OPINION OF ADVOCATE GENERAL TESAURO
delivered on 26 November 1996 *

1. By judgment of 27 June 1995 in Case T-186/94 (hereinafter 'the judgment'), [1] the Court of First Instance ruled on the action brought by Guérin Automobiles, a company incorporated under French law, (hereinafter 'the appellant') for a declaration that the Commission had failed to act or, in the alternative, for the annulment of the decision, if any, not to investigate its complaint contained in two earlier letters from the Commission. In that judgment the Court of First Instance held, first, that there was no need to rule on the action for failure to act because it had in the meantime been deprived of its initial purpose and, second, that the action for annulment was inadmissible because the letters in question were not acts against which an action might be brought under Article 173. However, in the light of the circumstances of the case, it ordered the Commission to pay all the costs.

In the present case, the appellant claims that the Court of Justice should annul the judgment save as regards costs and grant the original application. The Commission has made a cross-appeal, seeking the annulment of the order requiring it to pay all the costs of the case.

Facts and procedure

2. On 3 August 1992 the appellant wrote to the Commission requesting a finding of breach of Article 85 of the Treaty, as provided for in Article 3(2) of Regulation No 17 of the Council, [2] on the ground that Volvo France had unlawfully terminated the dealership contract of unlimited duration entered into with the appellant on 10 September 1987. The appellant also alleged in that letter that various clauses of Volvo France's exclusive and selective distribution contracts were outside the scope of Commission Regulation (EEC) No 123/85 of 12 December 1984 on the application of Article 85(3) of the Treaty to certain categories of motor vehicle distribution and servicing agreements [3] (hereinafter 'the exemption regulation'). On 29 October 1992, the Commission wrote to inform the appellant that, as the problem of the termination of the contract had already been brought before the Paris Court of Appeal, it was difficult to see sufficient Community interest in the matter to justify it being dealt with by the Commission. Guérin was accordingly informed that unless it furnished

* Original language: Italian.

1 — Case T-186/94 *Guérin Automobiles* v *Commission* [1995] ECR II-1753.

2 — Regulation No 17 of the Council of 6 February 1962, First Regulation implementing Articles 85 and 86 of the Treaty (OJ, English Special Edition 1959-1962, p. 87).

3 — OJ 1985 L 15, p. 16.

new evidence within four weeks, the matter would be regarded as closed.

The appellant replied, in a letter dated 11 December 1992, that the Paris Court of Appeal had ruled only on the termination of the dealership contract, whereas its own complaint to the Commission concerned the legality of the whole distribution contract in relation to the exemption regulation. The Commission replied, by letter of 21 January 1993, that 'the complaint was not based on the factual circumstances in which Volvo France terminated the contract in question but was in reality based on the refusal to sell now applied to Guérin Automobiles solely by reason of a network of exclusive and selective distribution contracts which, according to Guérin, were null and void because they lay substantially outside the scope of exemption under Regulation (EEC) No 123/85 and were not covered by an individual exemption'. The Commission added: 'I must tell you that the problem you have raised, which is in fact the subject-matter of other complaints, is at present being examined by the Commission and the results will be communicated to you when the examination is complete'.

3. Almost a year later, on 6 January 1994, the appellant wrote to ask the Commission for the results of the examination referred to in the letter of 21 January 1993. Having received no reply, it addressed a formal letter of notice to the Commission on 24 January 1994, pursuant to Article 175 of the Treaty. The Commission replied, in a letter dated 4 February 1994, merely confirming that the examination of the other case was still in progress, adding that it 'will, if appropriate, be applicable as a precedent for the problems you have raised. I renew the assurance that you will be informed as soon as that examination has made significant progress'.

On 5 May 1994, the appellant brought an action under Article 175 before the Court of First Instance, claiming that the Court should declare that the Commission had failed to act and, in the alternative, annul the Commission's letters of 21 January 1993 and 4 February 1994, should they express a decision to reject the complaint.

4. On 13 June 1994, the Commission sent the appellant a letter referring explicitly in its heading to Article 6 of Regulation No 99/63/EEC of the Commission of 25 July 1963 on the hearings provided for in Article 19(1) and (2) of Council Regulation No 17. [4] The letter reads as follows:

4 — OJ, English Special Edition 1963-1964, p. 47.

'Dear Sir,

I acknowledge receipt of your letter of 24 January 1994, concerning the position of your client Guérin Automobiles following its complaint of 11 December 1992 against Volvo France's standard distribution contract alleging extensive trespass over the bounds of the exemption provided for by that regulation, and your request under Article 175 of the Treaty that the Commission define its position on the matter within two months. I have the following observations to make on that letter.

From the point of view of the competition rules your complaint raises the question of the compatibility with Regulation (EEC) No 123/85 of a selective and exclusive distribution contract for motor vehicles such as that applied by Volvo France. On that subject, and referring once again to my letter of 21 January 1993 to which you also refer, I confirm that an individual case is currently being considered by the Commission concerning the compatibility with the regulation of a standard distribution contract for motor vehicles in use by another manufacturer.

A number of the clauses or practices referred to in your complaint are at issue in that other case. As you are aware, the Commission must be guided by overriding requirements in its choice of priorities owing to lack of resources. It is therefore in the Community interest that the most representative cases should be selected for consideration where a number of similar cases are brought before it. For that reason I confirm, with reference to Article 6 of Regulation (EEC) No 99/63, that in the circumstances your complaint cannot be given individual consideration at present.

I would add that Regulation No 123/85 is directly applicable by the national courts; consequently, your client may bring his dispute, and the question of the applicability of that regulation to the contract in question, directly before those courts.

You may submit observations on this letter. Should you wish to do so, they should reach me within two months.'

The appellant submitted observations on the letter of 13 June 1994 to the Commission on 20 June 1994, asking for details of the other case and whether it was intended to join the two cases in order to respect the right to a fair hearing. Having received no reply to that letter or to two further letters of 13 and 24 July repeating those requests, the appellant sent the Commission another formal letter of notice under Article 175 on 11 August 1994.

5. In the procedure before the Court of First Instance the appellant claimed, first, in reply to the Commission's arguments, that the Commission's letter of 13 June 1994 could not be considered to have put an end to the failure to act because: (a) a communication pursuant to Article 6 of Regulation No 99/63 could not constitute a definition of position within the meaning of the second paragraph of Article 175 of the Treaty; (b) the letter contained no express rejection of the complaint; and (c) it did not contain an adequate statement of reasons.

The appellant also considered that the Commission's vague and ambiguous replies were deliberately intended to deprive it of access to the courts. In its view, the Commission was attempting to evade an action for annulment by describing the letters of 21 January 1993 and 4 February 1994 as mere 'holding letters', and an action for failure to act by declaring that its letter of 13 June 1994 defined its position.

The findings of the Court of First Instance

6. In its judgment, the Court of First Instance found, first, that 'at the time the application was lodged, it was admissible as regards the failure to act' (paragraph 22). It added that an act 'which itself is not open to an action for annulment may nevertheless constitute a definition of position terminating the failure to act if it is the prerequisite for the next step in a procedure which is to culminate in a legal act which is itself open to an action for annulment' (paragraph 25) and that a letter addressed by the Commission to the complainant in accordance with Article 6 of Regulation No 99/63 was just such an act. It also observed that the Court of Justice has consistently held that a communication pursuant to Article 6 'constitutes a definition of position within the meaning of Article 175 of the Treaty, even though it is not open to an action for annulment' (paragraph 26).

As regards the status of the letter of 13 June 1994, the Court of First Instance therefore found that although it does not expressly indicate that the complaint is to be rejected, 'the two references to Article 6 of Regulation No 99/63, the fact that the letter meets the formal requirements laid down by that provision, the content of the letter and the context in which it came about make it clear that on the date on which the Commission addressed that communication to the applicant the information in its possession indicated that there were insufficient grounds for granting the application' (paragraph 29). It also explained that even if the letter in question did not contain an adequate statement of reasons, such complaints 'are irrelevant to the question whether the Commission defined its position within the meaning of Article 175 of the Treaty, although they might be relevant in an action under Article 173' (paragraph 33).

The Court of First Instance also rejected the appellant's argument that allowing the letter

of 13 June 1994 to terminate the failure to act would enable the Commission to evade judicial review. It emphasized in that connection that, having submitted comments in response to the Article 6 notification, the appellant 'is henceforth entitled to obtain a definitive decision from the Commission on its complaint; and that decision may, if the appellant sees fit, be challenged in an action for annulment before this Court' (paragraph 34).

7. However, the appellant's arguments in support of the alternative claim for the annulment of the communications dated 21 January 1993 and 4 February 1994, should they express decisions to reject its complaint, were found to be inadmissible. The Court of First Instance noted that they were merely holding letters and were therefore not 'acts producing binding legal effects capable of affecting the applicant's interests, but preparatory measures which, as such, are not open to challenge by an action' (paragraph 40).

8. As regards costs, the Court of First Instance found, first, that the Commission failed to respond within the time-limit laid down in Article 175 of the Treaty to the formal notice addressed to it by the appellant on 24 January 1994, even though it had been duly informed of the ;1substance of the complaint since December 1992. Moreover, as it was not until after the action had been lodged that the Commission notified the appellant of its position on the complaint (paragraph 45), the Court of First Instance decided that the Commission should bear its own costs together with those of the appellant (paragraph 46).

The appeal brought by the appellant

9. The appellant has brought an appeal before the Court of Justice, challenging the validity of the judgment and claiming that the Court of First Instance made an error of law in ruling that, although the letter of 13 June 1994 constitutes a definition of position within the meaning of Article 175 and is therefore such as to terminate the failure to act, it does not constitute an act against which an action may be brought under Article 173. The appellant argues:

(a) that the Court of First Instance failed to consider the exchange of letters which took place after the Commission's letter of 13 June 1994 and which would have enabled it to assess the facts correctly and conclude that the failure to act had persisted;

(b) that it made an error of law in determining the nature of the letter of 13 June 1994 in various respects, described in detail below, all of which support the view that the letter did not constitute a decision to reject the complaint and consequently had not put an end to the failure to act;

and

(c) that it was illogical for it to consider that the letter in question had no legal effects *vis-à-vis* the person to whom it was addressed, when the fact that the action was deprived of its purpose clearly entailed a breach of the right to effective judicial review because the individual was thereby deprived of the right of access to the courts.

Essentially, the appellant complains that the failure to act had not been terminated (first and second pleas) and that, in any event, to suppose that it had been terminated without the benefit of an act that was open to appeal would entail a breach of the right to effective judicial review (third plea). The present appeal therefore offers the Court of Justice an opportunity to examine and clarify some aspects of the rights of the complainant in competition cases, particularly the right of access to the courts. [5] It is therefore appropriate, before considering the various pleas adduced before the Court, to recall — if only briefly — the regulations and case-law that form the background to the present dispute.

5 — In this connection see, *inter alia*, Idot: 'La situation des victimes de pratiques anticoncurrentielles après les arrêts Asia Motor et Automec II', in *Europe*, 1992, p. 1 et seq.; Gilliams and Maselis: 'Le statut du plaignant en droit communautaire', in *Journal des Tribunaux*, 1996, p. 25 et seq.; Amadeo: 'La posizione del singolo controinteressato dinanzi alla Commissione nell'applicazione delle regole di concorrenza', in *Il Diritto dell'Unione Europea*, 1996, p. 405 et seq.

The rights of the complainant according to the case-law

10. I should point out, first, that under Article 3(2)(b) of Regulation No 17, natural or legal persons who claim a legitimate interest are entitled to submit a complaint to the Commission concerning an alleged infringement of Articles 85 and 86 of the Treaty. That option is not, however, accompanied by any substantive rights. In fact it is clear from the case-law on the subject that the complainant is not entitled to require from the Commission a decision as regards the existence or non-existence of the alleged infringement, [6] and that the Commission cannot be compelled to carry out an investigation, because such investigation 'could have no purpose other than to seek evidence of the existence or otherwise of an infringement, which it is not required to establish'. [7]

6 — Case 125/78 *GEMA* v *Commission* [1979] ECR 3173, paragraphs 17 and 18, and most recently Case T-387/94 *Asia Motor III* [1996] ECR II-961, paragraph 46. The Court of First Instance ruled in Case T-24/90 *Automec II* [1992] ECR II-2223, paragraph 75, that the Commission cannot be required to give a decision unless the subject-matter of the complaint falls within its exclusive purview.

7 — Case T-24/90 *Automec II*, quoted in footnote 6, paragraph 76, and Case T-114/92 *BEMIM* v *Commission* [1995] ECR II-147, paragraph 81. See also Case T-5/93 *Tremblay and Others* v *Commission* [1995] ECR II-185, paragraph 61, in which the Court of First Instance expressly ruled that the applicants had no right to obtain a decision on the alleged infringement from the Commission, even if the latter 'had become persuaded that the practices concerned constituted an infringement of Article 86 of the Treaty'. That ruling, justified on the ground that 'once the Commission has found that there is an infringement it is bound to adopt a decision requiring the undertakings to bring it to an end, is contrary to the actual wording of Article 3(1) of Regulation No 17, according to which the Commission may take such a decision' (Case T-16/91 *Rendo and Others* v *Commission* [1992] ECR II-2417, paragraph 98), has caused a good deal of confusion.

All this does not, however, mean that the complainant has no remedy. Article 6 of Regulation No 99/63 affords some procedural guarantees in providing that 'where the Commission, having received an application pursuant to Article 3(2) of Regulation No 17, considers that on the basis of the information in its possession there are insufficient grounds for granting the application, it shall inform the applicants of its reasons and fix a time-limit for them to submit any further comments in writing'. The Commission may therefore reject the application either after examining the elements of law and of fact that it contains or after carrying out investigations or instituting proceedings for infringement. In all those cases, however, it is required to inform the applicants of its reasons for rejecting the application and give them a certain amount of time to submit any further comments in writing. [8] That is the purpose of the communication pursuant to Article 6.

11. The Court of Justice also explained in its judgment in *GEMA* that 'as is shown by the phrase "... shall inform the applicants of its reasons", the communication referred to in Article 6 of Regulation No 99/63 only seeks to ensure that an applicant within the meaning of Article 3(2)(b) of Regulation No 17 be informed of the reasons which have led the Commission to conclude that on the basis of the information obtained in the course of the inquiry there are insufficient grounds for granting the application. Such a communication *implies the discontinuance of the proceedings* without, however, preventing the Commission from re-opening the file if it considers it advisable, in particular where, within the period allowed by the Commission for that purpose in accordance with the provisions of Article 6, the applicant puts forward fresh elements of law or of fact'. [9]

In that case, after defining the characteristics and purpose of a communication pursuant to Article 6, the Court of Justice ruled that it constitutes a definition of position within the meaning of Article 175 and is therefore such as to terminate the failure to act. [10] The Court did not however resolve on that occasion a question that had been discussed at length during the proceedings, namely whether such a communication was open to challenge under Article 173; [11] nor did it

8 — This means that, even if the Commission is not obliged to adopt a decision establishing the existence of an infringement of the rules on competition or to investigate a complaint brought before it under Regulation No 17, it is none the less 'required to examine closely the matters of fact and law raised by the complainant in order to ascertain whether there has been any anti-competitive conduct. Moreover, where an investigation is terminated without any action being taken, the Commission is required to state reasons for its decision in order to enable the Court of First Instance to verify whether the Commission committed any errors of fact or of law or is guilty of a misuse of powers' (Case C-19/93 P *Rendo and Others* v *Commission* [1995] ECR I-3319, paragraph 27).

9 — *GEMA* v *Commission* (cited in footnote 6), paragraph 17; my emphasis.

10 — Idem, paragraphs 19 and 20.

11 — In this connection however, see the Opinion of Advocate General Capotorti. After coming to the conclusion that the failure to issue a letter pursuant to Article 6 constitutes an unlawful omission on the part of the Commission and is consequently open to challenge in an action for failure to act under Article 175, he goes on to point out that the act in question, adopted by the Commission only after the proceedings for failure to act were brought, 'could have been challenged within the proper time by an application for annulment since the acts whose legality may be reviewed by the Court of Justice are described in the first paragraph of Article 173 in identical terms with those employed in the last paragraph of Article 175' (idem, pp. 3193, 3200).

decide, generally, whether complainants can bring an action for annulment of the letter rejecting their complaint.

12. It should be remembered, in this connection, that the Court of Justice had already ruled in its judgment in *Metro* v *Commission* that any decision to reject a complaint should be open to an action for annulment, pointing out in particular that 'it is in the interests of a satisfactory administration of justice and of the proper application of Articles 85 and 86 that natural or legal persons who are entitled, pursuant to Article 3(2)(b) of Regulation No 17, to request the Commission to find an infringement of Articles 85 and 86 should be able, if their request is not complied with either wholly or in part, to institute proceedings in order to protect their legitimate interests'. [12] It is true that in that case the complainant, Metro, had brought an action against the Commission's decision to grant exemption for a distribution system under Article 85(3) of the Treaty. The ruling just quoted is nevertheless couched in such general terms as to suggest that the same considerations must also apply to a final decision to take no further action on a complaint.

That view is confirmed by the subsequent case-law. The Court of Justice has on a number of occasions ruled that letters indicating a final decision to take no further action may be challenged under Article 173. [13] However, that leaves two questions unresolved: (a) whether a communication pursuant to Article 6 too may be challenged under Article 173 or whether that applies only to a decision to close the investigation taken after the complainant has submitted further comments pursuant to that Article; and (b) whether or not the Commission not merely may but must adopt a final decision to take no further action on the complaint. [14]

13. An answer to both these questions is to be found in the case-law of the Court of First Instance. In its judgment in *Automec I*, [15] that Court explained the types of act the Commission may adopt in the course of the Article 6 procedure and defined the formal

12 — Case 26/76 *Metro* v *Commission* [1977] ECR 1875, paragraph 13.

13 — See Case 210/81 *Demo-Studio Schmidt* v *Commission* [1983] ECR 3045, paragraph 14, in which the complainant's right to challenge the decision to take no further action on the complaint is upheld in the terms used in the judgment in *Metro*, which are quoted; Case 298/83 *CICCE* v *Commission* [1985] ECR 1105, paragraph 18, in which the Court confirmed its right to review, in the light of the elements of law and fact brought to the Commission's notice by the applicant, the legality of the decision taken by the Commission to discontinue the procedure in the applicant's case; and Joined Cases 142/84 and 156/84 *BAT and Reynolds* v *Commission* [1987] ECR 4487, paragraph 12, in which the Court confirmed that for the purpose of determining the admissibility of claims for the annulment of letters rejecting a complaint, it was sufficient that such letters have 'the content and effect of a decision, inasmuch as they close the investigation, contain an assessment of the agreements in question and prevent the applicants from requiring the reopening of the investigation unless they put forward new evidence'.

14 — The Commission's position in this connection has long been that it is under no obligation to adopt a formal decision rejecting an application but that it may itself decide when it is advisable to do so. See, in particular, the XIth Report on Competition Policy, 1981, point 118, and the XVth Report on Competition Policy, 1985, point 1, which states that the Commission provides 'where necessary' a definitive rejection of a given complaint, and this rejection can then be referred to the Court of Justice.

15 — Case T-64/89 *Automec* v *Commission* [1990] ECR II-367, paragraphs 45-47.

conditions in which they may be challenged. It distinguished three successive stages in the procedure: the first may include a preliminary exchange of views and information between the Commission and the complainant; the second comprises the notification prescribed in Article 6; and in the third stage the Commission takes cognizance of the observations submitted by the complainant and may take a final decision. In the Court's view, proceedings may be brought only against that final decision, which the Commission apparently need not adopt.

The important point for present purposes is that, in defining the notification prescribed in Article 6 as merely a preparatory measure, that ruling removed all doubt as to whether it could in principle be challenged under Article 173. The Court of First Instance justified its decision on the grounds, *inter alia*, that 'an application for a declaration that such a notification was void might make it necessary, as in the case of an action against the statement of objections, for the Court of Justice and the Court of First Instance to arrive at a decision on questions on which the Commission had not yet had an opportunity to state its position' and that would be incompatible, *inter alia*, 'with the requirements of the sound administration of justice and the proper course of the administrative procedure to be followed by the Commission'. [16]

16 — Idem, paragraph 46.

14. Following the judgment in *Automec I*, the Commission observed: 'Letters stating the Commission's preliminary observations will be drafted so as to make it clear that they represent only an initial Commission reaction on the basis of the information in the Commission's possession. Complainants will in any event always be asked to submit any further comments within a reasonable time, failing which the case may be considered closed'. [17]

Subsequent Commission practice does not suggest, however, that those principles have been strictly observed; indeed the exceptionally large volume of litigation on the subject, particularly on the legal definition of the *acts* adopted under the Article 6 procedure, may well be due in part to the ambiguity of the letters it has addressed to complainants.

15. The remarks on the classification of final decisions under the Article 6 procedure made by the Court of Justice in its judgment in *SFEI* [18] are particularly useful in this connection. After noting that 'an institution empowered to find that there has been an infringement and to inflict a sanction in respect of it and to which private persons

17 — XXth Report on Competition Policy, 1990, point 165, p. 136.

18 — Case C-39/93 P *SFEI* v *Commission* [1994] ECR I-2681.

may make complaint, as is the case with the Commission in the field of competition, necessarily adopts a measure producing legal effects when it terminates an investigation initiated upon a complaint by such a person' (paragraph 27), the Court stated that 'a letter closing the file on a complaint may be analysed as a preliminary or preparatory statement of position only if the Commission has clearly indicated that its conclusion is valid only subject to the submission by the parties of supplementary observations, which was not so in this case' (paragraph 30).

In the Court's view, therefore, a letter which indicates the Commission's intention to close the file on the complaint and states its reasons for doing so invariably constitutes a decision that is open to challenge unless it explicitly refers to subsequent observations to be submitted by the complainant. The reason for this, as the Court explains, is that 'unlike a communication which is intended to afford to the undertakings concerned the opportunity of making known their point of view on the Commission's statement of objections and which does not prevent the Commission from altering its position ..., the decision to close the file on a complaint is the final step in the procedure; it cannot be followed by any other decision amenable to annulment proceedings' (paragraph 28).

16. The judgment at issue in the present case closed a further gap in the case-law on the subject by explicitly stating that, having submitted comments in response to the Article 6 notification, the applicant is henceforth entitled to obtain a definitive decision and that decision may be challenged under Article 173 (paragraph 34). That conclusion follows from statements made in earlier judgments [19] and appears to enshrine an inalienable right. The complainant would in fact have no remedy if, in addition to the notification pursuant to Article 6 of Regulation No 99/63 — which is deemed not to be open to challenge —, the Commission were not at least required to adopt a final decision rejecting the complaint.

In short, the case-law so far recorded has endorsed the complainant's right to obtain from the Commission, if necessary by means of an action for failure to act, first, a letter pursuant to Article 6 and, second, a final decision rejecting its complaint, the letter being a preparatory measure, not open to challenge but constituting a prerequisite for the adoption of the final act, and the decision being open to an action for annulment.

17. The present case illustrates the problems facing a complainant who has received a notification pursuant to Article 6, though only after bringing an action for failure to

19 — See, for example, *Automec II* (cited in footnote 6), paragraph 85, and Case T-74/92 *Ladbroke* v *Commission* [1995] ECR II-115, paragraph 60.

act, and who is still awaiting a final decision that may be challenged.

Bearing all these points in mind, I come now to the particular objections raised by the appellant against the contested judgment.

The perpetuation of the failure to act (first and second pleas)

18. In its first two pleas, I recall, the appellant claims that the Court of First Instance erred in holding that the Commission's failure to act had been terminated. It complains, in particular, that the Court of First Instance should have considered the exchange of letters that took place after the Article 6 letter, as this would have enabled it to assess the facts correctly and conclude that the failure to act had persisted (first plea).

It also alleges, somewhat ambiguously, that the Court of First Instance's decision as to the nature of the letter of 13 June 1994 is vitiated by errors and irregularities (second plea). To be more precise, it claims: (a) that it is obvious from the content of the letter that it was merely a holding letter; (b) that, in concluding that it was not, the Court of First Instance could not have based its view on information the Commission claimed to have gathered and relied on to justify its decision to take no further action on the application, as there was no trace of that information in the case-file; and, lastly, (c) that, in that case, as the alleged rejection was based on the existence of another complaint on which the appellant had never succeeded in obtaining any information, the Court of First Instance ought to have imposed a sanction for breach of the principle *audi alteram partem*. The appellant takes the view that an examination of these objections will confirm that the letter at issue cannot be interpreted as a decision to reject its application and that consequently the failure to act was not terminated.

19. Logically, the other issues raised in this case cannot be addressed until it has been ascertained whether the Court of First Instance was right about the nature of the letter of 13 June 1994 and I therefore propose to examine that plea first. It should be noted, in this connection, that in submitting the plea the appellant does not dispute the Court of First Instance's ruling that the letter 'constitutes notification under Article 6 of Regulation No 99/63' (paragraph 30), but merely asserts that in certain circumstances such a letter cannot be held to terminate the failure to act and that it is essential to examine its content in each case to determine whether or not it means that the file on the complaint is closed.

I should mention here that, although the judgment in *SFEI* [20] makes it clear that the nature of the letter must be determined pragmatically in the light of its purpose and not theoretically on the basis of purely formal criteria, it nevertheless also states that 'a letter closing the file on a complaint may be analysed as a preliminary or preparatory statement of position' [21] only if the Commission has informed the applicants of its reasons for taking no further action on the complaint and fixed a time-limit for them to submit further comments.

20. In the present case, it is common ground that the Commission gave the appellant two months to submit any further comments and that it gave its reasons for concluding that the appellant's complaint could not be given 'individual consideration at present', namely that it was already considering another complaint of a similar kind which was more representative and that, in view of the nature of the alleged infringement, the appellant could bring the matter before the national courts.

The Article 6 letter in question must therefore be regarded as a 'preliminary or preparatory statement of position', to quote the phrase used in the judgment in *SFEI*. That conclusion, which coincides at least partly with the appellant's position in the present case, was not accepted by the Court of First Instance, which ruled in the judgment at issue that 'an Article 6 letter does not fix the Commission's position definitively' (paragraph 31).

21. In these circumstances, the appellant's objection that the Court of First Instance made errors of law in determining the nature of the letter of 13 June 1994 must be held to be unfounded, at least in so far as it seeks to dispute the definitive nature of the decision to reject the complaint.

In particular, the appellant claims that it is apparent from paragraph 29 of the judgment that the Court of First Instance's conclusion that the letter in question contained a decision rejecting the complaint was mistakenly based on information gathered by the Commission, which in the Commission's opinion justified the decision to take no further action on the complaint, when there was no trace of that information in the case-file. That argument is irrelevant for the purposes of the present case. In that paragraph of its judgment, the Court of First Instance was in fact merely repeating that the letter met the requirements laid down for an Article 6 notification.

20 — *SFEI* v *Commission* (cited in footnote 18), paragraphs 28 to 31.

21 — Idem, paragraph 30.

22. Equally unacceptable is the appellant's second argument, that the Commission itself admitted that it had taken no action and did not intend to take any because it was already considering a similar but more representative complaint, and that this clearly meant that the failure to act had not been terminated. In fact, since the Commission is not required to investigate complaints [22] it is quite clear that in putting forward that argument the appellant is not taking issue with the Court of First Instance's assessment of the nature of the letter of 13 June 1994 but is disputing the soundness of the Commission's reasons for deciding not to investigate the complaint. Suffice it to say that this kind of objection, though it would undoubtedly carry weight in proceedings for annulment, is irrelevant for the purpose of establishing failure to act.

The same considerations apply to the allegation that the Court of First Instance failed to impose a sanction on the Commission for breach of the principle *audi et alteram partem*, although the rejection of the complaint was based on the existence of another complaint of a similar kind on which the appellant never succeeded in obtaining any information, even during the proceedings before that Court. If there was any breach of the right to a fair hearing as a result of such conduct, it is irrelevant for the purpose of determining whether the failure to act was terminated.

22 — See point 10 above.

23. It follows from the foregoing observations that the Court of First Instance was correct in its decision as to the nature of the letter of 13 June 1994 and the plea on that count must therefore be rejected. However, the purpose of the objections I have just considered was to establish that the letter in question did not constitute a decision to reject the complaint and that the failure to act had consequently not been terminated. Therefore, in my opinion it still remains to be determined whether the said letter, which according to the Court of First Instance does not fix the Commission's position definitively, can be considered to have deprived the action for failure to act of its initial purpose.

In any event, it is necessary to decide that question in order to establish whether the Court of First Instance was mistaken in failing to consider the correspondence that took place after the letter of 13 June 1994 (first plea). Clearly, the Court of First Instance is under an obligation to examine such correspondence only if it has first been established that the letter in question, and Article 6 notifications generally, are not by nature such as to terminate the failure to act or deprive the action for failure to act of its initial purpose.

24. Put in those terms, the problem is to determine whether a letter which, as the Court of First Instance itself recognized, does not constitute a definitive statement of position can be considered to be such as to terminate the failure to act and so deprive the action of its purpose. In other words, is it right to consider that such a definition of

position — be it preliminary or preparatory — can nevertheless terminate the failure to act?

In the appellant's opinion, that question ought not to be answered in the affirmative, particularly as no final decision had been taken when the Court of First Instance delivered its judgment and, significantly, no such decision has been taken to this day. That is why, as I already mentioned, it claims that the Court of First Instance ought to have examined the correspondence following the letter of 13 June 1994.

25. I must point out, first, that although the Court of First Instance did not examine the correspondence following the letter of 13 June 1994, it stated in the contested judgment that 'on the date of this judgment there is no evidence on the file that the Commission adopted a decision within the meaning of Article 189 of the Treaty in response to the appellant's complaint'. In its view, 'that finding is not sufficient, however, to justify the conclusion that the defendant institution has failed to act because in certain circumstances an act which itself is not open to an action for annulment may nevertheless constitute a "definition of position" terminating the failure to act if it is the prerequisite for the next step in a procedure which is to culminate in a legal act which is itself open to an action for annulment under the conditions laid down in Article 173 of the Treaty' (paragraph 25).

On that assumption, the Court of First Instance came to the conclusion that notification under Article 6 constitutes a "definition of position" within the meaning of Article 175 and is therefore such as to deprive the action for failure to act of its purpose — even though it is abundantly clear that the failure to act has not been terminated — precisely because it is a preparatory measure constituting a prerequisite for the adoption of the final decision. Consequently, again according to the Court of First Instance, events that occurred after the Article 6 letter was sent are irrelevant for the purpose of establishing failure to act.

26. Clearly that view assumes, first, that an Article 6 notification invariably constitutes a preparatory measure and, second, that despite its preparatory nature such a measure may nevertheless terminate a failure to act. These two assumptions, for which no proper reasons are given, cause me considerable doubts and perplexity.

As regards the first, I recall — primarily for my own benefit — that Article 6 of Regulation No 99/63 requires the Commission to inform applicants of its reasons for rejecting their application and also to 'fix a time-limit

for them to submit *any further* comments in writing'. [23] That provision is therefore clearly intended to ensure that complainants have an opportunity to submit comments on the reasons the Commission gives them for rejecting their complaint.

27. If that is the case, it seems to me impossible to avoid the conclusion that if complainants do not avail themselves of that opportunity — either because they consider that it would be pointless to do so in view of the content of the notification, or because they possess no new elements of fact or of law that might induce the Commission to change its mind — the Article 6 notification can no longer be described as a preparatory measure but assumes the character of a definitive act. This view is supported by the judgment in *SFEI*, [24] in which the Court of Justice ruled that the notification constituted a definitive statement of position, even though in that case the complainant had not been given the opportunity provided for in Article 6 to submit comments on the reasons for rejecting its complaint. In my opinion, this means that if no further observations are submitted, either because of some action on the part of the Commission or because the complainant did not wish to submit any, then the file on the complaint is definitively closed and the act in question is consequently open to challenge.

It should also be noted that a substantially similar point was made by the Commission itself in *GEMA*. On that occasion, the defendant institution contended that 'the communication referred to under Article 6 of Regulation No 99/63 may be regarded as a decision since it has legal consequences as regards [those to whom it is addressed]. When the Commission indicates the reasons which prevent it from granting the application, that is ordinarily to be regarded as a final definition of its position. The fact that Article 6 of Regulation No 99/63 provides for the applicant to be allowed a period in which to submit any further comments in writing does not prevent the communication from constituting a decision. That provision allows the applicant to decide whether he wishes to submit further comments on the communication. If he fails to do so, he accepts the definitive nature of the communication'. [25]

28. In my opinion, as I have already said, that is the view that is closest to the letter and spirit of Article 6. Otherwise, complainants who decided not to avail themselves of the opportunity to submit further comments would never have an opportunity of submitting the reasons given for the final decision to close the investigation of their complaint to the Community judicature for review, with the consequence that the right referred to in Article 6 would become an obligation, at least for those who did not wish to forgo the possibility of judicial review.

23 — My emphasis.

24 — Cited in footnote 18.

25 — *GEMA* (cited in footnote 6), facts of the case, particularly p. 3182.

I should add that this view does not conflict with the judgment in *Automec I* [26] but merely refines it in certain respects. It is true that in that judgment the Court of First Instance described the Article 6 notification as a preparatory measure not open to challenge and falling within what it referred to as the 'second stage' of the procedure provided for in that Article, but it also considered the possibility that the notification might constitute the *final act* in that procedure. In any event, the absence of the so-called 'third stage' referred to in the judgment in *Automec I* certainly cannot be taken to mean that the procedure provided for in Article 6 ends with a preparatory measure or that the measure in question cannot be challenged before the Courts if it is not in fact of a preparatory nature.

29. It is clear from the foregoing considerations that events occurring after the Article 6 letter is sent may be decisive for the purpose of determining the nature of the act in question, a conclusion that may certainly have important consequences for the complainant, at least in the matter of access to the courts. It now remains to be decided whether and to what extent the continuation of the Article 6 procedure must be taken into consideration when, as in the present case, the complainant avails himself of the opportunity to submit further comments. The initial reaction is that in that case the Article 6 notification cannot be described — at least not automatically — as a final act and cannot therefore be challenged in an action under Article 173.

So we return to the original question, namely whether the notification, as a preparatory measure, can nevertheless be considered such as to terminate the failure to act. The Court of First Instance, I recall, answered that question in the affirmative on the ground that such a measure constitutes the prerequisite for the adoption of the final act. [27] However, as the complainant is interested in the adoption of not a preparatory measure but a *decision*, can an Article 6 notification be considered to constitute a valid definition

26 — *Automec* v *Commission* (cited in footnote 15).

27 — In support of its view, the Court of First Instance cites the judgments in Case 377/87 *Parliament* v *Council* [1988] ECR 4017, paragraphs 7 and 10, and Case 302/87 *Parliament* v *Council* [1988] ECR 5615, paragraph 16. I must point out in this connection, however, that in the first of those two judgments the Court of Justice expressly avoided ruling on the objection that the action for failure to act was inadmissible in so far as it sought a declaration of failure to adopt the draft budget, i. e. a preparatory measure, and merely declared that there was no need for it to give a decision as the measure in question had in the meantime been adopted. In the second judgment, which concerned the Parliament's capacity to bring an action for annulment pursuant to Article 173, it is true that the Court of Justice ruled that 'the European Parliament can obtain a judgment establishing the Council's failure to act, whereas the draft budget, which is a preparatory measure, could not be challenged under Article 173' but the terms in which it did so are not very clear and in any case not decisive for the purposes of the present case. In fact, although I agree that mere preparatory measures may in some circumstances have definitive legal effects *vis-à-vis* the person concerned and that the failure to adopt them is open to an action for failure to act (as in the case of the Council's failure to adopt the draft budget and the Commission's failure to adopt a proposal for a directive, where the failure to adopt the measures in question prevented the Parliament and the Council respectively from performing their proper tasks), I must nevertheless point out in this connection that the situation is — or ought to be — very different in the case of an act such as an Article 6 notification. In that case, the adoption of the act in question, far from granting the complainant's request (except in a negative sense), may well constitute a preparatory definition of position that *allows* the failure to act to continue. The observations that follow will concentrate on this aspect of the matter.

of position within the meaning of Article 175, and at the same time to be such as to deprive the action of its purpose?

30. In this connection, I should begin by saying that, as the Court of First Instance itself pointed out in the judgment at issue in the present case, the Court of Justice has already given the first answer to that question in its judgment in *GEMA*. In that case, having ruled that the communication referred to in Article 6 'implies the discontinuance of the proceedings', [28] the Court expressly recognized that it is 'an act which constitutes a definition of its position within the meaning of the second paragraph of Article 175 of the Treaty'. [29]

That statement must however be interpreted in the light of the special features of that particular case, namely: (a) the Article 6 letter was sent before the action was brought and the application was consequently declared inadmissible; (b) the complainant did not avail itself of the opportunity to submit further comments, so the question whether the failure to act was terminated never arose; and (c) in any event, although the Court of Justice did not decide whether the letter in question was actionable, [30] the very fact that it was defined in that judgment as an act implying 'the discontinuance of the proceedings' without 'interlocutory character', suggests that it did not constitute a preparatory measure. In those circumstances, it is quite clear that the judgment in *GEMA* cannot be considered to be decisive for the purposes of the present case — on the contrary.

31. What we in fact have to establish — on the assumption that an Article 6 notification does not constitute a final act if the complainant avails himself of the right to submit further comments — is whether an action for failure to act is deprived of its purpose when the institution takes a position, even by means of a 'preparatory' measure, or only when the failure to act has been terminated or a final act has been adopted.

That question was expressly addressed in the Advocate General's Opinion in *Automec II* and *Asia Motor I*, [31] in which he examined

28 — *GEMA* (cited in footnote 6) paragraph 17.

29 — Idem, paragraph 21.

30 — I should mention that, in *GEMA*, the Court of Justice did not in fact have occasion to rule on the question whether the Article 6 letter was actionable as the arguments for its annulment were clearly inadmissible. However, the subject was discussed at length in the course of the proceedings and Advocate General Capotorti took the view that it was (see footnote 11, above). Moreover, in that case, the Commission itself — in suggesting three possible answers — did not rule out the possibility that an Article 6 notification might invariably be an act that was open to challenge by the persons concerned under Article 173.

31 — Opinion of Judge Edward, acting as Advocate General, delivered on 10 March 1992, [1992] ECR II-2226, points 90-97.

the legal basis and implications of the alternatives I have just described.

32. In particular, the second view, according to which a preparatory measure — precisely because it is preparatory — can never be considered such as to terminate the failure to act, means that once an admissible action under Article 175 is in Court, its purpose will not be exhausted unless and until the defendant institution has proceeded to a formal 'act', [32] with the result that the action retains its purpose until the definitive decision is taken. [33] According to that view, an Article 6 letter would bring about a kind of *interruption* of the failure to act, but not its termination. The advantage of adopting that solution 'would be that the continued existence of an action in Court, which could be revived at any time, would be a spur to the Commission to remain active. The disadvantage would be that a potentially unnecessary action would remain on the Court's lists, the parties rather than the Court having effective control over its disposal'. [34]

In that Opinion, the view that an action for failure to act is deprived of its purpose even by a preparatory measure is judged to be 'theoretically less attractive since it presupposes that a failure to act, in the sense of a failure to proceed to an attackable act, can be brought to an end by action falling short of an attackable act. While it would have the advantage of clearing the Court's lists quickly, it would have the *corresponding disadvantage of requiring a complainer to raise a series of actions to produce results* if the Commission continued to prove sluggish in dealing with the case'. [35] That disadvantage, I need hardly say, was the reason for bringing the present action.

33. The Court of First Instance, for its part, did not appear to rule out the possibility that events that occurred after the Article 6 letter was sent might be relevant for the purpose of determining whether the failure to act had been terminated. In fact, in its judgment in *Asia Motor I*, [36] in which the appellants claimed, *inter alia*, that the Article 6 letter would not necessarily bring the failure to act to an end, the Court of First Instance stated, significantly, that in that case the Commission not only satisfied the procedural requirements incumbent upon it under Article 6 of Regulation No 99/63 (albeit after the action was brought) but that it also adopted a definitive decision rejecting the complaints made to it, even though the decision had been taken after a considerable delay. It must therefore be concluded that 'the application has become devoid of purpose, at least and in any event following the

32 — Idem, point 94.

33 — Attention must be drawn, in this connection, to the ruling that 'a refusal to act, however explicit it may be, can be brought before the Court under Article 175 since it does not put an end to the failure to act' (*Parliament* v *Council*, cited in footnote 27, paragraph 17). However, in view of the particular circumstances in which that statement was made and the subsequent case-law on the subject, I do not think it can be cited in support of the arguments advanced in the present case.

34 — Opinion cited in footnote 31, point 95.

35 — Idem, point 96, my emphasis.

36 — Case T-28/90 *Asia Motor France and Others* v *Commission* [1992] ECR II-2285, paragraphs 34-37.

decision of 5 December 1991, and that there is therefore no longer any need to give a decision on it' [37]. Particular importance is therefore to be attached to the finding, in the same judgment, that 'the act whose absence constitutes the subject-matter of the proceedings was adopted after the action was brought but before judgment' and that consequently 'in this case, the Commission, which definitively rejected the appellants' complaint after sending the communication provided for in Article 6 of Regulation No 99/63, cannot be regarded as having refused to act'. [38]

These statements do not provide a clear and unequivocal answer to the question raised in the present case [39] but they do suggest that, for the purpose of determining whether there has been a failure to act, the Court of First Instance should endeavour to take account of events occurring after the Article 6 letter is sent. However, when it was called upon to address that very question in the case that is the subject of the present appeal, it explicitly took the opposite view.

That view cannot however be considered satisfactory, first, because it makes the termination of the failure to act and with it the subject-matter of the action, depend on the adoption of an act that is only a preparatory measure for the adoption of the definitive act requested by the complainant and, second, because it may have the effect of requiring the complainant to bring a series of actions for failure to act, to produce a *useful* result. However, it remains to be seen what remedies consistent with the law and, in particular, with the provision contained in Article 6 may be available to overcome these disadvantages.

34. One possible course would be to adopt the view suggested in the Opinion cited above: that the purpose of the action will not be exhausted unless and until a definitive decision is taken. Although it has the merit of avoiding the disadvantages arising from supposing the failure to act to be terminated and the related action devoid of purpose, that solution is not exempt from criticism. In particular, it would not prevent the Commission's inaction from continuing, even for long periods, and the complainant would have no way of *obliging* the Commission to act.

Another possibility, which is the one I would recommend, as the Commission certainly cannot and should not delay the adoption of the final act indefinitely, would be to require it to reply to the comments submitted by the complainant within a reasonable

37 — Idem, paragraph 35.

38 — Idem, paragraph 37.

39 — It should be noted that even in its subsequent judgment in *Ladbroke* the Court of First Instance did not dispel all the doubts on the subject. Indeed, after noting that a considerable amount of time had elapsed between the submission of the complaint and the date on which the letter calling upon the Commission to act was received, it stated that 'the applicant was entitled to obtain from the Commission, if not a reasoned decision, *at least* a provisional notice under Article 6 of Regulation No 99/63' (judgment cited in footnote 19, paragraph 61, my emphasis).

time; should it fail to do so, the conditions for the Court of First Instance to find that it has failed to act would be deemed to have been fulfilled. I should add that, in order to guarantee legal certainty and the right of access to the courts, it is in my view essential to fix a reasonable time within which the Commission must either confirm what it has already stated in the Article 6 letter or reopen the case if it considers it appropriate to do so in the light of further comments it has received. Such a 'reasonable' time, which could 'reasonably' be a period of three to six months, would also meet the need to ensure the sound administration of justice, a need that is particularly pressing in sectors such as that in the present case, where prompt action is vital if the purpose of a complaint under Article 3(2) of Regulation No 17 is to be achieved. I need hardly add that this would certainly not be the first time the Court of Justice has fixed a reasonable time-limit in order to meet the requirements and guarantee the principles mentioned above. [40]

35. Finally, to summarise the points I have made so far, the notification provided for in Article 6 suffices in itself to close the file on a complaint — and can therefore be described as a final act — whenever the complainant does not avail himself of the opportunity to submit further comments. In such cases, therefore, the notification effectively deprives the action of its purpose and at the same time constitutes an act that is open to challenge under Article 173. However, when the complainant does avail himself of the opportunity to submit comments, the action for failure to act becomes void of purpose only if the Commission adopts the final decision rejecting the complaint within the reasonable time fixed by the Court of Justice. Failure to adopt a decision within that time will, on the other hand, entail confirmation by the Court of the failure to act, provided of course that all the necessary conditions are fulfilled.

It scarcely needs to be emphasised that, in both cases, the conduct of the parties after the Article 6 letter is sent is consequently decisive for the purpose of establishing whether the failure to act continues or has been terminated and whether the action has been deprived of its purpose.

36. For the purposes of the present case it follows that, as the Court of First Instance recognized that a definitive decision rejecting the complaint had not yet been taken when the judgment was delivered but held this to

40 — See, for example, Case 120/73 *Lorenz* v *Germany* [1973] ECR 1471, paragraph 4, where the Court held that two months was a reasonable period to allow the Commission to form an opinion on the conformity with the Treaty of plans to grant new aid which have been duly notified to it. Also, on the subject of proceedings for failure to act, see Case 59/70 *Netherlands* v *Commission* [1971] ECR 639, paragraphs 15 to 22, where the Court held reasonable time-limits to be necessary in connection with the 'requirements of legal certainty and of the continuity of Community action'. While it is true that such requirements were invoked to support the point that 'the exercise of the right to raise the matter with the Commission may not be delayed indefinitely', and thus in favour of the defendant institution, it is also true that it would be unfair, to say the least, if they could not be cited in the opposite case, that is to say, when it is the institution that is delaying the adoption of the requested act indefinitely.

be irrelevant for the purpose of determining whether or not there had been a failure to act, the appellant's first plea must be upheld.

The legal effects of the Article 6 letter and the breach of the right to effective judicial review (third plea)

37. In its third plea, the appellant claims that to regard the letter of 13 June 1994 as depriving the action for failure to act of its initial purpose but not being open to challenge implies a breach of the right to effective judicial review.

On the premiss that that right is among the general principles of Community law, [41] the appellant claims that, in ruling that the letter in question had no binding legal effects *vis-à-vis* the appellant but that it was at the same time such as to terminate the failure to act, the Court of First Instance opened up a grey area in which the complainant was deprived of all access to the courts. It could not seek to establish that the failure to adopt the act requested was unlawful, nor could it bring an action for annulment.

38. It must be acknowledged that the solution adopted by the Court of First Instance does not in fact deprive the appellant of all remedy. Nevertheless, since the complainant, faced with the Commission's persistent inertia, will have to bring a second action for failure to act merely in order to obtain the final act it sought in the first one and may then possibly have to bring an action under Article 173 for the annulment of that act, [42] that solution would in the end make access to the courts rather more arduous.

In these circumstances, it is extremely difficult to avoid the conclusion that 'la duplication des recours transforme le contrôle juridictionnel communautaire en un véritable parcours du combattant où la persévérance et la résistance deviennent les vertus cardinales!' [43] and that complainants may consequently not be guaranteed proper access to the courts.

41 — See, *inter alia*, Case 222/84 *Johnston* v *Chief Constable of the Royal Ulster Constabulary* [1986] ECR 1651, paragraph 18, and Case C-249/88 *Commission* v *Belgium* [1991] ECR I-1275, paragraph 25.

42 — This is clear from a correct reading of paragraph 34 of the contested judgment.

43 — Bolze: 'Note sur l'arrêt Guérin', in *Revue trimestrielle de droit européen*, 1996, p. 393.

However, in view of the conclusions I reached on the first plea, I think there is no need to say any more about this one.

39. Clearly, the situation would be very different if the Court of Justice were to find that the grounds relied on by the appellant to show that the failure to act had not been terminated were unfounded. In that case, it would in fact be very difficult to show that the appellant was wrong in arguing that the very fact that an Article 6 notification could deprive the action for failure to act of its initial purpose inevitably meant that it produced binding legal effects *vis-à-vis* the appellant and was consequently open to challenge. [44] It follows that, in holding that the Article 6 notification was not open to challenge, the Court of First Instance clearly infringed the appellant's right to effective judicial review.

I should add that, in my view, it would be preferable to recognize that an Article 6 letter invariably constitutes a measure that is open to challenge, [45] rather than condone a situation in which the complainant, in order to obtain a definitive decision and submit it, should the need arise, to the adjudication of the Community courts, is obliged to bring two actions for failure to act. [46] Otherwise, there would be no alternative but to find the legal remedies available to an individual submitting an application under Article 3(2)(b) of Regulation No 17 to be inadequate in terms of speed and efficiency, a state of affairs that, in my opinion, the Court of Justice should not endorse.

40. In the light of the foregoing considerations, the judgment of 27 June 1995 should

44 — That view is confirmed, moreover, in the statement that 'the concept of a measure capable of giving rise to an action is identical in Articles 173 and 175, as both provisions merely prescribe one and the same method of recourse' (Case 15/70 *Chevalley* v *Commission* [1970] ECR 975, paragraph 6). That statement clearly implies that it is not possible to obtain the adoption of an act under Article 175 if its annulment cannot be sought under Article 173.

45 — I should mention, in this connection, that I cannot share the view expressed by the Court of First Instance in its judgment in *Automec I* that an application for a declaration that an Article 6 notification was void 'might make it necessary, as in the case of an action against the statement of objections, for the Court of Justice and the Court of First Instance to arrive at a decision on questions on which the Commission had not yet had an opportunity to state its position' and that that would be incompatible *inter alia* with 'the requirements of the sound administration of justice and the proper course of the administrative procedure to be followed by the Commission' (*Automec* v *Commission*, cited in footnote 15, paragraph 46). Suffice it to say, first, that the comparison between a statement of objections and an Article 6 notification is forced, to say the least, in view of the profound difference between the two measures, and, second, that the argument advanced here should be given serious consideration if it is concluded that the Article 6 letter deprives the action for failure to act of its purpose. The argument does not seem to me to raise particular objections, as: (a) the reasons for rejecting the complaint are clearly set out in the letter in question; (b) the subsequent final decision is, at least in most cases, merely a confirmation of the Article 6 letter; (c) if the Commission decides to initiate an investigation or infringement proceedings in the light of further comments it receives, this could simply be regarded as a fresh procedure under Article 6. I should add, lastly, that the only disadvantage of such a solution would be to oblige the complainant to produce its comments on the Article 6 letter and the act instituting proceedings for annulment at the same time.

46 — This prompts the question: how many actions for failure to act will the complainant have to bring if the adoption of the decision it has requested requires the adoption of not one, but several procedural measures?

be annulled in so far as it held the pleas I have just examined to be unfounded.

The cross-appeal brought by the Commission

41. The cross-appeal relates to the part of the judgment in which the Court of First Instance ordered the Commission, in the light of the circumstances of the case, to pay its own costs and those of the appellant (paragraphs 44 to 46).

In support of its appeal, the Commission contends that the Court of First Instance confused admissibility with merits in the case at issue. Essentially, the Commission considers that an order to pay the costs would be justified only if the Court of First Instance had found a failure to act or had carried out at least a *prima facie* examination of the merits, neither of which it had done in the present case.

42. The Commission is aware that the provision contained in the second paragraph of Article 51 of the Statute of the Court of Justice, namely that 'no appeal shall lie regarding only the amount of the costs or the party ordered to pay them', may constitute an obstacle to the admissibility of its claim. It concludes, however, that that provision is not applicable in the present case, primarily because its purpose — which is, for reasons of procedural economy, among others, to avoid the Court of Justice having to consider a case relating to costs alone — is irrelevant in the case of a cross-appeal. In these circumstances, it takes the view that the Court should consider the case in the light of the pleas submitted in the main appeal.

I must point out, first of all, that the Court of Justice has held that Article 51 applies even where — although the plea concerning costs was not the only reason for bringing the action — all the other pleas were held to be unfounded. [47] This clearly means that the purpose of that provision, contrary to the Commission's view, is not to avoid the need for the Court of Justice to *consider* a case solely in order to rule on the costs. It must be recognized that, as the abovementioned case-law shows, the provision in question seeks rather to prevent a ruling at first instance being challenged solely in respect of the costs and for this purpose it is irrelevant

47 — In a case of this kind, the Court of Justice stated that: 'all the other pleas advanced by the appellant having been rejected, the plea concerning costs must, by virtue of that provision [Article 51] be rejected as inadmissible' (Case C-396/93 P *Henrichs* v *Commission* [1995] ECR I-2611, paragraph 66. See also the Orders in Case C-253/94 P *Roujansky* v *Council* [1995] ECR I-7, paragraph 14, and Case C-264/94 P *Bonnamy* v *Council* [1995] ECR I-15, paragraph 14). It need hardly be said that the same view would have to be taken on a plea concerning costs advanced in a cross-appeal even if the Court rejects all the pleas advanced in the main appeal. Such a situation would in fact be similar in every respect to the situation where all the other pleas had been rejected as inadmissible in the same case.

whether the challenge in question is the main appeal or a cross-appeal. Moreover, the general terms in which the provision in question is couched can only be interpreted as meaning that it applies in both cases.

43. Should the Court of Justice take a different view, I would point out first of all that, in ruling as it did in this case, the Court of First Instance merely followed a consistent line of decisions by the Court of Justice, according to which, when the action is deprived of its purpose because the institution called upon to act responded only after proceedings had been brought, the costs in respect of those proceedings should be borne by that institution. [48] The purpose of such decisions is abundantly clear: it would be unfair, to say the least, to order the appellant to pay the costs of a case when the very reason for bringing it was that the institution called upon to act had not done so.

That is not to confuse admissibility with merits, as the Commission claims, but rather to take due account of the fact that the action has been deprived of its purpose as a result of the conduct of the institution that was called upon to act. May I add that, even if it is irrelevant for the purpose of apportioning the costs, the idea that the action for failure to act might be unfounded in the present case is also difficult to accept, even *prima facie*. Suffice it to say, first, that the Court of First Instance found that the Commission failed to respond to the formal notice addressed to it by the appellant on 24 January 1994 'even though it had been duly informed of the ;1substance of the complaint since December 1992' and, second, that it is now common ground that anyone submitting a complaint within the meaning of Article 3(2) of Regulation No 17 is in any case entitled to a decision. In these circumstances, I consider that the Commission's claim is manifestly unfounded to the point of being vexatious.

The action before the Court of First Instance

44. According to the first paragraph of Article 54 of the Statute of the Court of Justice, if the decision of the Court of First Instance is annulled, the Court of Justice may itself give final judgment in the matter, where the state of the proceedings so permits. As an examination of the claim submitted by the appellant does not, in the event, require any facts to be established, I consider that the Court of Justice may give final judgment in the present case.

45. In its first plea before the Court of First Instance, the appellant argued that the Commission's letter of 13 June 1994 could not be considered such as to terminate the failure to act and, in particular, that a notification under Article 6 of Regulation No 99/63 did not constitute a definition of position within the meaning of the second paragraph of Article 175 of the Treaty.

48 — See, for example, Joined Cases C-15/91 and C-108/91 *Buckl and Others* v *Commission* [1992] ECR I-6061, paragraph 33.

I have already explained, following my examination of the first ground of appeal, that such a letter — if, as in the present case, the complainant has availed himself of the opportunity to submit further comments — cannot be held to deprive the action for failure to act of its purpose, unless the Commission adopts a definitive decision within a reasonable time. As it is common ground between the parties in this case that such a decision had not been taken when the Court of First Instance delivered its judgment and that the reasonable time-limit, which in any case should not exceed six months, had long since expired, it only remains to be ascertained whether, in failing to respond to the appellant's request, the Commission did in fact fail to fulfil an obligation to act.

46. The answer must be that it did. Even if the Commission is not obliged to adopt a decision establishing the existence of an infringement of the rules on competition or to investigate a complaint brought before it under Article 3 of Regulation No 17, it is none the less required, where an investigation is terminated without any action being taken, 'to state reasons for its decision in order to enable the Court of First Instance to verify whether the Commission committed any errors of fact or of law or is guilty of a misuse of powers'. [49]

In these circumstances, the reference by the Commission to the Court of First Instance's statement that 'the fact that the Commission applies different degrees of priority to the cases submitted to it in the field of competition is compatible with the obligations imposed on it by Community law' [50] is completely irrelevant for the purpose of proving that the Commission has not failed to fulfil an obligation to act. The statement means that the Commission may reject an application in the light of the priorities it has set itself, but certainly not that it may do so in order to evade judicial review.

47. In short, the discretion enjoyed by the Commission as to the response to be accorded to the complaints submitted to it certainly does not allow it to call into question the right, henceforth undisputed, of anyone submitting a complaint under Article 3(2) of Regulation No 17 to obtain a decision.

Lastly, I should add that the Commission's argument that a reasonable period had not elapsed between the time when the complaint was submitted and the time when it received formal notice to act is likewise without foundation. Suffice it to say that the Commission failed to respond to the formal notice addressed to it by the appellant on 24 January 1994 even though it had been duly informed of the substance of the complaint since December 1992.

49 — *Rendo and Others* v *Commission*, cited in footnote 8, paragraph 27.

50 — *Automec II*, cited in footnote 6, paragraph 77.

Conclusion

48. In the light of the foregoing considerations, I propose that the Court of Justice should:

— annul the judgment of the Court of First Instance of 27 June 1995 in Case T-186/94 *Guérin Automobiles* v *Commission*;

— declare the cross-appeal brought by the Commission inadmissible;

— declare that the Commission has failed, contrary to Article 3(2)(b) of Regulation No 17/62 and Article 6 of Regulation No 99/63, to take a definitive decision with regard to the complainant;

— order the Commission to pay all the costs of the present case.