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

In Case T-116/89,

Vereniging Prodifarma, whose registered office is in Amsterdam,

Katwijk Farma BV, whose registered office is at Katwijk,

Lagap BV, whose registered office is at Krimpen a/d IJssel,

Medicalex BV, whose registered office is at Ridderkerk,

Polyfarma BV, whose registered office is at Groningen,

Stephar BV, whose registered office is at Krimpen a/d IJssel,

represented by M. van Empel and A. J. H. W. M. Versteeg, 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,

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,

* Language of the case: Dutch.

APPLICATION for a declaration that the decision alleged by the applicants to be contained in a letter of a Member of the Commission is 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-113/89 *Nefarma* v *Commission* [1990] ECR II-797, T-114/89 *VNZ* v *Commission* [1990] ECR II-827 and 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-113/89 and T-114/89.

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 Case T-113/89, 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.

10 The exception mentioned above is Prodifarma, the applicant in this case and in Case 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 two applicant organizations in Case T-113/89, 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 the present case, 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. It asked the Commission to prohibit implementation of the Agreement while the matter was being investigated and to apply Article 15(6) of Regulation No 17 should the Agreement be notified. On 9 December 1988 Nefarma, the applicant in Case T-113/89, notified the Agreement to the Commission in the name of all the signatories. The notification was registered by the Commission under No IV/33.017. Nefarma 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 On the basis of that letter Prodifarma sought an interlocutory order in the national courts against Nefarma and VNZ for the suspension of implementation of the Agreement until the Commission had had an opportunity to give its opinion on the Agreement. That application was, however, dismissed.

19 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.

20 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.

21 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%.

22 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-113/89 and T-114/89. 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.

23 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.

24 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.'

25 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.'

26 On 16 March 1989 a copy of that letter was sent by fax to Prodifarma. Nefarma and VNZ, the applicants in Cases T-113/89 and T-114/89 also received copies.

27 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 two State Secretaries gave their approval to the new directives after Prodifarma had unsuccessfully tried to prevent them from doing so by means of an application for an interim injunction against the Netherlands State. The proposals made in the Agreement were thus implemented with effect from 1 April 1989.

28 On 28 April 1989 Mr Rocca sent a letter to Prodifarma asking it to cooperate, by providing specified data, in the monitoring of the effects of the Agreement which the Commission intended to carry out. That letter stated:

'It also goes without saying that, in accordance with Article 20(1) of Regulation No 17 of 1962, the Commission will use that data solely for the purpose of monitoring the Agreement in the context of what was agreed in Case IV/33.017 and that it will respect the general rules of confidentiality.'

Procedure

29 By an application lodged at the Court Registry on 19 May 1989 the applicants brought this action against the Commission for the annulment of the decision allegedly contained in Sir Leon Brittan's letter of 6 March 1989.

30 The applicants challenge the legality of that letter on the four grounds for annulment in Article 173. They claim, first, that the Commission had no power to intervene in the way it did, in view of the fact that Article 85(3) of the Treaty and Articles 2 and 6 of Regulation No 17 empower it solely to issue either an exemption or negative clearance. Secondly, the applicants complain that the Commission failed to give adequate reasons for its positive decision on the Agreement. Thirdly, they take the view that the Commission disregarded Article 85(1) of the Treaty because it recognized the provisions in the Agreement on settling prices and increasing the authorized rebates as incompatible with the rules of the Treaty, but they were not amended and, moreover, the adjustment made to the incentive premium rate does not substantially alter the anti-competitive effects of the Agreement. Finally, the applicants complain that the Commission misused its powers.

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:

(i) declare void the Commission's decision contained in the letter of 6 March 1989 addressed to the State Secretary for Welfare, Public Health and Culture, D. J. D. Dees, and the State Secretary for Economic Affairs, A. J. Evenhuis;

(ii) 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 to pay the costs.

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. The contested letter does not therefore constitute a rejection of Prodifarma's complaint.

44 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.

45 The Commission observes that the contested letter cannot be regarded as a decision rejecting a request for 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, since the applicants had not made such a request. The Commission stresses that the letter does not affect the procedural rights of the applicants who, should the investigation show that their complaint was unfounded, could ask the Commission to address a letter to them pursuant to Article 6 of Regulation No 99/63/EEC of the Commission of 25 July 1963 on the hearings provided for in Article 19(1) and (2) of Council Regulation No 17 (Official Journal, English Special Edition 1963-64, p. 47).

46 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. At the hearing it emphasized that national law affords Prodifarma legal protection of its rights and that the applicant availed itself of that protection by applying for interim measures on two occasions on the basis of the alleged illegality of the Agreement. The fact that those two applications were rejected by the national courts does not entitle the applicant, in the Commission's view, to bring proceedings before the Court of First Instance. 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 it did not take any decision in that connection itself.

47 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.

48 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.

49 At the hearing the Commission finally expressed the fear that any relaxing of the conditions of admissibility might subsequently 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.

50 For their part, the applicants maintain that the contested letter constitutes a decision which, although addressed to the two State Secretaries concerned, nevertheless considerably changed their own legal position.

51 The applicants emphasize that the Commission's departments' first reaction to the Agreement on 14 December 1988 constituted an effective obstacle to its entry into force. They say that it was as an immediate consequence of Sir Leon Brittan's letter announcing that exemption pursuant to Article 85(3) of the Treaty would be granted provided the suggested amendments were put into effect that the Agreement was implemented. The applicants conclude that it was a decision which objectively and directly changed the legal position of the parties concerned by the Agreement, amongst whom were Prodifarma and its associates.

52 The applicants acknowledge that the language used in the letter might suggest a mere expression of intent on the part of the Commission. However, they cite the case-law of the Court of Justice according to which it is not the form of the act but its content which must be taken into account in order to determine whether it is open to challenge (judgments in Case 22/70 *Commission* v *Council* [1971] ECR 263 (the 'ERTA case') and in Case 60/81 *IBM* v *Commission* [1981] ECR 2639). According to the applicants, the Commission knew that in view of the circum-

stances in which the letter of 6 March 1989 was sent it would be regarded by all concerned as a decision setting out in binding terms the conditions under which the Agreement might be implemented. They conclude that the Commission intended to alter the pre-existing legal situation and to remove the blocking effect of its letter of 14 December 1988. The applicants consider that the Commission itself, in referring in its letter of 28 April 1989 to the 'context of what was agreed in Case IV/33.017', is assuming that the letter of 6 March 1989 created a new legal situation for the period indicated in that letter.

53 According to the applicants, the argument used by the Commission to the effect that the contested letter was only provisional in character ignores the central issue. An administration or authority may at any time adopt decisions or acts having binding legal effects. The view that only acts terminating a procedure may be challenged is contrary to the system of legal protection established by the second paragraph of Article 173 of the Treaty. In support of that argument they rely on the judgments in Case 60/81 *IBM*, cited above, and in Joined Cases 8/66 to 11/66 *Cimenteries* v *Commission* [1967] ECR 75. In response to the Commission's argument that there was no rejection of a request for interim measures in this case, the applicants stated at the hearing that the complaint lodged by Prodifarma with the defendant institution did indeed constitute a request for interim measures in respect of the Agreement.

54 The applicants consider that the argument that they are at liberty to ask the Commission to address to them the notification provided for in Article 6 of Regulation No 99/63 if the investigation shows that their complaint is unfounded is immaterial to the question whether the contested letter produced legal effects.

55 According to the applicants, to maintain, as the Commission does, that only the decision of the Netherlands Government, acting on its own authority and on its own responsibility, to give the 'green light' to the Agreement gave rise to binding legal effects disregards reality. They claim in that regard that the Netherlands Government had previously requested the Commission to give the Agreement a chance and, following the letter of 14 December 1988, implementation of the Agreement could only be envisaged at national level if the Commission reversed its initial view.

56 At the hearing, the applicants cited the judgments in Case 62/70 *Bock* v *Commission* [1971] ECR 897, and in Case 11/82 *Piraiki-Patraiki* v *Commission* [1985] ECR 207, in which the Court held to be admissible actions brought by individuals against decisions addressed to Member States in circumstances which, according to the applicants, were similar to those in the present case.

57 They further claimed that the communication of the draft letter, before it had been signed, to the Netherlands authorities confirms that it was a reponse to specific needs of which the Netherlands Government had informed the Commission very precisely. That fact militates against the letter in question being interpreted as a note containing merely suggestions of a political nature.

58 Against the Commission's argument that the contested letter reflects merely the personal opinion of a Member of the Commission the applicants counter that the writer of the letter is, after all, the Vice-President of the Commission with responsibility for competition. Furthermore, they conclude from the fact that the letter of 28 April 1989 mentioned above refers to Sir Leon Brittan's letter and sets out the attitude that 'the Commission' intends to adopt in the future that the defendant institution itself did not see the contested letter as containing merely the expression of a personal opinion.

59 In support of their argument that the decision contained in the letter of 6 March 1989 concerns them directly and individually, the applicants cite the judgments in Case 26/76 *Metro* v *Commission* [1977] ECR 1875, and in Case 210/81 *Demo-Studio Schmidt* v *Commission* [1983] ECR 3045. At the hearing they stated that individuals should be regarded as being directly concerned by a decision addressed to a Member State and necessitating an implementing measure at national level as soon as it is possible to foresee with certainty or a high degree of probability that the implementing measure will affect them and how it will do so. They point out that in the present case the consequences of the letter in question in their regard were foreseeable.

60 Finally the applicants submitted at the hearing that it would be contrary to the spirit and scope of the legal protection afforded by Article 173 of the Treaty to hold their application inadmissible. It is unacceptable that the Commission, within

the framework of a policy conducted informally in competition matters, should be free to act in a way which would restrict the judicial review provided for in the Treaty. Article 173 envisages not just the protection of individual interests but, even more importantly, review of the legality of acts of the Community institutions, and that system would be undermined if the contested letter were not regarded as a decision.

61 In reply to the questions put by the Court, the applicants declared that Article 85(2) of the Treaty, according to which agreements concluded in breach of Article 85(1) are automatically void, does not prevent the letter in question from being classed as a decision. The admissibility of an application for review of the legality of an act of a Community institution should not depend on whether remedies exist in national law enabling the agreement referred to in the act to be declared void.

62 The applicants relied on considerations of procedural economy to justify their view that the letter in question was an act against which an action might be brought by the Kingdom of the Netherlands. With regard to the legal basis of such a decision, the applicants observed that the blocking of the implementation of the Agreement was the consequence of the interpretation given by the Court of Justice to Articles 85 and 5 of the Treaty in its judgment in Case 311/85 *Vereniging van Vlaamse Reisbureaus* [1987] ECR 3801. They concluded that the decision to remove that obstacle was also founded on those provisions.

The legal nature of the contested letter

63 In the light of those factual and legal circumstances, the Court must first examine whether the letter against which the present action is directed is an act 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 measure produced binding legal effects (see, most recently, the Order of 17 May 1989 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 pre-existing legal position*

64 The Court considers that it must first be established whether the letter that Sir Leon Brittan addressed on 6 March 1989 to the two Netherlands State Secretaries changed the pre-existing legal position, in particular by removing the obstacle to the implementation by the Netherlands authorities of the Agreement which, according to the applicants, had been created by Mr Rocca's letter of 14 December 1988.

65 To that end the legal situation prevailing when the letter in question was sent must be examined in the light of the applicants' argument that the Agreement was incompatible with Article 85(1) of the Treaty. According to Article 85(2), if that was so the Agreement was automatically void and its nullity could be relied upon before national courts by anyone who believed himself detrimentally affected by the Agreement. The fact that the Agreement had been notified to the Commission was immaterial in that respect, in view of the fact that only an exemption decision taken in accordance with Article 85(3) has the effect of precluding with *erga omnes* effect the nullity resulting from Article 85(2). On the other hand, so long as such an agreement has not been the subject of a prohibition decision by the Commission pursuant to Article 3(1) of Regulation No 17, the parties are at liberty to implement it. If they have notified the agreement to the Commission, Article 15(5) of Regulation No 17 protects them even against the fines provided for in Article 15(2) of that regulation in the case of breach of Article 85(1) of the Treaty, unless the Commission has withdrawn that benefit in accordance with Article 15(6) of Regulation No 17. The parties run the risk, however, of having the nullity of their agreement raised against them in proceedings before the national courts.

66 The letter from Mr Rocca addressed to the parties to the Agreement on 14 December 1988 was not such as to change that legal position with regard to Community law. It represented merely an initial evaluation of the Agreement by the Commission's departments and confined itself to indicating to the parties concerned that the possibility of withdrawing the benefit of Article 15(5) of Regulation No 17 was being studied. However, following that letter an obstacle to the implementation of the Agreement emerged in Netherlands law, since the Netherlands Government was not prepared to adopt the regulations which the parties to the Agreement had made a condition for bringing it into force as long as the Commission maintained a negative attitude towards it.

67 The next question to be examined is whether the contested letter was such as to change the legal position described above.

68 With regard, first, to the alleged nullity of the Agreement under Article 85(2) of the Treaty, it must be observed that Sir Leon Brittan's letter cannot be regarded as a decision granting exemption pursuant to Article 85(3). It is merely the starting point of the examination of the Agreement in order to determine whether such an exemption could be granted. In consequence it is not capable of precluding the nullity of the Agreement resulting automatically from the breach of Article 85(1) alleged by the applicants.

69 The next question is whether the letter at issue produced effects equivalent to those of a decision which, without producing the same legal effects as an exemption decision pursuant to Article 85(3), nevertheless changes the pre-existing legal position by affecting the procedural rights of the parties to the Agreement and third parties who lodged complaints.

70 Such a decision may take the form of negative clearance pursuant to Article 2 of Regulation No 17, whereby the Commission defines its position with regard to an Agreement. Following such a decision the parties are protected from measures that the Commission might take against their agreement whilst complainants cannot require that the file be reopened unless there is a change in circumstances or they put forward new evidence. The effects of negative clearance as against third parties who lodge complaints are therefore comparable to those of a decision rejecting their complaint (see the judgment in Joined Cases 142/84 and 156/84 *BAT and Reynolds* v *Commission* [1987] ECR 4487, at p. 4571). Such effects presuppose, however, a definitive assessment of the Agreement concerned which, in this case, did not take place.

71 It should be added that the letter in question has not affected the right of the applicants to ask for a letter to be addressed to them pursuant to Article 6 of Regulation No 99/63. The express reservation concerning the procedural rights of the parties made in the letter indicates that Sir Leon Brittan wished to preserve those rights in full. It follows that the said letter did not change the pre-existing legal position at the procedural level either.

72 Furthermore, the Commission has the 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 in Case 792/79 R *Camera Care*, cited above, at p. 130 et seq.). However, the contested letter does not reveal any intention of temporarily changing the legal position as it then was by means of such measures. There is nothing in that letter to suggest that the author considered that the legal consequences of Article 85(2), of the Treaty and of Regulation No 17 produced an intolerable situation in the case in point. The intention of the letter is neither to exclude application of Article 85(2) temporarily nor to provisionally prohibit the implementation of the Agreement or subject it to restrictions. Although the writer of the letter made the possibility of a favourable decision on the Agreement conditional on an amendment to the incentive premium scheme provided for in the Agreement and the introduction of a monitoring system, it must be held, as the Court has done in its judgments of today's date in Cases T-113/89 and T-114/89, that those were not binding measures, since the contested letter left complete latitude to the parties to the Agreement whether to comply or not.

73 At the hearing the applicants maintained that the complaint made by Prodifarma to the Commission on 2 December 1988 did in fact constitute a request for the adoption of interim measures. However, the contested letter does not refer to the applications made in the said complaint. That fact reinforces the Court's view that the letter did not introduce interim measures within the meaning of the Order in Case 792/79 R *Camera Care*, cited above.

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

74 However, Sir Leon Brittan's letter did lead the Netherlands Government to change its national rules so as to remove the obstacle to the implementation of the Agreement in national law. It is therefore necessary to consider whether the Netherlands Government gave its approval to implementation of the Agreement after a Commission decision authorizing it to do so or after a mere opinion.

75 In order to assess whether the position taken by the Member of the Commission *vis-à-vis* the Netherlands Government was in the nature of a decision, it must first be determined 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).

76 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 of 30 September 1987 in Case 229/86 *Brother Industries* v *Commission* [1987] ECR 3757, at p. 3762 et seq.).

77 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 decisions producing legal effects 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. Similarly, the power of the Commission to issue negative clearance pursuant to Article 2 of Regulation No 17 and to grant exemption pursuant to Article 85(3) of the Treaty may be exercised only *vis-à-vis* the undertakings concerned and cannot serve as the basis for decisions addressed to Member States.

78 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.

79 Nor can any power for the Commission to adopt decisions producing legal effects with regard to 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 effectiveness (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 prescribing a course to be followed in conformity with Community law (Order in Case 229/86 *Brother Industries*, cited above). Nor, in consequence, can it serve as the legal basis for a decision authorizing a Member State to adopt a given course. It is for the Member States to ensure that their conduct meets their obligations under Articles 3(f), 5 and 85 of the Treaty, subject to the review which the Court may subsequently undertake in the context of the procedures provided for in Articles 169 and 177 of the Treaty (see, for the application of this latter provision, the judgment in Case 311/85 *Vereniging van Vlaamse Reisbureaus*, cited above). In contrast, a prior check as to whether national measures are in conformity with Community law, in the form of authorization given by the Commission, is not consistent with the division of powers between the Community and national authorities in this area as laid down by the Treaty.

80 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 and authorizing them to take steps to remedy those infringements. However, that transitional provision refers only to situations in which provisions implementing Articles 85 and 86, such as Regulation No 17, are lacking.

81 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.

82 It must therefore be held that the letter in question does not rest on a legal basis empowering the Commission to adopt a decision capable of changing the legal position of the Kingdom of the Netherlands, whether by obliging or authorizing it to adopt a specific course of action. It follows that it did not produce binding legal effects with regard to that Member State.

83 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, that when a favourable reaction was not forthcoming it decided not to adopt the regulations necessary to implement the Agreement and that it incorporated the observations made in the contested letter in the measures that it subsequently took. 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 that letter changed the legal position of the Kingdom of the Netherlands *vis-à-vis* the Community.

84 In consequence, the position taken by Sir Leon Brittan is to be regarded neither as a decision compelling the Netherlands Government to refrain from giving the 'green light' to the original version of the Agreement nor as authorization to implement it in its amended form, but rather as an act having effects comparable to those of an opinion requested by national authorities for the purposes of their examination whether measures which they were planning were compatible with Community law in order to meet the obligations imposed on them by virtue of Articles 3(f), 5 and 85 of the Treaty.

85 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. To that end it voluntarily decided not to implement the Agreement so long as the Commission's attitude was negative and subsequently adapted the national rules to the position defined in Sir Leon Brittan's letter. The Treaty, in particular 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 having no binding legal effect shows that voluntary compliance with the rules of the Treaty and non-binding acts of the institutions is an essential element in the achievement of the goals of the Treaty. It follows that the fact that the government of a Member State held back from taking a measure whose compatibility with the Treaty was doubtful until it had received a favourable opinion from the Commission cannot confer on that opinion the character of an authorization.

86 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.

87 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 8/66 to 11/66 *Cimenteries* v *Commission*, cited above), 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.

88 Similarly, the applicants cannot rely on the letter sent by Mr Rocca to Prodifarma on 28 April 1989 to contend that the Commission itself regarded Sir Leon Brittan's letter as a decision rather than a statement of the opinion of one of its Members at a political level. In referring to 'what was agreed in Case IV/33.017', Mr Rocca quite properly used terms incompatible with the thesis that it was a binding decision.

89 Nor, finally, is 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 compatible with the thesis that it was an authorization coupled with conditions. 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.

90 For all those reasons this Court holds that the contested letter did not produce binding legal effects with regard to the Kingdom of the Netherlands.

3. *The legal protection of individuals*

91 The applicants have further claimed that in view of the particular circumstances of this case individuals would not be afforded adequate legal protection nor would review of the legality of acts of the Community institutions be properly ensured if the contested letter were not regarded as a decision.

92 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 both the compatibility with Community competition law of the agreement which was the subject of their complaint to the Commission 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.

93 For all those reasons the Court holds that the letter addressed on 6 March 1989 by Sir Leon Brittan to the two Netherlands State Secretaries cannot be regarded as a decision against which an action lies. Accordingly 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.

94 In that connection it should be added that the applicants were mistaken in relying on the judgments of the Court in Case 62/70 *Bock*, and Case 11/82 *Piraiki-Patraiki*, both cited above, to contend that their application is admissible. In those cases the Court examined the question whether an individual could be directly concerned by a decision of the Commission addressed to a Member State necessitating implementing measures on the part of the latter before it produced practical effects *vis-à-vis* the individual concerned. It is true that there is a certain similarity between the facts giving rise to the present action and the situations on which the Court ruled in those two judgments, inasmuch as the Netherlands Government had expressly made its decision to create the conditions necessary for the implementation of the Agreement subject to a favourable reaction from the Commission and in consequence its intention to act in accordance with the statement of the Commission's position for which it had asked was not in doubt. The applications upheld by the Court in those cases were, however, directed against decisions which had produced legal effects with regard to the Member States concerned, by authorizing them to take measures affecting individuals which, in the absence of the contested decisions, would have been in breach of Community law. In contrast, there is no such decision in this case. Consequently the judgments referred to above cannot be relied upon in support of the admissibility of the present application.

95 It follows from all the foregoing considerations that the present application must be dismissed as inadmissible.

Costs

96 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 appliclicants 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