OPINION OF ADVOCATE GENERAL LENZ
delivered on 10 February 1994 *

Mr President,
Members of the Court,

A — Introduction

1. This case concerns an appeal against an order of the Court of First Instance of 30 November 1992 in Case T-36/92. [1] The facts of the case were as follows.

2. The Syndicat Français de l'Express International (SFEI) is an association of undertakings providing rapid mail services in France. On 21 December 1990 SFEI lodged a complaint with the Commission against the logistical and financial assistance provided to the Société Française de Messagerie Internationale (SFMI) by the French postal services. According to the findings of the Court of First Instance SFMI is a public limited company under French law 66% of whose share capital is held (indirectly) by the French postal services. The assistance alleged by SFEI included the availability of the post office network, a preferential procedure for customs clearance, the grant of preferential financial terms and the conduct of advertising operations in favour of SFMI.

3. As early as 20 December 1990 SFEI addressed a complaint to the French competition authority alleging an infringement of French competition law by the French postal authorities and by SFMI.

4. SFEI's complaint to the Commission consisted of three parts: a covering letter to the Director General of Directorate General IV (DG IV) a brief summary of the complaint, and the complaint itself to which an index was appended. Also attached was a copy of the complaint which SFEI had lodged on the preceding day with the French competition authority.

In the accompanying letter SFEI explained that the complaint was based on Article 92 et seq. of the EEC Treaty, was directed against the French State, and was without prejudice

* Original language: German.

1 — *SFEI and Others* v *Commission* [1992] ECR II-2479.

to proceedings under Article 85 and Article 86 of the EEC Treaty. SFEI added that the complaint lodged with the French competition authority was 'also relevant' both with regard to Articles 85 and 86 of the EEC Treaty and Articles 5 and 90 of the EEC Treaty.

5. On 18 March 1991, at a meeting between DG IV and representatives of the complainant, the applicability of Article 86 of the EEC Treaty was specifically discussed. DG IV undertook to examine the information available to it in the light of that provision.

6. On 15 November 1991 the complainant's legal representative sent a letter to the Directorate General of DG IV in which he inquired whether it was the Commission's intention to institute proceedings on the basis of the facts set out in the complaint and on which legal basis it proposed to do this (Articles 85, 86 and 90 and/or Article 92 et seq.).

7. On 9 January 1992 the Director General of DG IV replied to the letter of 15 November 1991. This letter drafted in English stated that

'When my colleagues met you on 18 March 1991, they indicated that they were unlikely to find a basis for a decision that the state aid rules of the Treaty had been infringed. They have since investigated this aspect further. We also undertook to consider the available information and to take a view in principle on the application of Article 86.

Whilst these investigations were continuing, the international express services of La Poste were affected by the joint venture announced between TNT, La Poste and four other postal administrations. We carried out an investigation under the provisions of the Merger Regulation into these arrangements, and the Commission's decision of 2 December has recently been published. The outcome clearly has a bearing on our consideration of SFEI's complaint.

We shall shortly write to you more fully with our conclusions on the matter.'

8. The proposal referred to in that letter concerns a joint venture between an Australian undertaking (TNT limited) on the one hand and the German, Canadian, French, Netherlands and Swedish postal services on the other hand. That proposal was notified to the Commission on 28 October 1991. On 2 December 1991 the Commission decided that the proposal was consistent with the terms of Council Regulation (EEC) No 4064/89 of 21 December 1989 on the

control of concentrations between undertakings. In the course of that procedure the four European postal services gave specific undertakings more particularly described in an annex to the Commission's abovementioned decision.

9. On 10 March 1992 the Commission sent two letters to the complainant. In the first letter (bearing the number 06873) the Commission informed the complainant of the decision of the relevant services to bring the procedure concerning a possible infringement of Article 92 of the EEC Treaty to an end.

In the second letter drafted in English (bearing the number 000978), a director of DG IV referred to the letter of 9 January 1992. He pointed to the investigation carried out in the context of the joint venture already mentioned and the resulting decision adopted by the Commission on 2 December 1991, and stated that this investigation had necessarily covered the most important points mentioned by SFEI with regard to a possible infringement of Article 86. He placed particular emphasis on the question of possible cross-subsidies and on the advantages likely to accrue to the joint venture from access to the general facilities and privileges of the French postal services. In addition, he stated that the Commission's assessment was that, taking the market conditions and the assurances given by the parties into account, there was no creation or strengthening of a dominant position as a result of which effective competition would be significantly impeded.

The letter ended as follows:

'I am aware that you had hoped that the Commission would follow the full procedure of an Article 86 investigation. This procedure would only have dealt with the situation regarding France. However, this investigation under the Merger Regulation has dealt with significant changes in the wider Community market. The competitive conditions facilitated by previous Commission decision on international express have now been effectively extended. I am satisfied that the result is the best framework that could be obtained at this time in order to ensure that SFEI members and other operators all have a full opportunity to compete.

While we do not propose to pursue enquiries under Article 86 in these circumstances, I can assure you that we shall maintain a close watch on developments in this market. In a separate letter we are informing you of the outcome of our consideration of the linked case presented under the State aid rules.'

10. SFEI and three associated undertakings — DHL International, Service Crie and May Courier — on 16 May 1992 instituted proceedings before the Court of First Instance for the annulment of the decision in their view contained in Letter No 000978 of 10 March 1992. The applicants were of the opinion that the Commission in this letter had definitively rejected the complaint based on Article 86. In their application they alleged that the Commission, *inter alia*, had infringed essential procedural requirements (in particular the duty under Article 190 to provide a statement of the reasons on which a decision is based), an infringement of Article 86 and a misuse of its discretionary power.

At the same time the applicants also brought proceedings against the Commission decision in Letter No 06873 to terminate examination of the complaint in the light of Article 92 et seq. Those proceedings lapsed after the Commission announced on 9 July 1992 that it had withdrawn that decision.

11. In the proceedings brought against Letter No 000978 the Commission raised several objections of inadmissibility. In particular it alleged that no action lay against that letter because it did not constitute a decision.

In support of its view the Commission stated that this letter merely gave a preliminary statement of its position, and thus formed part of the first stage in the investigation of complaints as analysed by the Court of First Instance in its *Automec I* judgment. [2] In that letter the Commission merely elucidated the decision of 2 December 1991 and its significance for the investigation of SFEI's complaint. That provisional statement of position was notified to SFEI in the letter of 9 January 1992.

In this connection the Commission took the view that the complaint raised on 21 December 1990 was at first solely based on a possible infringement of Article 92 et seq. of the Treaty. Only at the meeting on 18 March 1991 were the facts submitted in connection with that complaint examined in the light of Article 86. That view is disputed by the applicants who have submitted that a possible infringement of Article 86 was already alleged in the complaint of 21 December 1990.

2 — Judgment in Case T-64/89 *Automec* v *Commission* [1990] ECR II-367.

12. The Court of First Instance decided first to examine this objection of inadmissibility raised by the Commission. In that connection the Court of First Instance considered it appropriate to examine first of all whether the complaint of 21 December 1990 was also founded on Article 86, and secondly to establish whether the contested letter constituted a decision and was capable of producing legal effects. [3]

13. With regard to the first point the Court of First Instance came to the conclusion following a detailed examination (paragraphs 32 to 37 of the order) that the complaint of 21 December 1990 was based solely on Article 92. [4]

14. With regard to the second question the Court of First Instance distinguished between two different factual situations. If the contested letter was sent in the context of a procedure under Regulation No 17 [5] that could only have occurred in the present case on the basis of an additional request made orally by SFEI at the meeting of 18 March 1991, as alleged by the applicants and conceded by the Commission. [6] Under Article 3 of Regulation No 17 persons and associations of persons who claim a legitimate interest may apply to the Commission for a decision that there is an infringement of Article 85 or Article 86 of the Treaty. In the present case the letter in question could not in the Court's view be in the nature of a decision since it pre-dated the concluding stage of an investigation procedure. [7] The letter contained no assessment of the alleged facts in the light of Article 86 [8] and does not in itself and 'at that stage' of the procedure have the effect of terminating the investigation carried out by the Commission. [9] On the basis of its content the letter should instead be regarded as a document established at a preliminary stage in the investigation, which merely expresses an initial reaction by the Commission's services having no legal effects. [10]

If, on the other hand, the letter was not sent in the context of a procedure under Regulation No 17 it would be devoid of any legal effect and could not therefore be the subject of proceedings under Article 173 of the EEC Treaty. [11]

15. SFEI and the undertakings DHL International, Service Crie and May Courier (hereinafter referred to as the 'appellants') appealed against this decision by the Court of First Instance. Essentially they put forward three grounds of appeal which may be summarized as follows: first of all, the Court of First Instance misinterpreted the notion of 'application' used in Article 3 of Regulation No 17; the complaint of 21 December 1990, contrary to the view taken by the Court of First Instance did extend to Article 86. Secondly, the Court misconstrued the notion of an actionable legal decision. The letter of 10 March 1992 contested by the appellants constitutes a conclusive decision

3 — Ibid., (footnote 1), paragraph 31.
4 — Ibid., (footnote 1), paragraph 37.
5 — Regulation No 17 of the Council of 6 February 1962 (OJ, English Special Edition 1959-62, p. 87).
6 — Ibid., (footnote 1), paragraph 14.
7 — Ibid., (footnote 1), paragraph 41.
8 — Ibid., (footnote 1), paragraphs 42 and 43.
9 — Ibid., (footnote 1), paragraph 43.
10 — Ibid., (footnote 1), paragraph 43.
11 — Ibid., (footnote 1), paragraph 48.

which may be the subject of proceedings under Article 173 of the EEC Treaty. Finally, the Court of First Instance infringed the principle of good faith and legal certainty by not attaching due significance to a statement by the Commission published in the XXth Report on Competition Policy.

16. Accordingly, the appellants seek an order quashing the order of the Court of First Instance of 30 November 1992 in Case T-36/92, with all the legal consequences which that entails, in particular referral of the case back to the Court of First Instance, and an order that costs be reserved.

17. The Commission contends that the appeal should be rejected and that the appellants be ordered jointly to bear the costs of the proceedings.

B — Opinion

Admissibility of the appeal

18. Before I begin to examine the grounds of appeal put forward by the appellants, it is necessary, I think, to give closer consideration to an argument put forward by the Commission at the hearing. At that time the Commission's representative expressed the view that the appellants were misusing their rights by challenging the order of the Court of First Instance by way of an appeal. Apparently, that was based on the consideration that the order appealed against afforded to the appellants precisely that which they wanted, namely the continuation of the procedure initiated by the Commission on the basis of their complaint.

19. In point of fact, the order of the Court of First Instance of 30 November 1992 in the result stated that the investigation of the complaint by the Commission was not yet completed. The appellants could therefore have allowed this order to acquire legal validity in order to require the Commission to take a definitive position on the existence alleged by them of an infringement of Article 86. But on the supposition that the view taken by the appellants in both instances that the letter of 10 March 1992 concluded the Commission's proceedings, thus constituting an actionable decision, were correct, at most the Court of Justice would set aside the order of the Court of First Instance and the Court of First Instance, in the situation most favourable to the applicants, if it regarded the application as admissible and well-founded, would set aside this Commission decision. That outcome, too, would mean that the investigation of SFEI's complaint by the Commission could not be regarded as concluded, thus requiring the Commission to take a definitive position on it.

From this vantage point it may indeed be wondered whether the appeal to the Court by the appellants does not constitute an improper exercise of their rights. Some support for such a conclusion might perhaps be deduced from the observation of the appellant's representative at the hearing to the effect that they had been seeking for years to bring this case before the Court of Justice because they had lost confidence in the Commission.

20. In my opinion, however, the objection by the Commission calls for no lengthy discussion. For should this appeal be successful it cannot be ruled out that in its fresh examination of the application the Court of First Instance might also examine the substance of the application. Of course, a judgment of the Court of First Instance, confirming the existence of, but annulling, the Commission decision on the ground of an infringement of Article 86 or because of a misuse of discretionary power, [12] would significantly alter the legal position of the appellants. Therefore in the present case, the fact that the appellants lodged an appeal cannot be regarded as a misuse of their rights.

21. The Commission has submitted that certain of the allegations put forward by the appellants are inadmissible because they concern questions of fact and not questions of law. In accordance with Article 168a(1) of the EEC Treaty and the first paragraph of Article 51 of the EEC Statute of the Court of Justice the appeal is limited to points of law. In the interests of transparency I shall examine this question in connection with the specific grounds of appeal affected by this objection.

Examination of the specific grounds of appeal

First ground: *Misconstruction of the term 'application'*

22. In its order the Court of First Instance pointed out that the complaint of 21 December 1990 as such made no mention of Article 86 of the EEC Treaty. The fact that a document other than the complaint proper, namely the letter conveying it to the Director General for Competition, expressly reserved the possibility of a further application to the Commission under Article 85 and 86, and referred to the application to the French competition authority did not call in question the assessment that the complaint addressed to the Commission was originally based only on Article 92 but merely reinforced it. [13]

23. The appellants object that the Court of First Instance is thereby attaching to the term 'application' within the meaning of Article 3 of Regulation No 17 unjustified

12 — Cf. the allegations in the application at paragraph 10 above.

13 — Ibid., (footnote 1), paragraph 37.

formal requirements. The covering letter and the complaint to the French competition authority appended in an annex also formed part of the complaint lodged by SFEI with the Commission on 21 December 1990. Moreover, the Court manifestly misinterpreted the documents which thus comprised the complaint. On the basis of these documents the Court of First Instance was not entitled to conclude that the complaint of 21 December 1990 was not based on Article 86. Finally, the reasoning of the Court of First Instance is contradictory since the covering letter is first (in paragraph 32) described as forming part of the complaint, and, subsequently, (in paragraph 37), as being extraneous to it.

24. The Commission objected that this ground of appeal was not on a point of law but was challenging the evaluation of the facts by the Court of First Instance. I agree with it in that. If the Court of First Instance had misinterpreted the term 'application' (within the meaning of Article 3 of Regulation No 17), that would have constituted a point of law amenable to review in the context of appeal proceedings. In my view that is not the case in this instance.

It must be conceded in favour of the appellants that the terms used by the Court of First Instance were capable of giving rise to the misunderstanding that the Court of First Instance was drawing a strict distinction between a complaint properly so-called, on the one hand, and additional documents, on the other, and was attaching to the latter absolutely no significance for the purpose of delineating the content of a complaint. However, in my view, the context shows that this is not the most obvious and plausible interpretation. In actual fact the Court of First Instance examined the documents individually and came to the conclusion that it was apparent from none of them that the complaint of 21 December 1990 was also based on Article 86. That is a factual assessment which is not amenable as such to review by the appellate court.

Whether that would continue to be the case, if the Court of First Instance had manifestly misdirected itself in its assessment of the facts may here remain open. Contrary to the views of the appellants, no such evidence of misdirection is apparent. Moreover, an impartial view of the wording of the covering letter permits no other inference to be drawn than that the complaint of 21 December 1990 was based only on Article 92.

25. It is in any event otiose to go into this question in more detail in view of the fact that the parties are entirely agreed that at the meeting between representatives of SFEI and the Commission on 18 March 1991 the applicability of Article 86 was discussed and that therefore from this moment on the complaint was to be construed (and was so construed by the Commission) as covering Article 92 as well as Article 86. A more detailed examination of the precise content of the complaint, as it appeared on 21 December 1990, was therefore only necessary if any significance were to be attached to the period between 21 December 1990 and 18 March 1991 in the assessment of the questions to be considered. This is evidently not the case. The reasoning of the Court of First Instance in paragraphs 32 to 37 of its order

are therefore, as the Commission rightly pointed out, wide of the mark.

26. It is puzzling why the Court of First Instance should have embarked on a discussion at all of this question which is irrelevant to a decision in this case. Stranger still is the thoroughness with which that was done. However that may be, the order appealed against is not vitiated by the existence of that reasoning since the result reached by the Court of First Instance is not based on it.

Notwithstanding that fact, the appellants rightly point out that the Court stated (paragraph 31), that it regarded that reasoning as material for the purposes of its decision. I will come back to this in another context.

Second ground of appeal: *Misunderstanding of the concept of an actionable decision*

27. In their second ground of appeal the appellants submit that the Court of First Instance misunderstood the concept of an actionable decision. In view of the circumstances under which it was drafted and in the light of its contents, the contested letter constitutes a rejection decision amenable to annulment proceedings.

As regards the context of the contested letter, the appellants point in particular to the letter of 9 January 1992 in which the Commission gave notice that it would write more fully with its 'conclusions'. This choice of words presages a definitive position which was then taken in the contested letter of 10 March 1992. The Court of First Instance, it is alleged, gave no consideration to the letter of 9 January 1992 and did not take a position on the significance of the head of claim based on that letter, so that to that extent the order of the Court of First Instance is based on an inadequate statement of reasons. Moreover, they allege that there is a great similarity between the contested letter and the other letter from the Commission of 10 March 1992, which undeniably constitutes a decision.

In regard to the contested letter itself the appellants submit that a decision in which the Commission rejects a complaint is characterized by the fact that it first concludes the investigation instituted, secondly contains an assessment of the agreements in question and thirdly precludes the complainant, unless he brings forward new evidence, from demanding the resumption of the investigation. The contested letter satisfies these requirements, as its wording and context show. In its order the Court based itself on its judgment in the *Automec I* case, but incorrectly applied that case-law.

28. The Commission opposed that ground of appeal by stating that it concerned questions of fact and was therefore inadmissible. On the interpretation of the contested letter

the Commission continues to put forward its point of view already expressed at first instance that it was only a preliminary statement of the Commission's position.

29. Allow me first to address the complaint that the interpretation of the contested letter by the Court of First Instance was incorrect. In my opinion that is an assessment of facts which as such escapes review by the appeal court. However, it is true that the dividing line between questions of fact and law is very difficult to draw. One would be entirely justified in taking the view that the interpretation of the contested letter is intended to establish whether it is an actionable decision with the result that in the final analysis the question of fact is subsumed under a set of legal preconditions as to the facts, thus finally raising a point of law.

However, that interpretation would not in my view be appropriate. It would entail the consequence that the notion of 'point of law' would be very widely interpreted and would be extended to cover the assessment of facts by the Court of First Instance. That would run counter to the objective pursued by the establishment of the Court of First Instance. The establishment of a second court was intended to improve legal protection in the Community by enabling the Court of Justice in particular in the case of actions requiring close examination of complex facts 'to concentrate its activities on its fundamental task of ensuring uniform interpretation of Community law.' [14]

The lightening of the workload of the Court of Justice intended thereby would be set at nought if one were to interpret 'point of law' so widely as to include the determination of the contents of a document. If it were so, the Court of Justice would be required in the present case itself to examine whether the contested letter of 10 March 1992 constituted a definitive decision, thus substituting its assessment for that of the Court of First Instance. If it did so the Court would not be acting as a court of appeal on a point of law as defined in the Treaty, but rather as a court of appeal with full jurisdiction.

30. Support for the view that in interpreting the concept of 'point of law' a restrictive approach is appropriate may also be found in the Court's case-law. Of particular relevance is the judgment in the *Vidrányi* case in which the Court held that an appeal 'may rely only on grounds relating to the infringement of rules of law by the Court of First Instance, to the exclusion of any appraisal of the facts'. [15] An appeal is therefore admissible only 'in so far as it is claimed that the decision of the Court of First Instance is incompatible with the rules of law the application of which it had to ensure.' [16]

14 — See the third and fourth recitals in the preamble to Council Decision No 88/591/ECSC, EEC, Euratom of 24 October 1988 establishing a court of first instance of the European Communities (OJ 1988 C 215, p. 1) and also the first recital in the preamble to Council Decision No 93/350/Euratom, ECSC, EEC of 8 June 1993 amending Decision No 88/591 (OJ 1993 L 144, p. 21).

15 — Judgment in Case C-283/90 P *Vidrányi* v *Commission* [1991] ECR I-4339, paragraph 12 (emphasis added).

16 — Ibid., (footnote 15), paragraph 13.

31. The view I have expressed does not necessarily mean that the Court of First Instance is entirely free in its assessment of the facts and that its assessment may only be reviewed in the event of an infringement of legal rules. In my view it would be entirely possible (and appropriate) to allow an appeal where the Court of First Instance in its assessment of the facts has manifestly misdirected itself, e.g. has offended against the laws of logic.

32. In my view that possibility does not need to be discussed further here since there is no such manifest error. The interpretation of the content of the contested letter of 10 March 1992 by the Court of First Instance appears to be reasonable.

33. Indeed, the appellants rightly point out that in several places the wording of that letter conveys the impression that the Commission has already terminated the investigation initiated upon the complaint by SFEI. Particularly, is that true of the first two sentences of the section quoted above [17] in which the word 'would' is used twice. One could also mention in this connection the formulation to be found in the last paragraph of that letter 'we do not propose to pursue enquiries under Article 86'. The last-mentioned expression, it seems, does not preclude another interpretation, although I naturally do not wish to presume to interpret with any claim to authority an expression from a foreign language.

Nor is there any indication in the letter that it is merely a preliminary statement of position. Similarly, no attempt is made to draw the attention of the addressee of the letter to the possibility of submitting further arguments. That is all the more significant since in the XXth report on competition policy, which I shall come back to, the Commission itself, stated that it would in future pay heed to the concern that it should not be charged with the ambiguous drafting of administrative letters capable of giving the complainant the impression that its application had been definitively rejected. [18] The view expressed by the representative of the Commission at the hearing that the letter contained an 'implicit' demand to the addressee to inform the Commission whether it was of the same view can hardly be supported by the terms of the letter.

34. It should however be borne in mind that the contested letter contains no specific assessment under Article 86 of the facts submitted by SFEI to the Commission. As the Court of First Instance correctly stated the letter merely explains the decision on merger control of 2 December 1991 and the connection existing in the Commission's view between this decision and SFEI's complaint. [19] In the contested letter the Commission points out that in its decision of 2 December 1991 it had arrived at the conclusion that the establishment of a joint venture between the French postal authorities and the other parties did not create or reinforce a dominant position in such a way as significantly to impede effective competition.

17 — See paragraph 9 above.

18 — Cf. XXth report on Competition Policy (1990), Brussels/Luxembourg 1991, No 165.

19 — Ibid., (footnote 1), paragraph 42.

In examining the compatibility of the joint venture against the yardstick of the merger control regulation the situation on the French market was also discussed. [20] It may therefore be safely assumed that as a result of the findings made in the decision of 2 December 1991 a decision on the question whether in the present case, as had been alleged in SFEI's complaint, there was an abuse of a dominant position had already been prejudged. In its letter of 10 March 1992 the Commission seems to have assumed that to be the case. There is no express finding that any such abuse could be established. If one has regard in particular to the two paragraphs of the contested letter cited by me it is difficult to escape the impression that many words are devoted to the consequences of the decision of 2 December 1991 as regards the complaint of SFEI though little of substance is said. This lack of content and clarity is regrettable. It cannot however alter the fact that the interpretation given by the Court of First Instance to these statements is plausible.

Finally, there is the argument of the appellants that the contested letter had to be construed as a decision since it was sent on the same day as the letter concerning Article 92 and was couched in very similar terms. The Commission's representative convincingly refuted this argument at the hearing by quoting the actual wording of the letter. The letter bearing number 06873 speaks unambiguously of the Commission 'decision' to terminate the examination of the complaint under Article 92. [21]

35. This ancillary examination of the contested letter of 10 March 1992 has brought to light elements in it which seem to indicate that the complaint is being definitively rejected. On the other hand, factors of some weight may be adduced in support of the Commission's assertion that it was simply a preliminary statement of position. In my view, the latter predominate with the result that the assessment by the Court of First Instance is unimpeachable.

Nevertheless, the Commission cannot escape criticism for having created that lack of clarity and ambiguity by the manner in which it formulated its letter; a warning was already given about this in the judgment of the Court of First Instance in the *Automec I* case and the Commission itself promised in the XXth Report on Competition Policy to discontinue this practice. However, these defects alone provide no warrant for deeming the contested letter to constitute an actionable decision by having recourse to the theory of ostensible validity (Rechtschein), as the appellants suggest. The concept of an actionable decision must (as I will show below) be interpreted on the basis of objective considerations. The principle whereby responsibility for ambiguities in a declaration must be borne by the person making the

20 — Cf. numbers 33 and 42 et seq. of the decision of 2 December 1991. The full text of that decision is, as far as is apparent, has not been printed in any journal or any other publication. However, except for information covered by business secrecy, it is available from the Commission.

21 — The last paragraph of this letter (which was available to the Court of First Instance) reads: 'Je suis donc au regret de vous faire part de la décision des services compétents de clôturer, en raison des circonstances précisées ci-dessus, le dossier ouvert à la suite de votre demande du 21.12.1990' (I therefore regret to inform you of the decision of the competent services to close, for the reasons stated above, the file opened following your application of 21 December 1990.)

declaration may also be observed by taking it into consideration appropriately in the decision as to the costs of the proceedings.

36. I now turn to the complaint that the Court of First Instance did not give consideration to the letter of 9 January 1992. At first sight this also appears to be a question of fact of which the appellate court may not take cognizance. In my opinion, however, that view would be wrong. The assessment by the Court of First Instance of the facts should indeed, as I have already explained, only be reviewable within very strict limits. [22] If, however, the Court of First Instance in its decision does not give its mind to the arguments of the party concerned then no factual assessment has in fact taken place. As the Court of Justice held in the *Vidrányi* case that constitutes an 'irregularity amounting to a failure to state reasons', that is a 'failure to observe a general principle which places on every court the obligation to state the reasons on which its decisions are based, by indicating in particular the reasons which led it not to uphold a complaint expressly raised before it.' [23]

37. However, it should not be forgotten that the abovementioned judgment concerned the infringement of a *legal provision* which in the applicant's view had not been examined. In this case, however, it is a *document* to which in the appellant's view the Court of First Instance did not pay sufficient heed. One cannot however expect the Court of First Instance to examine in its decision *all* the factual matters mentioned by the parties in the course of the proceedings. Yet an error of law amenable to correction by the appellate court may be assumed to have been made where it concerns a *material* fact which, had it been considered, might have resulted in a different decision by the Court of First Instance.

38. It may not even be necessary to go into this question following the recent judgment in the *Pincherle* case. [24] In that case the appellant had alleged, *inter alia*, that in the judgment appealed against the Court of First Instance had failed to give consideration to three documents submitted by him. The Court of Justice rejected this allegation on the ground that it was not proven that the Court of First Instance had not examined the documents in question. [25]

I am inclined to the view that this statement was tailored to the specific circumstances of that case. It would be clearly inappropriate to elevate that statement to the status of a general rule. If it were, an appellant would hardly ever be able successfully to claim that the Court of First Instance had overlooked essential facts in its decision because it would be difficult for him to prove that the Court of First Instance had committed such an error. The only basis on which such proof can be established is the actual judgment of the Court of First Instance which of course will contain no submissions on the facts in question.

22 — Cf. paragraph 31 above.

23 — Ibid. (footnote 15), paragraph 29.

24 — Judgment in Case C-244/91 P *Pincherle* v *Commission* [1993] ECR I-6965.

25 — Ibid., (footnote 24), paragraph 33.

39. The question, therefore, is whether the letter of 9 January 1992 was considered by the Court of First Instance and whether, if that should turn out not to be the case, that letter carries appreciable significance for the present case. Indeed, the Commission submitted that the circumstances surrounding the contested letter were unimportant where the significance of the letter clearly and unambiguously appears from its contents. That is however not the case here. Even the Commission's representative at the hearing had to concede that the contested letter contained an element of ambiguity.

In my view the first question may be answered relatively easily. The Court of First Instance mentions the letter of 9 January 1992 in several places (paragraphs 17, 24 and 25 of its order), in which it deals with the arguments of the parties. In the legal evaluation, on the other hand, the letter no longer appears. Solely in paragraph 46 of the order would it be possible to read a reference to that document into the reference to paragraph 25. However, the contents of that paragraph militate against any such interpretation. The Court of First Instance there states that SFEI's letter to the Commission of 15 November 1991 is not to be construed as a request to take a position within the meaning of Article 175 of the EEC Treaty. On the question whether those statements were necessary for the decision to be reached there is no need for me to express an opinion. In any event there is scarcely any doubt that neither in this nor in any other place does the Court of First Instance in its order express an opinion on the possible significance of the letter of 9 January 1992 for the interpretation of the *contested letter*.

40. In my view, however, that question may in the end remain open since the letter of 9 January 1992 contributes nothing of substance to the interpretation of the letter under examination in this case. The Director General of DG IV refers in that letter to the decision of 2 December 1991 and its possible effects on the treatment of the complaint lodged by SFEI. He states that the Commission will shortly be taking a position on this question. The assumption that this gives notice of a *preliminary* statement of position which was then given in the letter contested in these proceedings is entirely plausible.

The appellants have attached particular importance to the fact that the letter of 9 January 1992 speaks in this connection of conclusions. Their interpretation that this term points to a definitive statement of position is entirely possible. On the other hand I do not consider it be persuasive (or even mandatory). The use of this term is entirely consistent with the idea that the contested letter constitutes a preliminary statement of position. In that case the letter of 9 January 1992, as the Commission submits, could be simply construed as giving notice of that preliminary statement of position.

41. In accordance with what has been stated hitherto the interpretation given to the contested letter by the Court of First Instance should be regarded as entirely possible and arguable. As I have already said there are certain factors which militate in favour of the interpretation advocated by the appellants. But, since the interpretation of the Court of First Instance is not vitiated by manifest errors, it may not be annulled on this ground.

42. I will now turn to the question whether the Court of First Instance correctly construed the *concept* of an act actionable under Article 173. This is evidently a question of law which may be the subject of an appeal on a point of law, as is confirmed by the Court's existing case-law. [26]

43. In its order the Court evidently relied on its judgment in *Automec I*. [27] In that judgment the Court of First Instance held that three successive stages must be distinguished in the course of Commission proceedings under Article 3(2) of Regulation No 17 and Article 6 of Regulation No 99/63. [28]

'During the first of those stages, following the submission of the complaint, the Commission collects the information referred to in Article 6 of Regulation No 99/63, on the basis of which it will decide what decision it will take on the complaint. That stage may include *inter alia* an informal exchange of views and information 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 the Commission. Preliminary observations made by Commission officials in the context of informal contacts cannot be regarded as measures open to challenge.

In the second stage, the Commission informs the complainant, in the notification prescribed in Article 6 of Regulation No 99/63, of the reasons for which it considers that there are insufficient grounds for granting the application and gives the applicant the opportunity to submit any further comments within a time-limit fixed by the Commission. The notification cannot be treated as a decision ...

In the third stage of the procedure, the Commission takes cognizance of the observations submitted by the complainant. Although Article 6 of Regulation No 99/63 does not explicitly provide for the possibility, this stage may end with a final decision.' [29]

44. This exposition by the Court of First Instance I consider to be entirely helpful in illustrating the procedure for investigating a complaint. It is not necessary for these pur-

26 — Cf. judgment in Case C-132/90 P *Schwedler* v *Parliament* [1991] ECR I-5745, paragraph 13; judgment in Case C-107/90 P *Hochbaum* v *Commission* [1992] ECR I-157, paragraph 16.

27 — See footnote 2.

28 — Regulation No 99/63/EEC of the Commission of 25 July 1963 on the hearings provided for in Article 19(1) and (2) of Council Regulation No 17 (Official Journal, English Special Edition 1963-64, p. 47). Under Article 19(1) of Regulation No 17 before giving a decision under Article 3 the Commission must hear the parties concerned. Article 6 of Regulation 99/63 provides as follows: 'If the Commission is of the opinion that the circumstances as ascertained by it do not give grounds for upholding an application brought under Article 3(2) of Regulation No 17, it should notify the applicants of the grounds for that decision and set them a period for submitting any written observations.'

29 — Ibid., (footnote 2), paragraphs 45 to 47.

poses to go into the questions specifically raised by this conception of the procedure. [30] If, upon examination, the question arises whether a measure is in the nature of a decision or not, the scheme described above permits the relevant measure to be assigned to the relevant stage of the proceedings.

45. However, in several places the order of the Court of First Instance appealed against conveys the impression that the Court of First Instance has reversed this logic: a measure cannot be an actionable act because it is to be assigned to the first (or the second) of the abovementioned procedural stages. I am referring to paragraphs 41 and 43 of the order appealed against. That argument of course amounts to nothing more than a *petitio principii*. The same may also be said of the Commission's argument that the contested letter could not be a decision since the Commission had not previously sent to the complainant a letter under Article 6 of Regulation No 99/63 (requiring him to state his views within a stated time-limit). [31]

If that was in point of fact the view of the Court of First Instance it must necessarily be refuted. Under the Court's consistent case-law what is decisive in determining whether an act is actionable under Article 173 is whether the measure in question is intended to produce legal effects, irrespective of its form. [32] In the case of acts which are formulated in the course a multiphase procedure an act will indeed in principle be actionable only in the case of measures which definitively determine the Commission's viewpoint and not in the case of preparatory measures. [33] In all cases, however, it is the content of the measure in question which is relevant.

46. In the *Philip Morris* case the Court of Justice mentioned certain criteria which may be availed of in determining whether a Commission letter is to be construed as a conclusive rejection of a complaint. In that case it established that the relevant letters concluded the investigation, contained an assessment of the agreements in question and precluded the complainants from seeking a resumption of the investigation, unless they could bring forward new evidence. [34]

47. The order appealed against reveals that this judgment was brought to the attention of the Court of First Instance. Thus, in paragraphs 42 and 43 of its order the Court of First Instance states that the contested letter contains no assessment of the facts submitted by the complainant and does not have the effect of terminating the procedure.

30 — The last-mentioned section of the judgment specifically leaves open the question whether the Commission if it does not wish to uphold a complaint, must upon application by the complainant reject the complaint by means of a formal decision (and not only may) which the complainant may then proceed against under Article 173 of the EEC Treaty. In my view the complainant is entitled to that much. The judgment of the Court of First Instance in the *Automec II* case (judgment in Case T-24/90 *Automec* v *Commission* [1992] ECR II-2223 which points in this direction (cf. paragraph 85) is therefore to be welcomed).

31 — This argument was, moreover, used by the Court of First Instance in the *Automec I* case, ibid., footnote 2, paragraph 56.

32 — Judgment in Case 22/70 *Commission* v *Council* [1971] ECR 263, paragraph 42; cf. most recently the judgment in Case C-325/91 *France* v *Commission* [1993] ECR I-3283 paragraph 9.

33 — Cf. judgment in Case 60/81 *IBM* v *Commission* [1981] ECR 2639, paragraphs 9 et seq.

34 — Judgment in Joined Cases 142/84 and 156/84 *BAT and Reynolds* v *Commission* [1987] ECR 4487, paragraph 12.

48. I am therefore of the opinion that those places in the order in which the Court of First Instance appears to draw inferences as to the legal nature of the letter from the stage of the procedure to which in its view the letter belonged, are merely attributable to a confused mode of expression. In accordance with the findings referred to above, [35] the Court of First Instance must be assumed to have been familiar with the applicable law and also to have applied that law. The mere fact that the terms in which the order appealed against is couched to that extent give grounds for certain doubts does not warrant the setting aside of that order. The appellate Court merely has to examine whether the Court of First Instance infringed *rules of law*. No such error can be established with certainty in this case. In the present case it must also be borne in mind that the interpretation by the Court of First Instance of the contested letter appears as such to be entirely defendable. To regard the order as vitiated by legal defects simply owing to certain confused formulations would therefore be difficult to reconcile with the principle of the economy of legal proceedings.

49. Nevertheless, the order contains detailed elucidations on a question (interpretation of the terms of the complaint of 21 December 1990) which are manifestly superfluous. [36] This factor makes it necessary to subject the other statements of the Court of First Instance to a particularly critical examination. Since in the end the order appealed against is not founded on the statements in question, that factor also can provide no warrant for setting aside the order appealed against.

Third ground of appeal: *Infringement of the principles of good faith and legal certainty*

50. In their last ground of appeal the appellants in effect are complaining that the Court of First Instance misconstrued a statement made by the Commission in its XXth Report on Competition Policy. The Commission had explained that in future it would draft the notification of preliminary observations in complaint proceedings in such a way that the recipient could recognize them as an initial reaction on the part of the Commission's services. The Commission added that it would in any event require recipients to submit their additional comments to the Commission within a period to be fixed in the letter, failing which the complaint would be regarded as terminated. [37]

The appellants construe this passage as meaning that a letter from the Commission in which (as in the present case) no period is set them for making known their observations is to be construed as a rejection of their complaint.

51. I do not need to go into whether this is a question of fact or of law and whether any legal significance may be attached to the

35 — See paragraph 47.

36 — See paragraph 26 above.

37 — Ibid., (footnote 18), cf. No 165.

statements made by the Commission in its reports on competition policy, since the appellant's view is patently incorrect.

The statement quoted admits of only *one* reasonable interpretation, namely that the Commission undertakes *at all times* to grant the complainants a period for the submission of further observations and that a complaint is to be regarded as terminated, *if the complainants do not avail themselves of this opportunity.* This meaning is clearly expressed for example in the German and Italian versions of that report. [38] Recourse need not therefore be had to the offer made at the hearing by the appellant's representative to include a linguistic expert opinion on the significance of the comma in the French version.

52. In the result, therefore, I am of the opinion that the appeal cannot be allowed. However, this is, I consider, an appropriate moment for me to point out that these proceedings would never even have been started had the Commission taken the necessary care in drafting the contested letter. The Commission could reasonably have been expected to make that effort, since in the *Automec I* case the Court of First Instance had already clearly given to understand that the Commission's existing practices in this field left something to be desired. For in its XXth Report on Competition Policy the Commission acknowledged the necessity for drafting its correspondence in complaint proceedings in such a way as to avoid any misapprehension as to their legal nature. It is therefore surprising that heed was not paid to that acknowledgement in the drafting of the contested letter. Since the unclear formulation of that letter and the resulting difficulties concerning its legal evaluation gave rise to the appeal proceedings, it seems reasonable that the Commission should bear the costs thereof in accordance with the first paragraph of Article 122 and Article 118 in conjunction with the first paragraph of Article 69(3) of the Rules of Procedure of the Court of Justice.

C — Conclusion

53. I therefore propose that the Court should dismiss the appeal and order the Commission to pay the costs.

38 — The German text states 'bei deren Nichteinhaltung der Antrag als zu den Akten gelegt angesehen werde' (in the event of whose non-observance the application is deemed to have been discontinued.) In the Italian version '...qualora tali osservazioni non vengano trasmesse, la denuncia verrà considerata archiviata' (where such observations are not submitted, the complaint shall be deemed to have been terminated).