preparatory to the decision that will constitute the final stage of the administrative procedure established by Regulations Nos 17 and 99/63 and cannot, as such, form the subject matter of an action for annulment under Article 173 of the Treaty.

Although compliance with the rights of the defence in any procedure which might result in the imposition of a penalty constitutes a fundamental principle of Community law that must be complied with in every circumstance, the possible infringement of those rights by way of refusal to grant access to the file remains within the bounds of the prior administrative procedure in which it takes place.

Were the Community judicature, in proceedings directed against a decision bringing the procedure to a close, to recognize that a full right of access to the file existed and had been infringed and therefore to annul the said decision for infringement of the rights of the defence, the entire procedure would be vitiated by illegality. In such a case the Commission should either abandon the proceedings or resume the procedure, ensuring that the rights previously disregarded were observed.

JUDGMENT OF THE COURT OF FIRST INSTANCE (Second Chamber)

18 December 1992 *

In Joined Cases T-10/92,

SA Cimenteries CBR, a company governed by Belgian law, whose registered office is in Brussels, Belgium, represented by Michel Waelbroeck, Alexandre Vandencasteele and Denis Waelbroeck, of the Brussels Bar, with an address for service in Luxembourg at the Chambers of Ernest Arendt, 8-10 Rue Mathias Hardt,

T-11/92,

Blue Circle Industries plc, a company governed by English law, whose registered office is in London, United Kingdom, represented by Paul Lasok and Vivien Rose, of the Bar of England and Wales, and Graham Child, Solicitor of the Supreme Court, with an address for service in Luxembourg at the Chambers of Messrs Elvinger and Hoss, 15 Côte d'Eich,

* Languages of the case: English and French.

T-12/92,

Syndicat National des Fabricants de Ciments et de Chaux, an association governed by French law, whose registered office is in Paris, France, represented by Edouard Didier and Jean-Claude Rivalland, of the Paris Bar, with an address for service in Luxembourg at the Chambers of Marc Loesch, 8 Rue Zithe,

and T-15/92,

Fédération de l'Industrie Cimentière asbl, an association governed by Belgian law, whose registered office is in Brussels, Belgium, represented by Hans van Houtte and Onno W. Brouwer, of the Brussels Bar, with an address for service in Luxembourg at the Chambers of Marc Loesch, 8 Rue Zithe,

applicants,

v

Commission of the European Communities, represented by Julian Currall, of its Legal Service, acting as Agent, with an address for service in Luxembourg at the office of Roberto Hayder, of the Commission's Legal Service, Wagner Centre, Kirchberg,

defendant,

APPLICATIONS for the annulment of one or more decisions contained in various letters sent by the Commission to the applicants in Cases IV/27.997 — CPMA, and IV/33.126 and IV/33.322 — Ciment, refusing them full access to the file and communication to them of all the objections,

THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES (Second Chamber),

composed of: J. L. Cruz Vilaça, President, D. Barrington, J. Biancarelli, A. Saggio and A. Kalogeropoulos, Judges,

Registrar: H. Jung,

having regard to the written procedure and further to the hearing on 24 November 1992

gives the following

Judgment

The events giving rise to the dispute

1 On 25 April 1989, the Commission, acting on its own initiative, carried out a number of checks in the offices of some ten undertakings or associations of undertakings in several Member States, as part of an investigation into the existence of agreements or concerted practices within the European cement industry. Checks were also carried out on other undertakings or associations of undertakings over the subsequent days and weeks.

2 On the basis of the documents obtained during the course of those checks and of the information provided by the undertakings and associations of undertakings concerned under Article 11 of Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles 85 and 86 of the EEC Treaty (OJ, English Special Edition 1959-1962, p. 87), the Commission concluded that a system of agreements or concerted practices probably existed, at both national and international levels, between the European cement producers, supported by certain national and international trade associations, the purpose of that system being, essentially, to share out the markets of the Member States, to keep those markets separate, and to limit imports from other Member States and from non-member countries.

3 In those circumstances, the Commission decided to initiate proceedings for infringement of Article 85(1) of the EEC Treaty (Cases IV/27.997 — CPMA, and IV/33.126 and IV/33.322 — Ciment) against 76 undertakings or associations of undertakings in the cement industry, including the applicants. In the course of those proceedings, the Commission sent a Statement of Objections ('SO') in November 1991 to each of the undertakings or associations of undertakings

accusing them of infringing Article 85(1) of the EEC Treaty and informing them that they were liable to have fines imposed on them.

4 In its SO the Commission draws a distinction, essentially, between two types of objection concerning respectively conduct at international level and conduct at national level. Those of the first type relate to meetings allegedly held within Cembureau, a European association of which the various national federations are members, and the taking of certain action decided on at those meetings. Those of the second type relate to action aimed at sharing out the national markets between the producers of the Member State concerned and at limiting imports.

5 The SO is divided into two parts, each part being divided in turn into a number of chapters. Part I, entitled 'The Facts', comprises nine chapters. The first two chapters deal with 'The Cement Market' and 'International Cement Organizations' respectively, and each of the remaining seven is devoted to an analysis of the practices observed in the individual national markets. Part II, entitled 'Legal Assessment', is itself divided into three further sections, the first of which, relating to the applicability of Article 85(1) of the EEC Treaty to the facts in issue, comprises ten chapters. The first three chapters concern the agreements and practices described in Chapter 2 of Part I ('International Cement Organizations'), while the remaining seven relate to the agreements and practices set out in each of the seven chapters in Part I examining the individual national markets. The two remaining sections of Part II concern the non-applicability of Article 85(3) of the EEC Treaty and the applicability of Article 15(2) of Regulation No 17 respectively.

6 Although it is a single document, the full text of the SO was not communicated to each of the 76 undertakings and associations of undertakings concerned. Only the chapters concerning conduct at international level (Chapters 1, 2, 10, 11 and 12) and Sections B and C of Part II of the SO were communicated to all the undertakings and associations of undertakings concerned. The chapters concerning conduct at national level (Chapters 3 to 9 and 13 to 19) were sent only to the undertakings and associations of undertakings established in the Member State in question.

Besides the chapters concerning them, the addressees of the SO received a full table of contents to the SO and a list of all the documents on the file showing those to which they could have access.

7 After receiving the SO and the list of documents to which they had access, a number of undertakings and associations of undertakings, including the applicants, requested the Commission to communicate to them the chapters which had been addressed to each of the other addressees of the SO but not to them. They also requested the Commission to grant them access to the complete file, with the exception of internal or confidential documents. In response to those requests, the Commission informed the applicants in particular, in a number of letters sent to them in December 1991 and January and February 1992, that it refused to communicate to them the chapters of the SO sent to each of the other addressees or to grant them access to documents in its file other than those which they had already been able to inspect. Arguing that the two procedures were interconnected, the Fédération de l'Industrie Cimentière (the 'FIC') also requested the Commission to allow it to reply at the same time to the SO which had already been sent to it and the one which the Commission intended sending to it in respect of the 'Cement en Beton Stichting' agreement (the 'CBS' agreement), notified on 14 January 1975. By letters of 27 January and 12 February 1992, the Commission informed the FIC that the procedure in progress had no connection with the CBS agreement. It then rejected the FIC's requests that the procedure concerning the CBS agreement be joined with the procedure with which the present action is concerned and that the time-limit granted to it to reply to the SO be extended.

Procedure

8 In those circumstances, by applications lodged at the Registry of the Court of First Instance on 12, 14 and 17 February 1992 respectively, the applicants SA Cimenteries CBR ('CBR'), Blue Circle Industries plc ('Blue Circle'), Syndicat National des Fabricants de Ciments et de Chaux ('SNFCC') and the FIC brought the present actions for the annulment of the decisions contained in the Commission's abovementioned letters. A fifth action having the same subject-matter, brought by Eerste Nederlandse Cement-Industrie NV and Vereniging Nederlandse Cementindustrie, was removed from the register by order of the Court of First Instance (Second Chamber) of 14 September 1992, following its discontinuance by the parties.

9 At the same time as they commenced their actions, all the applicants submitted applications for interim measures under Articles 185 and 186 of the EEC Treaty and Article 105(2) of Rules of Procedure of the Court of First Instance seeking suspension of the procedure initiated by the Commission pending the judgment to be given by the Court on the substance. By order of 23 March 1992, the President of the Court of First Instance dismissed the applications for interim measures but extended the period allowed to the applicants for lodging their replies to the SO until Friday 27 March 1992 or, in so far as the applicants complied with the conditions laid down by the Commission as regards the number of copies to be lodged, until Tuesday 31 March 1992.

10 Upon hearing the Report of the Judge-Rapporteur, the Court decided to open the oral procedure without any preparatory inquiry and to inform the parties that the hearing would be limited to the question of the admissibility of the applications. After inviting the parties to submit their observations, on 11 November 1992 the Court of First Instance (Second Chamber) ordered that Cases T-10/92, T-11/92, T-12/92 and T-15/92 be joined for the purposes of the oral procedure and the judgment.

11 The parties presented oral argument and their answers to the questions put by the Court concerning the admissibility of the present actions at the hearing on 24 November 1992. At the end of the hearing, the President declared the oral procedure closed.

Forms of order sought by the parties

12 In Case T-10/92, CBR claims that the Court should:

— declare the application admissible and well founded;

— annul the Commission decision of 15 January 1992 refusing to communicate to it the complete SO and refusing full access to the file which it requested with a view to its effectively exercising its rights of defence against the SO which was sent to it by the Commission in Cases IV/33.126 and IV/33.322 — Ciment, and IV/27.997 — CPMA;

— order the Commission to pay the costs.

13 In Case T-11/92, Blue Circle claims that the Court should:

— annul the decision or decisions whereby the Commission refrained from communicating to it the entire contents of the SO and refused to grant it access to all the relevant documents in the file and required the applicant to lodge its reply to the SO by 24 or 28 February 1992;

— order the Commission to pay the costs.

14 In Case T-12/92, the SNFCC claims that the Court should:

— find that the Commission has contravened the rights of defence of the Syndicat by refusing to grant it access to all the documents in the file compiled by it that are available to the parties not of French nationality;

— annul the Commission's decision refusing such access, as it appears from the its letters of 23 and 27 December 1991 and 10 January 1992;

— order the Commission to pay the costs and disbursements of which evidence will be produced in due course.

15 In Case T-15/92, the FIC claims that the Court should:

— declare the action admissible and well founded;

— consequently, annul the Commission's decisions of 29 November 1991, 27 January 1992 and 12 February 1992 refusing:

(a) to allow the applicant to reply at the same time to the SO sent to it by the Commission in Cases IV/27.997 — CPMA, IV/33.126 and IV/33.322 — Ciment and the one which the Commission intends sending to it concerning the CBS agreement, and to allow it to do so within a reasonable period of at least two months;

(b) to send to the applicant a complete explanation of the Commission's objections against it;

(c) to grant it access to all the non-confidential documents in the file, and

(d) to send to it certain chapters of the SO;

— order the Commission to pay the costs.

16 The Commission contends that the Court should:

— dismiss the applications as inadmissible;

— in the alternative, if they are found to be admissible, dismiss them as unfounded;

— deal with the present cases as a matter of priority pursuant to Article 55(2) of the Rules of Procedure;

— order the applicants to pay the costs, including those of the application for interim measures.

Admissibility

A — *Arguments of the parties*

17 The Commission, without raising a formal objection of inadmissibility under Article 114 of the Rules of Procedure, submits that the applications are inadmissible. In its view, the grounds of such inadmissibility vary according to the claims made in the various applications. Thus, the claims that the SO should be disclosed in its entirety and access be granted to the documents concerning the chapters of the SO which were not addressed to each of the applicants are manifestly inadmissible since they are directed against the SO itself, and the case-law of the Court of Justice clearly precludes such a course of action (judgment in Case 60/81 *IBM* v *Commission* [1981] ECR 2639). Moreover, that reasoning was, in the Commission's view, fully confirmed by the order made by the President of the Court of First Instance on 23 March 1992 on the application for interim relief.

18 As regards the claims concerning access to the documents relating to the chapters of the SO sent to the applicants, the Commission, although putting forward arguments concerning the substantive legal issues, also raises the question of their admissibility. According to the Commission, access to the file is a stage in the administrative procedure closely bound up with the SO itself and is in fact simply one manifestation of the general principle of observance of the rights of the defence and in particular the right to be heard. Other than in exceptional cases, such as where a measure lacks even the appearance of legality, non-disclosure of one or more documents as well as questions relating to the SO can be dealt with only in proceedings directed against the decision which brings the administrative procedure to a close. In the Commission's view, the case-law of the Court of Justice (judgment in Case 107/82 *AEG* v *Commission* [1983] ECR 3151) and of the Court of First Instance (judgment in Joined Cases T-68/89, T-77/89 and T-78/89 *SIV and Others* v *Commission* [1992] ECR II-1403) confirms that approach.

19 The Commission also rejects the view that the more recent decisions of the Court of Justice cited by certain applicants — and in particular the judgment in Case 53/85 *Akzo* v *Commission* [1986] ECR 1965 — have made any change regarding the appropriate appraisal to be made of the claims put forward by the applicants. The defendant contends in particular that an SO cannot be placed on the same level as a decision to transmit confidential information to a third-party complainant — the latter being of a final character since the confidentiality of information is lost for ever once it is disclosed to a third party — or as a decision adopted under

Article 11 of Regulation No 17 which, unlike an SO, imposes an obligation on its addressee. Nor, in the Commission's opinion, can the applicants rely on the judgment of the Court of Justice in Case 170/89 *BEUC* v *Commission* [1991] ECR I-5709 since, unlike the addressees of an SO in competition matters, which are entitled to challenge the final decision, a third-party complainant in anti-dumping proceedings has no standing to institute proceedings for the annulment of the final decision.

20 Finally, the Commission states that in any event the various letters at issue in these proceedings are not measures against which an action may be brought under Article 173 of the EEC Treaty since they are merely letters sent by Commission officials at an even earlier preparatory stage of the procedure than the SO and consequently do not affect the applicants' legal situation in any way.

21 The applicants consider that the situation in the present case is entirely different from that in the IBM case (Case 60/81, above) since, unlike an SO, which is a preparatory measure expressing a provisional view, the decisions contested in this case are measures by which the Commission expressed its final view, the legal effects of which are binding on the addressees and affect their interests.

22 The applicants also state that the Court of Justice has already held, in the interests of upholding the rights of the defence, that actions against decisions taken by the Commission during the prior administrative procedure are admissible — notwithstanding the fact that an action against the subsequent decision finding an infringement may be possible (judgments in Case 53/85 *Akzo*, above, Case 374/87 *Orkem* v *Commission* [1989] ECR 3283, and Case C-170/89 *BEUC*, above), if such decisions affect the legal situation of the applicants and are definitive in character, as they are in the present case.

23 CBR considers in particular that since full access to the file must include not only access to all the non-confidential documents but also — and as a matter of priority — access to all the chapters of the SO, any attempt to separate those two aspects of the application is artificial and must therefore be rejected. It also claims that, by contrast with the *IBM* case, in which the judicial procedure was intended to protect the interest of the applicant in not having to defend itself in administrative proceedings which it regarded as entirely illegal, CBR wishes, in the present case, to give full effect to the administrative procedure by ensuring that the principle *audi alteram partem*, which can be guaranteed only by access to the file and to the SO in its entirety, is observed. The applicant also wonders what interest the Commission has in contending that the present actions are inadmissible since any subsequent annulment of the decisions which it will have to take at the end of the administrative procedure would place it under an obligation to resume the procedure and allow the undertakings and associations of undertakings involved an opportunity to express their views on the objections maintained against them, in the light of the new information to which they should have been granted access at the outset.

24 Blue Circle considers, as do CBR and the FIC, that, contrary to the Commission's interpretation of the judgment of the Court of Justice in Case C-170/89 *BEUC*, supra, BEUC's application was declared admissible despite the fact that it had no right to challenge the Commission's final decision and not, as contended by the Commission, because that right had not been recognized as available to it. Blue Circle also considers that the possibility of challenging the Commission's final decision does not provide sufficient protection of its rights to take the place of the present action, since deferral of judicial review to the stage of the Commission's final decision under Article 85 would undermine its right to have such a decision based on a correct appraisal of the available evidence.

25 The SNFCC states that, unlike the SO, which is a preparatory measure, access to the file is in itself a distinct and special procedure within the administrative procedure for investigating alleged infringements of Article 85 or 86 of the Treaty. Refusal of access to the file entails harm of two kinds, in the applicant's view: immediate harm, which affects the legal situation of the addressee even at the stage of the administrative procedure, and potential harm, which might become apparent in the final adverse decision adopted by the Commission.

26 The FIC states that the Commission could not find in the order made by the President of the Court of First Instance on the applications for interim relief any confirmation of the merits of its argument concerning the inadmissibility of the actions for annulment, since it has been consistently held that the review carried out by the judge hearing an application for interim relief is provisional and not binding on the Court as regards the substance of the case. It also considers that the contested decisions significantly affect its legal situation, since they definitively fix the manner in which the rights of the defence may be exercised and, even at the present stage, diminish their substance and prevent their proper exercise.

27 At the hearing, the applicants also referred, in support of their contention that the present applications are admissible, to two judgments of the Court of Justice on State aids (in Case C-312/90 *Spain* v *Commission* [1992] ECR I-4117 and Case C-47/91 *Italy* v *Commission* [1992] ECR I-3669), in which the Court declared admissible actions brought against preparatory measures, namely letters initiating the procedure provided for in Article 93(2) of the Treaty.

B — *The Court's appraisal*

28 In deciding whether the present applications are admissible it should be observed first of all that the measures against which proceedings for annulment may be brought under Article 173 of the EEC Treaty are measures the legal effects of which are binding on, and capable of affecting the interests of, the applicant by having a significant effect on his legal position. In that regard, it must be observed that, in the case of acts or decisions drawn up in a procedure involving several stages, only measures definitively laying down the position of the institution upon the conclusion of that procedure may in principle be contested, and not a provisional measure intended to pave the way for the final decision (see the judgment in Case 60/81 *IBM* v *Commission*, above, paragraph 8 et seq. and the judgment of the Court of First Instance in Case T-64/89 *Automec* v *Commission* [1990] ECR II-367, paragraph 42).

29 In the present case, the applicants essentially criticize the Commission for infringing their rights of defence, by refusing, first, to disclose to them all the chapters of the SO and, secondly, to grant them access to all the documents in the file, subject

to business confidentiality and with the exception of internal Commission documents and other confidential information. The FIC also criticizes the Commission for failing to set out clearly the objections maintained against it and for not allowing it to reply at the same time to the SO with which the present proceedings are concerned and the one which the Commission intends to send it in the near future in respect of the CBS agreement.

30 As regards the applicants' complaints concerning access to the file, it is apparent from the documents before the Court and from the oral argument presented by the parties that two types of documents obtained by the Commission during its investigation were not made available to each addressee of the SO. They are, first, documents relating to the chapters of the SO concerning each of the national markets, which were disclosed only to the undertakings and associations of undertakings to which the corresponding chapters of the SO were addressed. Secondly, they are certain documents which, although relating to the objections notified, are, in the Commission's view, covered by the requirement to protect professional secrecy as referred to in Article 20 of Regulation No 17, since they were obtained in the exercise of the powers of investigation conferred on the Commission by that regulation and were not used against the undertaking or association of undertakings to which the objections were addressed.

31 In the present proceedings, the Court must determine whether the measures contested by the applicants significantly affect their legal position. In order to do so it is necessary to consider whether the contested measures are in themselves capable of producing legal effects capable of affecting the applicants' interests or whether they are merely preparatory steps the illegality of which could be raised in actions brought against the Commission's final decisions whilst still providing sufficient protection (judgment in Case 53/85 *Akzo*, above, paragraph 19).

32 In the present case the applicants all received an SO and a time-limit was set by the Commission for the submission of their views, in accordance with Article 2(1) and (4) of 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 (OJ, English Special Edition 1963-1964, page 47).

33 The SO must clearly set out the facts on which the Commission relies and its legal classification of them (judgment of the Court of Justice in Case C-62/86 *Akzo* v *Commission* [1991] ECR 1-3359, paragraph 29), and, by virtue of Article 4 of Regulation No 99/63, the Commission may rely, as against the undertakings and associations of undertakings to which the statement of objections is addressed, only on those objections in respect of which they have been afforded the opportunity of making known their views.

34 It must, however, be borne in mind that 'neither the initiation of a procedure nor a statement of objections may be considered, on the basis of their nature and the legal effects they produce, as being decisions within the meaning of Article 173 of the EEC Treaty which may be challenged in an action for a declaration that they are void. In the context of the administrative procedure laid down by Regulations No 17 and No 99/63, they are procedural measures adopted preparatory to the decision which represents their culmination' (Case 60/81 *IBM*, above, paragraph 21).

35 It follows that the question raised by the applicant FIC whether the procedure followed in the present case diminishes the rights of the defence and is consequently illegal, in that the Commission did not clearly set out the objections made against each of the addressees and reserved the right to notify further objections in relation to the CBS agreement, may still be raised by the FIC, without the legal protection available to it being affected, in any further proceedings it might consider it appropriate to bring against the Commission's final decision.

36 It must also be pointed out that to give a decision, at the present stage of the administrative procedure, on the objections relied on by the Commission against each of the addressees of the SO would, when that procedure is still in progress, have the effect of prejudging the possibility of the Commission's changing its position with respect to the undertakings and associations of undertakings concerned after

examining their written and oral observations in reply to the SO and thus anticipate the arguments on the substance of the case (Case 60/81 *IBM*, above, paragraphs 18 and 20). Therefore, the FIC's claims on this point are premature and must be dismissed.

37 As regards the measures by which the Commission refused, first, to disclose to the applicants all the chapters of the SO and, secondly, to grant them access to all the documents in the file — including the parts of the SO addressed to other undertakings and associations of undertakings — the Court considers it necessary to analyse the procedural background to those measures.

38 The procedure for access to the file in competition cases is intended to allow the addressees of an SO to examine evidence in the Commission's files so that they are in a position effectively to express their views on the conclusions reached by the Commission in its SO on the basis of that evidence. Access to the file is thus one of the procedural guarantees intended to protect the rights of the defence and to ensure, in particular, that the right to be heard provided for in Article 19(1) and (2) of Regulation No 17 and Article 2 of Regulation No 99/63 can be exercised effectively. It follows that the right of access to the file compiled by the Commission is justified by the need to ensure that the undertakings in question are able properly to defend themselves against the objections made against them in the SO.

39 Secondly, observance of the rights of the defence in all proceedings in which sanctions may be imposed is a fundamental principle of Community law which must be respected in all circumstances, even if the proceedings in question are administrative proceedings. Due observance of that general principle requires that the undertakings and associations of undertakings concerned must have been afforded the opportunity during the administrative procedure to make known their views on the truth and relevance of the facts and circumstances alleged by the Commission (judgment of the Court of Justice in Case 85/76 *Hoffmann-La Roche* v *Commission* [1979] ECR 461, paragraphs 9 and 11).

40 It must also be observed that, for the implementation of those principles, the Commission itself stated in its Twelfth Report on Competition Policy (at pages 40 and 41) that the Commission 'now permits the undertakings involved in a procedure to inspect the file on their case. Undertakings are informed of the contents of the Commission's file by means of an annex to the statement of objections or to the letter rejecting a complaint, listing all the documents in the file and indicating documents or parts thereof to which they may have access. They are invited to come and consult these documents on the Commission's premises. If an undertaking wishes to examine only a few of them the Commission may forward copies. However, the Commission regards the documents listed below as confidential and accordingly inaccessible to the undertaking concerned: documents or parts thereof containing other undertakings' business secrets; internal Commission documents, such as notes, drafts or other working papers; any other confidential information, such as documents enabling complainants to be identified where they wish to remain anonymous, and information disclosed to the Commission subject to an obligation of confidentiality'.

41 In its judgment in Case T-7/89 *Hercules* v *Commission* [1991] ECR II-1711, the Court of First Instance inferred from that statement that 'the Commission has an obligation to make available to the undertakings involved in Article 85(1) proceedings all documents, whether in their favour or otherwise, which it has obtained during the course of the investigation, save where the business secrets of other undertakings, the internal documents of the Commission and other confidential information are involved'.

42 It follows from the foregoing considerations that, even though they may constitute an infringement of the rights of the defence, Commission measures refusing access to the file produce in principle only limited effects, characteristic of a preparatory measure forming part of a preliminary administrative procedure. Only measures immediately and irreversibly affecting the legal situation of the undertakings concerned would be of such a nature as to justify, before completion of the administrative procedure, the admissibility of an action for annulment.

43 That conclusion is not undermined by the arguments put forward by the applicants on the basis of the judgments of the Court of Justice in Case 53/85 *Akzo* and Case C-170/89 *BEUC*, cited above. Both cases were concerned with Commission decisions on the disclosure of certain documents to third parties. Consequently, the contested decisions were independent from the decision to be taken on conclusion of the procedure initiated by the Commission and, for that very reason, sufficiently severable from that final decision. In the *Akzo* case, the decision expressing the Commission's view that certain documents were not of a confidential nature and could therefore be disclosed to the third-party complainant was final and was unconnected with any decision to be given on conclusion of the procedure initiated under Article 86 against the applicant. As the Court held, the opportunity to bring an action against that decision is not of such a nature as to provide the undertaking with an adequate degree of protection of its rights, since the irreversible consequences which would result from improper disclosure of certain of its documents to third parties could not be remedied by the annulment of such a decision. In the *BEUC* case, the person refused access to the file was not a party to the procedure. However, the procedure applied in that case, based on Council Regulation (EEC) No 2423/88 of 11 July 1988 on protection against dumped or subsidized imports from countries not members of the European Economic Community (OJ 1988 L 209, p. 1), was not one capable of leading to a decision which could adversely affect consumers or organizations like the BEUC and therefore a measure denying the latter access to the Commission's non-confidential file had an immediate adverse effect on its interests and therefore could be challenged only within the time-limit for bringing proceedings against it.

44 Nor is that conclusion affected by the case-law of the Court of Justice concerning, on the one hand, decisions requesting information or decisions to investigate adopted by the Commission under, respectively, Articles 11(5) and 14(3) of Regulation No 17 and, on the other hand, letters initiating the procedure provided for in Article 93(2) of the EEC Treaty concerning State aid.

45 As regards, on the one hand, decisions requiring information or decisions to undertake investigations, it must be stressed that, in addition to the fact that a remedy against such decisions is expressly provided for in the relevant legislation, such

measures form part of the preliminary investigation procedure which is not *inter partes* and differs from the procedure whose purpose is to enable the Commission, after sending an SO, to adopt a decision finding an infringement of the Treaty competition rules (see the judgment in Case 374/87 *Orkem*, cited above, paragraphs 20 to 25).

46 As regards, on the other hand, letters initiating the procedure provided for in Article 93(2) of the Treaty, it must be observed that the Court of Justice, in its judgments of 30 June 1992 in Case C-312/90 *Spain* v *Commission* and Case C-47/91 *Italy* v *Commission*, cited above, held that in the particular circumstances of those cases the decision to initiate the procedure involved a choice as to the classification of the aid and the rules of procedure to be applied and thus produced definitive legal effects consisting in particular of the suspension of the payment of the proposed aid. The Court of Justice held that neither a subsequent decision of the Commission finding the aid to be compatible with the Treaty nor the bringing of an action against a decision of the Commission finding it to be incompatible could eradicate the irreversible consequences of the delay in the payment of the aid.

47 By contrast with the situations mentioned above, any infringement of the right of the addressees of an SO effectively to put forward their views on the objections made by the Commission and on the evidence intended to support those objections is capable of producing binding legal effects of such a nature as to affect the interests of the undertakings and associations of undertakings concerned only if and when the Commission has adopted a decision or decisions finding the existence of the infringement of which it accuses them. Indeed, until a final decision has been adopted, the Commission may, in view, in particular, of the written and oral observations of the parties, abandon some or even all of the objections initially made against them. It may also rectify any procedural irregularities by subsequently granting access to the file after initially declining to do so, so that the addressees of the SO have a further opportunity to express their views, in full knowledge of the facts, on the objections notified to them. However, if, for the sake of argument, the Court were to recognize, in proceedings against a decision bringing the procedure to a close, that a right of full access to the file existed and had been infringed, and were therefore to annul the Commission's final decision for infringement of the rights of the defence, the entire procedure would be vitiated by illegality. In such circumstances, the Commission would be obliged either to abandon all

proceedings against the undertakings and associations of undertakings concerned or to resume the procedure, giving the undertakings and associations of undertakings concerned a further opportunity to give their views on the objections made against them in the light of all the new information to which they should have been granted access. In the latter situation, a properly conducted *inter-partes* procedure would be sufficient to restore fully the rights and privileges of the applicants.

48 It follows from all the foregoing considerations that the measures by which the Commission refused, first, to disclose all the chapters of the SO to the applicants and, secondly, to grant them access to all the documents in its file are not capable of producing legal effects of such a nature as to affect their interests immediately, before any decision finding an infringement of Article 85(1) of the Treaty and possibly imposing a penalty on them is adopted.

49 Finally, the Court considers, in any event, that in this case there are no exceptional circumstances within the meaning of the judgment in Case 60/81 *IBM*, cited above (see paragraph 23) such as to make it possible to consider the contested measures as lacking even an appearance of legality. Although the parties differ as to the extent to which the protection of confidentiality provided for in Article 20(2) of Regulation No 17 extends to all information obtained by the Commission in the exercise of the powers vested in it by Regulation No 17 and not used against an undertaking, it must be pointed out that even if it were accepted that the Commission might in this case have misapplied Article 20(2) of Regulation No 17, that fact is not such as to deprive the contested measures of all appearance of legality, particularly since that question of law has not yet been decided by the Community judicature.

50 In view of all the foregoing, the actions must be declared inadmissible.

Costs

51 At the hearing, the applicants claimed that, pursuant to Article 87(3) of the Rules of Procedure, the Commission should be ordered to pay the costs, even if the present applications were to be dismissed, since these proceedings are merely the result of unreasonable conduct on the part of the Commission which is detrimental to the applicants' rights of defence. In support of their claim, the applicants rely in particular on the Order of the Court in Case 248/86 *Brüggemann* v *CES* [1987] ECR 3963.

52 It must be observed that, pursuant to Article 87(3) of its Rules of Procedure, the Court of First Instance may order that the costs be shared or that each party bear its own costs where each party succeeds on some and fails on other heads or where the circumstances are exceptional. By virtue of the same provision, the Court may order a party, even if successful, to pay costs which it considers that party to have unreasonably or vexatiously caused the opposite party to incur.

53 The present applications have been declared inadmissible because the contested measures are neither of such a nature as to produce immediate legal effects likely to affect the interests of the applicants nor capable of being classified as measures devoid of any appearance of legality. In that connection, it must be stated that, as is apparent from paragraph 49 of this judgment and by contrast with the situation referred to in the order of the Court of Justice relied on by the applicants, the Commission cannot be accused of having acted in a manner contrary to the case-law of the Court of Justice or Court of First Instance. It is therefore not appropriate in this case to apply Article 87(3) of the Rules of Procedure.

54 Pursuant to Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the applicants have failed in their submissions and the Commission has applied for an order that the applicants pay the costs, the applicants must be ordered to pay the costs, including those of the proceedings for interim measures.

On those grounds,

THE COURT OF FIRST INSTANCE (Second Chamber)

hereby:

1. Dismisses the applications as inadmissible;

2. Orders the applicants to pay the costs, including those of the proceedings for interim measures.

Cruz Vilaça Barrington Biancarelli

Saggio Kalogeropoulos

Delivered in open court in Luxembourg on 18 December 1992.

H. Jung J. L. Cruz Vilaça

Registrar President