

Judgment of the Court, IBM/Commission, Case 60/81 (11 November 1981)

Caption: According to the Court of Justice, in its judgment of 11 November 1981, in Case 60-81, IBM/Commission, any measure the legal effects of which are binding on, and capable of affecting the interests of, the applicant by bringing about a distinct change in his legal position is an act or decision which may be the subject of an action under Article 173 of the EEC Treaty (now Article 230 of the EC Treaty) for a declaration that it is void.

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Judgment of the Court 11 November 1981 (1) International Business Machines Corporation v Commission of the European Communities

Competition - Annulment of the decision to initiate a procedure and of the statement of objections)

Case 60/81

1. Application for a declaration that a measure is void - Measures open to challenge - Concept - Measures producing binding legal effects - Preparatory measures - Exclusion (EEC Treaty, Arts 173 and 189)

2. Application for a declaration that a measure is void - Measures open to challenge - Concept - Initiation of a procedure for a declaration that the rules on competition have been infringed - Statement of objections - Exclusion (EEC Treaty, Art. 173; Regulation No 17 of the Council, Art. 3; Regulation No 99/63 of the Commission, Art. 2)

3. Competition - Administrative procedure - Statement of objections - Effects - Difference as against the communication referred to in Article 15 (6) of Regulation No 17 (Regulation No 17 of the Council, Art. 15 (6); Regulation No 99/63 of the Commission, Art. 2)

1. In order to ascertain whether measures are acts within the meaning of Article 173 it is necessary to look to their substance, as the form in which they are cast is, in principle, immaterial in this respect.

Measures producing binding legal effects of such a kind as to affect the applicant's interests by clearly altering his legal position constitute acts or decisions open to challenge by an application for a declaration that they are void.

Measures of a purely preparatory character may not themselves be the subject of an application for a declaration that they are void.

2. Neither the initiation of a procedure for a declaration that the Community rules on competition have been infringed 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 as laid down by Regulations No 17 and No 99/63, they are procedural measures adopted preparatory to the decision which represents their culmination.

3. A statement of objections does not compel the undertaking concerned to alter or reconsider its marketing practices and it does not have the effect of depriving it of the protection hitherto available to it against the application of a fine, as is the case when the Commission informs and undertaking, pursuant to Article 15 (6) of Regulation No 17, of the results of the preliminary examination of an agreement which has been notified by the undertaking. Whilst a statement of objections may have the effect of showing the undertaking in question that it is incurring a real risk of being fined by the Commission, that is merely a consequence of fact, and not a legal consequence which the statement of objections is intended to produce.

In Case 60/81

INTERNATIONAL BUSINESS MACHINES CORPORATION (hereinafter referred to as "IBM") Armonk, New York 10504, United States of America, represented by Jeremy Lever, Queen's Counsel, of the Bar of England and Wales, David Edward, Queen's Counsel, advocate of the Scots Bar, John Swift, Queen's Counsel, of the Bar of England and Wales, Christopher Bellamy and Nicholas Forwood, barristers of the Bar of England and Wales, and Andrew Soundy, of Ashurst, Morris, Crisp and Co., Solicitor of the Supreme Court of England and Wales, with an address for service in Luxembourg at the offices of International Business Machines of Belgium SA, 8 Boulevard Royal,

applicant,

v

COMMISSION OF THE EUROPEAN COMMUNITIES, represented by its Legal Adviser, John Temple Lang, and Götz zur Hausen, a member of the Legal Department, acting as Agent, with an address for service in Luxembourg at the office of Oreste Montalo, a member of its Legal Department, Jean Monnet Building, Kirchberg,

defendant,

and

Memorax SA, 178 Chaussee de la Hulpe, 1170 Brussels, represented by Ivo Van Bael and Jean-François Bellis, of the Brussels Bar with an address for service in Luxembourg at the chambers of Messrs Elvinger and Hoss, 15 Côte d'Eich,

intervener

Application for the annulment of the decision to initiate a procedure in matter of competition and the statement of objections appertaining thereto,

THE COURT

composed of J. Mertens de Wilmars, President, G. Bosco and A. Touffait (Presidents of Chambers), Lord Mackenzie Stuart, T. Koopmans, U. Everling and F. Grevisse, Judges,

Advocate General: Sir Gordon Slynn

Registrar: A. Van Houtte

gives the following

JUDGEMENT

Facts and Issues

The facts of the case, the course of the procedure, the conclusions and the submissions and arguments of the parties may be summarized as follows:

I - Facts

1. For a number of years the Commission, which had received complaints from some of the applicant's competitors, has been conducting an investigation of the marketing practices of the applicant and its subsidiaries in order to determine whether or not those practices amount to an abuse of a dominant position on the market within the meaning of Article 86 of the EEC Treaty.

The applicant was informed by letter of 19 December 1980 signed by the Director-General for Competition that the Commission had initiated in its regard a procedure pursuant to Article 3 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 that it intended to make a decision regarding infringements of Article 86 of the EEC Treaty. A statement of objections as provided for in Article 19 of Regulation No 17 was sent with the letter. At the same time the applicant was invited to submit its reply in writing, and was informed that it would subsequently be given an opportunity to state its views orally at a hearing.

It appears from the statement of objections that the Commission is of the opinion that the applicant occupies a dominant position in the supply of central processing units and basic software for the IBM 360 and 370 type computer systems, thus controlling the operation and maintenance of such units, and that it has abused that position to the detriment of "plug-compatible" manufacturers who offer products specifically designed to be compatible with the above-mentioned computer system, by means of certain marketing practices which consist of:

(a) Supplying one product with another at no separate price or supplying a product physically attached to

another at no separate price ("bundling"), namely the basic software and the main memory or storage for its central processing units;

(b) Refusing, on the announcement of new products, to disclose details of any interface change or, if it does disclose them, not doing so until after the first customer shipment;

(c) Refusing to supply certain valuable software to users of IBM computer systems unless such software is used with a central processing unit of IBM manufacture.

These practices pursued by the applicant on the world market have been and are still, in part, the subject of legal proceedings in the United States.

2. By letter of 28 January 1981 applicant requested the Commission to supply it with details concerning the acts of the Commission authorizing the initiation of the procedure and communication of the statement of objections, and to send copies of the relevant documents recording those acts.

In a letter of 3 February 1981 signed by the Director of Directorate IV B the Commission refused to supply the said details, stating that the decisions were internal ones which would not be notified outside the Commission.

The applicant informed the Commission by letter of 20 February 1981 that in its opinion the administrative procedure was defective in a number of respects. It therefore asked the Commission to withdraw the statement of objections and terminate the procedure or, alternatively, to answer a number of questions, both general and specific, set out in the letter in order to clarify the Commission's position and to persuade the Commission not to make use of the right which it had reserved to itself to put forward further objections at a later stage.

The response to that letter, communicated in a letter of 13 April 1981 after the present application was lodged, was a refusal by the Commission to accede to the applicant's requests, but giving IBM certain information; in addition, it extended on several occasions the period allowed for submitting a written reply to the statement of objections, finally until 31 August 1981.

II - Conclusions and procedure

1. This application was lodged on 18 March 1981; in it the applicant claims that the Court should:

(1) Declare void:

(i) the act or acts of the Commission by which

(a) a proceeding was initiated against IBM pursuant to Article 3 of Regulation No 17 of the Council;

(b) a statement of objections was addressed and/or notified to the applicant; and/or

(ii) the statement of objections itself, in so far as by itself it constitutes an act of the Commission;

(2) Order the Commission to pay the costs.

The application is founded on three grounds which may be briefly summarized as follows:

(a) Commission has failed to meet minimum legal criteria in relation to the statement of objections. The statement of objections is not clear and contains defects of substance, it is wrong for the Commission to reserve to itself therein the right to make further objections, and inadequate time has been allowed for submitting a reply. The statement of objections therefore conflicts with the fundamental principles concerning the rights of the defence.

(b) The initiation of the procedure under Article 86 constitutes an unlawful exercise of the powers of the Commission. The acts which are the subject-matter of the application were not adopted by a collegiate decision of all the Commissioners, yet there was no delegation of powers, nor can such a delegation be lawfully made, at least in the absence of publication or due notification.

(c) As the conduct of the applicant to which objection is taken is pursued for the most part outside the confines of the Community and is the subject of legal proceedings in the United States, the Commission was under a duty from the start to have regard to the relevant principles of international law, in particular the principles of comity and non-interference in the internal affairs of the United States, which preclude the exercise of Community jurisdiction.

In a separate lodged at the Court Registry on 10 April 1981 pursuant to Article 91 (1) of the Rules of Procedure the Commission entered an objection of inadmissibility claiming that the Court should:

- Declare the application inadmissible; and
- Order the applicant to pay the costs.

By an order of the Court of 13 May 1981 Memorex SA, the complainant in the administrative proceedings before the Commission, was allowed to intervene. In its observations on the admissibility of the application the intervener claimed that the Court should:

- Declare the application inadmissible; and
- Order the applicant to pay the costs including those of the intervention.

2. Concurrently with the main application the applicant by a separate document made application pursuant to Article 91 (1) of the rules of Procedure for an order:

(1) that the Commission should produce particulars of its acts authorizing:

- (i) the initiation of the proceedings; and
 - (ii) the delivery of the statement of objections, and provide copies of the minutes or other relevant documents recording the same; and
- (2) that the Commission should pay the costs of and incurred in connection with that application.

In support of that application the applicant relied on Article 21 of the Statute of the Court of Justice of the European Economic Community and Article 45 (2) of the Rules of Procedure, stating that unless the Commission provided the particulars so requested the applicant would be unable effectively to advance relevant arguments relating to the validity of the acts in question, and the Court would be unable to exercise its powers of review under Article 173 of the EEC Treaty.

The Commission, replying, contended that the Court should:

- Dismiss the application for production of documents;

and

- Order the applicant to pay the costs.

In support of its conclusions the Commission claimed that it was not open to the applicant to request the production of documents dealing with issues of substance in the main application outside the context of the main procedure, and before it had even been established whether the main application was admissible, and that the provisions relied upon by the applicant dealt with different circumstances and could not therefore support such a request.

3. On 29 May 1980 the applicant submitted an application for the adoption of interim measures pursuant to Article 83 of the Rules of Procedure seeking the suspension of the Commission's administrative procedure and of the implementation of the disputed acts or the adoption of such interim measures as might be necessary.

The President of the Court made an interlocutory order on 7 July 1981 dismissing the application for the adoption of interim measures and reserving costs, including those of the intervention.

4. The written procedure relating to the objection of inadmissibility followed the normal course.

On hearing the views of the Advocate General the Court decided to open the oral procedure concerning the admissibility of the main application without any preparatory inquiry.

III - Arguments of the parties on the admissibility of the application

1. In the application it is submitted by the *applicant* that the acts of the Commission which form the subject matter of the action constitute decisions within the meaning of Article 173 of the EEC Treaty because they are acts of the Commission which produce legal consequences. The applicant bases its submission on the

decisions of the Court of 31 March 1971 in Case 22/70 (*Commission v Council*, [1971] ECR 263), and 15 March 1967 in Joined Cases 8 to 11/66 (*Cimenteries v Commission*, [1967] ECR 75).

Notification of the statement of 15 objections crystallizes and determines the final attitude of the Commission concerning undertakings and binds it to a position from which it cannot lawfully depart. Furthermore, notification of a statement of objections is a *conditio sine qua non* of the power of the Commission impose a fine or a periodic penalty payment or to make an order for termination of an infringement. It brings about a change in the legal position of the undertaking concerned in that the latter is thereby required to answer a charge and put up a defence and to do so within period laid down by the Commission. By virtue of the notification of the statement of objections the undertaking may become directly liable to a fine, a penalty payment or an order for termination of an infringement if it takes no action to defend itself.

Moreover, the initiation of a proceeding and notification of the statement of objections have the consequence in law, by virtue of Article 9 (3) of Regulation No 17, that the authorities of the Member States cease to be competent to apply Articles 85 and 86 of the EEC Treaty, and such notification interrupts the limitation period in pursuance of Article 2 of Regulation (EEC) No 2988/74 of the Council of 26 November 1974, concerning limitation periods in proceedings and the enforcement of sanctions under the rules of the European Economic Community relating to transport and competition (Official Journal, L 319, p. 1).

Judicial review of the acts in question prior to the stage at which a final decision is made ensures observance of the principles of good administration and the right to be heard and reduces the possibility of the final decision's being annulled for procedural irregularity.

2. In support of its objection of inadmissibility the *Commission* argues that initiation of an administrative procedure and the statement of objections are procedural steps, which are preparatory and provisional and therefore not open to challenge under Article 173 of the EEC Treaty.

Community competition law draws a distinction, in the same way as the various national legal procedures known to the Commission, between decisions which may be challenged under Article 173 and procedural steps which cannot themselves be challenged. If such procedural steps are adopted or carried out improperly, the only course of action available to the undertaking concerned is to challenge the validity of the decision adopted by the Commission at the end of the procedure in question. IBM's theory would obstruct the normal operation of the Commission's procedure, for no administrative procedure could work if it were constantly the subject of requests for judicial review at every stage. The distinction in Community law between decisions which may be challenged under Article 173 on the one hand, and procedural steps on the other, is in any case of advantage to undertakings for in the absence of such a distinction they would be compelled to challenge every procedural measure adverse to them or be compelled to be bound by it, and would be obliged to incur considerable costs to defend themselves in the course of an administrative procedure. In the light of that distinction the acts which have been challenged in the present case constitute mere steps in the administrative procedure governed by the Commission's administrative discretion which the Court should not review and with which it should not involve itself before a definitive decision has been adopted.

Regulation No 17 of the Council and Regulation No 99/63 of the Commission of 25 July 1963, on the hearings provided for in Article 19 (1) and (2) of Council Regulation No 17 (Official Journal, English Special Edition 1963-64, p. 47), contain no indication whatsoever that the initiation of a procedure and the statement of the objections are to be regarded as decisions which may be the subject of challenge in the courts.

The measures impugned are to be distinguished, in particular, from notification of the results of a preliminary examination of an agreement, decision or concerted practice under Article 15 (6) of Regulation No 17. None of the circumstances which led the Court in the decision of 15 March 1967 in the *Cimenteries* case, cited above, to consider such a notification as a decision is present here. Neither the initiation of a procedure nor the statement of objections deprives the undertaking concerned of protection or places it in a position where it must choose between substantially altering its conduct or running the risk of a fine. Such

acts are not the culmination of the special procedure and do not call for legal guarantees in order to protect the undertaking.

As to the effect of the initiation of a procedure under Article 9 (3) of Regulation No 17, it falls on the powers of the national authorities, not on the undertaking itself, and the undertaking benefits from it because it is thereby protected from the risk of parallel proceedings.

The Commission must always reconsider the case when it receives the reply to the statement of objections and it is free to send out a second statement of objections, or to clarify or add to the first. The "crystallizing" effect of the statement of objections does not therefore justify its being challenged directly. The undertaking's right to criticize the statement of objections is more efficiently and appropriately protected by the right to challenge the final decision, for only at that stage can the effect of any defects in the statement of objections be adequately assessed without its being necessary to indulge in speculation as to the future development of the procedure.

The fact that the limitation period is interrupted cannot enter into account. The applicant's argument implies that any action taken for the purpose of investigating an infringement might be open to challenge.

The applicant's theory of admissibility, which is not borne out by the competition laws of the Member States, I would inevitably lead to serious and undesirable consequences for it would mean that in the course of every procedure initiated under Regulation No 17 large numbers of actions directed against steps in the procedure might come before the Court which would thus be obliged to examine at an unsuitably early stage arguments going to the substance of the issues.

3. In its observations on the objection of inadmissibility the *applicant* develops its arguments to the effect that, having regard to their characteristics, the initiation of a procedure and a statement of objections amount to decisions which may be the subject of proceedings under Article 173 of the EEC Treaty.

According to the case-law of the Court an act may be declared void if it has consequences for the applicant in law or in fact which, in the interests of the administration of justice, require that act to be reviewed. The acts in question meet those requirements. The legal nature of the initiation of a procedure and the statement of objections show all the characteristics of a decision. Initiation of a procedure proceeds from a formal decision by the Commission which constitutes an authoritative act on the part of the latter, and the statement signals the termination, by an authoritative act which determines the Commission's attitude, of the internal administrative phase of the preliminary inquiry. That is confirmed by the legal and practical consequences of the acts in question. The applicant subjects those consequences to detailed analysis in order to buttress the theory already set forth in its application that the acts in question, by reason of their effects in law, are decisions within the meaning of Article 173.

In particular, the statement of objections meets all the conditions laid down by the decision of the Court in the abovementioned *Cimenteries* case. It marks the end of the initial stage of the procedure, has the effect of eliminating the presumption of good faith on the part of the applicant who prior to the statement of objections had no reason to believe that the conduct complained of might constitute an infringement of Article 86 of the EEC Treaty, and it confronts the applicant with the dilemma of either altering its marketing practices or running the increased risk of incurring a fine.

Furthermore, the applicant emphasizes that it is not seeking a general statement of principle on the admissibility of applications in the context of administrative proceedings under Regulation No 17, but that the present action is admissible in view of the special, perhaps unique, circumstances of this case.

Owing to the special nature of the case the admissibility of this application cannot effectively be considered without examining the substance of the case. The issues raised are, by their very nature and by their implications for the integrity of the Community, and international, legal order, questions which fall squarely within the immediate jurisdiction of the Court and ought to be decided now. The crux of the main application is that the Commission's administrative procedure was vitiated *ad initio* by a defect and that to

pursue that procedure in any way is unlawful. The application seeks to establish that the acts in question were adopted in breach of international law by persons acting without the lawful authority of the Commission, and to protect the applicant's interest in not finding itself compelled to defend itself in the course of a procedure which is wholly unlawful. In the circumstances subsequent annulment of the Commission's ultimate decision would not be sufficient to provide proper protection for the applicant and legal action should be available to it in order to obtain early judicial review.

In support of its argument the applicant refers to a legal opinion by Professor Meessen which states that the rule of non-interference under customary international law, which has direct effect in Community law and may be relied upon by undertakings, requires States to refrain from adopting measures in application of their competition law if such measures would affect the interests of a foreign State to a substantial extent and if those interests outweigh the interests of the State proposing to take the measures. By initiating and continuing the administrative procedure the Commission has, according to that opinion, infringed the rule of non-interference. Community law and the rules of international law require the acts in question to be subject to judicial review at the outset, therefore, to determine whether they breach the rule of non-interference, which is a rule of jurisdiction, relevant under Article 173 of the EEC Treaty. The decision to deliver the statement of objections must, in addition, be viewed as an implicit refusal to apply the rule of non-interference and for that reason constitutes a reviewable decision under Article 173.

The applicant relies further, in support of its argument, on a series of opinions and notes on the laws of the Member State which, it claims, reveal the existence of a principle common to all the legal systems to the effect that judicial review *in limine* is available at an early stage in various forms in the same circumstances as those of the present case when the interests of the administration of justice so require especially where competence or jurisdiction is in issue. Examination of past decisions of the Court in staff cases show that under certain conditions on certain grounds preparatory acts may be subject to judicial review and that the principle of early judicial review is known in Community law.

4. The *intervener*, in its observations as to the admissibility of the application, maintains that the application is manifestly inadmissible for failure to meet the conditions laid down by case-law of the Court for application of Article 173 of the EEC Treaty, because the acts impugned do not have legal effects capable of prejudicing the individual interests of the applicant and do not constitute the culmination of a special procedure of the Commission.

The statement of objections has no more the character of a decision within the meaning of Article 173 of the EEC Treaty than the reasoned opinion given by the Commission in the course of a procedure under Article 169 of the EEC Treaty.

The applicant's reliance on the staff cases decided by the Court is misplaced because the relevant rules in Article 179 of the Treaty and in the Staff Regulations of Officials are different. Similarly the legal opinions concerning the laws of the Member States, which were drawn up, moreover, in a biased manner, are not pertinent. By contrast, the applicant has omitted to draw the attention of the Court to the decision of the Supreme Court of the United States of America of 15 December 1980 in *Federal Trade Commission v Standard Oil Company of California*, 101 S.Ct. 488, according to which acts similar to those in question here are not open to judicial review in the course of competition proceedings in the United States.

The *intervener* concludes with the opinion that the application must be dismissed as manifestly inadmissible by means of an order under Article 92 (1) of the Rules of Procedure. IBM's application represents dilatory tactics of an unprecedented kind and an attempt to manipulate the Rules of Procedure in order to protract and obstruct the procedure by the Commission, calling in question the credibility and effectiveness of Community competition law and inflicting serious damage on the *intervener* owing to the delay in concluding the procedure.

IV - Oral procedure

Oral argument on the objection of inadmissibility was presented at the sitting on 16 September 1981 by the

Commission of the European Communities, represented by John Temple Lang, Legal Adviser, by the applicant, represented by Jeremy Lever, Queen's Counsel, of the Bar of England and Wales, and by the intervener, represented by Ivo van Bael of the Brussels Bar.

The Advocate General delivered his opinion at the sitting on 30 September 1981.

Decision

- 1 By application lodged at the Court Registry on 18 March 1981 the International Business Machines Corporation (hereinafter referred to as "IBM"), whose headquarters are in Armonk, New York, United States of America, brought an action under the second paragraph of Article 173 of the EEC Treaty for a declaration that the measure or measures of the Commission of which IBM was notified in a letter dated 19 December 1980, initiating a procedure against IBM pursuant to Article 3 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 notifying IBM of a statement of objections, or the statement of objections itself, are void.
- 2 The letter, signed by the Commission's Director-General for Competition was sent to IBM after an inquiry lasting several years by the officers of the Commission in connection with some of the marketing practices of IBM and its subsidiaries in order to determine whether or not such practices constitute an abuse of a dominant position on the market in question within the meaning of Article 86 of the EEC Treaty. The letter informed IBM that the Commission had initiated against the company a procedure under Article 3 of Regulation No 17 of the Council and that it was about to take a decision concerning infringements of Article 86. Together with the letter IBM received a statement of objections under Article 2 of Regulation N 99/63/EEC of the Commission of 25 July 1963 on the hearings provided for in Article 19 (1) and (2) of Council Regulation No 17 (Official Journal English Special Edition 1963-64, p. 47). The Director-General for Competition requested the company to reply in writing within a specified period and stated that it would be given on opportunity later to explain its point of view orally in the course of a hearing.
- 3 IBM took the view that the measures of which it had been notified in the letter of 19 December 1980 were vitiated by a number of defects and requested the Commission to withdraw the statement of objections and terminate the procedure. The Commission refused to do so and IBM then brought the present action for a declaration that the measures in question were void.
- 4 IBM's action is based on the submission that the measures which it challenges do not meet the minimum legal criteria which have been laid down for such measures, and that defects in the content of the statement of objections, the inadequacy of the time-limits laid down and the Commission's reservation of the right to raise further objections at a later date have made it impossible for IBM to raise a defence. In addition, IBM considers that the measures impugned amount to an unlawful exercise of its powers by the Commission inasmuch as they have not been the subject of a collegiate decision adopted by all the members of the Commission together although there has been no corresponding delegation of power and, in law, there could not be one, at least without due publication or notification. Finally, IBM maintains that the measures in question offend against the international legal principles of comity between nations and non-interference in internal affairs, principles which ought to have been taken into consideration by the Commission before it adopted the measures in question because the conduct of IBM which is the subject of complaint occurred in the main outside the Community, in particular in the United States of America where it is also the subject of legal proceedings.
- 5 Commission, supported by Memorex SA, intervening, lodged an objection of inadmissibility under Article 91 (1) of the Rules of Procedure. The Court decided to adjudicate on the objection of inadmissibility without going into the substance of the case.
- 6 In support of the objection the Commission and the intervener Memorex submit that the measures in question are procedural steps whereby the Commission expresses an opinion which it may later change, and as those steps are preparatory to the final decision to be adopted by the Commission on the conclusion of the

procedure they do not constitute decisions capable of being challenged under Article 173 of the EEC Treaty.

7 IBM maintains that the initiation of a procedure and notification of the objections amount to decisions within the meaning of Article 173 of the EEC Treaty by reason of their legal nature and their consequences, and that such measures may therefore be the subject-matter of an action.

8 According to Article 173 of the Treaty proceedings may be brought for a declaration that acts of the Council and the Commission other than recommendations or opinions are void. That remedy is available in order to ensure, as required by Article 164, that in the interpretation and application of the Treaty the law is observed, and it would be inconsistent with that objective to interpret restrictively the conditions under which the action is admissible by limiting its scope merely to the categories of measures referred to in Article 189.

9 In order to ascertain whether the measures in question are acts within the meaning of Article 173 it is necessary, therefore, to look to their substance. According to the consistent case-law of the Court any measure the legal effects of which are binding on, and capable of affecting the interests of, the applicant by bringing about a distinct change in his legal position is an act or decision which may be the subject of an action under Article 173 for a declaration that it is void. However, the form in which such acts or decisions are cast is, in principle, immaterial as regards the question whether they are open to challenge under that article.

10 In the case of acts or decisions adopted by a procedure involving several stages, in particular where they are the culmination of an internal procedure, it is clear from the case-law that in principle an act is open to review only if it is a measure definitively laying down the position of the Commission or the Council on the conclusion of that procedure, and not a provisional measure intended to pave the way for the final decision.

11 It would be otherwise only if acts or decisions adopted in the course of the preparatory proceedings not only bore all the legal characteristics referred to above but in addition were themselves the culmination of a special procedure distinct from that intended to permit the Commission or the Council to take a decision on the substance of the case.

12 Furthermore, it must be noted that whilst measures of a purely preparatory character may not themselves be the subject of an application for declaration that they are void, any legal defects therein may be relied upon in an action directed against the definitive act for which they represent a preparatory step.

13 The effects and the legal character of the invitation of an administrative procedure pursuant to the provisions of Regulation No 17 and of the notification of objections as provided for in Article 2 of Regulation No 99/63 must be determined in the light of the purpose of such acts in the context of the Commission's administrative procedure in matters of competition, detailed rules for which have been laid down in the abovementioned regulations.

14 The procedure was designed to enable the undertakings concerned to communicate their views and to provide the Commission with the fullest information possible before it adopted a decision affecting the interests of an undertaking. Its purpose is to create procedural guarantees for the benefit of the latter and, as may be seen in the eleventh recital in the preamble to Regulation No 17, to ensure that the undertakings have the right to be heard by the Commission.

15 That is why in accordance with Article 19 (1) of Regulation No 17 and in order to guarantee observance of the rights of the defence, it is necessary to ensure that the undertaking concerned has the right to submit its observations on conclusion of the inquiry on all the objections which the Commission intends to raise against it in its decision and, therefore, to inform it of those objections in the document which is provided for in Article 2 of Regulation No 99/63. That is why, too, in order to remove any doubt as to the procedural position of the undertaking in question, initiation of the procedure under the abovementioned provisions is clearly marked by an act manifesting the intention to take a decision.

16 In support of its submission that the application is admissible IBM relies on a number of effects arising from the initiation of a procedure and from communication of the statement of objections.

17 Some of those effects amount to no more than the ordinary effects of any procedural step and, apart from the procedural aspect, do not affect the legal position of the undertaking concerned. That is so, in particular, of the interruption of the time-limit brought about both by the initiation of a procedure and by the communication of the statement of objections by virtue of Regulation (EEC) No 2988/74 of the Council of 26 November 1974 concerning limitation periods in proceedings and the enforcement of sanctions under the rules of the European Economic Community relating to transport and competition (Official Journal 1974, L 319, p. 1). The same is true as regards the fact that the acts in question are necessary stages to be accomplished by the Commission pursuant to the provisions of Regulation No 17 before it is able to impose a fine or a periodic penalty payment on the undertaking concerned, and the fact that the acts oblige the undertaking concerned to put up a defence in administrative proceedings.

18 Other effects relied on by IBM do not adversely affect the interests of the undertaking concerned. One such is the fact that initiation of a procedure under Article 9 (3) of Regulation No 17 puts an end to the jurisdiction of the authorities in the Member States - a result which did not in fact occur in this instance as there were no national proceedings, and which essentially results in protecting the undertaking concerned from parallel proceedings brought by the authorities of the Member States. Another such effect is the fact that communication of the statement of objections is recognized as crystallizing the Commission's position, which means in effect that the Commission is prevented, pursuant to Article 4 of Regulation No 99/63, from relying in its decision, in the absence of a fresh statement of objections, on the existence of any objections other than those on which the undertaking has been given an opportunity to make known its views, though it does not prevent the Commission from withdrawing its objections and thereby altering its standpoint in favour of the undertaking.

19 A statement of objections does not compel the undertaking concerned to alter or reconsider its marketing practices and it does not have the effect of depriving it of the protection hitherto available to it against the application of a fine, as is the case when the Commission informs an undertaking pursuant to Article 15 (6) of Regulation No 17, of the results of the preliminary examination of an agreement which has been notified by the undertaking. Whilst a statement of objections may have the effect of showing the undertaking in question it is incurring a real risk of being fined by the Commission, that is merely a consequence of fact, and not a legal consequence which the statement of objections is intended to produce.

20 An application for a declaration that the initiation of a procedure and a statement of objections are void might make it necessary for the Court to arrive at a decision on questions on which the Commission has not yet had an opportunity to state its position and would as a result anticipate the arguments on the substance of the case, confusing different procedural stages both administrative and judicial. It would thus be incompatible with the system of the division of powers between the Commission and the Court and of the remedies laid down by the Treaty, as well as the requirements of the sound administration of justice and the proper course of the administrative procedure to be followed in the Commission.

21 It follows from the foregoing 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 as laid down by Regulations No 17 and No 99/63, they are procedural measures adopted preparatory to the decision which represents their culmination.

22 In support of its submission that the application is admissible IBM relies further on the special circumstances of the case and on the nature and implications of the submission which it puts forward on the substance of its case, claiming that a judicial review ought to be made available at an early stage in this case both in accordance with the principles of international law in such matters and pursuant to general principles flowing from the laws of the Member States. The present application is intended to establish that the administrative procedure was wholly unlawful from the beginning under the rules of Community law and international law, particularly those concerning the power to initiate such procedures. Any continuation of

that administrative procedure is unlawful, it claims, and the fact that IBM may subsequently have the final decision declared void is not sufficient to give it effective legal protection.

23 It is not necessary for the purposes of this case to decide whether, in exceptional circumstances, where the measures concerned lack even the appearance of legality, a judicial review at an early stage such as that envisaged by IBM may be considered compatible with the system of remedies provided for in the Treaty, because the circumstances referred to by the applicant in this case are in any event not such as would make it possible to regard the action as admissible.

24 Moreover, in this instance adequate legal protection for IBM does not require that the measures in question be subject to immediate review. If, on the conclusion of the administrative procedure and after any observations which IBM may submit in the course of it have been examined, the Commission were to adopt a decision which affects IBM's interests, that decision will, in accordance with Article 173 of the EEC Treaty, be subject to judicial review in the course of which it will be permissible for IBM to advance all the appropriate arguments. It will then be for the Court to decide whether anything unlawful has been done in the course of the administrative procedure and if so whether it is such as to affect the legality of the decision taken by the Commission on the conclusion of the administrative procedure.

25 The application must therefore be dismissed as inadmissible.

Costs

26 Article 69 (2) of the Rules of Procedure provides that the unsuccessful party is to be ordered to pay the costs if they have been asked for in the successful party's pleading. Since IBM's application has failed it must be ordered to pay the costs including those of the intervener, Memorex SA. The order for costs must include, besides the costs in the main proceedings, those which were occasioned by IBM's application for the adoption of interim measures and which were reserved in the order made by the President of the Court on 7 July 1981, together with those occasioned by IBM's request for production of information and documents concerning the Commission's initiation of the procedure, a request which has now become nugatory in view of the dismissal of the main action.

On those grounds,

THE COURT

hereby:

1. Dismisses the application as inadmissible;

2. Orders the applicant to pay the costs including the costs of the intervener, Memorex SA, and the costs resulting from IBM's application for the adoption of interim measures and the production of information and documents concerning the Commission's initiation of the procedure.

Mertens de Wilmars
Bosco
Touffait
Mackenzie Stuart
Koopmans
Everling
Grevisse

Delivered in open court in Luxembourg on 11 November 1981.



Registrar
A. Van Houtte
President
J. Mertens de Wilmars

(1) Language of the Case: English