OPINION OF ADVOCATE GENERAL TESAURO
delivered on 11 July 1995 *

1. In these appeal proceedings Rendo NV, Centraal Overijsselse Nutsbedrijven NV and Regionaal Energiebedrijf Salland NV, companies incorporated according to Netherlands law (hereinafter 'the appellants'), request the Court to set aside the judgment given by the Court of First Instance on 18 November 1992 in Case T-16/91 (hereinafter the 'judgment'). [1] In that judgment the Court of First Instance declared the action for annulment of Commission Decision 91/50/EEC of 16 January 1991 (hereinafter the 'decision') [2] inadmissible in part and dismissed it for the rest.

The case before the Court today forms part of a long and complex contractual and judicial series of events beginning more than six years ago, involving many parties and concerning the compatibility with the Treaty provisions on competition of the restrictions on imports and exports of electricity applicable in the Netherlands.

Facts and national legislation

2. In the Netherlands, electricity distribution is organized on three levels. The four producers supply regional distributors; these in their turn supply local distributors; these, finally, sell the electricity to the end consumers.

On 3 June 1949 the producers established an association of undertakings under the name of Samenwerkende Elektriciteitsproduktiebedrijven NV (hereinafter 'SEP'), [3] to which they entrusted the management of the high-voltage grid and transactions with foreign undertakings involving imports and exports of electricity.

3. On 22 May 1986 SEP entered into an agreement with its shareholders (the

* Original language: Italian.

1 — *Rendo and Others* v *Commission* [1992] ECR II-2417.

2 — Commission decision relating to a proceeding under Article 85 of the EEC Treaty (IV/32.732 — IJsselcentrale and Others; OJ L 28, p 32).

3 — Intervener in support of the Commission in these proceedings.

'Overeenkomst van Samenwerking', hereinafter 'the OVS agreement') which was not notified to the Commission. Under Article 21 of that agreement, SEP reserved the exclusive right to import and export electricity; furthermore its shareholders undertook to impose on their contracting parties, that is regional and local distributors, an express prohibition on imports and exports of electricity. [4]

The appellants are electricity distribution companies operating at local level who obtain their supplies from the regional distribution company, IJsselcentrale (which became in 1988 IJsselmij, hereinafter 'IJC'). With effect from 1985 IJC imposed on the appellants, in addition to an exclusive acquisition clause reinforcing the prohibition on imports under the OVS agreement, an extra cost equalization charge intended to cover the increased costs borne by IJC in providing electricity in rural areas which was not supplied by local and other regional distributors.

4. In 1988, following a dispute as to the lawfulness of that equalization charge, the applicants addressed a complaint to the Commission under Article 3 of Council Regulation No 17 [5] concerning the compatibility with the Community competition rules of the following restrictions: (a) the express prohibition on imports contained either in the OVS agreement and in a previous general SEP agreement of 1971; [6] (b) the exclusive purchasing requirement which also includes a prohibition on imports; (c) IJC's power unilaterally to fix prices and impose the equalization charge.

5. The Netherlands legislation applicable until 8 December 1989, [7] which was thus in force at the time when the OVS agreement was entered into, permitted those who had obtained prior authorization to import electricity. With effect from 1 July 1990, however, Article 34 of the new law on electricity (Elektriciteitswet of 1989, hereinafter 'ETW') reserved to SEP as the 'designated company', by ministerial decree under Article 8 of the ETW, the exclusive right to import electricity intended for public supply. [8] The same law also liberalized imports intended for private consumption whilst remaining silent on exports.

4 — Supplies with a maximum power of 5 000 kW and 15 kV voltage are exempt from that prohibition under Article 21(3) of the OVS agreement.

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

6 — The SEP general agreement of 1971, wholly replaced by the OVS agreement, contained analogous provisions.

7 — Date of the entry into force of the majority of the provisions of the new law on electricity referred to in the text below.

8 — Except electricity of under 500 volts.

The Commission decision

6. On 16 January 1991 the Commission adopted the contested decision in which it stated that it was referring merely to the restrictions on imports and exports of electricity provided for in the agreement, to the exclusion of any assessment of the extra cost equalization charge (deemed not to have any effect on intra-Community trade). The decision found that:

— Article 21 of the OVS agreement restricted competition within the meaning of Article 85(1) of the Treaty and continued to do so notwithstanding the regime introduced by the ETW; [9]

— in the *non-public* supply sector, although the application of the competition rules did not prevent SEP from correctly performing the service of general interest with which it was entrusted, the contested restrictions affected trade to an extent contrary to the interests of the Community. Consequently, the criteria for the application of Article 90(2) of the Treaty were not satisfied; [10]

— as regards *public* supply, since the prohibition on imports is now laid down in Article 34 of the ETW the assessment of the lawfulness of such prohibition presupposes a prior examination of the compatibility of the national legislation with Community law, to be conducted in the context of an appropriate procedure. [11]

7. On the one hand, then, the decision clearly finds in the operative provision that Article 21 of the OVS agreement is incompatible with the Treaty in so far as it restricts imports in the *non-public* supply sector. On the other hand, it reserves for infringement proceedings an examination of the restrictions introduced *subsequently* to the adoption of the ETW in the *public* supply sector, whilst making no reference to the alleged restrictions relating to the *preceding* period.

8. By letter of 20 November 1991, the Commission informed the appellants of its intention to initiate infringement proceedings in connection with the matters complained of. It further took the opportunity to specify the scope of the decision adopted confirming that the cost equalization charge was not material from the point of view of

9 — Paragraphs 21-38 of the decision.

10 — Paragraphs 39-48 of the decision.

11 — Paragraph 50 of the decision.

Community law and defining the decision itself as a partial rejection of the complaint as regards restrictions on imports of electricity in the public supply sector in the period *prior* to the entry into force of the ETW. [12]

On 13 June 1994 the Commission lodged an application under Article 169 of the Treaty for a declaration by the Court that, by granting exclusive rights to import electricity in the public supply sector, the Kingdom of the Netherlands had infringed its obligations under Articles 30 and 37 of the Treaty. Those proceedings are at present still pending. [13]

The judgment of the Court of First Instance

9. By application lodged on 14 March 1991 the appellants requested the Court of First Instance, *inter alia*, to annul the decision in so far as the Commission did not rule on the application of Article 21 of the OVS agreement to imports and exports by the distribution companies in the *public* supply sector.

10. In its judgment which forms the subject-matter of these appeal proceedings, the Court of First Instance declared the action inadmissible in part and dismissed it for the rest.

More specifically, it found that the Commission did not in fact rule on the prohibition on imports with regard to the *public* supply sector in the period *prior* to the entry into force of the ETW, and held that there was in this regard no act amenable to challenge under Article 173; it therefore declared the action inadmissible in regard to that aspect. [14]

As regards the part of the decision in which the Commission stated that it did not intend to rule on the period *subsequent* to the entry into force of the ETW, the Court of First Instance found that it was capable of producing legal effects and of affecting the rights of the defence of the appellants. Consequently, it declared the application admissible to that extent. [15]

11. As to the substance, the Court of First Instance considered that the application was essentially based on three distinct allegations: (a) infringement of Community competition

12 — The appellants also challenged that letter before the Court of First Instance. By order of 29 March 1993 in Case T-2/92 (*Rendo and Others* v *Commission*, not published in the European Court Reports) those proceedings were declared inadmissible because they were directed against an act which was not in the nature of a decision and was therefore not capable of producing legal effects.

13 — Case C-157/94 *Commission* v *Netherlands*.

14 — Paragraphs 58-62.

15 — Paragraphs 44-57.

law and of certain general legal principles; (b) infringement of the duty to provide a statement of reasons; (c) infringement of essential procedural requirements, in particular the obligation on the Commission to fix a time-limit for the complainant to submit comments in writing, where the complaint is dismissed. [16]

On the first plea, in particular concerning the failure by the Commission to rule on the permissibility of import restrictions under Article 90(2) of the Treaty, the Court of First Instance pointed out in the first place that the Commission is not *obliged* to adopt a decision requiring the undertakings to bring to an end infringements which it has found, though it *may* do so. Likewise, Article 3(2) of Regulation No 17 does not give an applicant under that article the right to obtain a decision as to whether or not the alleged infringement exists. [17]

12. According to the Court of First Instance, an obligation in that connection could be envisaged only if the subject-matter of the complaint fell within the exclusive purview of the Commission. On the other hand, under the Court's more recent case-law, [18] it is also for the national court to assess whether anti-competitive practices by an undertaking entrusted with the operation of a service of general economic interest may be justified under Article 90(2) of the Treaty.

13. Recalling the discretionary power enjoyed by the Commission in regard to procedures relating to complaints by individuals under Article 3 of Regulation No 17, the Court of First Instance went on to assess whether the Commission had exercised that discretion without committing an error of law or of fact or a manifest error of assessment.

In that regard, the Court of First Instance found that the import prohibitions laid down in Article 21 of the OVS agreement and in Article 34 of the ETW are, albeit with certain differences of little importance, capable of producing the same effects. It followed, according to the Court of First Instance, that the Commission was right to decide that an examination of the compatibility of the national law with Community law ought to precede any examination of the OVS. On the one hand, the Commission cannot require undertakings to engage in

16 — Article 6 of Regulation No 99/63/EEC of the Commission of 25 July 1963 on the hearings provided for in Article 19(1) and (2) of Council Regulation No 17 (OJ, English Special Edition 1963-1964, p. 47).

17 — Paragraph 98 in which reference is made to the judgment in Case 125/78 *GEMA* v *Commission* [1979] ECR 3173.

18 — See the judgment in Case C-260/89 *ERT* [1991] ECR I-2925 and the judgment in Case 66/86 *Ahmed Saeed* [1989] ECR 803, referred to by the Court of First Instance.

conduct which is contrary to a national law without expressing a view as to its compatibility with Community law. Secondly, for those purposes, the Commission has a more suitable procedure available to it, namely that provided for in Article 169 of the Treaty. [19]

14. According to the Court of First Instance, that conclusion does not prejudice the judicial protection of the complainants under Regulation No 17. The complaint, which has not been dismissed but is still pending before the Commission, could be reactivated by the appellants should the Article 169 procedure lead to results which they regard as unsatisfactory.

Though recognizing that in such a case the exercise of the rights of the defence of the appellants will be subject to considerable delay, the Court of First Instance considered that to be an inevitable consequence in this case of the fact that, for the reasons set out above, the proceedings under Article 169 of the Treaty had to take precedence over the procedure under Article 3 of Regulation No 17. [20]

15. The Court of First Instance stated that the Commission, though refraining from ruling on the permissibility of the restrictions at issue under Article 90(2) of the Treaty, did not commit any error of law or of fact or a manifest error of assessment, dismissed as unfounded both the second and third pleas raised by the appellants which are not under appeal, and accordingly concluded by dismissing that part of the action which it had declared admissible.

The *Almelo* judgment

16. In the context of the same matter concerning an appeal lodged by the appellants against an arbitration award dismissing claims similar to those relevant in this case, the Netherlands court requested the Court to give a preliminary ruling on the compatibility with Articles 37, 85, 86 and 90 of the EEC Treaty of a prohibition on imports of electricity *for public supply* contained in the general conditions of sale of a regional electricity distribution company for the years 1985 to 1988, possibly in conjunction with a prohibition on imports contained in an agreement between national producers.

It will be recalled that in its judgment of 27 April 1994, [21] the Court held: (a) a clause prohibiting a local distributor from importing electricity for public supply purposes to

19 — Paragraphs 102-107.

20 — Paragraph 111.

21 — Case C-393/92 *Almelo* [1994] ECR I-1477.

be contrary to Article 85 of the Treaty; (b) an exclusive purchasing clause which is imposed by a regional electricity distributor belonging to a group of undertakings occupying a collective dominant position and which prohibits imports to be contrary to Article 86 of the Treaty; (c) the national court competent to consider whether the preconditions required for the application of Article 90(2) of the Treaty are fulfilled.

The appeal against the judgment

17. By document lodged on 21 January 1993 the appellants appealed against the judgment to the Court of Justice requesting the latter: (a) to set aside the judgment; (b) partially to annul the decision in conformity with the original action before the Court of First Instance or, in the alternative, to refer the case back to the Court of First Instance for judgment to be given on whether the decision should be partially annulled; (c) to order the Commission and/or the intervener to pay the costs of the proceedings before the Court of First Instance and order the Commission to pay the costs relating to the procedure before the Court of Justice. [22]

22 — The procedure remained suspended at the request of the appellants pending delivery of the judgment in the *Almelo* judgment, cited above, and was reactivated, again on the initiative of the appellants, only in January 1995.

The appellants' interest in bringing the proceedings

18. Though raising no formal objection, the Commission evinced certain doubts as to the appellants' interest in bringing the proceedings. Essentially, according to the Commission, the *Almelo* judgment gave full satisfaction to the appellants' claims, holding the contested restrictions to be incompatible with the Treaty also in regard to the *public* supply sector on which the decision had refrained from giving a ruling.

In any event, moreover, the Commission points out that the restrictions in question have not yet occasioned any damage to the appellants, and are not likely to do so in the future, since the appellants have never operated in the sector of electricity imports and would have nothing to gain from doing so given the lower level of Netherlands tariffs in relation to those prevailing in neighbouring countries.

19. It should be observed straight away that, even in the absence of an express objection, the Court may of its own motion take cognizance of the absence of any interest on the part of the appellants in bringing the proceedings, and declare the action inadmissible. [23]

23 — See, in this connection, the judgment in Case 134/87 *Vlachou* [1987] ECR 3633.

However, in order to refute a party's interest in appealing against a judgment of the Court of First Instance in which it was unsuccessful within the meaning of the second paragraph of Article 49 of the Protocol on the Statute of the Court, there would have to be a new fact producing legal effects of such a nature as to deprive the Court's judgment of its effectiveness.

20. I do not consider that such significance may be attributed to the *Almelo* judgment. On the one hand, that judgment expressly concerns only the restrictions resulting from the OVS agreement, thus relating to a specified period, and does not concern the restrictions currently contained in the ETW which are the subject of infringement proceedings still pending.

On the other hand, the judgment at issue was given in the context of a reference for a preliminary ruling on a question of interpretation and, consequently, the value of the ruling is limited from a formal point of view to the main proceedings alone. To attach to that kind of ruling the significance inferred by the Commission would be tantamount to giving to it the force of *res judicata* not provided for in the Treaty.

It follows that the *Almelo* judgment, though providing further elucidation in some respects of the matter at issue, cannot constitute an alternative to a decision under Article 3 of Regulation No 17 sought by the appellants, which forms the subject-matter of separate, independent proceedings.

21. As regards the fact that the appellants are alleged not to have suffered damage from the restrictions at issue since they have never operated in the import sector, that does not seem to me at this stage of the procedure to be capable of depriving the appellants of an interest in challenging the judgment.

That circumstance predated the events material to this case, whose relevance for the purposes of determining the existence of an interest in bringing the proceedings ought possibly to have been considered by the Court of First Instance. None the less, it cannot be deemed by the Court of Justice to be a new fact capable of rebutting the presumption of an interest in bringing the proceedings which enures for the benefit of one of the parties to the proceedings in regard to a judgment in which that party has been unsuccessful.

Substance

22. The appellants rely on three grounds of appeal based on an infringement of Community law by the Court of First Instance, in particular of Articles 85(1), 90(2) and 190 of the Treaty.

First, the appellants challenge the legal classification by the Court of First Instance of that part of the decision which contains no reference to restrictions on imports of electricity in force in the period *prior* to the entry into force of the ETW in the public supply sector. By declaring the action inadmissible on this point owing to the non-existence of an actionable decision within the meaning of Article 173 of the Treaty, the Court of First Instance is alleged to have misdirected itself in the classification of that decision.

In support of that argument, the appellants rely on the interpretation of the decision given by the Commission itself which, as pointed out by the Court of First Instance as well, intended, by refraining from giving a ruling, partially and by implication to reject the complaint on this point.

23. In my view, the submission is well founded.

As a preliminary matter I would point out that, as maintained by the Commission in these proceedings (reversing, moreover, the interpretation of the decision which it initially proposed before the Court of First Instance), the legal classification of an act by its author cannot escape the two-tiered judicial review of the Community judicature.

By considering that that part of the decision which refrains from ruling on one of the three grounds relied upon by the appellants under Regulation No 17 did not constitute an actionable decision within the meaning of Article 173 of the Treaty and by declaring on that ground the action brought by the appellants to be inadmissible in that respect, the Court of First Instance disregarded the principle of the protection of the rights of the complainant, as interpreted by the Court of Justice and by the Court of First Instance itself.

24. In *Automec II*, [24] for example, the Court of First Instance, amplifying the principles already contained in the Court's existing case-law, held that, in the context of Regulation No 17, although the Commission is not obliged to adopt a decision finding an infringement of the competition rules or to investigate the complaint, it is nevertheless obliged to examine closely the factual and legal arguments put forward by the complainant in order to verify the existence of any anti-competitive conduct. Where the file on a complaint is closed, moreover, the Commission is obliged to provide a statement of reasons in order to enable the Court of First Instance to verify whether or not it erred in fact or in law or was guilty of a misuse of powers.

In order to provide for specific protection of the rights of the complainant, therefore, the

24 — Judgment in Case T-24/90 *Automec* [1992] ECR II-2223.

Court of First Instance reserved the right to exercise a judicial review of the reasons underlying a decision taken by the Commission to close the file in order to verify whether it satisfies the requirements of Article 190 of the Treaty. This must apply *a fortiori* in a case where there is no statement of reasons whatsoever.

25. It is true that when the Commission omits to rule on the complaint in its entirety, the complainant is afforded the remedy of an action for failure to act. The aim of that remedy, however, is to require the Commission to adopt a definite position in a context entirely different to the situation now before the Court.

The present case is concerned with an act whose nature as a definitive decision is not open to discussion, as is borne out by the declaration of the Court of First Instance that other parts of the action for annulment brought by the appellants are admissible. Very simply, then, it is an act which refrains from ruling on one of the three points on which the appellants had based their complaint.

26. I do not consider, as the Commission now seems to be maintaining, that by its silence it sought to reserve its right to rule on the matter or to await subsequent proceedings of another kind, as it did in the case of the restrictions relating to the period *subsequent* to the entry into force of the ETW which it reserved the right to assess in the context of infringement proceedings. In fact such a postponement would not have been justified.

Failing any other indication, therefore, the failure to rule on an aspect of the complaint must be interpreted as a *partial* and *implied* rejection thereof.

27. The remedy available to the complainant in such a case is an action for annulment of the act in the context of a review of legality under Article 173.

However, I would rule out as a solution an action for failure to act brought solely with reference to the aspect on which the Commission did not rule. On the one hand, as I have indicated, an action for failure to act is designed to secure a decision by the Commission, whereas in the case before the Court the Commission has already adopted a definitive position on the matter.

28. On the other hand, in a case such as this, such a solution would oblige the appellants

to bring two separate actions, one for annulment, the other for failure to act, both having the same subject-matter: the alleged failure by the Commission to uphold a complaint under Regulation No 17 in the terms in which it was formulated. That would not be sufficient to guarantee the rights of the complainant and at the same time would be contrary to the requirements of procedural economy.

It seems to me, therefore, that to accept the legal classification given to the Commission decision by the Court of First Instance and, consequently, to deem it to be a *non-act* in regard to the part of the complaint on which no ruling was given, would deprive the appellants at least in part of their rights under Regulation No 17, or at least would make the exercise of those rights extremely difficult.

29. Those considerations, moreover, are confirmed by recent case-law of the Court of First Instance itself. I refer in particular to the *BEMIM* judgment, [25] in which the Court of First Instance, giving judgment in a case analogous to the present one, came to the opposite conclusion to that which it arrived at in the judgment now under appeal. In that case the applicant had lodged a complaint under Regulation No 17 consisting of three points, on one of which the Commission had refrained from ruling.

30. In an action for annulment brought by the applicant on the basis, *inter alia*, of the lack of a statement of reasons for the decision, the Court of First Instance, without evincing any doubt as to the admissibility of that plea, examined the decision in the light of that submission and found in fact that it did not comply with the requirements of Article 190 of the Treaty. Consequently, it upheld the action and partially annulled the decision.

With regard to the point under discussion in this context, therefore, the case-law of the Court of First Instance itself is not without a certain ambivalence.

31. Moreover, on the merits, the principle laid down by the Court of First Instance in the *BEMIM* judgment, and above all the consequences which could flow from the application of that principle, do not strike me as altogether convincing.

There is, in my view, a risk that if the *BEMIM* judgment is applied without the necessary rigour the end result will be to contradict that which has on several occasions been affirmed by the Court and reaffirmed by the Court of First Instance, namely that the Commission in proceedings under Regulation No 17 is under no duty, in

25 — Judgment in Case T-114/92 *BEMIM* [1995] ECR II-147.

stating the reasons for the decisions it takes in order to ensure compliance with the competition rules, to adopt an attitude on all the arguments which the interested parties may raise in support of their application; it is sufficient that it should set out the facts and the legal considerations having decisive importance in the context of its decision. [26]

32. But there is also a risk of negating the very spirit of the *Automec* decision which, although systematically seeking to identify the rights of the complainant under Regulation No 17, did not call in question the principle established by the Court, and now accepted as settled, pursuant to which the rights of the complainant are always more circumscribed in scope than those of the undertaking which is subject to the procedure. [27]

In that connection I consider that the Court may take this opportunity to restate quite clearly the respective roles which the Commission (under Articles 89 and 155 of the Treaty) and the complainants (under Regulations No 17 and No 99/63) are called upon to play with regard to the rules on competition: the complainants submit the *facts* and are at liberty to suggest legal interpretations thereof. However, the legal classification of those facts remains a matter for the Commission subject to judicial review by the Community judicature in the event of a dispute.

33. In the final analysis, reverting to the case now before the Court, I consider that the omission by the Commission to give a ruling on one of the three heads of the complaint must be deemed to be an implied and partial rejection which the appellants were entitled to submit to the Court of First Instance for judicial review. The action for annulment against that rejection, should, therefore, have been declared admissible. It follows that the first ground of appeal is well founded.

34. Moreover, in my view, once the judgment has been set aside on that point the conditions are satisfied for the Court of Justice to rule on the merits without referring the case back to the Court of First Instance.

The state of the proceedings allows the Court of Justice itself to give final judgment on the merits of the first head of claim submitted by the appellants to the Court of First Instance and specifically to declare it unfounded.

26 — Judgments of the Court in Case 55/69 *Casella* v *Commission* [1972] ECR 887, and in Case 56/69 *Hoechst* v *Commission* [1972] ECR 927; as well as judgments of the Court of First Instance in Case T-44/90 *La Cinq* [1992] ECR II-1, and in Case T-7/92 *Asia Motor* [1993] ECR II-669. The *BEMIM* judgment reaffirms that principle as a premiss of its reasoning.

27 — Judgment in Joined Cases 142/84 and 156/84 *BAT* v *Reynolds* [1987] ECR 4487.

35. The head of claim concerned conduct found to exist prior to the entry into force of the ETW, on which the Commission had refrained from ruling. The alleged anti-competitive nature of that conduct, however, was of no relevance at the time when the decision was adopted, primarily because, as is not disputed, the appellants suffered no indemnifiable damage from it. [28]

Besides, the Commission is at liberty to establish the level of priority to be accorded to each procedure on the basis, *inter alia*, of the Community interest in that procedure. [29] It decided in this case to focus its investigation and decision on the restrictive effects which the OVS agreement was capable of causing at the time when the ETW was in force, and rejected the allegations made by the appellants concerning the restrictive effects caused by earlier conduct. The allegation as to the abstention from ruling on that conduct was therefore unfounded.

36. In conclusion, I consider that the Court should declare the first ground of appeal well founded and thus set aside the judgment of the Court of First Instance to the extent to which it declared the appellants' first head of claim against the decision inadmissible, but at the same time hold that head of claim to be unfounded.

37. I turn now very briefly to the other two grounds of appeal raised by the appellants.

In their second ground of appeal the appellants claim that the Court of First Instance did not comply with the obligation to provide a statement of reasons laid down in Article 190 of the Treaty. By declaring that complainants under Regulation No 17 are entitled to a definitive decision by the Commission finding an infringement only when the subject-matter of the complaint comes within the exclusive purview of the Commission and, in accordance with the Court's case-law, denying exclusive competence to the Commission with regard to the application of the *first sentence* of Article 90(2) of the Treaty, the Court of First Instance failed to take into consideration the existence and scope of the *second sentence* of Article 90(2).

It would seem, therefore, that the appellants are attributing exclusive competence to the

28 — The only damage which the appellants claimed to have suffered in the period prior to the entry into force of the ETW resulted from the payment of the equalization charge which the Commission considered not to have any appreciable effect on intra-Community trade.

29 — See, for example, the *Automec II* judgment, cited above.

Commission as regards the application of the second sentence of Article 90(2) from which their right to obtain a decision stems, in accordance with the conditions laid down by the Court of First Instance itself. Accordingly, the fact that the latter did not examine that question in depth is said to amount to a defect in the statement of reasons.

38. The plea must be rejected, in my view, since it is based on an erroneous reading of the judgment. It is true that the judgment expressly mentions only the first sentence of Article 90(2) of the Treaty; it is also true, however, that there is no evidence to suggest that, by omitting to refer to the second sentence of the same article, the Court of First Instance sought to distance itself from the interpretation commonly given of Article 90(2) in its entirety.

Indeed, on several occasions the Court has ruled that national courts are competent to assess whether instances of anti-competitive conduct by an undertaking entrusted with the operation of a service of general economic interest may be justified by the specific tasks entrusted to the undertaking. [30] In upholding that principle the Court has never drawn a distinction between the first and second sentences of Article 90(2).

I consider therefore that the reference to the first sentence of Article 90(2) alone is to be regarded as a matter of drafting rather than as a failure to examine a point which might have led the Court of First Instance to take a different view.

39. In their last submission, the appellants claim that the Court of First Instance did not provide a sufficient statement of reasons for endorsing the Commission's view of the priority to be accorded to the Article 169 procedure as opposed to the procedure under Regulation No 17, although it acknowledged that in such a case the exercise of the complainant's rights would be subject to delay.

That submission, too, is unfounded. Far from establishing any general procedural hierarchy, the Court of First Instance merely considered that in the present case the anti-competitive situation complained of by the appellants could be better assessed in the context of infringement proceedings under Article 169, particularly since the alleged restrictions had now acquired a legislative basis.

30 — See, for example, in addition to the judgments mentioned by the Court of First Instance (*ERT* and *Ahmed Saeed*, cited above), the *Almelo* judgment.

40. Moreover, as already stated, the Court of First Instance gave express and detailed reasons for its choice, namely: (a) the impossibility of ordering the undertakings subject to the proceedings to bring an end to any infringement found, when such infringement is imposed by a national law whose compatibility with Community law has not yet been assessed; (b) the need to allow the State concerned to submit its observations when the validity of national legislation is at issue; (c) the primary and exclusive competence of the Court in default proceedings against a Member State.

Accordingly, it is evident that the Court of First Instance did provide a sufficient statement of the reasons for its judgment on this point in accordance with the requirements of Article 190 of the Treaty.

41. As regards costs, finally, the upholding of the first ground of appeal in these proceedings does not substantially alter the position of the appellants who in the end have been unsuccessful before the Court of First Instance and before the Court of Justice. I consider therefore that they should be ordered to pay all of the costs including those of the appeal proceedings.

42. In the light of the foregoing observations, I therefore suggest that, in response to the appeal brought by the appellants, the Court should:

(1) Uphold the first ground of appeal and consequently: (a) set aside the judgment of the Court of First Instance to the extent to which it declared inadmissible the first head of claim submitted by the appellants against Commission Decision 91/50/EEC of 16 January 1991; and (b) declare the original head of claim unfounded.

(2) Dismiss the remainder of the appeal.

(3) Order the appellants to pay the costs, including those of the appeal proceedings before the Court of Justice.