the Agreement. Any prohibition decision that the Commission might address to them would amount to nothing more than a mere decision of principle devoid of any real effect. Prodifarma adds that by inserting into the procedure a 'trial period' of one year and by delaying

examination of the agreement until the end of that period the Commission itself deliberately lengthened the procedure. The applicant considers that in those circumstances the Commission is bound to ensure that its own conduct does not contribute to making its supervisory function 'ineffectual or even illusory' and must in consequence make the adjournment of its examination conditional on the 'trial period' being at the risk of the parties to the Agreement as regards the threat of fines.

30 The applicant refers also to the judgment of the Court of Justice in Joined Cases 100/80 to 103/80 *Musique diffusion française* v *Commission* [1983] ECR 1825, at p. 1905 et seq., according to which the Commission must also take into consideration 'the context in which an infringement occurs and ensure that its action has the necessary deterrent effect'. It maintains that withdrawal of the benefit of the immunity provided for in Article 15(5) would have a preventive effect in so far as it would deter the parties to the Agreement from merely prolonging the procedure and would encourage them to work actively towards the pending administrative procedure culminating in a final decision.

31 With regard to the Commission's second plea in law, the applicant maintains that the Commission is disregarding the position of the complainants in a procedure such as this by denying their interest in the application of Article 15(6) of Regulation No 17. According to Prodifarma, when an agreement is the subject of a complaint on the one hand and of a notification on the other, the parties concerned are adversaries in the context of the procedure in which the Commission assesses the agreement in question with regard to Article 85 of the Treaty. To state that such a procedure concerns solely the parties to the agreement amounts to a serious disregard of the facts of the case. The applicant considers that it has a manifest and direct interest in the course and termination of the procedure. It claims that in the judgments in Case 26/76 *Metro*, cited above, and Case 210/81 *Demo-Studio Schmidt* v *Commission* [1983] ECR 3045 it was recognized that individuals have an interest, which must be legally protected, in the correct application of the competition rules when their interests are affected by an agreement which is assessed in the light of those rules. As for the specific question of the application of Article 15(6) of Regulation No 17, Prodifarma maintains that its interest lies in the fact that the immunity from fines conferred by Article 15(5) leads, as between the parties to the 'dispute', to inequality, which disappears when the immunity is lifted.

32 Finally the applicant claims that the decision it seeks would affect it directly and individually and that it must therefore be regarded as an act within the meaning of the third paragraph of Article 175 of the Treaty as far as the applicant is concerned.

33 With regard to the Commission's third plea in law, the applicant states that only a definition of position imputable to the institution can put an end to its failure to act. That condition is not satisfied by the letter of 21 November 1989, which was signed neither by a Director, nor by a Director-General nor by the Member of the Commission responsible.

34 In view of those issues of fact and law, the Court of First Instance considers that the Commission's second plea of inadmissibility should be examined first.

35 It must be pointed out that, according to the third paragraph of Article 175 of the Treaty, any natural or legal person may, under the conditions set out in that article, complain to the Community Court that an institution 'has failed to address to that person any act other than a recommendation or an opinion'. It is clear from the wording of that provision that in order for an action for failure to act to be admissible a natural or legal person must establish that he is in the exact legal position of a potential addressee of a legal act that the Commission is obliged to take in his regard (see, for example, the judgment in Case 246/81 *Lord Bethell* v *Commission* [1982] ECR 2277, at p. 2291, and the Orders in Case C-371/89 *Emrich* v *Commission* [1990] ECR I-1555, at paragraphs 5 and 6, and Case C-72/90 *Asia Motor France* v *Commission* [1990] ECR I-2181, at paragraphs 10 to 12).

36 The applicant is seeking a decision from the Commission pursuant to Article 15(6) of Regulation No 17, which states that the provisions of Article 15(5) guaranteeing immunity from fines to parties who have notified an agreement 'shall not have effect 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 Article 85(3) is not justified'. It is clear from the terms of that provision that the decision which it empowers the Commission to

take must necessarily be addressed to the parties to the agreement notified. On the other hand, it does not provide that third parties who have complained about the agreement in accordance with Article 3 of Regulation No 17 should also be addressees.

37 The decision sought by the applicant association should not therefore be addressed to it nor to its member undertakings. In those circumstances neither the applicant nor its members are among the natural and legal persons who, under the actual wording of the third paragraph of Article 175 of the Treaty, could bring an action for failure to act.

38 Although that finding is sufficient to establish that the present application is inadmissible, the Court of First Instance considers that *ad abundantiam* and in the alternative it must examine the applicant's argument that it is directly and individually concerned by the decision it seeks and that it therefore ought to be treated as a potential addressee of that decision for the purposes of the third paragraph of Article 175.

39 Even assuming that there could be held to exist the parallelism between the application for annulment pursuant to Article 173 and the action for failure to act pursuant to Article 175 of the Treaty alleged by the applicant, and assuming also that the judicial protection of individuals requires that the third paragraph of Article 175 be interpreted broadly, so that a natural or legal person could allege that an institution had failed to adopt an act of which he would not be the addressee but which would concern him directly and individually if it were adopted (see, for instance, the judgment of the Court of Justice in Case 247/87 *Star Fruit Company* v *Commission* [1989] ECR 291, at p. 301, and in particular the Opinion of Mr Advocate General Lenz in that case at p. 296), the present action cannot be regarded as admissible unless a decision pursuant to Article 15(6) of Regulation No 17 would affect the applicant directly and individually by producing legal effects in its regard. The legal effects that would be produced by the decision requested by the applicant must therefore be examined from the point of view of competition law and legal procedure.

40 It must be noted at the outset that a decision pursuant to Article 15(6) of Regulation No 17 has no effect on the validity of the agreement being examined with regard to Article 85(2) of the Treaty. It would not therefore affect the applicant's position or that of its members before national courts.

41 For the parties to an agreement, the decision to withdraw immunity produces legal effects in two respects. On the one hand it lays them open to being fined if they continue to implement their agreement. On the other hand it excludes the undertakings' good faith as regards the compatibility of their agreement with Article 85 of the Treaty, so that henceforth they can scarcely deny that their infringement of Article 85(1) was committed intentionally or, at the least, negligently. In consequence, the decision requested by the applicant would not be merely apparently addressed to the parties who notified the agreement. On the contrary, such a decision, if it were adopted, would actually affect the legal situation of the parties to the agreement.

42 On the other hand, the decision to withdraw immunity does not have the effect of preventing the parties from implementing their agreement. It is true that the risk of a fine could deter them, but that possible effect of such a decision is a purely factual matter and depends, moreover, on the intention of the undertakings concerned. It cannot of course be denied that the applicant Prodifarma and its members, who consider themselves harmed by the conduct of the parties to the Agreement, have an interest in seeing such an effect produced in the case. That is an indirect interest, though, and is insufficient to warrant a finding that their legal position would be affected by the decision requested (see the judgment in Case 246/81 *Lord Bethell*, cited above).

43 It must further be held that the applicant is not entitled to have the Commission lift the immunity from fines enjoyed by the parties to the Agreement. Regulation No 17 does not provide that complainants may call on the Commission to exercise the power it holds pursuant to Article 15(6) of Regulation No 17. As the Commission has rightly stressed, that is because complainants have no legitimate interest in having the benefit of that immunity withdrawn from the parties to the Agreement. As opposed to interim measures, which the Commission may adopt pursuant to Article 3 of Regulation No 17, withdrawal of the immunity cannot directly benefit complainants. Moreover, such a decision must satisfy consider-

ations of expediency which require that the Commission should enjoy wide freedom of action. Such freedom is incompatible with the possibility that third parties should be able to compel it to lift the immunity or to take a decision on their request to that effect.

44 It should be added that a decision pursuant to Article 15(6) of Regulation No 17 cannot change the legal position of the applicant from the procedural point of view either. Such a decision constitutes the culmination of a special procedure which is distinct from the procedure for examining the applicant's complaint (see the judgment of the Court of Justice in Joined Cases 8/66 to 11/66 *Cimenteries* v *Commission* cited above, at p. 92) in which the procedural rights of the applicant remain intact. The said special procedure concerns only the parties to the agreement. The indirect interests of the applicant (see paragraph 42 *supra*) are not sufficient to confer on it a right to be heard, pursuant to Article 19(2) of Regulation No 17, in the context of that special procedure. The applicant, as a complainant, is not a party thereto, and therefore has no procedural right capable of being affected by a decision taken on the termination of that procedure.

45 It follows that, although there is no provision entitling it to do so, the applicant is seeking the adoption of an act which would not concern it directly and individually within the meaning of the second paragraph of Article 173 of the Treaty. In consequence, even were its argument as regards the existence of parallelism between the legal remedies available under Articles 173 and 175 to be accepted, its application must be declared inadmissible.

46 It follows from all the foregoing considerations that this action must be dismissed as inadmissible and there is no need for the Court to examine the other pleas in law raised by the Commission.

Costs

47 Under Article 69(2) of the Rules of Procedure of the Court of Justice the unsuccessful party is to be ordered to pay the costs if they have been asked for in the

successful party's pleadings. Since the applicant has failed in its submissions, it must be ordered to pay the costs as the Commission requested. The intervener did not ask for costs and must therefore bear its own costs.

On those grounds,

THE COURT OF FIRST INSTANCE (First Chamber)

hereby:

(1) Dismisses the application as inadmissible;

(2) Orders the applicant to pay the costs, except those incurred by the intervener, which must be borne by the intervener itself.

Luxembourg, 23 January 1991.

H. Jung
Registrar

J. L. Cruz Vilaça
President