2. Reserves the costs.

Mertens de Wilmars Pescatore O'Keeffe

Everling Mackenzie Stuart Bosco Koopmans

Due Bahlmann Galmot Kakouris

Delivered in open court in Luxembourg on 4 October 1983.

For the Registrar

H. A. Rühl

Principal Administrator

J. Mertens de Wilmars

President

OPINION OF MRS ADVOCATE GENERAL ROZÈS DELIVERED ON 31 MAY 1983 [1]

Mr President,
Members of the Court,

This action is brought under the second paragraph of Article 173 of the Treaty by the EEC Seed Crushers' and Oil Processors' Federation (Fediol) (hereinafter referred to as "the Federation"), which has its registered office in Brussels, for a declaration that a decision alleged to have been contained in a letter of the Commission of 25 May 1982 refusing to initiate an anti-subsidy

1 — Translated from the French.

proceeding in respect of imports of soya-bean oil-cake from Brazil, is void.

I — The facts of the dispute are as follows:

At the beginning of 1977 the applicant, which is an association representing the oil processing industry in the European Economic Community, submitted to the Commission, on behalf of all the undertakings in the Community processing soya seeds, an initial complaint against Brazil in relation to the grant of an export subsidy in respect of soya-bean oil-cake. According to a notice of 14 April 1977 [1] that complaint resulted in the initiation of the anti-dumping or anti-subsidy procedure concerning imports of soya-bean oil-cake from the Federative Republic of Brazil in accordance with Regulation (EEC) No 459/68 of the Council of 5 April 1968 on protection against dumping or the granting of bounties or subsidies by countries which are not members of the European Economic Community, [2] as in force at that time. By a notice of 10 December 1977 [3] the Commission indicated that the procedure had been terminated after undertakings had been received from the Brazilian Government which satisfied the Commission that the introduction of protective measure was unnecessary at that time.

Towards the middle of 1978 the Federation, suspecting that the practice of granting subsidies had not ceased, requested the Commission to re-open the anti-subsidy procedure concerning imports of the soya-bean oil-cake from Brazil in pursuance of Article 14 (2) of Regulation No 459/68. The Commission, however, decided not to do so and the 1978 exporting season for oil-cake had come to an end.

By reason of the abundant harvest expected for 1980, the failure to terminate the payment of export subsidies and the introduction of new subsidies the Federation, by letter of 2 April 1980, once more requested the Commission, pursuant to Article 5 (1) of Council Regulation (EEC) No 3017/79 of 20 December 1979 [4] to initiate the anti-subsidy procedure against the Federative Republic of Brazil. That complaint, like the first one, was in respect of the direct or indirect grant of production and export subsidies for soya-bean oil-cake. It referred to numerous matters alleged to prove the existence of such subsidies and to the existence of injury thereby caused to the Community oil-processing industry. In particular the Federation requested that in the context of the anti-subsidy procedure Brazil should be invited in writing to give particulars of the nature, extent and amount of all direct or indirect subsidies granted to the Brazilian oil-processing industry.

The Commission and the applicant then exchanged copious correspondence and oral and written statements of their views. In particular the applicant supplemented the statement of facts and law in its complaint by a number of observations each of which was intended

1 — Official Journal C 89, p. 7.

2 — Official Journal, English Special Edition 1968 (I), p. 80.

3 — Official Journal, C 298, p. 2.

4 — On protection against dumped or subsidized imports from countries not members of the European Economic Community.

to establish the new practice followed by Brazil in respect of the grant of subsidies and the existence of injury. In addition the Commission conferred with the Member States and with Brazil.

As the Commission still felt unable to initiate the anti-subsidy procedure, the Federation, by letter of 30 September 1981, formally requested it, with reference to the second paragraph of Article 173 of the Treaty, to adopt an immediate decision in respect of its request that such a procedure should be initiated.

By a telex message of 4 December 1981 the Commission informed the Federation that, in view of the fact that Brazil had announced that the sale of soya seed would be completely open in respect of the 1982/83 season, it had decided not to act on its request for the time being.

By registered letter of 5 February 1982 the Commission stated that, after detailed examination of the applicant's request and following consultations with the Brazilian Government, it did not intend to initiate the anti-subsidy procedure since the contested subsidies had to all intents and purposes been withdrawn and their total impact was insufficient to justify initiation of the procedure. By the same letter the Commission set a time-limit for the applicant to submit its comments.

Finally by letter of 25 May 1982 the Commission informed the Federation that the supplementary observations which it had submitted in the meantime were not such as to cause it to alter the view which it had expressed in its letter of 5 February 1982. Consequently and in pursuance of Article 5 (5) of Council Regulation No 3017/79 the applicant was informed that the anti-subsidy procedure in respect of imports of soya-bean oil-cake from Brazil would not be initiated. The Commission added that it would continue to watch subsequent developments in the situation in that sector carefully since the course of Brazilian policy in credit matters gave rise to concern as regards both the periods of payment and the rates.

By an application lodged in the Court Registry on 29 July 1982 the Federation sought a declaration that the "decision" contained in the Commission's letter of 25 May 1982 refusing to initiate the anti-subsidy procedure, was void.

Pursuant to Article 91 (1) of the Rules of Procedure the Commission now requests the Court to give a preliminary decision that the application is inadmissible. The applicant, on the other hand, claims that the objection of inadmissibility should be dismissed. As the oral procedure was concerned solely with considering the question of the admissibility of the action, my opinion will relate only to that question.

II — 1. The applicant's capacity to institute proceedings

Proceedings may be brought under the second paragraph of Article 173 by "any natural or legal person". According to Belgian law the Federation is an association devoid of legal personality; the question therefore arises whether it has the capacity to institute proceedings. As the applicant and the Commission emphasize, in applying a theory based on the reality of the organization's position or on its functions,[1] reference must not be made to formal legal personality, but

1 — Judgment of 8 October 1974 in Case 18/74 *Syndicat Général du Personnel des Organismes Européens* v *Commission of the European Communities* [1974] ECR 933; Judgment of 28 October 1982 in Case 135/81 *Groupement des Agences de Voyage* v *Commission* [1982] ECR 3799.

inquiry must be made as to whether the association in question is recognized by the law and endowed with certain powers to fulfil the duties given to it. Under Regulation No 3017/79 a number of powers of a procedural nature are granted not only to natural and legal persons but also, in express terms, to associations which, while not possessing legal personality, operate in the context of one economic sector of the Community; it must therefore be concluded that such associations do have the capacity to institute proceedings in order to protect such specific procedural interests.

2. Whether the disputed letter is to be regarded as a measure adopted by the Commission

The letter of 25 May 1982, signed by a director of the Commission's Directorate General for External Relations, states expressly that "the Commission" will not initiate a procedure in respect of imports of soya-bean oil-cake from Brazil. Consequently that letter, based expressly on Article 5 (5) of Regulation No 3017/79, must be attributed to the Commission in its capacity as an institution. On that point both parties are in agreement.

3. Whether the Commission's letter of 25 May 1982 amounts to a "decision addressed to" the applicant within the meaning of the second paragraph of Article 173 of the Treaty

According to the Commission an action is always inadmissible unless the communication is a *decision* addressed to the applicant within the meaning of the second paragraph of Article 173 of the Treaty. In support of its contention the Commission maintains that the communication addressed to the Federation amounts simply to the transmission of the information required by Article 5 (5) of Regulation No 3017/79 and does not contain any "other decision" of wider scope. The transmission of such information certainly amounts to a declaration of the Commission's intention not to initiate an official proceeding under Article 7 of the regulation at that time but it does not amount to a decision in respect of which an action may be brought within the meaning of the second paragraph of Article 173. Even though there is no doubt that the interests of the complainant are affected by such a communication the fact nevertheless remains that the circumstance cannot be considered as altering the complainant's legal position at that stage to such an extent as to acknowledge that it has a right, capable of being asserted at law, to the initiation of an official investigation. Such a right cannot be acknowledged, if only because the decision to institute such a proceeding must also take into account the interests of the Community, which therefore has a discretion which is not subject to review by the Court.

(a) It is necessary to consider first whether the letter in dispute should be regarded as a decision within the meaning of the second paragraph of Article 173, which is the view taken by the applicant, or whether it merely imparts information within the meaning of Article 5 of Regulation No 3017/79 so that no action may be brought in respect of it.

In the judgment in the *IBM* case [1] the Court repeated in summary form the conditions which must be fulfilled to establish a decision capable of being the subject-matter of an action within the

1 — Judgment of 11 November 1981 in Case 60/81 *International Business Machines Corporation* v *Commission* [1981] ECR 2639.

meaning of the second paragraph of Article 173 of the Treaty. It stated first that proceedings may be brought for a declaration that acts of the Council and the Commission other than recommendations or opinions are void. It went on to state that that remedy is available in order to ensure, as required by Article 164, that in the interpretation and application of the Treaty the law is observed, and it would be inconsistent with that objective to interpret restrictively the conditions under which the action is admissible by limiting its scope merely to the categories of measures referred to in Article 189. Thirdly it emphasized that the form in which such acts or decisions are cast is, in principle, immaterial as regards the question whether they are open to challenge, but that it is necessary, on the contrary, to look to their *substance*. In that respect the Court recalled that any measure the legal effects of which are binding on, and capable of affecting the interests of the applicant by bringing about a distinct change in his legal position is an act or decision which may be the subject of an action under Article 173 for a declaration that it is void. In the case of acts or decisions adopted by a procedure involving several stages, in particular where they are the culmination of an interim procedure, the Court went on to state that in principle an act is open to review only if it is a measure *definitively* laying down the position of the Commission or the Council on the conclusion of that procedure and not a provisional measure intended to pave the way for a final decision. It added that it would be otherwise if the measures adopted in the course of the preparatory proceedings were themselves the culmination of a special procedure distinct from that intended to permit the Commission or the Council to take a decision on the substance of the case.

On the basis of those criteria the Court decided that an application made by IBM for a declaration that the initiation of a proceeding under Article 3 of Regulation No 17 concerning restrictive agreements [1] and the statement of objections attached to it pursuant to Article 2 of Regulation No 99/63 [2] were void, was inadmissible. In doing so the Court emphasized that the measures in question adopted by the Commission could not be the subject of an action as they were purely measures of a preparatory character on account in particular of the fact that any legal defects therein might be relied upon *later in an action directed against the definitive act* for which they represented a preparatory step.

Applying those criteria to these proceedings I note first that it is immaterial whether the contested letter is a decision within the meaning of the fourth paragraph of Article 189 of the Treaty and that its form is irrelevant. It is also unnecessary to inquire whether, as is contended by the applicant, the decision contained in the letter might not be based on Article 5 (5) of Regulation No 3017/79 according to which, where it becomes apparent after consultation that the complaint does not provide sufficient evidence to justify initiating investigation, the complainant is to be so informed: that it is a question of substance which cannot therefore affect the admissibility of the action. Viewed in that light the relevant question is whether the letter, as a measure adopted by the Commission, has *binding legal effect*.

The applicant and the Commission are at one in accepting that it does *not* follow

1 — Official Journal, English Special Edition 1959-62, p. 87.

2 — Official Journal, English Special Edition 1963-64, p. 47.

from the provisional nature of the previous communications that the disputed letter must be regarded as a *confirmatory measure* and that the possibility that the measure in question may be the subject of proceedings cannot be denied on that ground. Nevertheless they disagree as to the legal nature of that letter.

The Commission states that it merely informed the applicant pursuant to Article 5 (5) of the regulation that its request for the initiation of a new anti-subsidy proceeding against Brazil was not supported by sufficient evidence. It takes the view that the contested provisions of Regulation No 3017/79 must be interpreted to mean that a complaint which satisfies the conditions laid down in Article 5 (2) of the regulation, that is to say which provides sufficient evidence of the existence of dumping or subsidization and of actual injury resulting therefrom, may be examined only in the context of the consultation provided for by Article 6 of the regulation. On completing such examination the Commission may initiate an official investigation under Article 7 or may decide "having regard to the situation" not to proceed with the merely preliminary procedure and to inform the complainant of its decision under Article 5 (5). Informing the complainant to that effect does not however preclude the possibility that the Commission may of its own motion re-open the proceeding subsequently if it is shown that new subsidies have been granted. The fact that the regulation was deliberately drafted without a provision for a formal termination of the preliminary proceeding means, it is claimed, that the complainant has of course the right to be informed of a decision not to proceed but that is not empowered either to insist that the Commission must initiate an official proceeding or above all to force it to take protective measures. A refusal pursuant to Article 5 (5) cannot therefore be the subject of proceedings under the second paragraph of Article 173 any more than can a refusal to adopt a decision in proceedings concerning agreements, decisions and concerted practices under Article 6 of Regulation No 99/63.

In order to appraise that line of argument it is necessary to recall the declaratory nature of the letter of 25 May 1982 and the claims set out in the application. Referring expressly to the applicant's complaint about the subsidies, the letter states clearly that the Commission will not initiate an anti-subsidy procedure in respect of imports of soya-bean oil-cake from Brazil. The only fact to which the claims set out in the application relate and therefore the only matter to which this action relates is that statement, made by the Commission after earlier provisional statements of its attitude. By that statement the Commission unequivocally expressed its intention not to initiate the official investigation on the completion of the preliminary proceeding laid down by Articles 5 and 6 of Regulation No 3017/79 and therefore definitively rejected the applicant's request. With regard to the legal effects flowing therefrom it is therefore imaterial to consider whether an anti-subsidy proceeding may be initiated by the Commission of its own motion in the absence of an express provision to that effect in the regulation, even without the receipt of an application from the economic sector in question, as the Commission believes it may, since in any event in this case a preliminary proceeding commenced on the *initiative* of the applicant was brought to an end.

Relying upon the Court's judgment in the *GEMA* case [1] and in view of the fact that Regulation No 3017/79 does not make express provision for a formal decision terminating a proceeding but provides merely in Article 5 (5) for the giving of information, the Commission would like to conclude that the measure in question is not capable as such of being the subject of an action.

As the applicant has correctly stated, that point of view must be rejected for several reasons. Even if the wording of Regulation No 3017/79 does not expressly provide that the rejection of a request for the institution of an anti-subsidy procedure should be in the form of a *decision,* the information to be provided presupposes logically that the preliminary proceeding has been terminated. If the mere manifestation of an intention were to be regarded as an act which is separate from the internal process by which that intention has been formed it would follow that, from a procedural point of view, such a decision could never be challenged.

In that respect the Court's judgment in the *GEMA* case does not assist very greatly in determining the nature of the information provided under Article 5 (5) of Regulation No 3017/79. In that case the applicant made an application pursuant to Article 3 (2) (b) of Regulation No 17; it instituted proceedings under Article 175 of the Treaty for a declaration that the Commission had wrongfully failed to act and that it must adopt a formal decision in the proceedings in respect of which the applicant had made its application or must inform the applicant of their discontinuance in accordance with Article 6 of Regulation No 99/63. According to the latter provision, where the Commission considers that on the basis of the information in its possession there are insufficient grounds for granting the application, it is to inform the applicant of its reasons and fix a time-limit for him to submit any further comments in writing. The Court held that the purpose of such a communication was solely to ensure that an applicant be informed of the reasons which led the Commission not to grant his application. Such a communication certainly implies the discontinuance of the proceedings but it does not prevent the Commission from re-opening the file if it thinks fit to do so, in particular where the applicant puts forward fresh evidence within the period allowed him. Since the lodging of an application under Article 3 (2) of Regulation No 17 *does not confer a right* to obtain from the Commission a decision as to the existence of an infringement of Articles 85 and 86 of the Treaty, the Court decided, in the final analysis, that the action for failure to act was inadmissible.

From the point of view of procedure this action, however, may be distinguished from that case in so far as the applicant is not attempting to force the Commission to act by means of an *action for failure to act,* but is challenging under the second paragraph of Article 173 a measure by which the Commission rejected the application to initiate an investigation in accordance with Article 7 of Regulation No 3017/79. On the other hand, in the *GEMA* case the question whether a communication made under Article 6 of Regulation No 99/63 constitutes a measure which may be the subject of proceedings under Article 173 of the Treaty did not arise. The fact that

1 — Judgment of 18 October 1979 in Case 125/78 *GEMA, Gesellschaft für musikalische Aufführungs- und mechanische Vervielfältigungsrechte* v *Commission of the European Communities* [1979] ECR 3173.

the Court left that question open is abundantly clear in particular in paragraph 18 of the decision in that case, in which the question whether an action might be brought in respect of such a communication is only referred to as a possibility.

Furthermore the wording of Article 6 of Regulation No 96/63 is clearly different from that of the provision in question in this case, namely Article 5 (5) of Regulation No 3017/79. Whilst the former is based on the premise that the Commission arrives, on the basis of "the information in its possession", at the conclusion that there are insufficient grounds for granting an application for the adoption of certain sanctions, the latter is concerned with the case of a refusal to initiate an official investigation because in the opinion of the Commission there is insufficient evidence to justify the holding of such an investigation.

Thus as can be seen from the fact that a time-limit is laid down, the communication made under Article 6 of Regulation No 99/63 is only of a *provisional* nature so that, as the Court has held, the file may be re-opened on the presentation of fresh information. In the present case the disputed letter in question clearly and definitively indicates the Commission's intention not to initiate an official investigation under Article 7 of Regulation No 3017/79 at the applicant's request.

Furthermore the grounds on which the judgment in the *GEMA* case, cited above, is based cannot be simply transferred to this case: the structure of the procedure laid down in the regulations concerning agreements, decisions and concerted practices is clearly different from the general structure of the regulations concerning dumping and subsidies. The latter lay down a procedure divided into two distinct parts:

The preliminary procedure contained in Articles 5 and 6 of the regulation which requires that there must be an application for the initiation of an anti-subsidy proceeding;

The procedure contained in Articles 7 to 9 of the regulation which marks the commencement of the investigation properly so called.

Those two stages of the procedure are governed by very specific conditions. Very precise rules regulate the question of who may lodge a complaint, the content of the complaint and its consequences. Special consultations between the Commission and the Member States must take place in relation to an anti-subsidy complaint (Article 6). After those consultations have taken place the Commission must assess and decide under Article 7 (1) of the regulation whether there is sufficient evidence to justify the initiation of a proceeding. If the fact that it decides to undertake the next stage of the procedure is to be regarded as a decision, logically the same must apply if the matter is not proceeded with, even if the word "decision" is not expressly used. The fact that the draftsmen of the regulation regarded the preliminary procedure as a distinct proceeding which had to be terminated even where the official investigation is not initiated is confirmed by Article 5 (4) of the regulation where it is stated that if the complaint is withdrawn "proceedings may be *terminated*".

The procedure relating to agreements, decisions and concerted practices is not formally divided into distinct stages but it must be remembered also that the legal position of the applicant is different under the anti-dumping or anti-subsidy regulation from that under the regulations governing agreements, decisions and concerted practices. Both the Treaty

provisions and Article 3 of Regulation No 17 clearly show that the Commission, which is charged with ensuring that the competition rules are observed, is to investigate and pursue all infringements of Articles 85 or 86 of the Treaty and require the undertakings in question to bring to an end the infringements established. The principle that Community or national authorities may act on their own initiative is not found at least in essentials in Regulation No 3017/79, since the principle that they may act *following* the lodging of a complaint is emphasized more than in the regulations relating to agreements, decisions and concerted practices. Articles 4, 5 and 7 of Regulation No 3017/79 lay down in a detailed manner the conditions in which a complaint will lead to the opening of a proceeding or the refusal to open one. The producer must establish, in particular, on the basis of specific criteria the existence of a subsidy and of injury. The latter requirement, substantially laid down in Article 4, in particular seems to indicate that a fundamental aspect of the anti-subsidy procedure is the necessity to protect the relevant Community industry.

As the Federation pertinently states, such procedural requirements are not laid down in the regulations on agreements, decisions and concerted practices in respect of which the lodging of an application is simply subjected to the requirement of the existence of a "legitimate interest". In that connection the Commission's explanations concerning the difference between the methods of making a request do not seem convincing to me. If the purpose of the detailed provisions applying to anti-dumping or anti-subsidy proceedings were simply to prevent complaints for which there are insufficient grounds from coming before the authorities in the first place, the same should apply to proceedings in relation to agreements, decisions and concerted practices.

In the latter field, although the proceedings set in motion by an application and the duties of the applicant are not regulated in as detailed a manner as those relating to dumping, the Court recognized in the *Metro* case, [1] in relation specifically to the right to make an application made available by Article 3 (2) (b) of Regulation No 17, that the applicant had a right to bring an action in respect of a decision addressed to another person, by which the Commission at one and the same time granted negative clearance under Article 85 (1) and an exemption under Article 85 (3) of the Treaty.

The Court stated that it was in the interests both of a satisfactory administration of justice and of a proper application of Articles 85 and 86 that natural or legal persons who are entitled, pursuant to Article 3 (2) (b) of Regulation No 17, to lodge an application should be able, if their request is not complied with either wholly or in part, to institute proceedings in order to protect their legitimate interests. As a result the Court held that the applicant must be considered to be directly and individually concerned, within the meaning of the second paragraph of Article 173, by the contested decision, even though it was not addressed to him. There are even stronger grounds for recognizing a similar right to bring an

1 — Judgment of 25 October 1977 in Case 26/76 *Metro SB-Großmärkte GmbH and Co. KG* v *Commission of the European Communities* [1977] ECR 1875.

action in anti-subsidy proceedings for an applicant who wishes to challenge a decision which is *addressed to him* and which rejects his application.

There are also good reasons based on the judgment in the *IBM* case [1] for regarding the contested letter which was intended to bring to an end a distinct stage of a complicated procedure as a measure capable of being the subject of legal proceedings under the second paragraph of Article 173 of the Treaty. Unlike the statement of objections with which that case was concerned, the letter of 25 May 1982 is not a provisional measure merely intended to pave the way for a final decision which is itself capable of being the subject of legal proceedings. In the absence of any method of challenging such a measure the applicant would have no opportunity in contrast to the procedure relating to agreements, decisions and concerted practices, of challenging it at a later stage of the procedure.

Furthermore, account must be taken of the fact that the information supplied to the Federation constitutes a definitive termination of the preliminary procedure, separate from the investigation properly so called, which is intended to enable the Commission, the Member States and the Council to proceed to a decision on the substance of the case. As the Court emphasized in paragraph 11 of its judgment in the *IBM* case such an intermediate measure must be regarded as a decision against which proceedings may be taken.

Finally the Commission itself concedes that the applicant is entitled to such information and in its absence he may, in an appropriate case, bring an action for failure to act under the third paragraph of Article 175. If the transmission of such information constitutes the act to which that provision applies it is logical that such an act, once it has taken place, may also be the subject of an action for a declaration that it is void. As Mr Advocate General Capotorti observed in his Opinion in the *GEMA* case [2] such an action is admissible if only because the acts the legality of which may be reviewed are described in the first paragraph of Article 173 of the Treaty in terms identical to those employed in the third paragraph of Article 175.

On the basis of those considerations and regard being had to the principle, emphasized on various occasions in the Court's case-law, according to which Article 173 should not be interpreted narrowly, the contested letter must consequently be regarded as a measure intended to have binding legal effects.

(b) It is necessary to consider next whether the contested letter produced legal effects which were of a type to affect the *applicant's interests* and to change its legal position.

(1) The Commission does not deny that the failure to institute an anti-subsidy proceeding may affect the applicant's interests. However, in its opinion, the interests must be significant: there must be a "distinct" change in the applicant's legal position, according to the particularly clear wording of the judgment in the *IBM* case [1] in the language of the case. In fact, it claims, there can be no question of such an effect in this case: since the anti-subsidy

1 — Judgment of 11 November 1981 in Case 60/81 *International Business Machines Corporation* v *Commission of the European Communities* [1981] ECR 2639.

2 — Judgment of 18 October 1979 in Case 125/78 *GEMA (Gesellschaft für musikalische Aufführungs- und mechanische Vervielfältigungsrechte)* v *Commission of the European Communities* [1979] ECR 3173.

proceeding is intended principally to safeguard general economic interests and not to protect individuals the Federation is unable to claim a right to have protective measures adopted. Furthermore, in view of the discretion vested in the Commission, the applicant cannot be acknowledged to have a right to require the initiation of an investigation.

(2) In answer to such arguments it must be remembered that the action is not in respect of the refusal to adopt protective measures but against the decision by which the Commission refused to comply with the applicant's request for the initiation of an investigation under Article 7 of the relevant regulation. Consequently, contrary to the view maintained by the Commission, it is not necessary to consider whether the applicant has a right to have protective measures adopted; at most it is necessary to inquire whether, in so far as sufficient evidence within the meaning of Article 5 (2) of the regulation has been presented, the producers in question have a right to require the initiation of an investigation. In the Commission's opinion no such right exists because it possessed at that stage a wide discretion which is not open to review by the Court in view of the need to take Community interests into account.

In my opinion it is not necessary to go further into this point since the applicant is entitled to a proper exercise of the discretion, that is to say, free from a misuse of power or a patent disregard of Community law, at least where the provision conferring the discretion was also devised in its interests. In such a case and on the assumption that the interests of the Community must already be taken into account at that stage, those interests may in any event constitute only *one* of the criteria in respect of the decision to initiate an official investigation unless a total discretion is implied.

The Court will note that the regulation on protection against dumping and the grant of subsidies was not made solely in the interests of commercial policy or from the point of view of general economic interests but also, at least partially, in the interests of the producers who have suffered injury. According to Articles 2 and 3 of the regulation protective measures may be adopted only if the dumping or the subsidies have caused *injury* in the Community but Article 4 places the emphasis on the effect suffered by a sector involving all producers of similar products in the Community.

The fact that the purpose of the regulation in question is to protect the interests of that category of persons follows furthermore from the detailed rules governing the position of the sector in question as regards the procedure; once the Commission has initiated an anti-subsidy proceeding and it appears, after consultation, that protective measures are unnecessary, the Commission may, provided no objection has been made in that respect by the Consultative Committee, close the proceeding in accordance with Article 9 (1) of the regulation. Nevertheless, before closing the proceeding it must give the complainants the benefit of the *procedural guarantees* provided for in Article 7 of the regulation and in particular

allow them to inspect all information, [1] give the parties directly concerned the opportunity to be heard by the Commission, [2] and to meet. [3] The aim of those guarantees is clearly to allow the Commission to make a decision regarding the progress of the procedure with as precise knowledge as possible of the facts concerning the grant of the subsidy and the injury. If an anti-subsidy proceeding were not to be initiated in a case where the complainant has given detailed and conclusive evidence of the existence of a subsidy, of injury and of a causal relationship that would amount to a fault affecting the complainant's rights in so far as the decision was made without a searching official investigation required in its own interests.

To allow the Commission to decide in the context of a summary preliminary proceeding not to initiate an anti-subsidy proceeding without that decision's being capable of review by the Court might jeopardize the whole decision-making process provided for in Regulation No 3017/79 or might neutralize the powers which, once the proceeding has been initiated, belong to the Member States and to the Council with a view to the adoption of protective measures.

Even if it were to be accepted that the Commission has a discretion in deciding whether or not to initiate an investigation it must be stated that it cannot be free from any review. The complainants therefore have the right to ensure that no misuse of power is committed in regard to them and that Community law will not be patently disregarded; in this respect their interests are already affected.

(c) Even on the supposition that such interests have been affected to an insufficient extent, a complainant may nevertheless still be affected in a case where, all other requirements being satisfied, he has a legal right to the initiation of an official proceeding. Contrary to the opinion of the Commission, the question whether or not the Federation has a *substantive* right to the adoption of protective measures is of little importance at this stage: a procedural guarantee exists where, in the case of a decision to initiate an investigation, the Commission's power of appraisal cannot be discretionary. In that respect the Commission maintains that even at the stage of considering the advisability of initiating a proceeding it may take into account the general interests of the Community on the basis of the implications for commercial policy of such a decision and that in that respect it must have an unfettered power to consider questions of policy.

It must however be noted that the *interests of the Community* are not referred to in the provisions of the regulation concerning the preliminary proceeding: they are referred to only in Articles 11 and 12 of the regulation in connection with the adoption of provisional or definitive anti-dumping or countervailing measures. As the wording of the regulation shows, in the context of the preliminary proceeding, the Commission simply has a choice between terminating the proceeding in accordance with Article 5 (5) if it considers that the complaint does not provide sufficient evidence, and initiating the procedure in accordance with Article 7. *Its margin of discretion* therefore relates solely to the question whether there is

1 — Article 7 (4).
2 — Article 7 (5).
3 — Article 7 (6).

"sufficient evidence" within the meaning of Article 5 (5) of the regulation, and not whether or not it is appropriate to initiate a proceeding. It is furthermore for that reason that Articles 9 (1) and 10 (6) of the regulation, which deal with the termination of the investigation and its re-opening respectively, do not provide for any discretion to take account of the general interest of the Community as part of its power of appraisal.

To take the general interest of the Community into account as early as the preliminary stage of the procedure would scarcely comply with the *spirit and purpose* of the regulation with regard to dumping and subsidies. Since the investigation procedure is intended to give the Commission as precise knowledge as possible of the existence of a subsidy and of the reality of injury in order subsequently to propose the adoption of protective measures, the question of the common interest must not be raised until the completion of a searching inquiry into the facts.

Finally, the fact that the Community institutions may simply terminate a proceeding at a later stage does not imply that the industry in question has no right to have *protective measures* adopted. Even on the supposition that that were the case by reason of the discretion enjoyed in that connection by the Community institutions that by no means pre-empts the question whether or not the complainants have a right to have an investigation initiated. As the Commission has stated in particular in the course of the oral procedure, there is, in fact, in relation to investigations, a clear separation between the informal preliminary procedure and the official investigation. Whilst the initiation of the formal proceeding normally involves an inquiry *in situ* into the industries concerned and in non-member countries in order to provide the Commission with as much information as possible, that does not apply at the stage of the preliminary proceeding. As the two proceedings are different in that respect the complainants retain a right to have that procedural guarantee observed even if they have already had the opportunity to make known their interests during the preliminary proceeding.

(d) In my opinion the letter of 25 May 1982 must be considered to be a Commission measure producing binding legal effects upon the applicant's interests by changing its legal position. The guarantee of effective legal protection leads me to conclude that the action for a declaration of nullity is admissible. Complainants in anti-subsidy proceedings to whom such a decision is addressed must at least have the opportunity to have that decision reviewed from the point of view of the Commission's powers, the observation of essential procedural requirements, the correctness of the appreciation of the facts and the absence of a misuse of power, in accordance with the second paragraph of Article 173 of the Treaty.

The outcome follows directly from Community law itself, but also from the Court's case-law in connection with the admissibility of an action for a declaration of nullity; [1] it is not therefore necessary to consider the applicant's additional argument that the producers

1 — Judgment of 15 March 1967 in Joined Cases 8 to 11/66 *Société Anonyme Cimenteries CBR Cementbedrijven NV and Others* v *Commission of the European Economic Community* [1967] ECR 75.

injured by subsidies should, as happens in the United States of America, be acknowledged to have a right to bring an action because the fifth recital in the preamble to the contested regulation states that the Community must take account of the interpretation of the General Agreement on Tariffs and Trade and its Anti-Dumping Code by the Community's major trading partners.

My opinion is that the objection of inadmissibility raised by the Commission in respect of the application by the EEC Seed Crushers' and Oil Processors' Federation for a declaration that the Commission's decision of 25 May 1982 is void must be dismissed and that the Commission should pay the costs relating to this stage of the proceedings.