THE COURT

hereby :

1. **Annuls the decision of 14 December 1965, notice of which was given to the applicant undertakings by letter dated 3 January 1966;**

2. **Orders the Commission to pay the costs.**

Trabucchi Monaco

Donner Lecourt Strauß

Delivered in open court in Luxembourg on 15 March 1967.

A. Van Houtte
Registrar

A. Trabucchi
President of Chamber
President

OPINION OF MR ADVOCATE-GENERAL ROEMER DELIVERED ON 15 FEBRUARY 1967[1]

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Mr President,
Members of the Court,

The case on which I am giving my opinion today is about a notice concerning cartels given by the Commission of the EEC to the applicants under Article 15 (6) of Regulation No 17 of the Council. This notice was issued in the following circumstances.

1 — Translated from the German.

On 6 July 1956, 28 Belgian, 2 Netherlands and 44 German cement undertakings (the German ones grouped in the 'Nederlandse Cementhandelmaatschappij NV') made an agreement, the 'Noordwijks Cement Accoord', with a view to prolonging and reorganizing a set of rules for the Netherlands market in cement (which obviously the Netherlands producers cannot supply in sufficient quantities). This set of rules has been in force for some decades. This agreement lays down, *inter alia* with regard to the supply of cement and clinker to the Netherlands market, provisions for quotas, the construction of new cement works and the uniform fixing of prices and of conditions of sale; and it contains exclusive purchase clauses as well as certain prohibitions on exports. These latter points, which in fact are irrelevant to these proceedings, are also the subject-matter of an agreement concluded between the Executive Committee of the 'Accoord', the 'Stichting Cement-Centrale voor Nederland', and the 'Vereniging van Cementhandelaren'. They are also the subject-matter of the trading conditions laid down by the 'Vereniging'.

Pursuant to Regulation No 17 of the Council, the Noordwijks Cement Accoord was notified by the parties to it to the Commission (on 31 October 1962). That led to the opening of the procedure laid down for cartels which included, as from January 1964, a specific examination of the agreement. During the course of this procedure the Netherlands undertakings concerned, the trade organization of the Belgian undertakings ('Cimbel') and the Netherlands sales organization in which the German undertakings are grouped received letters from Mr von der Groeben, a member of the Commission, on 8 April 1965. These letters declared, *inter alia,* that the agreement notified appeared to fall under Article 85 (1) and did not seem to qualify for exemption under Article 85 (3). Consequently it was desirable to consider striking out a certain number of clauses. The undertakings were requested to submit their written or—by arrangement—oral observations on this point. It was expressly emphasized that the letters were not notices under Article 15 (6) of Regulation No 17.

At the request of the undertakings several meetings and an exchange of letters subsequently took place between their representatives and officials of the Commission.

Hence it came about that on 11 June 1965 certain conversations took place in Brussels, although it is true that the parties interpret the substance of them differently. The Commission says that the undertakings were again invited to strike out the clauses mentioned in the letter of 8 April 1965. But the applicants (referring in particular to letters of 23 June 1965 from 'Cimbel' to Mr von der Groeben summarizing the contents of these conversations) claim that the main subject discussed was the future organization of exchanges of view in order to arrive at an amicable settlement. They also claim that the contents of the agreement were only treated incidentally and in such a way that it seemed possible to come to an understanding on the amendment of certain clauses. In fact certain provisions were indeed amended. On the initiative of the Netherlands cement works fresh conversations took place in September 1965 between representatives of the Belgian and Netherlands undertakings and officials of the Commission. The results of these conversations were set out in a letter of 8 October 1965 from the undertakings to the Directorate-General for Competition. This deals again with alterations which were made to certain clauses of the agreement between the 'Stichting' and the association of Netherlands traders, which means alterations to the Netherlands traders' conditions of sale. The willingness to consider new amendments is also expressed.

Finally, I should also mention a request for information addressed on 1 December 1965 by the Directorate-General for Competition to the 'Stichting'. This asked for explanations of the alleged contradictions between the clauses of the agreement concluded between the 'Stichting' and the association of traders, and the latter's conditions of sale. The explanations were given in a letter from the representatives of the Netherlands undertakings dated 17 December 1965.

But although the applicants in these circumstances, thinking that they had satisfied or that they could satisfy the essential wishes of the Commission, expected that the negotiations would continue, the Commission took the view that the amendments made and those in prospect did not go far enough because they left the nucleus of the agreements unchanged.

So on 14 December 1965 it decided during the course of the written procedure to send a notice to the undertakings which had signed the 'Accoord', in accordance with Article 15 (6) of Regulation No 17. For this purpose it authorized one of its members, the Chairman of the Working Party on Competition, Mr von der Groeben, to have the notice in question signed and despatched by the Director General for Competition. The order from the Chairman of the Working Party on Competition was given by letter dated 15 December 1965. It was carried out by letters dated 3 January 1966 signed by the Director General for Competition. These letters were worded as follows:

'EUROPEAN ECONOMIC COMMUNITY

The Commission
Directorate-General for Competition

Subject: Case IV/A-00581 (Noordwijks-Cement-Accoord and schedules)

Dear Sirs,

Your undertaking is a party to the above-mentioned agreement which was notified on 31 October 1962 with a view to obtaining a declaration that Article 85 (3) of the Treaty establishing the European Economic Community applies.

The agreement notified comprises:

— the fixing of quotas for the supply of cement (Articles 4 to 13) and of clinker (Article 26);
— a prohibition on constructing cement works in the territory of other parties to the agreement (Article 2);
— the collective fixing of prices for cement (Article 20 in conjunction with the "Prijslijst en verdere voorwaarden vor de verkoop en de levering van cement in Nederland, vastgesteld door de Stichting Cement-Centrale voor Nederland");
— the collective fixing of prices for clinker (Article 28);
— a reciprocal collective commitment to the exclusive supply and exclusive purchase of clinker (Articles 24 and 25);
— the collective application of conditions of sale (Article 20) which provide in particular for:
— the obligation on the part of traders to comply with re-sale prices and conditions (IV b) of the "Aanvullende voorwaarden voor de verkoop en de levering van cement in Nederland aan handelaren, ingaande 1 januari 1964, vastgesteld door de Stichting Cement-Centrale voor Nederland");
— exclusive supply to the members of the "Vereniging van Cementhandelaren" on the conditions, applicable to the traders mentioned above (I b) of the "Aanvullende voorwaarden voor de verkoop en de levering van cement in Nederland aan handelaren, ingaande 1 januari 1964, vastgesteld door de Stichting Cement voor Nederland");
— exclusive sale of the manufacturers of concrete cement approved by the

"Betonvereniging" at The Hague on the conditions of sale laid down in the "Aanvullende voorwaarden voor de verkoop ... aan betonmortelbedrijven ..." (I d);

— the fixing of reductions for quantity buying, trade discounts and other reductions; of prices for packaging; of discounts on and supplements to prices (appearing in all the conditions of sale sent to the Directorate-General for Competition together with the letter of 8 October 1965).

The Commission has subjected the agreement in question to a preliminary examination. It has reached the conclusion that the requirements for applying Article 85 (1) of the Treaty are met and that there is no justification for applying Article 85 (3) to the agreement in the form in which it has been notified.

The Commission hereby informs you of this in accordance with Article 15 (6) of Regulation No 17 (First Regulation implementing Articles 85 and 86 of the Treaty, dated 6 February 1962, Official Journal of the European Communities, 1962, No 13, p. 204 et seq.).

The Commission draws your attention to the fact that the provisions of Article 15 (5) of Regulation No 17, whereby the agreement notified was granted provisional exemption from the application of the provisions concerning fines set out in Article 15 (2) (a) of the said Regulation, will cease to apply to the agreement as from the date of receipt of this letter.

I should be obliged if you would let me know within a period of six weeks (from the date of receipt of this letter) whether you have put an end to the implementation of the agreement in question.

F. Verloren van Themaat
Director General for Competition.'

The Belgian cement works reacted with a letter of 25 January 1966, in which they let it be known that they did not understand how the Commission could have broken off the negotiations for the reaching of an amicable solution after all the negotiations which had taken place and in view of the amendments which had already been made to the agreements, and of the willingness, which they had already declared, to proceed to further amendments of the agreements, that is to say, after a 'quasi-settlement' had been reached. On 7 February 1966 they merely received from the Director General for Competition a communication confirming the contents of the letter of 3 January 1966 and reminding them that it was the Commission itself which had taken up this position. Further, they were asked to propose a new date for discussing the dissolution of the 'Accoord'. Following this, the undertakings decided to make applications to the Court, which were lodged with the Registrar on 2 and 9 March 1966. In them applicants claim that the Court should:

1. Annul the notice of 3 January 1966 (in Cases 8, 9, 10 and 11/66);
2. In the alternative: declare that Article 15 (6) of Regulation No 17 is illegal and, therefore, annul the notice of 3 January 1966 (in Cases 9 and 10/66).

In its turn the Commission maintains that the applications are inadmissible since the notices are not measures which can be contested before the Court. Alternatively it asks that they be dismissed as unfounded.

All these cases were joined by order of the Court on 4 May 1966 so that today my task is to examine all the arguments put forward by the parties.

Legal consideration

I — Admissibility of the applications

In the legal evaluation of the subject-matter of the dispute it is clear that the question of admissibility takes first

place. Since we are dealing with applications for annulment under the second paragraph of Article 173 of the EEC Treaty, and since the directly contested measures are clearly not regulations, the main problem is whether the notices sent to the undertakings can be considered as *decisions* within the meaning of Article 173. In its turn, this question subdivides into two subsidiary questions: the first concerns the abstract definition of the legal nature of a notice duly given under Article 15 (6) of Regulation No 17; the second, assuming that on principle the notice is in the nature of a decision, requires us to examine *whether in this case* there appear such grave defects of form that the contested measures no longer, therefore, have the character of decisions.

1. *As a matter of legal theory can notices under Article 15 (6) of Regulation No 17 be classified as decisions?*

As we know, the Commission says that notices under Article 15 (6) are not in the nature of decisions. It thinks that mere procedural measures are involved which are opinions in the sense of Article 189 of the Treaty, and which are not binding. In support of its view it refers, *inter alia,* to the case-law of the Court on the ECSC Treaty, and to the fact that a notice under Article 15 (6) is not the final stage of the procedure relating to cartels but that on the contrary it will be followed by other measures. It also argues that notices of this sort do not compel the undertakings concerned to act or to refrain from acting. On the other hand the applicants, who also put forward a large number of arguments, assert that the notice is in the nature of a decision. They say that what is of primary importance is the legal effects which attach to the notices and the requirements of legal certainty and satisfactory protection by the Court.

To begin with, it seems indisputable, and at all events both sides are agreed on this, that the concept of a decision in Article 173 is the same as that in Article 189. Furthermore it is a fact that Article 189 contains an *exhaustive* statement of the kinds of measures within which as a matter of principle the organs of the Community must operate in exercising their powers (cf. Articles 4 and 155 of the Treaty). This is also true for the Council when it adopts regulations in implementing the Treaty. It follows from this that these regulations must be interpreted in accordance with the Treaty. Therefore, as the applicants emphasize, we must indeed start with the idea that, as regards the protection by the Court provided for by Article 173 on the one hand and the definitions and formal conditions laid down by Articles 189 and 190 on the other hand, the Treaty represents a coherent system. What has just been said should be borne in mind every time that an attempt is made to interpret the Treaty. But in addition to this, and despite the undoubtedly independent character of a good many of the Treaty's concepts, it should not be forgotten that it is useful to make a comparison with *national law* when interpreting the Treaty.

Passing next to an examination of the various arguments put forward by the parties, I must stress that they are of little value in so far as they deal with *terminology*. As I have already said on several occasions, these methods of interpretation should only be used with a great deal of circumspection as regards the Community Treaties, in view of the fact that the Treaties have not been drafted with the same precision as the respective national codes, a fact which many examples prove. This is equally true for regulations of the Council, which are based on the Treaty, and for regulations adopted by the Commission on the authority of the Council. This is why I need waste no time on the

fact that the Belgian applicants refer to the expression 'estimer' ('is of the opinion') found in the French version of Article 15 (6) of Regulation No 17, which they interpret as meaning the same thing as 'juger' ('judge'). Nor need I spend time on the fact that they refer to Article 9 of Regulation No 17 and to the concept of a decision contained in it and conclude from this that there is always a decision when the Commission states that Article 85 (3) does not apply, for the applicants obviously fail to realize that this Article 9 only lays down a set of rules concerning powers in relation to the authorities of the Member States. The same goes for the Commission's attempts to derive arguments in support of its position from the various provisions of Regulation No 17 and of its own Regulation No 99. As regards Regulation No 99 in particular it must be said that it is the Commission itself which has chosen the wording of Articles 2, 6 and 10 on the one hand and of Article 4 on the other, and that therefore these Articles cannot be used as evidence to prove that the descriptions chosen are in fact admitted by the Treaty itself. Furthermore as regards Regulation No 99 it may be remarked that it is not clear that the *kind of communications* of which it speaks always have the same legal significance (cf. Article 2 for one example and Article 6 for another). Therefore there is something unconvincing about the attempt to read the word 'inform' as used in Article 6, where it does not have any legal effect, in the same was as 'informed' in Article 15 (6) of Regulation No 17. As for Regulation No 17 of the Council it indeed cannot be denied that some of its provisions expressly talk of a 'decision' (for example Articles 15 and 16 on the imposition of fines and periodic penalty payments). Nor, doubtless, can it be denied that other provisions thereof expressly distinguish between requests for information and authorizations for investigations, which are not of a binding character, on the one hand, and decisions on the same subject-matter which are binding (Articles 11 and 14) on the other. Nevertheless other provisions of Regulation No 17 prove that its terminology does not always employ technical legal terms and that therefore it would be a mistake to say that the only measures which are in the nature of decisions are those described as such. For example I am thinking of the negative clearances under Article 2 (here the word used is '*certify*', of measures *prohibiting* certain specified acts (see Article 8) of *declarations* within the meaning of Article 85 (3), of *revocations* and *amendments* of authorizations (Articles 6 and 8) that is to say, of measures for which the only clarity supplied is the indirect definition of Article 19. But the applicants, too, rely on this Article in support of their arguments: they argue that Article 15 refers simply to decisions without making a distinction between the various paragraphs, which proves that the notices under Article 15 (6) should also be considered as such. Finally the fact that Article 15 of Regulation No 17 only requires the Advisory Committee to be consulted in the circumstances set out in paragraphs (1) and (2) is not enough for reaching a decisive conclusion about the nature of the contested measure, and is no more conclusive than the terminology of Regulation No 17, which is not decisive when judged by the criteria of the Treaty itself. Another point is that Regulation No 17 does not say that the Advisory Committee has to be consulted before every request for information and every authorization for proceeding to investigations, that is to say, before the adoption of measures which are undoubtedly decisions because they are defined as such in Regulation No 17.

For this reason instead of spending

any more time on these attempts at interpretation, we should rather turn our attention to the *contents* and the *legal effects* of the contested measures, and try to solve in this way the question whether they can be described as decisions.

According to Article 189, a decision is a measure which is binding in its entirety upon those to whom it is addressed. This definition distinguishes a decision from other measures which are only partially binding (for example, as regards the objectives to be achieved) or which are not binding at all. While it is true that these distinguishing criteria are not very abundant nevertheless they may facilitate the solution of our problem because they coincide with the criteria upon which the concept of a decision is based under Article 14 of the ECSC Treaty, and the Court has already had occasion to pass judgment on these criteria several times. In fact both sides refer to our earlier case-law, though they stress different aspects of it. However, before following them into this field and entering into the details, let us not forget that in previous years the Court has on each occasion had to pass judgment on particular cases, and that it is with this in mind that the attempts which it has made to arrive at a definition must be considered. The recognition of this fact, to which the applicants in particular expressly draw attention, is intended to act as a warning of the danger of taking generalized definitions out of their context and drawing from them rigid legal conclusions which the Court itself cannot have intended, by reason of the nature of its jurisdiction.

This remark is particularly valid as regards judgments in which the Court has *affirmed* that the contested measure was a decision: for in these cases it was enough to note *certain* constituent elements of a decision, without exhaustively stating other criteria which would have compelled the Court to accept the existence of a decision in a different factual situation. Thus it can be understood that in Case 8/55 the Court found that a decision was constituted by a letter threatening the Belgian Government that equalization payments would be withdrawn if it did not take certain precise measures; in that case the Court stated: 'The High Authority . . . unequivocally determined ... the attitude which it had decided to take thenceforth should the circumstances mentioned ... arise. In other words it laid down a rule to be applied if necessary[1]'. Of course it cannot be deduced from this that it is only in these circumstances that the existence of a decision can be admitted. This is particularly shown by later judgments; in one of these the Court took the view that it was a decision to refuse to grant an exemption from the levy under the ferrous scrap equalization scheme, this being a declaratory measure, on the ground that: '... the defendant intended to settle a point of law; ... it expressly affirmed the existence of a duty on the part of the applicant[2]'. In other judgments the Court took a similar view of the rejection of a request that the payment of the levy be returned (that is to say, of the retention of a given legal situation[3]), and the grant of an exemption from the equalizaton levy on ferrous scrap[4].

But one should also consider the special aspects of the particular case in judgments which, in carefully formulated terms, deny the existence of a decision. Thus the judgment delivered in Joined Cases 1 and 14/57[5], which says that

1 — Rec. 1955-1956, p. 225.
2 — Case 14/59, Rec. 1958-1959, p. 467.
3 — Joined Cases 41 and 50/59, Rec. 1960, p. 1013.
4 — Case 14/61, Rec. 1962, p. 520.
5 — Rec. 1957, p. 221.

the contested measure is not a decision because it does not contain 'rules' which it is possible to apply and does not impose any legal duty on the persons to whom it is addressed, is a judgment relating to an opinion on an investment matter which was not binding, and which did not produce any legal effects. Similarly there was nothing of a binding nature or which had any legal effects in certain passages of a decision concerning the extension of the authorization of a cartel (Joined Cases 16 to 18/59[1]). The Court refused to hold that the passages disclosed the hallmarks of a decision because of the High Authority expressly reserved the right to issue binding rules at a later date, that is to say, because in the measure in question the High Authority restricted itself to giving non-binding information, or (in so far as what was involved was giving its officials the task of carrying out checks at the premises of the undertakings) to adopting a purely internal measure. Once those facts are taken into account it will particularly be understood that there is no decision when there are not 'rules' 'producing legal effects of general application or of an individual nature'. As regards the judgment delivered in Case 42/59 which denied that a measure was in the nature of a decision because it 'does not establish any general rule and does not conclusively affect any individual interest'[2] it must be borne in mind that this was a case where one of the High Authority's departments, which had no power to take decisions, was concerned. Having examined the consequences of another judgment this department had declared without any authority that in its opinion there was no ground for admitting a claim for damages. Finally, I should also point out as regards the identical judgments delivered in Cases 23, 24, 52/63[3], 28/63 and 53 and 54/63 that the measure under consideration was not a decision because it was not intended to 'have legal effects' upon those to whom it was addressed, it did not mark the culmination of the internal administrative procedure and it did not constitute a definitive expression of the High Authority's intentions. In this case, too, the measure emanated from a department of the High Authority and as such it could not have any legal effects. This explains the words used in the grounds of judgment which say that there is only a decision if the measure is 'intended to have legal effects'.

However, if an attempt be made, in particular on the basis of the judgments last cited above, to obtain guidance on the solution of our problem of definition, this attempt leads to two questions about which the parties disagree:

1. What is the meaning of the requirement that there must be a definitive expression of intention?

2. Does the expression 'have *legal effects*' mean no more than that a measure must *confer rights* or *impose duties*?

To deal with the second question first, in my opinion there is no doubt that this cannot be answered in a restrictive sense. Here I would mention the last relevant judgment of the Court of Justice (Case 54/65) in which all that is said on the concept of a decision is that the measure must be 'capable of producing legal effects' and there is therefore no mention of conferring rights or imposing duties. Furthermore it seems to me to go without saying that it is impossible to exclude from the concept of a decision — and the restrictive method would do so—*declaratory* measures (such as negative clearances under Article 2 of Regulation No 17). This view is indeed confirmed by the judg-

1 — Rec. 1960, p. 63.
2 — Rec. 1961, p. 142.
3 — Rec. 1963, p. 455.

ments delivered in Cases 14/59 and 14/61. The same is true of measures which *take rights away* or *grant exemptions from certain duties* and can therefore encroach noticeably on individual interests. Therefore, in particular according to the case-law of the Court, we must not interpret the criterion 'binding', which is also found in Article 14 of the ECSC Treaty and in Article 189 of the EEC Treaty, as meaning that the measure in question must confer rights or impose duties. On the contrary, in order to find out whether there is a decision we must first examine whether the measure is capable of producing *legal effects*. It will later be seen what other restriction may on occasion seem appropriate.

As regards the question how we are to understand the requirement that there must be a definitive expression of intention as stated in previous judgments, it should not be forgotten that this requirement was stipulated when the Court was evaluating measures emanating from departments of the High Authority which was acting *ultra vires* and doing so as part of a preliminary administrative procedure, measures, therefore, which did not yet constitute the expression of a body endowed with the power of taking decisions. This fact should be enough to make us wary of concluding that the Court has said that it is only measures which mark the *culmination* of *procedure* which are 'definitive expressions of intention'. This conclusion cannot be right, and indeed the system laid down by Regulation No 17 proves this. It expressly describes as decisions, which can be contested before the Court, requests for information and authorizations to proceed to an investigation, that is to say measures intended to continue and facilitate a procedure, the final stage of which may, depending on the case, still be a long way off. Thus it seems right, as the applicants think, to consider the requirement as to the '*definitive*' nature of the intention only from the point of view of the *concrete legal effects* which a given measure will produce. When there are no reservations as to the preliminary nature nature of the measure, I mean when the legal effects produced can only be nullified by the revocation of the measure which has produced these effects in accordance with general principles, it cannot be denied that there is a definitive expression of intention.

Let us now examine, with the help of the case-law in its present state, how the measure to be considered in this case appears in the light of these first attempts at a definition.

On the subject of the creation of legal effects, it should be remarked that such effects are certainly created in this case. This is true even if, as the Commission rightly insists in view of certain express formulations in the Treaty, one holds that not every kind of legal effect is sufficient, (that is to say, even if one does not classify *all measures which have some kind of legal significance* as decisions) but that one must take a narrower view and see whether the legal effects are capable of *adversely affecting substantial interests* (and this is in line with certain definitions given in previous judgments of the Court[1]). It is of course true that it is not possible in this case to accept, on the ground that the notices under Article 15 (6) of Regulation No 17 encroach on the field of civil law, that legal effects therefore exist, since according to the system set up by Regulation No 17, cartels already in existence and declared to the Commission in due time are not *wholly* but only *provisionally* valid under civil law, which means that in any event as from the coming into force of Regulation No 17, they are exposed to risk under civil law which is not altered by a notice

1 — Cf. Joined Cases 16 to 18/59, Rec. 1960, p. 64; Case 42/59, Rec. 1961, p. 142.

under Article 15. What, however, is important is the fact that the notices under Article 15 bring about a change in the status of the undertakings concerned as regards *public law* in so far as, from the time when they are given, they bring about the possibility, which did not exist before, of imposing fines on the cartels declared and thus introduce a 'new element into the legal relationship' existing between the Commission and the undertakings, to use the language of a judgment of the Court (Joined Cases 41 and 50/59). There is no doubt that this is a very important legal effect and therefore the notice is not, as the Commission thinks, a measure which can be treated on the same footing as other procedural measures or as certain recommendations. The examples cited on this subject by the Commission relate to measures adopted as regards Member States and which either do not have any legal significance (for instance the opinion provided for by Article 170) or which are not in any sense binding (for instance the opinion provided for by Article 169 of the Treaty) since it is only a judgment delivered by the Court at a later date, which is binding on the behaviour of the Member State, assuming that such a judgment is in fact delivered. Nor can the notice under Article 15 (6) be compared with other procedural measures concerning cartels. This is because the latter (for instance the initiating of the procedure laid down by Article 9 and the notice of objections provided for by Article 4 of Regulation No 99) only have the legal effect of defining powers in relation to the authorities of Member States, or of prescribing in a non-binding manner the extent of the terms of reference of a procedure concerning cartels. But these other procedural measures do not have any influence on the substantive behaviour of undertakings or of third parties. Similarly, from the point of view of legal effects, it is not possible to make a comparison with the recommendations addressed to Member States under Article 102 of the Treaty (which can be made when measures of general application bring about a distortion of the conditions of competition are being adopted), for in this case also, no decisive action is exercised over the behaviour of the Member State concerned. On the contrary the said Member State retains a genuine freedom of choice and can either follow the recommendation or admit that an amendment to the legislation of other Member States cannot be required. The strength of the effects which the notices with which we are here concerned have on the behaviour of those to whom they are addressed is entirely different. We must not forget that during the written procedure the Commission expressly declared that it used its right to issue notices only rarely and with prudence, and only in cases of grave and obvious infringements of Article 85 (1), in order that its measures 'should be taken seriously'. Thus the measure in question has a particular importance and the risk run by the undertakings concerned becomes so great that from the point of view of its function and its effects the notice can be treated on entirely the same footing as an interim injunction (such as is known to national law on cartels[1]). This means that the notice can be treated as a mandatory measure of a temporary nature, as the wording of the notice in question also suggests. The applicants rightly point out that the Commission could have adopted a recommendation under Article 3 of Regulation No 17, which would not have had any individual effects, if a less drastic measure had seemed to be sufficient. Thus it cannot be denied that the contested notice is in the nature of a decision by claiming that its legal effects are of no importance.

1 — Cf. para. 56 of the German law against restraints on competition.

As for the question whether the contested notice contains a *definitive expression of intention*, that is to say, following the wording used in the judgment in Cases 41 and 50/59, whether it is drafted in its final form, this question cannot clearly be given an affirmative answer as regards the assessment given on Article 85 (1) and Article 85 (3), or on the reprehensible nature of the agreement concluded by the applicants. In other words the notice does not mark the culmination of the administrative procedure. However, to be fair, this is not indispensable. It is enough for the notice to put an end to a certain *part* of the procedure, which is also the case, for example, as regards an application to the Court for the adoption of an interim measure, or the publishing of a notice of competition, which, according to our case-law, can be contested before the Council[1]. It is not the preliminary or definitive nature of the examinations which matters in all these cases, but only the question whether the concrete legal effects intended by the measures in question are provisional ones. Unlike the letter of 8 April 1965, this is certainly not the case with the notice of 3 January 1966. In these circumstances I think that it is necessary to accept the existence of a decision which can be contested, just as with regard to requests for information and authorizations to proceed to investigations, which similarly do not mark the culmination of an administrative procedure, and which cannot, contrary to the Commission's view, upon an objective assessment be looked upon as more important for the undertakings concerned (in view, for example, of the necessity of keeping professional secrecy) than notices creating the *possibility of imposing fines on them.*

In my opinion, finally, certain considerations of the Commission (which the applicants dub 'political') cannot undermine this conclusion either. This conclusion has also been influenced, and I shall not deny this, by the judgment delivered in the *Humblet* case[2] (and therefore by the principle that in cases of doubt provisions relating to protection by the courts must be interpreted in favour of the persons subjected to those provisions) and in my opinion it corresponds to the trend of national administrative law[3] which is to interpret the concept of an 'administrative measure' widely, when it is defined in relation to protection by the courts[4].

Thus, according to the arguments of the Commission, it is entirely unnecessary for the undertakings concerned to refer notices given under Article 15 (6) directly to the Court, because review by the Court at a later stage of measures which undoubtedly can be contested offers a sufficient protection of their rights and their interests. Other national systems or other conceivable Community systems which have analogous effects to those of Article 15 (6) also exclude, so it is said, the possibility of instituting proceedings. Finally, if, as the applicants consider to be necessary, the warning notices were in the nature of decisions, the procedure would become so long, by reason of indispensable formalities, that the notices could no longer fulfil their function. Nor, should the Court admit the existence of a right to bring an application, would it be possible to envisage what sort of review of these notices it could exercise without going into problems relating to the application of Article 85 (1) and Article 85 (3)

1 — Cf. Case 15/63, Rec. 1964, p. 63.
2 — Case 60/60, Rec. 1960, p. 1130.
3 — Cf. judgment of the Bundesverwaltungsgericht of 9 February 1966, Verwaltungsarchiv 67, p. 76.
4 — Cf. judgment of the Bundesgerichtshof of 10 March 1958, volume 2, p. 209; judgment of the Bundesverwaltungsgericht of 3 May 1956, Entscheidungen des Bundesverwaltungsgerichts, volume 3, p. 258.

before the Commission itself had concluded its examination of them.

Taking first the remarks relating to the protection of undertakings by the Court, these are certainly irrelevant in so far as they refer to certain national systems (such as the German Law on cartels, according to which the fine provided for by paragraph 38 of the Law against restraints on competition can be imposed without prior notice, and such as the Netherlands law which provides for the suspension of cartels by ministerial order, against which no appeal lies), or in so far as the Commission attempts to describe other possible measures under Regulation No 17, which it says do not give a right to lodge an application in comparable situations. Leaving aside the fact that the German Law on cartels (Article 106) lays down a specific set of rules for the so-called 'Überläuferkartelle' (old cartels corresponding to our cartels existing at the moment when Regulation No 17 entered into force), the fact that Netherlands law limits the suspension of cartels to a period of three months (before the expiry of which it would not at all events be possible to give judgment on an application for annulment), leaving aside then these objections to the examples taken from national law, the decisive factor in the solution prescribed by the Community is that the system of Regulation No 17 provides for a *legal measure*, the notice under Article 15, as a necessary element which alters the legal position of the undertakings concerned. Furthermore it does not seem to me to be proved that in the different system outlined by the Commission for the purposes of its arguments (and according to which, before having received a *warning* from the Commission, undertakings could rely on the fact that they have not acted deliberately or negligently), the warning in question could never be considered as a measure which could be contested before the Court.

As regards protection by the Court it is indisputable that there are substantial reasons in favour of the right to institute proceedings against notices under Article 15 (6). On the one hand, according to the present practice of the Commission, it cannot be said that the procedure laid down for cartels could in principle be concluded before the Court had delivered judgment on applications relating to the contested notices, quite apart from the fact that during the course of the proceedings before the Court the President can issue interim measures which, where necessary, compensate for the point that applications to the Court do not have a suspensory effect. Therefore if the right to bring applications for annulment be conceded, undertakings can hope to know with certainty whether a notice given under Article 15 (6) is valid before the end of the procedure laid down for cartels. On the other hand if such a right were not admitted, undertakings could only submit to the jurisdiction of the Court notices given to them when such notices were followed at a later stage by a negative decision, and after the adoption of a decision imposing a fine on them, that is to say, after accepting considerable risks and conducting their affairs in a way other than that desired by the Commission. If, however, the undertakings obey the warning, that is to say, if they refrain from applying the agreement which must, it seems, be the rule because of the substantial risk of being fined, and which frequently amounts in practice, in particular where the agreement is suspended for a lengthy period, to the irrevocable dissolution of the agreement, then not only, should a positive decision be given later, will they have considerable difficulty in setting back in motion a marketing organization which they had to dismantle, but what is more, in order to claim redress for the damage caused to their interests, they are reduced to bringing an action for a wrongful act or omission (in accordance with Article

215 of the Treaty) which, for example from the point of view of the burden of proof, is extraordinarily difficult and often does not lead to recovery of the whole loss suffered.

Furthermore I was not impressed by the arguments of the Commission (particularly taking into account its practice hitherto) relating to certain alleged procedural disadvantages which the applicants' concept would imply and which would deprive the device constituted by the notice of its efficacy. I shall limit myself here—I shall come back to this question later—to pointing out that the special aspects inherent in the measure provided for by Article 15 (6) and more particularly its function, which is to replace interim measures, makes possible a reasonable interpretation of Regulation No 17 and other implementing regulations concerning cartel law, in accordance with which it is to a certain extent possible to depart from normal procedure. For example, at that stage in the procedure third parties concerned do not have to be heard, and similarly it seems possible not to consult the Advisory Committee or the national authorities concerned with cartels. However, as regards the hearing of the undertakings concerned themselves, the procedural rules in their present state (setting of a short time-limit, omitting oral hearing) leave enough room for discretion, so that there is little danger of the procedures being delayed to any appreciable extent. Moreover, the review by the Court of a preliminary measure does not hold up and does not influence the continuation of the main procedure laid down concerning cartels, since the decision of the Court on the legality of a contested notice does not prejudice the main questions in the procedure concerning cartels, any more than proceedings before the Court for the adoption of an interim measure prejudice the substance of the case.

Therefore, looking at Community law on cartels from an abstract point of view, I stand by my opinion that because of their legal content notices under Article 15 (6) of Regulation No 17 must be considered as decisions within the meaning of Article 189 of the Treaty and, accordingly, may be contested by individuals.

2. *Is there no decision in this case because essential procedural requirements and rules on competence are infringed?*

After these observations of principle, I must turn to the question whether the notices given in this case reveal such serious defects of form that it is impossible to speak of decisions, and that, therefore, the applications are inadmissible. Not only is this question familiar to us from national administrative law, but also it has been examined on several occasions in the case-law of the Court. The question suggests itself in this case because the Commission has expressly assured us that it did not intend to take a decision and that for this reason it omitted the usual formalities associated with a decision and with the notification of it.

Assuming that the applicants who did not receive the notice of the Directorate General for Competition dated 7 February 1966 were originally justified in wondering whether a measure really had been taken by the Commission or whether there was only an expression of intent on the part of the Directorate General for Competition (in view of the fact that the contested notice carried the signature of the Director-General for Competition), the proof has been given to us during these proceedings, with the help of the minutes of the 343rd meeting of the Commission, that, although it took place as part of the written procedure, there was indeed a decision of the Commission itself, acting on a proposal from the Chairman of the Working Party on Competition (contained in a note of the secretary of

the executive of 9 December 1965). At the same time this decision authorized the Chairman of the Working Party on Competition to have a notice under Article 15 (6) signed and sent by the Director-General for Competition. Thus at the most it can be asked whether this decision was correctly adopted and if notice of it was given in the prescribed form.

However, I shall not spend any more time on the question whether it is necessary for the text of a decision of the Commission to be drawn up by the Commission itself acting as a body and in the official languages, or whether the details of its drafting can be left to the departments of the Commission, that is to say, whether delegation is possible. While it may be true that there are good reasons for requiring the Commission to draw up the contents of its decisions in detail itself (because their legal effects may depend on the nuances of the drafting), nevertheless it may be wondered whether it is possible, where this principle is disregarded, (a principle laid down by the case-law of the Court—see Cases 23, 24, 53/63) to speak of a *serious* defect of form bringing about the *absolute nullity* of the measure (non-existence). Nor should we give further thought to the question whether the delegation of the drafting and notifying of decisions of the Commission is authorized by Article 27 of the Commission's rules of procedure of 9 January 1963 which reads: 'The Commission may . . . empower its officials to take in whole or in part measures necessary for implementing the decisions of the Commission', or whether—which is more likely—this provision only deals with the internal measures which may be naturally *inferred* from a decision every detail of which has been drafted by the Commission. In particular, as regards the problem which interests us here, our case-law has evolved certain criteria which, while they refer to the ECSC Treaty, may be considered as general principles applicable in the same way to the system set up by the EEC Treaty, and they make the solution of our problem relatively easy. I am not thinking of the judgment in Joined Cases 1 and 14/67, which has been cited several times during the course of these proceedings, and in which the Court, basing itself on a *failure to state reasons*, refused to admit the existence of a decision, because that judgment deals with the particular case of an *opinion under Article 54* of the ECSC Treaty as is shown by later case-law on the obligation to state reasons. I am thinking rather of the judgments in which the Court has insisted on the fact that it must be possible 'to identify . . . a decision, 'by its very form', that it must appear clearly from the measure itself, that it has been discussed and adopted by the competent authority acting as a body (describing it as a 'decision' is not what matters) and that it is especially necessary for the measure (as is also laid down by Article 12 of the Commission's rules of procedure) to be authenticated by the signature of one of the members of the competent body (Joined Cases 23, 24, 52/63; Case 54/65[1]). When a measure does not satisfy these conditions (the judgment delivered in Case 42/59[2] says that it must at least be signed *in the name and on behalf of* the competent body), no decision which can be contested before the Court has been taken. This is exactly what has happened in this case. Admittedly it is true that according to the wording of the contested notice: 'The Commission has subjected the agreement in question to a preliminary examination. *It* has reached the conclusion . . . *The Commission* hereby informs you of this in accordance with Article 15 (6) of Regulation No 17.

1 — Rec. 1963, p. 484 et seq.
2 — Rec. 1961, p. 142.

The Commission draws your attention to the fact . . .' (and this might appear as a reference to the decision of the Commission on which the notice was based). Nevertheless these statements only carry the signature of the Director-General for Competition without saying that he has acted in the name and on behalf of the Commission. The indispensable authentication given by the signature of a member of the Commission is therefore missing. According to the present case-law, and even if the formalistic approach which it expresses could be considered as severe, this omission compels us to deny the existence of a decision. Applying general principles of law (and not the provisions of the Commission's rules of procedure) we thus arrive at the conclusion, one which will satisfy the interest which the undertakings concerned have in knowing with certainty their legal position, that the applications must finally be dismissed as inadmissible on account of the absence of a measure which they can contest before the Court.

II — The substance of the cases

In view of this unequivocal conclusion I can confine myself to a brief subsidiary examination of the substance of the cases. In doing so I shall not deal with the fundamental criticism raised against the very system set up by Regulation No 17. Nor shall I go into the question whether the notified agreement does obviously infringe the rules of competition law as the Commission thinks on the basis of a preliminary inquiry. Nor shall I consider the alleged complaint that the applicants have been made the victims of unfair discrimination because of the serving of the notices. Nor shall I deal with the question whether the Commission was guilty of a misuse of powers in breaking off the negotiations which it had been conducting with the applicants for several months and in taking a unilateral measure in the context of the legal provisions concerning cartels. I shall only devote a few words to the defects of form and procedure alleged against the Commission.

In this connexion I am not thinking of the question whether the applicants have been properly heard, because we run into difficulties on this point when it comes to ascertaining what was the subject-matter of the various discussions. I have in mind rather the legal questions whether in this case the Commission could properly resort to the written procedure (in accordance with Article 11 of its rules of procedure), whether it was required to consult the Advisory Committee, and in particular whether it has satisfied the obligation to give reasons.

On the two first questions I have only the following brief points to make:

By reason of the special provisions laid down by the Commission's rules of procedure (distribution of a detailed checklist of points to be discussed and the possibility of objecting to the written procedure), I do not think that the written procedure for reaching decisions must be restricted to purely routine matters. At all events it does not seem that there is a misuse of the procedure when it is applied to the preliminary examination under the law on cartels which precedes the service of a notice under Article 15 (6). Furthermore, I have already stressed the point that by reason of the nature and the particular functions of a warning notice under Article 15 (6) it is not necessary to insist that the Advisory Committee be consulted before issuing the notice, because this might bring about an intolerable delay in the procedure on account of the formalities and time-limits applicable (Regulation No 17 and Regulation No 19). This opinion is shared by the Belgian applicants. Moreover it coincides with a sensible inter-

pretation of Article 10 of Regulation No 17.

As for the obligation of the Commission to state reasons for its measures, however, the criticism made by the applicants seems justified. This is true even if the urgent nature of notices under Article 15 (6) makes the obligation to state reasons less rigorous. As we know, the contested notices go no further than mentioning some of the clauses of the agreement and finding that Article 85 (1) is applicable and that an authorization under Article 85 (3) cannot be granted. But we do not find any special considerations on the different elements of Article 85 (1), nor any mention of the findings of fact (which admittedly are not always indispensable under our case-law, at least as regards Article 85 (1)). Nor do we find any explanation relating to Article 85 (3) (this is obviously because of the misguided notion that authorizations must always be refused when particularly serious infringements of Article 85 (1) are at issue). Nor, finally, do we find any explanation justifying the necessity of resorting to an urgent measure. Neither the explanations given during the course of the negotiations with the applicants, nor the press notice published during the month of January 1966, nor the letter addressed to the Belgian undertakings on 7 February 1966 (which, moreover, gives no further information) can make up for these omissions. Nor can they be excused by reason of the speed which accompanies the issue of an urgent measure under Article 15 (6). A particular reason for this is that before sending a notice, the Commission must at all events have reached a well-considered opinion and because, as I have already said in previous cases, the *mere pronouncement of this opinion* cannot appreciably delay the adoption of the measure.

Therefore, assuming that the contested notices were classified as decisions, and if the admissibility of the application were to be accepted, the notices should be annulled for disregard at least of the obligation to state the reasons on which a decision is based.

Moreover I would point out here that, taking a just view of the matter, even if the notices did not constitute decisions which could be contested but only procedural measures in the shape of a preliminary warning given to the undertakings, more explicit reasons than those given by the Commission would have to be required. Even then the notices could only fulfil their function, which is to show that the undertakings are not acting *bona fide,* if they had a certain persuasive force. This cannot be inferred solely from the fact that the measure emanates from high officials of the Commission or from the Commission itself. It needs the support of explicit arguments relating to the legal provisions on cartels. If, after refusing to accept that the notices are decisions, the Court had then to consider the notices during the course of proceedings relating to a decision imposing fines, there is no doubt that the Court would have to disregard them as having no legal significance: by reason of the failure to state reasons, they would be entirely lacking in any persuasive force.

III — Costs

Since my principle argument is that the applications are inadmissible in the absence of a correctly formulated decision, I shall say a last word on the question of the costs. While it is true that in my opinion the applicants must fail, as regards costs they nevertheless raise in their favour the fact that the notices of 3 January 1966 had the legal appearance of decisions and on this subject they refer to judgments given in comparable situations in matters concerning ECSC law.

In fact it seems proper to adopt the opinion of the applicants. Not only does

the wording of the notices of 3 January 1966 contain certain expressions which can give the impression that they are measures adopted by the Commission, but what is more the press-notice for the month of January 1966, the letter sent on 7 February 1966 to some of the applicants, and an objective interpretation of the system laid down by Regulation No 17 according to which a decision is necessary, are pointers in the same direction. Finally I might also bring to your attention the fact that this matter has not yet given rise to any case-law concerning the EEC Treaty, and that by reason of the considerable risk, created by the Commission's notices, of having fines imposed upon them, in the opinion of the applicants it was essential to elucidate this legal position. For this reason, but especially because, supposing that the applications were admissible, the Commission would fail on even the substance of the case, it seems right to make an order for costs against it.

IV — Conclusion

I am therefore of the opinion that :

By reason of the existence of serious defects of form, the contested measures are not decisions, and for this reason the applications must be dismissed as inadmissible. Nevertheless, in accordance with the case-law which has been developed on the subject of Article 69 (3) of the Rules of Procedure, the Commission should pay the costs.