adopt measures of domestic law does not alter its legal nature. The Commission has no power either under Article 85 of the Treaty or Regulation No 17 or under Article 5 of the Treaty to address a binding decision to a Member State as regards the conduct to be adopted by the national authorities in connection with an agreement between undertakings falling under Article 85 of the Treaty,

JUDGMENT OF THE COURT OF FIRST INSTANCE (First Chamber)
13 December 1990 *

In Case T-113/89,

Nederlandse Associatie van de Farmaceutische Industrie 'Nefarma', whose registered office is in Utrecht,

and

Bond van Groothandelaren in het Farmaceutische Bedrijf, whose registered office is in Amsterdam,

represented by B. H. Ter Kuile of the Hague Bar, and E. H. Pijnacker Hordijk, of the Amsterdam Bar, with an address for service in Luxembourg at the Chambers of J. Loesch, 8, rue Zithe,

applicants,

v

Commission of the European Communities, represented by B. J. Drijber, a member of its Legal Department, acting as Agent, with an address for service in Luxembourg at the office of Guido Berardis, also a member of the Commission's Legal Department, Wagner Centre, Kirchberg,

defendant,

* Language of the case: Dutch.

supported by

Kingdom of the Netherlands, represented by J. W. de Zwaan, Assistant Legal Adviser at the Ministry of Foreign Affairs, acting as Agent, with an address for service in Luxembourg at the Netherlands Embassy, 5 rue C. M. Spoo,

intervener,

APPLICATION for a declaration that one or more decisions alleged by the applicants to be contained in various letters of a Member of the Commission and of a Director of the Directorate-General for Competition are void,

THE COURT OF FIRST INSTANCE (First Chamber),

composed of: J. L. Cruz Vilaça, President, H. Kirschner, R. Schintgen, R. García-Valdecasas and K. Lenaerts, Judges,

Registrar: B. Pastor, Administrator,

having regard to the written procedure and further to the hearing on 20 June 1990,

gives the following

Judgment

The facts giving rise to the application

1 This case must be seen in the context of the efforts made by the Netherlands public authorities since the 1970s to curb the cost of medicinal products supplied outside hospitals and other health-care establishments. It is closely linked to Cases T-114/89 *VNZ* v *Commission* [1990] ECR II-827 and T-116/89 *Prodifarma* v *Commission I* [1990] ECR II-843 and to Case T-3/90 *Prodifarma* v *Commission II* (order of 23 January 1991 declaring the application inadmissible, [1991] ECR II-1). The actions brought in each of these cases are directed against the Commission's reaction to an agreement providing for a reduction in the level of the prices at which medicinal products are supplied to chemists in conjunction with an amendment to the Netherlands rules on chemists' profit margins. That

agreement was signed by almost all the organizations in the Netherlands representing undertakings in the pharmaceutical industry, public health funds and private medical insurance bodies and the professional and trade organizations concerned with the supply of medicinal products, hence its name, the 'Omni-Partijen Akkoord' (All Party Agreement, hereinafter referred to as 'the Agreement'). In its examination of the facts giving rise to the application the Court has of its own motion taken account of the facts set out in the files in the parallel cases T-114/89 and T-116/89.

1. *The national rules*

2 The main instrument used by the Netherlands public authorities to influence the price of medicinal products is the Wet tarieven gezondheidszorg (Law on Health-Care Tariffs, hereinafter referred to as 'WTG'), which was adopted on 20 November 1980 (*Staatsblad* 1980, p. 646) and contains a number of rules relating to the tariffs of establishments and persons providing health care, including chemists and general practitioners with dispensaries. Article 2(1) of the WTG contains a general prohibition against applying a tariff which has not been approved or fixed in accordance with the law.

3 The WTG conferred the power to fix and approve health-care tariffs on the Centraal Orgaan Tarieven Gezondheidszorg (Central Office for Health-Care Tariffs, hereinafter referred to as 'COTG'), a body governed by public law. The COTG is empowered to adopt directives concerning the level, the structure and the detailed rules of application of a tariff or part thereof. Those directives must be approved by the Minister for Welfare, Public Health and Culture, by the Minister for Economic Affairs and by the particular Minister responsible for the policy to be adopted as regards the category of establishments or persons providing health care in question. Under Article 13 of the WTG, the COTG is to take account of those directives when taking decisions approving or fixing tariffs. Article 14 empowers the Minister for Welfare, Public Health and Culture and the Minister for Economic Affairs to make joint recommendations to the COTG on the content of directives and the COTG must comply therewith when adopting those directives.

4 Pursuant to that provision, on 21 April 1987 the State Secretary for Welfare, Public Health and Culture and the State Secretary for Economic Affairs issued a

recommendation relating to the adoption of directives amending the system of reimbursements made to chemists for the supply of medicinal products, in order to achieve savings in that sector.

5 The recommendation envisaged, first, that rebates obtained by a chemist from a supplier of a medicinal product should be deducted from the reimbursement to which the chemist was entitled if they represented more than 2% of the price of the medicinal product as shown on a list approved by the COTG.

6 Secondly, the recommendation sought to encourage chemists to buy and supply generic or parallel import drugs, which were cheaper than the proprietary drugs put on the market in the Netherlands by the official producer or importer. Although it is true that the choice of medicinal product to be purchased by the consumer is in principle a matter for the prescribing doctor, the chemist does have the possibility of supplying another equivalent drug if the consumer asks for it. In that way the chemist can play a part in substituting parallel import or generic drugs for proprietary drugs. The recommendation proposed that, as an incentive, the chemist should be allowed to retain one-third of the difference between the higher price of the proprietary drug prescribed and that of the cheaper medicinal product he supplied.

7 A system that was in accordance with the recommendation described above was implemented by the COTG with effect from 1 January 1988. Although there is still controversy over whether the effects of that system are beneficial or harmful, it is widely accepted that it has not yielded all the savings hoped for. For that reason the Netherlands Government planned to adopt even more stringent price control measures. To that end it presented a plan, known as the 'ijkprijzensysteem' under which a single ceiling would be established for reimbursement by the sickness insurance funds for all medicinal products which might be prescribed for the treatment of a specific illness so that if the doctor prescribed a product whose cost exceeded the amount fixed, the patient would have to pay the difference himself. Those suggestions were not implemented, however, partly because the professional and trade organizations in the health-care sector proposed the Agreement to the authorities as an alternative solution for achieving the savings considered necessary which, the Netherlands Government had decided, were to amount to HFL 420 million a year.

2. *The Omni-Partijen Akkoord ('the Agreement')*

(a) The parties to the Agreement

8 The Agreement, which was the result of previous initiatives by the Nederlandse Associatie van de Farmaceutische Industrie (Netherlands Pharmaceutical Industry Association) 'Nefarma', one of the applicants in the present case, and the Vereniging van Nederlandse Ziekenfondsen (Association of Sickness Insurance Funds) 'VNZ', one of the applicants in Case T-114/89, was concluded on 18 August 1988.

9 The parties to the Agreement include, with one exception, the organizations which represent all the parties concerned in prescribing and supplying medicinal products: producers and suppliers, prescribing doctors and chemists, and the insurers and sickness insurance funds which bear the cost. The applicants in the present case and in Case T-114/89 are parties to the agreement.

10 The exception mentioned above is Prodifarma, the applicant in Cases T-116/89 and T-3/90, an association of smaller undertakings producing generic drugs or proprietary drugs or operating as parallel importers of generic drugs but not forming part of the branded drugs industry. Although it was included in the discussions which preceded the conclusion of the Agreement, Prodifarma and its affiliated undertakings are not parties to it. Nor is the Netherlands Government a party to the Agreement.

(b) The content of the Agreement

11 The Agreement is divided into two distinct main parts: first, a private-law agreement between the parties by which the producers and distributors undertake to make reductions in the sale price of pharmaceutical products; secondly, proposals from the parties for amendments to the national rules described above, which they hope will be adopted by the public authorities. The parties make the implementation of their private-law agreement conditional on those amendments. Those two main points are supplemented by a number of provisions concerning the scope of application of the agreement and the parties' undertakings concerning the implementation of the system they suggest.

12 The main provisions of the Agreement may be summarized as follows: the members of the applicant organizations, Nefarma and Bond van Groothandelaren in het Farmaceutische Bedrijf (Pharmaceutical Wholesalers Federation), declare in Paragraph 7.1 that they are prepared to lower their prices on sales to chemists of proprietary drugs by an average of 7%. Paragraph 8 provides for a price freeze until 1 January 1991. The parties declare further that they will forgo any 'compensatory price rises' after that date. At Paragraph 9, Nefarma and the Bond van Groothandelaren undertake to fix the price of newly introduced medicinal products at a level corresponding to the average of the prices prevailing in other Member States.

13 The amendments to the national rules proposed by the parties to the Agreement to the national authorities relate, first, to increasing from 2 to 4% the rebate which a chemist can receive before it is taken into account for the purpose of the reimbursements made by the sickness insurance funds (Paragraph 10). Secondly, the public authorities are asked to reduce the rate of the incentive premium described above granted to chemists for supplying cheaper medicinal products from 33.3 to 15% (Paragraph 11).

14 Annex 2 to the Agreement shows the forecasts made by the parties to the Agreement with regard to the way the market would develop if a premium of 15% was introduced. It was thought that the volume of sales of proprietary medicinal products would fall between 1988 and 1990 from HFL 1 750 million to HFL 1 700 million, the volume of generic drugs would rise from HFL 250 million to HFL 360 million and the volume of parallel import products would rise from HFL 135 million to HFL 200 million.

3. *The course of the administrative procedure*

15 By a letter of 6 September 1988 the Agreement was submitted by the President of Nefarma to the State Secretary for Welfare, Public Health and Culture and to the State Secretary for Economic Affairs. At the end of November 1988 the Netherlands public authorities said they were prepared to try it out. It was envisaged that the price reductions provided for in the Agreement would come into effect on 1 January 1989.

16 Two parallel procedures relating to the Agreement were then set in motion before the Commission. On 2 December 1988 Prodifarma, the applicant in Case T-116/89, lodged a complaint and requested the Commission to find, in accordance with Article 3 of Regulation No 17 of the Council of 6 February 1962, the first regulation implementing Articles 85 and 86 of the Treaty (Official Journal, English Special Edition 1959-62, p. 87), that the Agreement was incompatible with Article 85 of the EEC Treaty. On 9 December 1988, Nefarma, the applicant in the present case, notified the Agreement to the Commission in the name of all the signatories. It asked for negative clearance pursuant to Article 2 of Regulation No 17 or at least, in the alternative, grant of exemption pursuant to Article 85(3) of the Treaty.

17 In a letter of 14 December 1988 signed by Mr Rocca, a Director of the Directorate-General for Competition, the Commission informed the parties that the provisional view of its departments was that the Agreement was incompatible with Article 85(1) of the Treaty by reason of the agreement on prices contained therein and that the parties had not put forward any arguments to justify an exemption under Article 85(3). The Commission added that its departments were examining the possibility of opening a procedure under Article 15(6) of Regulation No 17. A copy of that letter was sent to Prodifarma.

18 After that first unfavourable reaction on the part of the Commission, several parties to the Agreement and the Netherlands Government, represented by the two State Secretaries concerned, contacted the Commission's departments and the Member of the Commission with responsibility for competition on several occasions in order to provide more information about the Agreement and to plead on its behalf.

19 Meanwhile the procedure for adapting the national rules, in particular the COTG directives, to the terms of the Agreement continued to run its course. However, on 23 December 1988 the Netherlands Government informed the parties to the Agreement and Prodifarma and its associates that the Netherlands public authorities did not intend to approve the amendments to the directives necessary to implement the Agreement without first examining whether, in the light of the 'Commission's definitive opinion', such approval would constitute a breach of the Treaty. Accordingly, when the COTG decided to amend its directives on 29

December 1988, the amendment was not approved by the State Secretaries concerned. Contrary to the original expectations of the parties to the Agreement and the Netherlands Government, the Agreement could not therefore enter into force on 1 January 1989.

20 The parties to the Agreement and the Netherlands Government continued their efforts in the early part of 1989 to convince the Commission of the merits of the agreement. In particular, on 7 February 1989 the State Secretary for Economic Affairs and the State Secretary for Welfare, Public Health and Culture had a meeting at their request with the new Member of the Commission responsible for competition, Sir Leon Brittan. Following that meeting, on 9 February the State Secretary for Economic Affairs, Mr Evenhuis, sent Sir Leon Brittan a letter with further information to justify the reduction in the incentive premium from 33.3 to 15%.

21 In reply, Sir Leon Brittan wrote to the two State Secretaries the letter of 6 March 1989 which is being challenged by the applicants in the present case and the applicants in Cases T-114/89 and T-116/89. In that letter, the draft of which had already been communicated to the Netherlands authorities by fax several days previously, Sir Leon Brittan declared 'as a former Minister for Finance', that he endorsed the aim pursued by the Netherlands Government of curbing the cost of the supply of medicinal products in the Netherlands. He found, however, that the anti-competitive effect of the Agreement's provisions relating to the reduction of the incentive premium and the increase in the permitted rebate margin should be attenuated before a favourable decision could be given.

22 He stated that the Agreement would have to satisfy two conditions before a favourable decision might be given by the Commission:

(i) first, the incentive premium for the supply of cheaper medicinal products should be reduced to 20% rather than to 15% of the difference in price between those products and the more expensive proprietary drugs;

(ii) secondly, the effects of the reduction in the premium should be evaluated for a period of one year by means of a monitoring system set up for the purpose.

23 The letter included the following passage:

'In those circumstances I suggest that you reduce the incentive of 33% merely to 20% instead of the 15% provided for in the Agreement and I suggest that you test the effects of the 20% premium in practice over a period of one year.'

24 As regards the monitoring system, Sir Leon Brittan pointed out that the Netherlands and the Community authorities could cooperate in its implementation, in particular by exchanging statistical data concerning the market in medicinal products. He added:

'It goes without saying that my conclusions concerning the Agreement do not affect the procedural rights of the parties which have notified the agreement, nor those of Prodifarma which has lodged a complaint against it.'

25 A copy of that letter was sent on 16 March 1989 to Nefarma. In an accompanying letter, Mr Rocca, a Director in the Directorate-General for Competition, stated that the question whether implementation of the Agreement would have the effect of causing distortion of competition between proprietary drugs and generic or parallel import products would have to be examined in the light of the forecasts as to future market developments which had been drawn up on the basis of an incentive premium of 15% by the parties to the Agreement and appeared in Annex 2 to the Agreement.

26 On 17 March 1989 the majority of the members of Nefarma declared that they were prepared to accept that the rate of the incentive premium should be fixed at 20%. The other parties to the Agreement also agreed to apply it under the conditions set out in the letter of 6 March 1989. The COTG adapted its directives accordingly and the Netherlands Government gave its approval. The proposals made in the Agreement were thus implemented with effect from 1 April 1989.

27 Nefarma and Prodifarma asked the Commission for details of its proposed monitoring, whereupon Mr Rocca stated in a letter dated 4 April 1989 that the

evaluation would take place on the basis of monthly reports relating to the market share of proprietary drugs, generic drugs and parallel import products respectively. Those data would be compared by the Commission with the forecasts made by the parties to the Agreement.

28 On 28 April 1989, Mr Rocca sent a letter to the applicants specifying the data wanted by the Commission for the purposes of the planned monitoring and requesting them to supply such data.

Procedure

29 By an application lodged at the Court Registry on 10 May 1989, the applicants brought this action against the Commission for the annulment of the decisions allegedly contained in the letter from Sir Leon Brittan of 6 March 1989 and the letters from Mr Rocca dated 16 March and 4 and 28 April 1989.

30 In support of their claim the applicants put forward two main complaints. Firstly, they maintain that the Commission was wrong to consider that the Agreement falls under the prohibition in Article 85(1) of the Treaty. Secondly they believe that the Commission is not justified in making a decision finding the Agreement compatible with Community competition rules subject to the two conditions set forth in the contested letters.

31 In pleadings lodged on 30 June 1989, the Commission raised an objection of inadmissibility pursuant to Article 91(1) of the Rules of Procedure of the Court.

32 By an application lodged at the Court Registry on 20 October 1989, the Kingdom of the Netherlands sought leave to intervene in the present case in support of the defendant's conclusions.

33 By order of 15 November 1989, the Court of Justice referred the case to the Court of First Instance, pursuant to Article 14 of the Council Decision of 24 October 1988 establishing a Court of First Instance of the European Communities.

34 By order of 7 December 1989, the Court of First Instance (First Chamber) gave the Kingdom of the Netherlands leave to intervene in support of the Commission's conclusions. In pleadings lodged on 19 January 1990, the intervener indicated that it did not wish to take any position on the question of admissibility and reserved its right to make observations on the merits at a later stage.

35 Upon hearing the report of the Judge-Rapporteur, the Court of First Instance (First Chamber) decided to accede to the Commission's request that it decide the question of admissibility without examining the merits of the case. The representatives of the applicants and the Commission presented oral argument and replied to questions put by the Court at the hearing on 20 June 1990.

36 The applicants claim that the Court should:

(1) declare void:

(i) the Commission's decision contained in the letter of 6 March 1989 from Sir Leon Brittan, Member of the Commission, to the State Secretaries A. J. Evenhuis and D. J. D. Dees,

(ii) the Commission's decisions contained in the letters to Nefarma of 16 March, 4 April and 28 April 1989 from Mr G. Rocca, Director in the Commission's Directorate-General for Competition,

in so far as the Commission found in that decision or decisions that the Agreement falls within the scope of the prohibition laid down in Article 85(1) of the EEC Treaty and in so far as in that decision, or those decisions, the

Commission attached two conditions to its decision to find that the Agreement was compatible with European competition rules;

(2) order the Commission to pay the costs.

37 The Commission contends that the Court should:

(i) declare the application inadmissible;

(ii) order the applicants to pay the costs.

38 With regard to the objection of inadmissibility raised by the Commission, the applicants claim that the Court should:

(i) dismiss the objection of inadmissibility raised by the Commission;

(ii) order the Commission — in the final judgment — to pay the costs relating to that procedural issue.

39 The intervener states that it leaves the question of the admissibility of the applicants' action to the Court.

40 At the end of the hearing the President declared that the oral procedure on the objection of admissibility was closed.

Admissibility of the action for annulment

41 In support of its objection of inadmissibility, the Commission submits principally that no action may be brought against an act of a Community institution pursuant to Article 173 of the Treaty unless it has binding legal effects.

42 According to the Commission, Sir Leon Brittan's letter had consequences of a factual nature only and did not have any legal effect. The Commission maintains that that letter does not bind either the Netherlands Government, to which it was addressed, nor any third parties such as the applicants, nor indeed the Commission itself. It believes that a simple reading of the letter in question shows that it is an opinion without any binding effect and that it is therefore not an 'act' within the meaning of Article 173 of the Treaty.

43 In support of its argument the Commission first draws attention to certain terms in the letter which, inasmuch as they expressly leave open the possibility of a later decision by the Commission which they do not prejudice in any way, underline its provisional character. The Commission states that the said letter contains only suggestions and does not mark the closure of the case or terminate the Commission's investigation; on the contrary the investigation would only really begin when the monitoring system was put into operation. At the hearing the Commission added that if, in the future, it was to take a decision on the substance of the matter, that decision would have retroactive effect and would replace the contested letter. It was only when such a definitive decision was taken that the applicants could invoke the need for legal protection.

44 The Commission then points out that the contested letter does not deprive the parties to the Agreement of any legal advantage and in particular does not affect the protection against fines to which they are entitled by reason of having notified the Agreement. The contested letter has no connection with the adoption of interim measures within the meaning of the order of the Court of Justice in Case 792/79 R *Camera Care* v *Commission* [1980] ECR 119, and does not affect the procedural rights of the parties as defined in Regulation No 17 of the Council and Regulation No 99/63/EEC of the Commission of 25 July 1963 on the hearings provided for in Article 19(1) and (2) of Council Regulation No 17 (Official Journal, English Special Edition 1963-64, p. 47).

45 The Commission maintains that it is not the letter in question which produced binding legal effects with regard to the applicants but the decision taken by the Netherlands Government, acting on its own authority and responsibility, to implement the Agreement taking into account the amendments proposed in the contested letter. The Commission acknowledges that the Netherlands Government made its decision to establish the conditions necessary for the implementation of

the Agreement conditional on obtaining the 'green light' from the Commission. It emphasizes, however, that the Netherlands authorities conformed to the Commission's point of view voluntarily.

46 The Commission also points out that the present case is not directed against a collegiate decision of the Commission taken at the end of the normal internal procedure in such matters but against a letter in which a single Member of the Commission is giving his personal opinion, having been pressed to do so by the Government of the Member State concerned, on a case in which the investigation is at a very early stage.

47 The Commission adds that third parties to whom Sir Leon Brittan's letter was not addressed cannot therefore be concerned in any way at all by it. It considers that, for third parties to be directly and individually concerned within the meaning of the second paragraph of Article 173 of the Treaty, it is necessary for the contested act to have produced legal effects with regard to a first addressee and that is not the case of the contested letter with regard to the Netherlands Government.

48 The letters from Mr Rocca constitute, in the Commission's view, acts of day-to-day management; they are purely factual in character and cannot have the slightest influence on the applicants' legal position. According to the Commission, the monitoring system proposed in the contested letters has not changed the applicants' legal position in view of the fact that participation in the system is voluntary. The Commission has refrained from requesting information by way of binding decision, as it was permitted to do under Article 11 of Regulation No 17, and it points out that the applicant Nefarma itself did not consider itself bound by that system since, in January 1990, it stopped supplying the statistical data provided for under that system.

49 In support of its objection of inadmissibility the Commission claims in the alternative that the applicants have not shown that they have a legal interest in bringing an action since they accepted that the rate of the incentive premium should be

fixed at 20% instead of the 15% initially provided for in the Agreement; that is apparent from a letter of 21 March 1989 according to which the majority of Nefarma's members had agreed to the new percentage.

50 At the hearing the Commission finally expressed the fear that a further relaxing of the conditions of admissibility might lead to a flood of actions against the various sorts of letters which the Commission's departments have occasion to address to undertakings in the course of investigations concerning them, so that it would in future have to refrain from complying with the numerous requests made to its departments to adopt an informal position.

51 For their part the applicants maintain that the contested letters contain decisions which produce binding and irreversible effects in their regard. They consider that in the contested letters the Commission irrevocably undertook to give a favourable opinion on the Agreement subject to certain specified conditions.

52 The applicants consider that in his letter of 6 March 1989 Sir Leon Brittan, at the Netherlands Government's request, gave a definitive opinion as regards the compatibility of the Agreement with Article 85 of the Treaty which constituted a decision affecting the legal position of the applicants, as parties to the said agreement, regardless of the fact that the decision took the form of a letter addressed to the Netherlands Government. They point out that the implementation of the Agreement depended entirely on the prior amendment of the rules of public law then in force, a measure which the Netherlands authorities, for their part, had made conditional on the prior agreement of the Commission. The fate of the Agreement thus depended entirely on the view taken by the Commission which, by its letter of 6 March 1989, gave the required signal enabling the proposals contained in the Agreement to be put into effect.

53 According to the applicants, the tenor of that letter prevented the Netherlands Government from taking the necessary steps to implement the Agreement in its initial version, because such conduct would have prompted the Commission to bring infringement proceedings based on Articles 5, 3(f) and 85 of the Treaty. They add that Netherlands law also precluded the public authorities giving the 'green light' to the original version of the Agreement as long as there were doubts

as to its validity under Community law. Furthermore, they consider that the letter had given third parties, in particular the Prodifarma association, the opportunity to prevent the implementation of the Agreement in its original form by relying on the letter before the Netherlands courts.

54 The applicants consider that in those circumstances the Commission was well aware of the effects its decision would have and that it had thereby sought to confirm or alter the respective legal positions of the various parties concerned by the Agreement. They consider that it is not necessary in that respect to determine whether there was a legal basis for the Commission to address a binding decision to the Kingdom of the Netherlands.

55 The applicants take the view that Sir Leon Brittan's letter does constitute a decision with regard to the Kingdom of the Netherlands, but even if were not, it would nevertheless constitute a decision as regards themselves. The decisive factor for classifying that letter as a decision is that it affects their legal position directly and individually.

56 The applicants consider that the letters from Mr Rocca also produced legal effects, if only in relation to the implementation of the monitoring system referred to in Sir Leon Brittan's letter. But they stated at the hearing that they did not wish to bring an action against those letters separately from the action challenging the letter from the Member of the Commission and therefore the present action is directed against Mr Rocca's letters only in the alternative.

57 The applicants allege that the arguments put forward by the Commission in support of its objection of illegality relate solely to the form of the acts challenged. They stress that the form chosen by the Commission is not decisive and account must be taken of the content and consequences of the letters in question.

58 Although its wording would seem to indicate that it was only provisional in character, the applicants consider that a more thorough examination of the letter of 6 March 1989 reveals that it is a definitive decision, albeit for a limited time. That view is confirmed, in the applicants' opinion, by the subsequent letters from Mr Rocca in the light of which the effects of the letter from Sir Leon Brittan must be measured. The definitive character of the letters challenged is attested by the presence of the following factors:

(i) a definitive finding that if the rate of the incentive premium is reduced to 15% the Agreement falls under the prohibition set out in Article 85(1) of the Treaty and a definitive refusal to allow the said Agreement exemption from that prohibition;

(ii) definitive and irreversible authorization for implementation of the Agreement for a period of one year, provided that the rate of the incentive premium is fixed at 20%;

(iii) the definitive and irreversible introduction for a period of at least one year of a monitoring system for the purpose of verifying whether the Agreement should continue to apply after that trial period.

59 The applicants assert that even if the Commission were subsequently to adopt a formal decision on the Agreement pursuant to Regulation No 17, such a decision could not have the effect of retroactively negating those definitive conclusions.

60 In reply to the argument that there was no collegiate Commission decision the applicants point out that it is clear from the subsequent letters from Mr Rocca that Sir Leon Brittan's letter of 6 March 1989 did not merely reflect his personal point of view but also that of the Commission.

61 The applicants further claim that although the decisions which they are challenging are not covered by the procedural framework of Regulation No 17, their practical and legal effects are nevertheless equivalent to those of a formal prohibition decision taken under Article 3 of Regulation No 17 or else a formal

exemption decision, coupled with certain restrictive conditions, taken pursuant to Article 8 of Regulation No 17, subject, in the case of that second comparison, to the power which the national court retains in this instance to review the validity of the agreement with regard to Article 85(1) of the Treaty.

62 The applicants leave open the question whether the Commission is empowered to take such measures outside the framework of Regulation No 17, while emphasizing that that regulation has disadvantages in the case of matters of some urgency such as those at issue here, because it does not provide for any possibility of granting (provisional) exemptions quickly. They assert that, irrespective of whether such a departure by the Commission from the rules of Regulation No 17 is lawful, it cannot deprive citizens of the legal means of redress available to them against formal decisions pursuant to the said regulation.

63 At the hearing the applicants developed that argument, maintaining that Regulation No 17, which they described as out of date, does not altogether correspond to the need for the Commission and the Member States to conduct an effective and appropriate competition policy. They stated that they were prepared to accept that the Commission might have recourse to procedures not provided for in Regulation No 17, such as that adopted in this case. However, that practice raises the question how far the Commission can conduct a policy of acting in concert with national authorities without the risk of actions being brought by the undertakings concerned. The applicants stress the need for the undertakings in question to be afforded legal protection in such circumstances. They fear that a judgment rejecting their application as inadmissible would allow the Commission to intervene on Community markets by adopting acts producing effects *de jure* and *de facto* without being subject to review by the courts.

64 The applicants consider that they are directly and individually concerned by the contested letters both as regards the decision contained in the letter addressed to the two State Secretaries as well as the decisions contained in the letters addressed to them directly. In view of the fact that the former expresses no less than the Commission's position on the agreement to which the applicants are parties, they consider themselves just as directly and individually concerned by that decision as

if they were the addressees. The applicants add that that decision was also communicated to them by the letter which Mr Rocca sent to Nefarma on 16 March 1988.

65 Finally the applicants stress that their legal interest in bringing proceedings cannot be challenged by reason of the fact that they accepted the amendments to the proposals contained in the Agreement following Sir Leon Brittan's letter and consented to their implementation. The applicants consider that the Commission presented them with a *fait accompli* leaving them no choice but to cooperate — albeit under protest — in the implementation of the Agreement in a version which conformed to the Commission's indications, failing which the direct effect of the Commission's intervention would have been to prevent altogether the entry into force of the measures proposed by the Agreement.

The legal nature of the contested letters

66 In the light of those factual and legal circumstances, the Court must first examine whether the letters against which the present action is directed are acts open to challenge by an application for annulment within the meaning of Article 173 of the Treaty. As is clear from the consistent case-law of the Court of Justice, it must first be determined whether the measures produced binding legal effects (see, most recently, the order in Case 151/88 *Italy* v *Commission* [1989] ECR 1255, at p. 1261).

1. *The effects of Sir Leon Brittan's letter with regard to the Kingdom of the Netherlands*

67 The Court considers that it must first be established whether the letter sent by Sir Leon Brittan on 6 March 1989 to the two Netherlands State Secretaries produced such effects with regard to the Kingdom of the Netherlands.

68 To that end the first question to be examined is whether the contested act rests on a legal basis which empowers the Commission to take a decision binding a Member State. It is clear from the case-law of the Court of Justice that views expressed by the Commission to the authorities of a Member State in areas where

the Commission has no power to adopt binding decisions are mere opinions with no legal effect (for example, the judgments in Case 17/57 *Gezamenlijke Steenkolenmijnen in Limburg* v *High Authority* [1959] ECR 1, at p. 7, and in Case 133/79 *Sucrimex* v *Commission* [1980] ECR 1299, at p. 1310; order in Case 151/88 *Italy* v *Commission*, cited above, at p. 1261).

69 It must be pointed out at the outset that no such power may be presumed to exist in the absence of a specific provision in the Treaty or in binding acts adopted by the institutions (order in Case 229/86 *Brother Industries* v *Commission* [1987] ECR 3757, at p. 3762 et seq.).

70 As the Commission stressed at the hearing, neither Article 85 of the Treaty nor Regulation No 17 conferred on the Commission the power to adopt binding decisions with regard to the Member States. Although Article 3(1) of Regulation No 17 provides that the Commission may by decision require the undertakings or associations of undertakings concerned to bring their alleged infringements of competition law to an end, that provision does not empower the Commission to oblige a Member State to introduce certain measures into its national law, for example to amend national rules relating to the incentive premium referred to in the contested letter.

71 It should be noted that Article 11(1) of Regulation No 17, which provides that 'in carrying out the duties assigned to it . . . the Commission may obtain all necessary information from the governments and competent authorities of the Member States . . . ', cannot serve as a legal basis for a decision compelling the Kingdom of the Netherlands to introduce the monitoring system referred to in the contested letter.

72 Nor can any power for the Commission to adopt decisions binding the Member States be derived from the consistent case-law of the Court of Justice to the effect that the Treaty requires Member States not to adopt or maintain in force laws or regulations capable of depriving Articles 85 and 86 of the Treaty of their effec-

tiveness (see, for example, the judgment in Case 311/85 *Vereniging van Vlaamse Reisbureaus* [1987] ECR 3801, at p. 3826). That obligation stems from Article 5 of the Treaty, which must be interpreted in the light of Articles 3(f) and 85. However, Article 5 of the Treaty does not confer on the Commission the power to address binding decisions to the Member States (order in Case 229/86 *Brother Industries*, cited above).

73 It is true that Article 89 empowers the Commission to take decisions in respect of Member States finding that there have been infringements of competition law. However, that transitional provision refers only to situations in which provisions implementing Articles 85 and 86, such as Regulation No 17, are lacking.

74 On the other hand, Article 90(3) of the Treaty confers power on the Commission to address appropriate decisions to Member States in order to ensure that they comply with the Treaty rules, in particular those of Article 90 with regard to undertakings falling within the scope of application of that provision. It is quite clear from the contested letter, however, that it was not based on that provision.

75 It must therefore be held that the letter in question does not rest on a legal basis empowering the Commission to adopt a decision which could bind the Kingdom of the Netherlands. It follows that it did not produce binding legal effects with regard to that Member State.

76 That conclusion is not invalidated by the fact that the Netherlands Government had asked the Commission to state its position with the intention of conforming thereto and that it complied scrupulously with the observations made in the contested letter when it made the regulations necessary to implement the Agreement. Neither the Netherlands authorities' intention to conform to the position to be adopted by the Commission with regard to the Agreement nor the fact that they followed in every particular the proposals contained in Sir Leon Brittan's letter mean that the letter created a legal obligation to do so.

77 It must be added that legal effects cannot be attributed to the letter in question on the basis of a rule of Netherlands law which would prevent the government from authorizing the implementation of the Agreement as long as doubts subsisted as to its validity. It is not the task of the Court to decide in this case as to the existence of such a rule, relied on by the applicants. Nevertheless, assuming that national law does prohibit the Netherlands public authorities from adopting in domestic administrative law measures liable to conflict with Community law, it must be pointed out that the application of such a rule would fall within the jurisdiction of the national authorities, which, in that regard, would have to decide on their own responsibility whether the measures envisaged were compatible with Community law.

78 In that context the position taken by Sir Leon Brittan is in the form not of a decision which might have had the effect of compelling the Netherlands Government to refuse to give the 'green light' to the original version of the Agreement, but rather of an act having effects comparable to those of an opinion which the national authorities were able to use for the purpose of verifying whether the Agreement was valid. In fact, doubts on that point cannot originate from a letter of the Commission since the nullity of an agreement contrary to Article 85(1) of the Treaty ensues by operation of law from Article 85(2).

79 It is clear from its correspondence with the Commission that the Netherlands Government's conduct can be explained by its wish to avoid the risk of acting in breach of Community law when the Agreement was implemented by voluntarily adapting its national rules so as to conform to the position expressed in the letter from a Member of the Commission. Moreover, the Treaty, in particular in Article 155 and the first paragraph of Article 189, makes express provision for such voluntary cooperation between national authorities and Community institutions by including, among the acts which the institutions, and in particular the Commission, may adopt, recommendations and opinions. That express conferral of the power to adopt acts with no binding force shows that voluntary compliance with the non-binding acts of the institutions is an essential element in the achievement of the goals of the Treaty. It follows that the non-binding character of a position taken by a Community institution cannot be challenged on the ground that the government to which the act was addressed conformed thereto.

80 It should be added that neither the wording nor the content of the letter in question indicates that it was intended to produce any legal effects whatsoever.

81 As the Commission emphasized, one indication to that effect is the absence of a collegiate decision of the Commission. As opposed to the cases where the Court of Justice has recognized as acts open to challenge letters signed by the Commission's officials (see, for instance, the judgment in Joined Cases 8 to 11/66 *Cimenteries* v *Commission* [1967] ECR 75), the contested letter is not in the form of either the communication of a decision taken by the institution or something written in the name of the Commission or by virtue of a delegated power, the system of delegation of authority having been recognized as valid by the Court of Justice in its judgment in Case 5/85 *AKZO* v *Commission* [1986] ECR 2585, at p. 2614. It appears rather to have been written by Sir Leon Brittan in his own name and in the context of an exchange of views between politicians.

82 Furthermore, the language used by Sir Leon Brittan to indicate to the Netherlands Government the amendments to the system laid down in the Agreement which he considered desirable before a positive decision could be envisaged with regard to the said agreement is not that of a binding act. Thus, with regard to the fixing of the rate of the incentive premium at 20%, he merely says 'I would suggest that you' ('stel ik u voor'). Similarly, with regard to the introduction of a monitoring system, the terms used show that it was not intended to impose such a system but that its introduction would depend on the voluntary cooperation of the Netherlands Government.

83 For all the foregoing reasons this Court holds that the letter addressed on 6 March 1989 by Sir Leon Brittan to the two Netherlands State Secretaries cannot be described as a decision with regard to the Kingdom of the Netherlands.

2. *The effects of the contested letters with regard to the applicants*

84 The next question to be examined is whether Sir Leon Brittan's letter, by itself or in conjunction with the three letters from Mr Rocca which are referred to in the alternative in the present proceedings, constitutes a decision with regard to the applicants.

85 In that respect consideration must first be given to the applicants' argument that that letter contains a definitive assessment of the initial version of the Agreement in the light of Article 85 of the Treaty, so that its effects with regard to the parties to the agreement are identical to those of a prohibition decision, taken pursuant to Article 3 of Regulation No 17, or to an exemption decision coupled with restrictive conditions, taken pursuant to Article 8(1) of Regulation No 17.

86 The letter from Sir Leon Brittan indicates that, in all probability, the anti-competitive effects of the agreement in its original form would preclude exemption pursuant to Article 85(3) of the Treaty. It is clear, however, from the terms of that letter that the examination of the agreement with regard to competition law was still in progress. That is shown in particular by the express reservation concerning the procedural rights of the parties to the Agreement. For the applicants, the significance of that reservation is that they are entitled to receive a notification of objections and to reply thereto before the Commission may take a prohibition decision, pursuant to Article 3 of Regulation No 17, which could be legally binding on them. It further shows that Sir Leon Brittan had no intention at all of adopting *vis-à-vis* the applicants a measure equivalent to a prohibition decision outside the framework of Regulation No 17.

87 Nor did the contested letters produce effects comparable to those of an exemption decision to which conditions and obligations are attached against which, according to the case-law of the Court of Justice, an action for annulment may lie (see the judgment in Case 17/74 *Transocean Marine Paint* v *Commission* [1974] ECR 1063, at p. 1080). The said letters constitute in fact merely the starting point of the examination of the Agreement in order to determine whether such an exemption could be granted. It follows that the terms mentioned in Sir Leon Brittan's letter upon which a favourable result at the end of the investigation might depend cannot be assimilated, as to their effects, to the conditions contained, pursuant to Article 8(1) of Regulation No 17, in an exemption decision.

88 It must further be examined whether the contested letters produced legal effects with regard to the applicants by defining in a binding way the terms for the implementation of the Agreement with regard to the rate of the incentive premium and the introduction of a monitoring system.

89 In that respect account must be taken of the Commission's power to adopt interim measures in order to avoid a situation likely to cause serious and irreparable harm to the complainant or which is intolerable for the public interest, before it gives a final decision on an agreement notified or a complaint made to it (see for instance the order of the Court of Justice in Case 792/79 R *Camera Care* [1980] ECR 119, at p. 130).

90 An examination of the contested letters shows, however, that they cannot be assimilated to decisions introducing such interim measures of a binding character, but that they leave it entirely open to the parties to the Agreement whether to comply or not. That is the case both as regards the amendment of the incentive premium and the setting up of a monitoring system.

91 It is true that in his letter of 6 March 1989 Sir Leon Brittan envisaged the possibility of the parties' adapting the provisions of the Agreement to the terms he proposed to the Netherlands authorities. However, that amendment of the agreement of a private-law nature remained entirely subject to the parties' consenting thereto. It is clear moreover from Mr Rocca's letter of 4 April 1989 that the applicant Nefarma agreed to that amendment.

92 It should be added that the two letters relating to the monitoring system sent by Mr Rocca to the applicants on 4 and 28 April 1989 in no way affect the voluntary character of the system. The first of those letters is confined to the detailed preparations for the setting up of the monitoring arrangements mentioned in Sir Leon Brittan's letter. Although, in its letter of 28 April 1989, the Commission asked for specific information from Nefarma and its members, that letter does not even satisfy the requirements of Article 11(3) of Regulation No 17 relating to a non-binding request for information. *A fortiori* it cannot be assimilated to a request for information by way of binding decision pursuant to Article 11(5) of the said regulation.

93 Moreover, contrary to the applicants' allegations, the letters from Mr Rocca do not show that Sir Leon Brittan's letter reflected the point of view of the Commission, *qua* institution. It is true that Mr Rocca referred in his letters to future decisions of the Commission. However, that does not mean that the Commission had already, in the past, taken a decision. Neither Sir Leon Brittan nor Mr Rocca referred in their letters to any decision previously taken by the institution.

94 On the contrary, the legal hindrance to the implementation of the Agreement as originally concluded by the parties resulted from the fact that the Netherlands authorities amended the regulatory framework within which the agreement was to be placed, in particular the rules relating to the incentive premium, in accordance with the suggestions contained in Sir Leon Brittan's letter. Those regulations adopted by the Netherlands authorities are indeed binding on the applicants.

95 It should, however, be recalled that the Court found above that those measures were adopted voluntarily and in the absence of any Commission decision having produced legal effects with regard to the Netherlands Government. It follows that the binding effects which ensue for the applicants from the acts adopted by the national authorities cannot be imputed to the Commission and cannot therefore be regarded as effects produced by the contested letters.

96 The said letters do not therefore have binding effects as regards the applicants.

3. *The legal protection of individuals*

97 The applicants have further claimed that individuals would not be afforded adequate legal protection if the Court allowed the Commission, for the purposes of the application of competition law, to act in concert with national authorities, leading to measures which bind individuals at the national level, without the positions taken by the Commission in that context being subject to review by the Community Court.

98 In that respect it should be observed that the legal protection claimed by the applicants amounts in substance to asking the Court for a finding concerning the compatibility of their agreement with Community competition law and whether the position taken by Sir Leon Brittan in his letter of 6 March 1989 was well founded. No such form of legal protection is provided for in Article 173 of the Treaty. Although it is true that the provisions concerning the right of individuals to bring an action must not be interpreted restrictively (see the judgment of the Court of Justice in Case 25/62 *Plaumann* v *Commission* [1963] ECR 95, at p. 106), it would go beyond the bounds of interpretation of the Treaty to allow an action not envisaged in that provision.

99 For all those reasons the Court holds that the letter addressed on 6 March 1989 by Sir Leon Brittan to the Netherlands State Secretary for Economic Affairs and the State Secretary for Welfare, Public Health and Culture, by itself or in conjunction with the three letters from Mr Rocca dated 16 March, 4 April and 28 April 1989, referred to in the alternative in the present action, did not produce binding legal effects either with regard to the Kingdom of the Netherlands or with regard to the applicants and in consequence there is no decision against which an action can lie.

100 This action must therefore be dismissed as inadmissible and there is no need to examine the question whether the letter addressed by Sir Leon Brittan to the Netherlands Government concerns the applicants directly and individually.

Costs

101 Under Article 69(2) of the Rules of Procedure of the Court of Justice, applicable *mutatis mutandis* to the procedure before the Court of First Instance pursuant to the third paragraph of Article 11 of the Council Decision of 24 October 1988, cited above, the unsuccessful party is to be ordered to pay the costs if they have been asked for in the successful party's pleadings. Since the applicants have failed in their submissions, they must be ordered to pay the costs jointly and severally, as the Commission requested. The intervener did not ask for costs and must therefore bear its own costs.

On those grounds,

THE COURT OF FIRST INSTANCE (First Chamber)

hereby:

(1) Dismisses the application as inadmissible;

(2) Orders the applicants jointly and severally to pay the costs, except those incurred by the intervener, which must be borne by the intervener itself.

Cruz Vilaça Kirschner

Schintgen García-Valdecasas Lenaerts

Delivered in open court in Luxembourg on 13 December 1990.

H. Jung
Registrar

J. L. Cruz Vilaça
President