JUDGMENT OF THE COURT OF FIRST INSTANCE (Fourth Chamber)
17 February 2000 *

In Case T-241/97,

Stork Amsterdam BV, a company incorporated under Netherlands law, established in Amsterdam, represented by A.J. Braakman, of the Rotterdam (Netherlands) Bar, with an address for service in Luxembourg at the Chambers of Loesch and Wolter, 11 Rue Goethe,

applicant,

v

Commission of the European Communities, represented by Wouter Wils, of its Legal Service, acting as Agent, assisted by Hans Gilliams, of the Brussels Bar, with an address for service in Luxembourg at the office of Carlos Gómez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

defendant,

* Language of the case: Dutch.

supported by

Serac Group, a company incorporated under French law, established in Paris, represented by Mary-Claude Mitchell, of the Paris Bar, with an address for service in Luxembourg at the Chambers of Guy Harles, 8-10 Rue Mathias Hardt,

intervener,

APPLICATION for annulment of the decision contained in the Commission's letter of 20 June 1997 rejecting the complaint made by the applicant with a view to obtaining a declaration that a cooperation agreement it entered into with Serac Group to market complete production lines for manufacturing plastic bottles and filling them aseptically with liquid foods is incompatible with Article 85 of the EC Treaty (now Article 81 EC),

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

composed of: R.M. Moura Ramos, President, V. Tiili and P. Mengozzi, Judges,

Registrar: A. Mair, Administrator,

having regard to the written procedure and further to the hearing on 22 April 1999,

gives the following

Judgment

Facts

1 Stork Amsterdam BV (hereinafter 'Stork') is a company incorporated under Netherlands law which produces machines for manufacturing plastic bottles by means of the blow moulding technique.

2 On 14 August 1987 Stork and Serac SA (now Serac Group, hereinafter referred to as 'Serac'), a company incorporated under French law which produces machines for aseptically filling plastic bottles, entered into a cooperation agreement (hereinafter 'the cooperation agreement' or 'the agreement') to market complete production lines for manufacturing such bottles and filling them aseptically with liquid foods. The two companies undertook to purchase from each other the machines they produced and to sell them as complete lines under the name 'Stork-Serac' or 'Serac-Stork'. The agreement also imposed a duty on either company to make available to the other the know-how needed for marketing, installing and servicing the machines (clause 5 of the agreement).

3 Clause 6 of the agreement contained a restrictive covenant against competition which provided as follows:

'6.1 Each party agrees to refrain... [from developing, manufacturing and selling] directly or indirectly through agents or subsidiaries of any [kind] equipment or parts thereof competing with or similar to the other [party's equipment] involved in this cooperation.

6.2 In the event that a potential customer requires either from Stork or from Serac equipment made by third parties for filling or blow moulding, the selling party shall seek approval from the other party, which approval will not unreasonably be withheld. In the event that one party [sells] a third [party's] competitive machine without [the] approval of the other party, the other party is entitled to a penalty to be paid as liquidated damages of 30% (thirty per cent) of the replaced machine.

6.3 Only in [the] case of termination of this agreement in accordance with Art. 14 [that is to say, after the agreement has been in force for five years and on expiry of twelve months' written notice of termination] the obligation [not to compete] as agreed in Art. 6.1 shall remain in force for the terminating party [for] four years after such termination.'

4 In 1989, Stork sought Serac's agreement to terminate the cooperation agreement, in particular by letter of 13 July 1989, in which it also threatened to submit a complaint to the Commission alleging infringement of Article 85 of the EC Treaty (now Article 81 EC) should Serac refuse to agree to terminate the agreement.

5 In the absence of any positive reply from Serac, Stork lodged a complaint with the Commission on 20 September 1989 with a view to obtaining a declaration that the cooperation agreement was incompatible with Article 85 of the Treaty. Stork argued that Serac had infringed Article 85 by failing to terminate the agreement.

6 On 24 January 1990 Serac sent a copy of the agreement to the Commission in order to obtain negative clearance or exemption, at the same time informing the Commission that it would be content with a simple comfort letter.

7 The Commission responded to Stork's complaint and to Serac's notification by letter of 20 March 1991, signed by J. Dubois, acting Director of the Directorate-General for Competition (DG IV). The letter proposed an amicable solution to the dispute, which was put forward in response to the complaint and notification and 'the supplementary information supplied to the Commission by both companies'. Analysing the cooperation agreement, Mr Dubois indicated that, whilst it did not qualify for exemption, it was sufficiently similar to the type of agreement covered by Commission Regulation (EEC) No 417/85 of 19 December 1984 on the application of Article 85(3) of the Treaty to categories of specialisation agreements (OJ 1985 L 53, p. 1, hereinafter 'Regulation No 417/85'), the principal differences being in clauses 6.2 and 6.3. Mr Dubois stated that, on the basis of the information available to him, he took the view that those clauses restricted competition and were not indispensable to the attainment of the objectives of the agreement. He therefore suggested that they be amended to bring the agreement into line with the spirit of Regulation No 417/85.

8 The amendment proposed for clause 6.2 (which concerns exclusive mutual supply) was to make the clause conform to Article 2(b) of Regulation No 417/85 by enabling either party to obtain supplies — without incurring a penalty — from third parties offering more favourable supply terms. To the same end of making the agreement comply with Regulation No 417/85, Mr Dubois also stated that clause 6.3 (concerning the duty not to compete for a period of four years following termination) 'should be suppressed'.

9 Mr Dubois added that, given the limited economic importance of the matter at Community level, it did not seem to him 'appropriate, at [that] stage, to recommend to the Commission the formal opening of a procedure'. In the event that the parties failed to agree to amend the clauses as he had suggested, they were invited to bring the matter before the proper national court or the competent national administrative authorities, calling attention to the Commission's letter.

10 The letter addressed to Stork contained an additional paragraph which read:

'Failing a reaction on your part within four weeks from your receipt of this letter, I shall close the file; it could, however, be reopened at any time should a change in the factual or legal circumstances require a new examination of the situation.'

11 By letter of 19 July 1991, Serac informed the Commission that the parties expected to settle their dispute amicably. However, discussions between them failed to reach a conclusion and the agreement expired on 14 August 1992 without having been amended.

12 On 21 December 1992 Serac sent another letter to Mr Dubois, inviting the Commission to reconsider its analysis of the matter. Serac argued, *inter alia*, that the suggestion made by the Commission in its letter of 20 March 1991 to amend or delete certain clauses in the agreement reflected a poor understanding of the market in question and an incorrect assessment of the effect of the cooperation agreement on competition. Serac went on to confirm that it would not rely on clause 6.3 of the cooperation agreement, provided only that no use was made of 'confidential know-how divulged while the agreement was in force'.

13 By letter of 25 February 1993 F. Giuffrida, Head of Unit within DG IV, replied that the arguments put forward by Serac were not such as to call into question the Commission's position as expressed in its letter of 20 March 1991 according to which clauses 6.2 and 6.3 of the agreement were too restrictive of competition and not indispensable to attaining the objectives of the agreement. He ended his letter by saying 'it therefore seems to me that this matter should be considered closed.' The Commission sent a copy of that letter to Stork.

14 On 15 May 1993 Serac brought an action for annulment of the decision contained in the Commission's letter of 25 February 1993 before the Court of First Instance (Case T-31/93).

15 On 16 July 1993 the Commission raised an objection of inadmissibility, arguing that Mr Giuffrida's letter did not constitute an actionable measure but merely expressed the Commission's provisional view. It was not intended to produce legal effects and did not contain any definitive decision on the complaint or the notification. In the memorandum in which it raised the objection of inadmissibility, the Commission also announced that it was to pursue its analysis of the matter. In those circumstances, Serac withdrew its action and the case was removed from the register by order of the President of the Court of First Instance of 20 December 1993.

16 On 5 October 1994, pursuant to Article 11 of Council Regulation No 17 of 6 February 1962: First Regulation implementing Articles 85 and 86 of the Treaty (OJ, English Special Edition 1959-1962, p. 87, hereinafter 'Regulation No 17'), the Commission sent to each party identical requests for information soliciting 'the latest data on the market share of the different types of packaging (brick, plastic or glass bottles, cartons...) [for] each segment of the liquid milk market', the purpose of those requests being to 'enable the Commission to assess the compatibility of [the agreement] with EC rules on competition and in particular Article 85 of the EC Treaty..., in full knowledge of the facts and in the correct economic context'.

17 The two parties sent the information requested and the matter was subsequently reviewed by the Commission together with Stork's counsel on 14 November 1994 and Serac's counsel on 13 December 1994.

18 By letter of 23 January 1996, pursuant to Article 6 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, p. 47, hereinafter 'Regulation No 99/63'), G. Rocca informed Stork, on behalf of Alexander Schaub, Director-General of DG IV, of the reasons why its complaint had been rejected. After setting out his analysis of the matter with regard to Article 85 of the Treaty, Mr Rocca concluded that it was not realistic to say that 'the agreement affords the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the products in question, all the more [so] since on 21 December 1992 Serac renounced its right under clause 6.3' (which concerned exclusive rights after termination of the agreement). The Commission's letter ended with a warning that the institution would not adopt a definitive position until it had received Stork's comments and any further information it wished to submit, which should be in writing and should reach the Commission within four weeks.

19 Stork sent a reply to the Commission on 22 March 1996, refuting the Commission's arguments and questioning whether the Commission was entitled to conduct a fresh analysis of the matter after its letters of 20 March 1991 and 25 February 1993.

20 By letter of 20 June 1997 the Commission informed Stork of its decision to reject its complaint of 20 September 1989 (Decision IV/F — 1/33.302 Stork, hereinafter 'the contested decision'). Adopting essentially the same analysis of the agreement as that contained in its letter of 23 January 1996, the Commission concluded that, whilst the clauses in the agreement restricting competition fell within Article 85(1) of the Treaty, the conditions for applying Article 85(3) had been satisfied.

Procedure and forms of order sought

21 By application lodged at the Registry of the Court of First Instance on 21 August 1997, the applicant brought the present action for annulment of the Commission's decision set out in the letter of 20 June 1997.

22 By order of the President of the First Chamber of the Court of First Instance of 20 April 1998, Serac was given leave to intervene in support of the form of order sought by the Commission.

23 Upon hearing the report of the Judge-Rapporteur, the Court of First Instance (Fourth Chamber) decided to open the oral procedure. As a measure of organisation of procedure, the Court requested the parties to reply in writing to certain questions before the hearing.

24 The parties presented oral argument and gave their answers to the Court's questions at the hearing on 22 April 1999.

25 The applicant claims that the Court should:

— annul the contested decision;

— order the Commission to pay the costs.

26 The Commission contends that the Court should:

— dismiss the application;

— order the applicant to pay the costs of the action.

27 The intervener contends that the Court should:

— dismiss the application brought by Stork;

— order Stork to pay all the costs of the action, including those incurred by reason of its intervention.

Law

28 The applicant makes three pleas in law in support of its claim. It alleges, first, that the Commission lacked power to adopt the contested decision, or that the adoption of the contested decision was an abuse of power, given that the Commission's letters of March 1991 and February 1993 already contained a definitive decision and the matter must be regarded as having been closed after the letter of 25 February 1993 at the latest. Secondly, the contested decision is vitiated by errors of fact and law. Thirdly, there is no statement of reasons, or only an inadequate statement of reasons, for the contested decision.

29 The Commission disputes the applicant's claims and asks that the Court dismiss the application.

The first plea, alleging that the Commission lacked power to adopt the contested decision, or that the adoption of the contested decision was an abuse of power

30 The applicant's first plea challenges the Commission's right to reopen the procedure relating to the complaint and the notification, and its right to adopt the contested decision. The plea is divided into two limbs, the first alleging that the letters of 20 March 1991 and 25 February 1993 contained an actionable decision and that the matter must be regarded as having been closed after the second letter at the latest, given that no new factor had arisen to warrant re-examination of the file. The second limb alleges that, by reopening the administrative procedure on 5 October 1994 and adopting its final decision on 20 June 1997, the Commission failed to fulfil its obligation to adopt a decision on the applicant's complaint of 20 September 1989 within a reasonable time.

31 In its reply, in connection with its second plea for annulment, the applicant also argues that the decision to reopen the procedure was adopted in breach of Article 190 of the EC Treaty (now Article 253 EC).

32 The Court takes the view that, in order to determine whether the first plea is well founded, the first limb of that plea should be considered together with the plea disputing the adequacy of the statement of reasons given for reopening the procedure.

Arguments of the parties

33 The applicant argues that, in its letters of 20 March 1991 and 25 February 1993, taken either separately or together, the Commission adopted an actionable decision whereby, with a view to creating legal effects, it defined its position on the application to the cooperation agreement of Article 85 of the Treaty.

34 In view of its content, the Commission's letter of 25 February 1993 should, the applicant maintains, be regarded as an actionable measure, since it was intended to produce legal effects. The letter contains an appraisal of the agreement in question and is the Commission's definition of its position that two clauses of the agreement of 14 August 1987 are incompatible with the common market under Article 85(1) of the Treaty and do not fall within the scope of Article 85(3). By that letter, the Commission formally closed the procedure and its legal assessment of the agreement became definitive.

35 The applicant concludes that the defendant was not entitled to reopen the administrative procedure after giving its decision and without any new factor having arisen to warrant reopening the procedure. In so doing, the Commission was guilty of an abuse of power.

36 In its reply, the applicant also alleges that the reasoning of the contested decision is defective in that it does not explain, on the one hand, why the Commission changed its opinion of the economic importance of the agreement or, on the other hand, why it decided to conduct a thorough re-examination of the file, despite the absence of any new factor warranting such re-examination, instead of suggesting, as it had earlier, that the matter be submitted to the national authorities should the proposed amendments fail to be accepted.

37 The Commission contests the applicant's view. It explains that, from September 1989 onwards, it was confronted with a dispute between Stork and Serac concerning the implementation and validity of their cooperation agreement, and refers to the rules which apply to its intervention in such circumstances. It relies on paragraphs 45 to 47 of the judgment in Case T-64/89 *Automec* v *Commission* [1990] ECR II-367 (hereinafter '*Automec I*'), in which the Court of First Instance observed that there were three successive stages in the procedure governed by Article 3(2) of Regulation No 17 and Article 6 of Regulation No 99/63, and held that the preliminary observations made by Commission officials in the context of informal contacts during the first stage could not be regarded as constituting a measure open to challenge.

38 The Commission submits that, viewed in that light, the letters of 20 March 1991 and 25 February 1993 clearly amount to preliminary observations made informally by Commission officials on the basis of an initial appraisal of the facts and arguments put forward by the two parties. The Commission did not, in those letters, express a definitive position, creating legal effects, on the application of Article 85 of the Treaty.

39 The Commission argues that the letter of March 1991 contains a pragmatic solution designed to end the dispute between the two parties, and not a definitive interpretation of Article 85 of the Treaty. The most important part of the letter is the passage where Mr Dubois wrote that, taking into account the limited economic importance of the matter, it did not seem appropriate to him, at that stage, to suggest to the Commission that it open a procedure. That observation explains the suggestion made to the parties to settle their dispute in accordance with the Commission's proposal and, should they continue to disagree, to bring the matter before the national courts.

40 The letter of February 1993 simply confirmed that, even after acquainting itself with the arguments and supplementary information submitted by Serac, the Commission did not consider it appropriate to open a procedure and that, consequently, 'the matter [had to] be considered closed'.

41 The Commission adds that those two letters cannot be regarded as expressing a definitive decision creating legal effects and declaring the agreement incompatible with Article 85 of the Treaty, since such a decision can only be taken in accordance with the procedure laid down in Regulation No 17, which provides, *inter alia*, for a statement of objections. The Commission takes the view that, in the present case, it has not been shown that there was any such notification, and the fact that the letters were not signed by or on behalf of the Member of the Commission responsible for competition matters confirms, in its view, that the letters merely expressed an initial, provisional opinion.

42 Moreover, the defendant accepts that, after Serac withdrew its action in Case T-31/93, it decided, in view in particular of the arguments and information put forward by Serac in its application, to re-examine — this time in depth — the effect of the cooperation agreement upon competition. In that way, by 'reactivating the procedure', it went back on its initial position that the matter did not appear to be of sufficient economic importance to warrant a thorough-going examination.

43 The Commission takes the view that the letter of 20 March 1991 already signalled the possibility of a procedure subsequently being initiated inasmuch as its author wrote that it did not seem to him 'appropriate at [that] stage to recommend to the Commission the formal opening of a procedure'.

44 Relying on paragraph 77 of the judgment of the Court of First Instance in Case T-24/90 *Automec* v *Commission* [1992] ECR II-2223 (hereinafter '*Automec II*'), the Commission maintains that the decision to conduct a thorough examination of a matter which, on first analysis, was regarded as being of minor importance, is one which falls within the unfettered discretion of any administration entrusted with the tasks of supervision and regulation. Similarly, the power to set priorities implies the power to revise those priorities also. That principle must apply *a fortiori* in the present case where the reopening of the procedure prejudiced no party's interests. Neither the applicant nor Serac raised any objection to the new priority assigned by the Commission to the examination of their case.

45 The Commission claims that the plea made by Stork in its reply alleging defective reasoning in the contested decision is inadmissible (see paragraph 36 of the present judgment). It maintains, in the alternative, that it was not required to indicate in that decision the reasons why it instituted an inquiry in October 1994, especially as neither Stork nor Serac ever raised that question and both cooperated fully in that inquiry.

46 The intervener also denies that the Commission's letters of 1991 and 1993 express a definitive, non-reviewable decision.

47 The intervener points out that the Commission indicated on a number of occasions that the letters of 1991 and 1993 did not represent final decisions. It also argues that, by agreeing without reservation to reply to the request for information addressed to it by the Commission in October 1994, the applicant accepted the fact that the procedure instituted in 1989 had not been finally closed.

48 The intervener concludes that only the letter of 1997 defines the Commission's definitive position on the matter, and that nothing in the two letters of 1991 and 1993 constitutes a decision or produced legal effects.

Findings of the Court

The legal nature of the Commission's letters of March 1991 and February 1993

49 According to settled case-law, 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 a decision which may be the subject of an action for annulment under Article 173 of the EC Treaty (now, after amendment, Article 230 EC). In particular, in cases of acts or decisions drawn up in a procedure involving several stages, and particularly at the end of an internal procedure, it is only those measures which definitively determine the position of the institution upon the conclusion of that procedure which are open to challenge and not intermediate measures whose purpose is to prepare for the final decision. Moreover, the particular form in which acts and decisions are adopted is, in principle, immaterial so far as concerns the possibility of their being challenged by an action for annulment (Case 60/81 *IBM* v *Commission* [1981] ECR 2639, paragraph 9, and *Automec I*, paragraph 42).

50 In order to assess the legal nature of the letters in question in the light of those principles, it is appropriate to consider them in the context of the procedure for investigating claims made under Article 3(2) of Regulation No 17.

51 The procedure for examining a complaint comprises three successive stages. During the first stage, following the submission of the complaint, the Commission collects the information which it needs to enable it to decide how it will deal with the complaint. That stage may include an informal exchange of views between the Commission and the complainant with a view to clarifying the factual and legal issues with which the complaint is concerned and to allowing the complainant an opportunity to expand on his allegations in the light of any initial reaction from Commission officials. During the second stage, the Commission may indicate, in a notification to the complainant, the reasons why it does not propose to pursue the complaint, in which case it must offer the complainant the opportunity to submit any comments it may have within a time-limit which it fixes for that purpose. In the third stage of the procedure, the Commission takes cognisance of the observations submitted by the complainant. Although Article 6 of Regulation No 99/63 does not expressly provide for the possibility, this stage may end with a final decision (*Automec I*, paragraphs 45 to 47 and Case T-37/92 *BEUC and NCC* v *Commission* [1994] ECR II-285, paragraph 29).

52 Neither the preliminary observations, if any, made in the context of the first stage of the procedure for considering complaints, nor notifications under Article 6 of Regulation No 99/63, can be regarded as measures open to challenge (*Automec I*, paragraphs 45 and 46).

53 On the other hand, comfort letters definitively rejecting a complaint and closing the file may be the subject of an action, since they have the content and effect of a decision, inasmuch as they close the investigation, contain an assessment of the agreements in question and prevent the applicants from requiring the reopening of the investigation unless they put forward new evidence (Case 210/81 *Demo-Studio Schmidt* v *Commission* [1983] ECR 3045, paragraphs 14 and 15, Case 298/83 *CICCE* v *Commission* [1985] ECR 1105, paragraph 18, and Joined Cases 142/84 and 156/84 *BAT and Reynolds* v *Commission* [1987] ECR 4487, paragraph 12).

54 In the present case, it is necessary to establish whether the letters of 1991 and 1993 belong to the first stage of the procedure for examining complaints, as the Commission maintains, or whether they are to be regarded as recording a decision to take no further action, producing legal effects, and thus belong to the last stage of that procedure, as Stork asserts.

55 The author of the Commission's letter of 20 March 1991, Mr Dubois, refers to clauses 6.2 and 6.3 of the agreement and begins:

'On the basis of the information presently in my possession, those clauses do appear to be restrictive of competition, and not indispensable to the attainment of the objectives of [the agreement].'

The letter then went on to suggest that clause 6.3 be deleted and clause 6.2 be amended to comply with the spirit of Regulation No 417/85 which, as matters stood, did not cover the agreement.

56 Mr Dubois continued:

'Given the relatively small economic importance of [the matter] within the communities as a whole, it does not appear appropriate, at this stage, to recommend to the Commission the formal opening of a procedure. If, therefore, you are unable to agree... the modification of the clauses mentioned in the sense indicated above, I suggest that you should take the matter to the national courts, or the national competition policy authorities, bringing this letter to their attention.'

57 The copy of the letter sent to Stork contained an additional paragraph worded as follows:

'Failing a reaction on your part within four weeks from your receipt of this letter, I shall close this file; it could, however, be reopened at any time should a change in the factual or legal circumstances require a new examination of the situation.'

58 In reply to Serac's letter of 21 December 1992 requesting the Commission to reconsider its analysis, Mr Giuffrida, Head of Unit at DG IV, wrote in his letter of 25 February 1993 (a copy of which was sent to Stork):

'I have given your letter of 21 December 1992 my fullest consideration. However, on reflection, I do not think that the arguments raised are such as to call into

question the content of the letter... of 20 March 1991 in which it was stated that clauses 6.2 and 6.3 of your agreement... with Stork were too restrictive of competition and not indispensable to attaining the objectives of [that agreement]. It therefore seems to me that this matter should be considered closed.'

59 It is clear from the letters of 20 March 1991 and 25 February 1993 that, after analysing the agreement, the Commission decided not to take further action on the matter in view of its limited economic importance at the Community level. Moreover, the Commission offered the parties a means of resolving the dispute amicably, suggesting certain amendments to the agreement, and, should they fail to incorporate those amendments and continue to disagree, invited them to bring the matter before the competent national authorities or the proper national court.

60 The letter of 20 March 1991, in particular, bears all the hallmarks of a notification under Article 6 of Regulation No 99/63: it indicates the reasons for which the Commission considers there to be insufficient grounds for allowing the complaint, explicitly refers to closing the file and imposes a time-limit on the complainant for the submission of any observations (*BEUC*, paragraph 34).

61 In that context, the letter of 25 February 1993 provided confirmation that, in the absence of any response to the letter of 20 March 1991, the matter had been closed, given the limited economic importance of the agreement at the Community level.

62 Against that background, the defendant's argument that the letters of 20 March 1991 and 25 February 1993 must be regarded as expressing 'preliminary observations made informally by Commission officials' in the context of the first of the three stages of the inquiry procedure cannot be accepted. On the contrary, having regard to their content and the context in which they were drafted, they must be regarded as recording a decision to take no further action on the complaint submitted by Stork and thus as belonging to the last stage in the procedure for examining a complaint.

63 It cannot, therefore, be said that those letters merely contain preliminary observations or preparatory measures. On the contrary, they contain a clear appraisal of the agreement and, in particular, of its economic importance. That appraisal was made on the basis of all the information which the Commission deemed it necessary to gather. All the indications are that the decision mentioned in the letters to take no further action on the matter was meant to constitute the final step in the administrative procedure whereby the institution's position is finally determined. That decision cannot be followed by any other measure capable of being the subject of annulment proceedings (Case C-39/93 P *SFEI and Others* v *Commission* [1994] ECR I-2681, paragraph 28).

64 The finality of that decision is not called into question by Mr Dubois' statement in his letter of 20 March 1991 that it did not seem to him 'appropriate at [that] stage to recommend to the Commission the formal opening of a procedure'. Those words signal the possibility of subsequently initiating a procedure and conducting a thoroughgoing investigation of the matter. Indeed, the statement should be regarded as referring to the other two facts mentioned in the letter, namely that the analysis carried out and the decision taken were based on the information available and that the file could be reopened if new points of fact or law arose warranting it.

65 Furthermore, the defendant's argument that the fact that the letters were not signed by or on behalf of the Member of the Commission responsible for competition matters proves that they merely communicated an initial, provisional opinion must also be rejected. According to settled case-law, the form in which acts or decisions are cast is, in principle, immaterial as regards the question whether they are open to challenge by way of annulment proceedings. It is necessary to look to their substance in order to ascertain whether they are actionable measures for the purposes of the Article 173 of the Treaty (*IBM*, paragraph 9).

66 In the present case, given that the two letters in question contain an appraisal of the complaint submitted to the Commission, their legal nature cannot be called into question on the sole ground that they emanate from a member of the

Commission's staff. To accept such an argument would render Article 3 of Regulation No 17 wholly ineffective (*BEUC*, paragraph 38).

67 As regards the argument that the applicant accepted that the letters of March 1991 and February 1993 constituted preliminary observations in that it replied to the request for information sent to it by the Commission in October 1994, it should be remembered that, according to settled case-law, measures of a purely preparatory character may not themselves be the subject of an application for annulment, but any legal defects therein may be relied upon in an action directed against the definitive act for which they represent a preparatory step (*IBM*, paragraph 12). Thus, in order to dispute the validity of the decision to reopen the procedure, the applicant had to await, as indeed it did, the decision adopted on completion of the inquiries launched by the request for information which the Commission sent it in October 1994. Only at the end of that procedure was the applicant in a position to assess the merits of the decision and, more specifically, whether it was necessary to re-examine the matter, having regard, in particular, to any new points of fact or law garnered and taken into consideration by the Commission.

68 The Commission's letters of 20 March 1991 and 25 February 1993 must therefore be regarded as containing a decision and producing legal effects in so far as they record a decision to take no further action on the complaint submitted by Stork, after analysis of the agreement, which itself was deemed as being of limited economic importance at the Community level.

69 Having thus established the legal nature of the letters, it is necessary to assess their legal consequences, in order to ascertain whether, in the present case, the Commission was entitled to reopen the administrative procedure, and, if so, whether it was entitled to adopt the contested decision.

The decision to reopen the administrative procedure

70 It should be observed at the outset that, as the institution responsible for implementing Community competition policy, the Commission has a certain discretion — within the limits of the applicable rules — in dealing with complaints submitted pursuant to Article 3 of Regulation No 17. It may, in particular, set different priorities for the complaints submitted to it and may close a matter without initiating procedures intended to establish whether or not Community law has been infringed if it forms the view that the matter in question is not of sufficient Community interest to warrant investigation of the complaint (*Automec II*, paragraphs 73 to 77 and 83 to 85).

71 The rules limiting the Commission's discretion in this regard include those relating to the procedural rights provided for by Regulation No 17 and Regulation No 99/63 for persons who have lodged a complaint with the Commission.

72 On the one hand, in accordance with Article 3 of Regulation No 17 and Article 6 of Regulation No 99/63, the Commission must examine carefully the factual and legal particulars brought to its notice by the complainant in order to decide whether they disclose conduct of such a kind as to distort competition in the common market and affect trade between Member States. On the other hand, persons who have lodged a complaint with the Commission have the right to be informed of the reasons why the Commission intends to reject their complaint (*Automec II*, paragraphs 72 and 79).

73 According to settled case-law, the extent of the obligation to state reasons depends on the nature of the measure in question and on the context in which it was adopted. The statement of reasons must disclose in a clear and unequivocal

fashion the reasoning of the institution, in such a way as to give the persons concerned sufficient information to enable them to ascertain whether the decision is well founded or whether it is vitiated by a defect which may permit its legality to be contested, and to enable the Community judicature to carry out its review of the legality of the measure (Joined Cases T-213/95 and T-18/96 *SCK and FNK* v *Commission* [1997] ECR II-1739, paragraph 226).

74 The obligation to state the reasons for a measure with sufficient precision, enshrined in Article 190 of the Treaty, is one of the fundamental principles of Community law which the Court has to ensure are observed, if necessary by considering of its own motion a plea of failure to fulfil that obligation (Case T-61/89 *Dansk Pelsdyravlerforening* v *Commission* [1992] ECR II-1931, paragraph 129).

75 In the present case, therefore, the defendant's objection of inadmissibility regarding the applicant's claim that the statement of reasons for the contested decision is defective because it failed to set out the reasons for the Commission's having changed its opinion of the economic importance of the agreement and decided to conduct a thoroughgoing re-examination of the matter must be rejected.

76 As to the substance, it should be remembered that the Commission informed the applicant by its letters of 20 March 1991 and 25 February 1993 of the decision to take no further action on the matter because of its limited economic importance at Community level (see paragraphs 59 to 61, above). By 're-activating the procedure', by decision notified to the parties by letter of 5 October 1994, the Commission went back on its previous position regarding the economic importance of the agreement at Community level (see paragraph 42, above).

77 The reasons for that change of position were not explained by the Commission. Nor can they be inferred from the context of such a decision. Moreover, in its

pleadings and in its oral replies to the Court of First Instance's questions regarding the reasons for reopening the file, the Commission stated that it initiated the inquiry in 1994 in response to the action brought by Serac and in order to avoid a contentious procedure. It did not refer to the reasons give in its letters of 1991 and 1993 for closing the matter, namely that the agreement was of limited economic importance.

78 The inadequacy of the statement of reasons is all the more serious because the obligation to state reasons, the scope of which must be determined in the light of the particular circumstances of the case, is a particularly broad one in the present case.

79 The Commission had already taken a decision on the agreement, which had expired in August 1992, well before the Commission's second letter of 25 February 1993 confirmed that the matter was closed. Moreover, it is clear from the documents before the Court that the decision to take no further action recorded in the letters of 1991 and 1993 was adopted following exchanges between the Commission and the two parties to the agreement, during which the Commission was able to gain a full understanding of the point of view of each party.

80 It is therefore clear that the decision to reopen the administrative procedure which resulted in the adoption of the contested decision was not based on the presence or awareness of new points of fact or law warranting re-examination of the matter (see, to that effect, Case C-279/95 P *Langnese-Iglo* v *Commission* [1998] ECR I-5609, paragraph 30, and Case T-7/93 *Langnese-Iglo* v *Commission* [1995] ECR II-1533, paragraph 40).

81 In those circumstances, the Court holds that the applicant was not in a position to ascertain the reasons for the contested decision which implied that the Commission, in taking the view that the matter *was* of sufficient economic importance to warrant its staff conducting a thoroughgoing examination, had gone back on its initial position.

82 It follows that the applicant's first plea is well founded in so far as it disputes the Commission's entitlement to adopt a fresh decision on a complaint relating to a matter which had already been closed because of its limited economic importance at Community level, without properly stating the reasons (in particular, the existence of fresh evidence) for reopening the administrative procedure which had led to that decision.

83 For those reasons the contested decision must be annulled and it is unnecessary to consider the other pleas raised by the applicant.

84 Moreover, according to settled case-law, comfort letters such as the two letters of 1991 and 1993, which reflect the Commission's assessment and bring its examination to an end, do not have the effect of preventing a national court before which the agreement in question is alleged to be incompatible with Article 85 of the Treaty, from reaching a different finding as regards that agreement on the basis of the information available to it. Whilst such letters do not bind the national court, the opinion expressed in them constitutes a factor which a national court may take into account in considering whether the agreement or conduct in question is compatible with the provisions of Article 85 of the Treaty (Case 31/80 *L'Oréal* [1980] ECR 3775, paragraphs 11 and 12).

85 In the present case, the national courts before which the agreement may be alleged to be incompatible with Article 85 of the Treaty will, on assessing the

agreement, be entirely at liberty to take into account, as factual evidence, the whole of the procedure conducted by the Commission.

Costs

86 Under Article 87(2) of the Rules of Procedure of the Court of First Instance, 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 Commission has been unsuccessful, and the applicant has applied for costs against the Commission, the latter will be ordered to bear its own costs and to pay those incurred by the applicant, apart from those occasioned by the intervention of Serac. Since the applicant did not apply for an order that Serac pay the costs occasioned by its intervention, the intervener will bear its own costs. The applicant will bear the costs it has incurred as a result of Serac's intervention.

On those grounds,

THE COURT OF FIRST INSTANCE (Fourth Chamber)

hereby:

1. **Annuls the Commission's decision contained in its letter of 20 June 1997, rejecting the complaint made by the applicant seeking a declaration that a**

cooperation agreement between Stork Amsterdam BV and Serac Group for marketing production lines for manufacturing plastic bottles and aseptically filling them with liquid foods is incompatible with Article 85 of the EC Treaty (now Article 81 EC);

2. Orders the Commission to bear its own costs and to pay those incurred by the applicant, apart from those occasioned to the applicant by the intervention of Serac which shall bear its own costs, and the applicant to bear the costs it has incurred as a result of Serac's intervention.

Moura Ramos Tiili Mengozzi

Delivered in open court in Luxembourg on 17 February 2000.

H. Jung
Registrar

V. Tiili
President