# OPINION OF ADVOCATE GENERAL SAGGIO

delivered on 18 July 1999 *

## I — Introduction

1. This appeal seeks to have set aside the judgment delivered on 14 May 1997 by the Court of First Instance in Joined Cases T-70/92 and T-71/92 *Florimex BV and Vereniging van Groothandelaren in Bloemkwekerijprodukten* v *Commission of the European Communities* [1] (hereinafter, 'Florimex', 'the VGB' and 'the Commission' respectively). In that judgment the Court annulled the Commission decision of 2 July 1992 rejecting the complaints lodged by Florimex and the VGB pursuant to Article 3(2) of Regulation No 17 of the Council of 6 February 1962: First Regulation implementing Articles 85 and 86 of the Treaty (hereinafter 'Regulation No 17'). [2]

The complaints concerned the rules of the Coöperatieve Vereniging De Verenigde Bloemenveilingen (hereinafter 'the VBA'), a cooperative society constituted under Netherlands law whose members are growers of flowers and ornamental plants. In particular, it was alleged that the payment of fees charged to non-member suppliers of the VBA to gain access to the premises of the cooperative and to supply their products directly to the dealers established on those premises constituted an infringement of Article 85(1) of the EC Treaty (now, after amendment, Article 81(1) EC).

2. I would observe that, under Article 36 EC (formerly Article 42), an agreement on agricultural products falls within the scope of the competition rules contained in the EC Treaty 'only to the extent determined by the Council'.

The Council established, in Regulation No 26 of the Council of 4 April 1962 applying certain rules of competition to production of and trade in agricultural products [3] (hereinafter 'Regulation No 26'), that 'Article 85(1) of the [EC] Treaty shall not apply to such of the agreements, decisions and practices ... as form an integral part of a national market organisation or are necessary for attainment of the objectives set out in Article 39 of the [EC] Treaty [now, after amendment, Article 33 EC]. In particular, it shall not apply to agreements, decisions and practices of farmers, farmers' associations, or associations of such associations belonging to a single Member State which concern the production or sale of agricultural products or the use of joint facilities for the storage,

* — Original language: Italian.

1 — [1997] ECR II-693.

2 — OJ, English Special Edition 1959-1962 (I), p. 87.

3 — OJ, English Special Edition 1959-1962 (I), p. 129.

treatment or processing of agricultural products, and under which there is no obligation to charge identical prices, unless the Commission finds that competition is thereby excluded or that the objectives of Article 39 of the Treaty are jeopardised' (Article 2(1)).

## II — Facts before the Court of First Instance

3. The facts of the present case are summarised in the Court of First Instance judgment in paragraphs 1 to 51. I will repeat below only those passages of the judgment which are relevant for the purposes of examining this appeal.

*The parties* [4]

4. The VBA represents more than 3 000 undertakings, the great majority of which are from the Netherlands with a small minority being Belgian. On its premises at Aalsmeer, the VBA organises auction sales of floricultural products, in particular fresh-cut flowers, indoor plants and garden plants. The VBA's premises are used primarily for the actual auction sales, but an area is reserved for the renting-out of processing rooms for the purposes of wholesale trade in floricultural products. The tenants of these rooms are mainly cut-flower wholesalers and, to a lesser extent, dealers in indoor plants.

5. Florimex is an undertaking engaged in the flower trade, established in Aalsmeer. It imports floricultural products from Member States of the European Community and from non-member countries, mainly for resale to wholesalers established in the Netherlands.

6. The VGB is an association comprising numerous wholesalers of floricultural products, including Florimex. The VGB's objects include promoting the interests of the wholesale trade in floricultural products in the Netherlands and liaising with the public authorities and auctioneers.

4 — Paragraphs 1 to 6 of the judgment.

*The VBA's rules* [5]

7. Article 17 of the VBA's statutes requires its members to sell their products in auctions organised on the premises of the cooperative. A fee or commission is invoiced to the members for the services provided by the VBA. In 1991 that fee amounted to 5.7% of the proceeds of sale.

With regard to direct supplies to dealers established on the VBA's premises, it is apparent from the Court's judgment that, until 1 May 1988, the VBA auction rules included provisions designed to prevent the use of its premises for supplies, purchases and sales of floricultural products not passing through its own auctions. In practice, the VBA granted authorisation for commercial transactions involving these products but only under certain standard contracts known as 'handelsovereenkomsten' (trade agreements) through which the VBA allowed certain dealers, under the conditions established by the VBA, to sell or supply to purchasers approved by it certain floricultural products bought in other auctions in the Netherlands, or to sell cut flowers of foreign origin against payment of a levy of 5% of the sale price. In addition, the association authorised the purchase by a dealer established on its premises of products not purchased through it, against payment of a levy of 10% of the value of the goods.

*The Commission decision of 1988* [6]

8. In 1982 Florimex lodged a complaint under Article 3(1) of Regulation No 17 that the VBA had infringed Articles 85 and 86 of the EC Treaty (now Article 82 EC) due to its auction rules on direct supplies to dealers established on its premises.

9. On 5 November 1984 the VBA applied to the Commission for negative clearance under Article 2 of Regulation No 17 or a favourable decision under Article 2 of Regulation No 26, or, failing this, an exemption decision under Article 85(3) of the Treaty, regarding, in particular, its statutes, its auction rules, its trade agreements, its general conditions for the rental of processing rooms and its scale of charges.

10. On 26 July 1988 the Commission adopted Decision 88/491/EEC relating to

5 — Paragraphs 7 to 14 of the judgment.

6 — Paragraphs 15 to 18 of the judgment.

a proceeding pursuant to Article 85 of the EEC Treaty (IV/31.379 — Bloemenveilingen Aalsmeer, hereinafter 'the 1988 decision').[7] In the operative part of that decision, the Commission found that:

'1. The agreements notified to the Commission which were concluded by the VBA whereby the dealers established on the VBA's premises and their suppliers were at least until 1 May 1988 required:

(a) to deal in and/or have delivered on the VBA's premises floricultural products not bought through the VBA only with the consent of the VBA and under the conditions laid down by it;

(b) to store temporarily on the VBA's premises floricultural products not bought through the VBA only against payment of a fee determined by the VBA,

constitute infringements of Article 85(1) of the EEC Treaty.

The charges for the prevention of irregular use of the VBA facilities imposed by the VBA on the dealers established on its premises (10% rule, NLG 0.25 levy) as well as the trade agreements concluded between the VBA and these dealers, also constitute, as notified, infringements of that provision.

2. An exemption pursuant to Article 85(3) of the EEC Treaty for the agreements referred to in Article 1 is hereby refused'.

*Amendments to the auction rules introduced after the 1988 decision*[8]

11. As from 1 May 1988 the VBA formally removed the purchase obligations and restrictions on the free disposal of goods imposed by the auction rules and also the levies, but at the same time introduced a 'user fee' ('facilitaire heffing'). The rules on this, amended several times in line with the Commission's indications, apply to direct supplies to dealers established on the VBA's premises and to commercial transactions not carried out through the VBA.

7 — OJ 1988 L 262, p. 27.

8 — Paragraphs 19 to 23 of the judgment.

The rules on this 'user fee' involve the following:

(a) the fee is payable by the supplier, that is to say the person by whom or the undertaking on whose instructions the products are brought on to the auction premises. Delivery is monitored at the entry to the premises. The supplier is required to indicate the name and nature of the products concerned, but not their destination;

(b) the fee is levied on the basis of the number of stalks (cut flowers) or plants supplied;

(c) as from 1 May 1991 the fee, which is subject to annual review, is fixed at specific levels, in particular according to the type of plant and the number of cut flowers;

(d) the fees are determined by the VBA on the basis of the annual average prices achieved in the previous year for the categories concerned;

(e) according to the VBA, a factor of around 4.3% of the annual average price for the products is applied but this must comply with the auction rules on the sale of products; suppliers may pay a fee of 5% as an alternative to the system described above;

(f) a tenant of a processing room who brings goods onto the VBA's premises is exempt from the user fee if he has purchased the products in question at another flower auction in the Community or has imported them on his own behalf into the Netherlands, provided that he does not resell them to dealers on the auction premises.

12. Furthermore, on 29 April 1988, the VBA removed, with effect from 1 May 1988, the restrictions previously contained in the trade agreements, particularly those concerning sources of supply. Since then three types of trade agreement have existed covering slightly different situations (depending on whether or not the supplier rents a processing room from the VBA or whether or not he was a holder of a previous trade agreement). All the agreements apply a charge of 3% of the gross value of the goods supplied to customers on the VBA's premises. The agreements concern for the most part products not grown in the Netherlands and therefore products other than those which are normally entered for auction by members of the VBA.

*The reopening of the administrative procedure* [9]

13. By letters of 18 May, 11 October and 29 November 1988 Florimex lodged a complaint with the Commission, registered under No IV/32.751, claiming in particular that the user fee had the same object or effect as the 10% levy prohibited by the Commission in the 1988 decision and that, for certain products, the user fee was levied at an even higher rate. The VGB lodged a similar complaint by letter of 15 October 1988.

14. On 19 July 1988 the VBA notified the Commission of the amendments to its rules adopted with effect from 1 May 1988, in particular the new user fee, but made no mention of the new trade agreements. On 15 August 1988 additional amendments to the VBA rules were notified to the Commission.

15. By letters of 21 December 1988 the Commission informed Florimex and the VGB that it had initiated proceedings against the VBA and expressed the opinion that the user fee was not discriminatory by comparison with the fees payable by members and other suppliers selling at VBA auctions.

16. On 4 April 1989 the Commission published Notice 89/C 83/03, pursuant to Article 19(3) of Regulation No 17 and Article 2 of Regulation No 26, indicating that it proposed to take a favourable decision on the VBA rules on supplies for auction sales by VBA members and other suppliers, the conditions of sale by auction and the user fee payable by suppliers and applicable to the direct supplying of dealers established on the VBA's premises.

17. By letters of 3 May 1989 Florimex and the VGB submitted their observations in response to the notice of 4 April 1989. On 7 February 1990 the VBA notified the Commission of its additional rules concerning the 'detailed provisions governing the user fee', under which it would be possible for a supplier to pay the user fee at a flat rate of 5% of the value of the products. On the same date, the VBA notified the new trade agreements to the Commission.

18. By letter of 24 October 1990 the Commission informed the appellants of its intention to adopt a decision favourable to the VBA. The appellants repeated their arguments in letters of 26 November and 17 December 1990 and at a meeting with Commission staff dealing with the matter on 27 November 1990.

9 — Paragraphs 25 to 36 of the judgment.

*The Commission decision contested before the Court of First Instance* [10]

19. By letter of 4 March 1991 the Commission informed the complainants, in accordance with Article 6 of Commission Regulation No 99/63/EEC of 25 July 1963 on the hearings provided for in Article 19(1) and (2) of Council Regulation No 17 [11] (hereinafter 'Regulation No 99/63'), that the information obtained did not enable the Commission to uphold their complaints regarding the user fee levied by the VBA. The Commission annexed to this letter a document which set out in detail the reasons which prompted the Commission to reach that conclusion.

In the part of that document entitled 'legal assessment', the Commission found firstly that the provisions concerning supplies for auction sales and the rules on direct supplies to dealers established on the VBA's premises formed part of a body of decisions and agreements concerning the supply of floricultural products on the VBA's premises which were covered by Article 85(1) of the EC Treaty. Secondly, it found that those decisions and agreements were necessary for attainment of the objectives set out in Article 39 of the EC Treaty, within the meaning of the first sentence of Article 2(1) of Regulation No 26.

20. As regards the application of the first sentence of Article 2(1) of Regulation No 26 to supplies for auction sales, the Commission found in particular, in point II.2(a) of the document annexed to the letter of 4 March 1991, that:

'The most important principle of the rules on supplies for the auction sales is the obligation to sell by auction imposed on VBA members, which is based on Article 17 of the statutes of the VBA. That obligation to sell by auction constitutes an essential element of the cooperative basis on which the VBA is organised, which is necessary for attainment of the objectives of the common agricultural policy set out in Article 39.

The importance of groups of producers and associations thereof in the context of the common agricultural policy is apparent from Council Regulation (EEC) No 1360/78 of 19 June 1978. The objectives set out in Article 39(1) cannot be attained unless the structural difficulties affecting the production of agricultural products and particularly the first stage of distribution of those products are eliminated. This situation can be remedied by grouping independent farmers on a cooperative basis so that the economic process can be influenced by common measures designed among other things to centralise supply (fifth and sixth recitals in the preamble to Regulation (EEC) No 1360/78).

10 — Paragraphs 37 to 47 of the judgment.
11 — OJ, English Special Edition 1963–1964, p. 47.

This general principle must also apply specifically in this case. It is clear from an analysis of the composition of the VBA's membership that, although a small group by itself is relatively important in economic terms, the vast majority of VBA producers are nevertheless farmers who can participate in the economic process on a wider-than-regional scale only through centralisation of supply.

Cooperative associations can in principle fulfil their task of improving the organisation of marketing only if all their members' supplies are brought together. Accordingly, the measures taken by the Community with a view to promoting the establishment of cooperative organisations provide that the statutes of the groups to be supported must either contain uniform rules for contributions and placing goods on the market or must provide that the whole of the production intended for marketing is to be placed on the market by the group (Article 6(1)(c) of Regulation (EEC) No 1360/78; [12] Article 13 of Regulation (EEC) No 1035/72 [13]).'

As regards the application of the first sentence of Article 2(1) of Regulation No 26 to direct supplies for dealers established on the VBA's premises, the Commission considered, in point II.2(b) of its document, that:

'The user fees constitute an essential feature of the VBA distribution system, without which its competitive capacity and therefore its survival would be compromised. Consequently, they are also necessary for attainment of the objectives set out in Article 39.

If the VBA, which specialises in exports, wishes to be in a position to achieve its object as an undertaking, in other words if it seeks to be able to develop and maintain its position as an important source of supply for international trade in flowers, it is necessary, because of the perishable and fragile nature of the products dealt in ("floricultural products"), that the export dealers should be geographically close to it. Geographical concentration of demand on its premises, which the VBA seeks in its own interest, is the consequence not only of the fact that a full range of products is offered there but also, and most importantly, of the fact that those dealers have services and facilities available there which help them carry on their trade.

The geographical concentration of supply and demand on the VBA's premises consti-

12 — OJ 1978 L 166, p. 1.
13 — OJ, English Special Edition 1972 (II), p. 437.

tutes an economic advantage which is the result of significant efforts, in both tangible and intangible terms, made by the VBA.

If dealers were able to enjoy that benefit without paying for it, the VBA's survival would be compromised because the resultant discriminatory treatment of suppliers linked with the VBA would prevent it from amortising unavoidable costs and covering current operating costs.'

Then, as to whether, through the user fee, the VBA obtained an unjustified advantage resulting in a restriction of competition, the Commission took the view that it was not necessary to calculate the fees with mathematical precision by apportioning the various costs on the basis of the internal organisation of the undertaking, but that it was sufficient to compare the levels of fees invoiced to the individual suppliers (point II.2(b), fifth and sixth subparagraphs, of the document annexed to the letter of 4 March 1991). The Commission concluded:

'It is clear from a comparison of the auction fees and the user fees that broad equality of treatment is guaranteed as between suppliers. Admittedly, a proportion of the auction fees, which cannot be precisely determined, represents payment for the service provided by the auction, but in so far as the rate of the auction fees can be compared with that of the user fees in this case, that service is a *quid pro quo* for the assumption of supply obligations. Dealers who have concluded trade agreements with the VBA also assume such supply obligations. Consequently, the rules on user fees do not have effects which are not compatible with the common market (ibid., point II.2(b), seventh subparagraph).'

Finally, the Commission took the view that the effect of the user fee was similar to that of the minimum auction sale price. According to the Commission, 'the lower the price actually achieved, the greater the fee. As a result, supply is discouraged at times of excess supply, which is certainly desirable (ibid., point II.2(b), sixth subparagraph).'

21. On 17 April 1991 the complainants replied to the Commission and maintained their complaints. They claimed in particular that the Commission had not commented on all the circumstances and that, therefore, the letter of 4 March 1991 could not be regarded as a notice under Article 6 of Regulation No 99/63.

22. On 2 July 1992 the Commission sent the appellants' lawyer a registered letter with acknowledgment of receipt giving

notice of the definitive rejection of their complaints concerning the user fee. In that letter (hereinafter 'the decision'), the Commission stated that the reasons given in it supplemented and clarified those given in its letter of 4 March 1991 under Article 6, to which it referred.

## III — The contested judgment

23. On 21 September 1992 Florimex and the VGB brought two separate actions against the contested decision. By an order of 14 June 1993, the cases were joined.

In support of their application for annulment, the appellants put forward a number of pleas which, after examining the arguments invoked, the Court grouped under the following four headings: the pleas alleging procedural error in that the user fee was, wrongly, dealt with separately; the plea alleging infringement of Article 19 of Regulation No 17 and the absence of a formal decision under Article 2 of Regulation No 26; the pleas alleging that the first sentence of Article 2(1) of Regulation No 26 was inapplicable and that adequate reasons were not given in that regard, and the plea alleging unequal treatment as between outside suppliers and the holders of trade agreements regarding the respective rates at which they were charged the user fee and the fee provided for in the trade agreements. [14]

24. The Court found that the arguments invoked under the first two headings were unfounded. It accepted the actions under the third and fourth headings, consequently annulling the Commission decision of 2 July 1992.

## IV — Substance

25. The VBA has put forward eight grounds of appeal against the judgment of the Court of First Instance. The first alleges infringement and incorrect application of Article 190 of the EC Treaty (now Article 253 EC) and the rules on the limits of the Court's review of administrative acts; the second alleges infringement and incorrect application of the second sentence of Article 2(1) of Regulation No 26; the third alleges infringement and incorrect application of Article 85(1) of the EC Treaty, and the fourth, fifth, sixth, seventh and eighth pleas allege infringement and incorrect application of the first sentence of Article 2(1) of Regulation No 26.

14 — Paragraph 78 of the judgment.

*The first ground of appeal alleging infringement of Article 190 of the EC Treaty and the rules on the limits of the Court of First Instance's review of administrative acts*

26. In its first ground of appeal the VBA alleges infringement and incorrect application of Article 190 of the EC Treaty and the rules on the limits of the Court of First Instance's review of administrative acts. According to the appellant, the Court wrongly interpreted Article 190 of the EC Treaty with regard to the requirement to state reasons for a decision rejecting the complaint of infringement of the competition rules. In addition, in deciding whether the reasons stated were inadequate, the Court re-examined all the matters of fact and law in the administrative procedure. In doing so, first, the Court carried out a review which is not within its competence but which comes exclusively under the competence of the administration and, secondly, it annulled the contested act for breach of a procedural requirement, after having accepted that the competition rules had been incorrectly applied, and not for inadequacy of the reasons given.

This ground has three different parts. The first concerns the requirement for the administration to state reasons for a decision rejecting a complaint on competition. The second concerns the legality of the review by the Court, when an act is being contested, of the matters of fact and law accepted by the Commission in the administrative procedure. Finally, the third concerns whether a court of law may assess the inadequacy of reasons by carrying out a review which also covers the substance of the decision and therefore any incorrect interpretation and application of the laws on which the contested act is based.

— The statement of reasons for the decision rejecting a complaint concerning infringement of the competition rules

27. The appellant maintains that, when applying the competition rules, in particular Article 85(1) of the EC Treaty, to acts on agricultural products, the Commission has wide discretion which reduces the scope of the Court to review the substance of the act. The appellant observes that, if the administration were required to state reasons in more detail for every decision on the application of the competition rules, the Community court called to review the legality of such an act would be able to review the assessments which come under the exclusive competence of the administration. However, it adds that, in any event, the decision rejecting a complaint on competition is not subject to the same requirements to state reasons as a decision on the substance of the complaint. The Commission is not therefore required to take into consideration all the arguments invoked by the parties but is only required to indicate the matters of fact and law which led it to reach a particular conclusion.

The defendants observe in this respect that, even accepting the appellant's above contention, even taking account of the characteristics of the contested act, the opposite conclusion to that drawn by the appellant must be reached. They state that, when applying the competition rules to acts concerning agricultural products, the Commission does not have wide discretion and that the review by the Community judicature must not be merely 'marginal', that is concentrating on identifying only manifest errors. In support of this contention, the defendants observe that this case does not involve a decision granting an 'exemption' under Article 85(3) of the EC Treaty but a decision excluding the application to an agreement of the prohibition referred to in Article 85(1). The Commission is therefore required only to ascertain that the conditions excluding, in agricultural matters, the application of the competition rules have been met. However, the decision at issue is not a decision on agricultural policy, as the appellant appears to maintain, but concerns the non-application of the competition rules to an agreement on the trade of agricultural products.

In this respect the Commission basically makes two observations. Firstly it claims that the truth is that the Court examined the infringement of Article 190 even though this was not invoked in a specific plea in law in the action which was limited to contesting the application to this case of the first sentence of Article 2(1) of Regulation No 26. Secondly it claims that the Court incorrectly interpreted the requirement to state reasons for a decision rejecting a complaint and thus also 'reversed the burden of proof' of the legality of the contested act. According to the contested judgment, the complainants are not responsible for proving that the act is unlawful, rather the Commission is responsible for proving that the reasons for this act are founded and that the act is therefore lawful.

28. Before assessing whether the arguments used to support this plea of illegality of the act are well founded, I will briefly recall the passages of the statement of reasons in the Court's judgment which apply in this respect.

In the action for annulment of the decision, the appellants maintained, *inter alia*, that adequate reasons were not given and that the facts were wrongly characterised. The Court ruled jointly on these pleas by carrying out an examination in particular of the statement that 'the first sentence of Article 2(1) of Regulation No 26 is inapplicable and that adequate reasons were not given in that regard'.

With regard to the requirement to state reasons for a decision such as that at issue here, the Court observes, in paragraph 146 et seq., that the Commission has never found, in acts concluding similar infringement procedures adopted before the decision at issue, 'that an agreement between the members of a cooperative which affects

free access by non-members to agricultural producers' channels of distribution is necessary for attainment of the objectives set out in Article 39 of the Treaty.' As stated by the Commission itself, the 'Court maintains that this type of agreement is for the most part not included among 'the means indicated by the regulation providing for a common organisation in order to attain the objectives set out in Article 39' and cannot be included within the provisions of the regulation on the common organisation of the market. The regulation to be considered in this case, on the common organisation of the market in live plants and floricultural products, does not in fact 'provide for agricultural cooperatives to impose such a fee on third parties'. The Court therefore concludes in this respect that 'it was incumbent on the Commission to set out its reasoning in a particularly explicit manner, since the scope of its decision goes appreciably further than that of earlier decisions'. It adds that this conclusion is particularly true in a case such as this because, 'constituting as it does a derogation from the general rule in Article 85(1) of the Treaty, Article 2 of Regulation No 26 must be interpreted strictly'. A decision adopted under the first sentence of Article 2(1) must show how 'the agreement at issue satisfies each of the objectives of Article 39'. In the event of a conflict between those objectives, 'the Commission's statement of reasons must, at the very least, show how it was able to reconcile them so as to enable the first sentence of Article 2(1) of Regulation No 26 to be applied'. The Court therefore proceeded to examine certain passages of the statement of reasons of the decision. In particular, according to the Court, the decision rejecting the complaint at issue does not fully set out the facts and points of law which led the Commission to conclude on the application of the derogation in Article 2. In the Court's opinion, the Commission essentially limited itself to acknowledging that the user fee is necessary in order to guarantee the survival of the VBA, without examining the compatibility, with the objectives of the common agricultural policy, of the effects of this fee on non-members of the cooperative.

29. As I have just observed, the VBA argues that this reasoning is defective in that the Court, in accepting that adequate reasons were not given, did not take account of the nature of the contested decision and specifically of the fact that this is a decision rejecting a complaint which, as such, does not deal with the substance of the conduct complained of.

30. In my opinion, this complaint is unfounded.

It must be borne in mind that, when adopting a decision rejecting a complaint, although not being required to comment on all the facts which the persons concerned put forward in support of their application, it is incumbent on the Commission, however, to set out the facts and points of law which play an essential role in the adoption of the act. Furthermore, according to the case-law referred to by the parties, Article 190 of the EC Treaty is to be interpreted as meaning that the statement of reasons 'must be appropriate to the act at issue and must disclose in a clear and unequivocal

fashion the reasoning followed by the institution which adopted the measure in question in such a way as to enable the persons concerned to ascertain the reasons for the measure and to enable the competent Community court to exercise its power of review. The requirements to be satisfied by the statement of reasons depend on the circumstances of each case, in particular the content of the measure in question, the nature of the reasons given and the interest [of] the addressees of the measure ...'. [15]

I do not therefore share the appellant's opinion that in each case the requirement to state reasons differs according to whether the decision concludes the procedure by taking a position on the substance of the infringements or orders the rejecting of the complaint. I do not believe that in the second case the statement of reasons can ever be less complete than in the first case. It is appropriate to note that Article 190 does not provide for a different requirement to state reasons for these two types of act. The situation in which the decision rejecting a complaint occurs before a formal investigation does not exempt the institution from the requirement to state adequate reasons for the act with regard to the findings of fact. The truth is that it does not make much sense to maintain that the statement of reasons should, for certain categories of acts, be clearer and more complete than in others. The adequacy of the statement of reasons is actually measured essentially according to the specific characteristics of each individual act which allows the parties to defend themselves and the Community court to review the content of the act. This is why its content must be appropriate for this function.

It cannot therefore be accepted, as the appellant does, that in stating the reasons for a decision such as that in this case the administration is not obliged to comply with the requirement to state reasons as defined in the case-law, in other words that it does not have to state the reasons clearly and completely for a decision such as that at issue where such a decision involves a rejection of the complaint and where, similarly, it does not rule on the substance of the alleged infringement of the competition rules. On the contrary, I would state that, according to settled case-law on the scope of the requirement to state reasons for decisions rejecting a complaint, 'when a complaint has been submitted to it, the Commission must, however, examine carefully the facts brought to its notice in order to decide whether they disclose conduct liable to distort competition in the common market and affect trade between Member States and inform the complainant of the reasons for its decision to close the file', [16]

15 — See in particular Case C-367/95 P *Commission* v *Sytraval and Brink's France* [1998] ECR I-1719, paragraph 63.

16 — See Case C-59/96 P *Koelman* v *Commission* [1997] ECR I-4809, paragraph 42 in particular, which confirms the judgment in Case T-575/93 *Koelman* v *Commission* [1996] ECR II-1, paragraphs 39 to 40. See also in this respect Case T-7/92 *Asia Motor France and Others* v *Commission* [1993] ECR II-669, paragraph 30; Case T-387/94 *Asia Motor France and Others* v *Commission* [1996] ECR II-961, paragraph 46; Joined Cases T-133/95 and T-204/95 *IECC* v *Commission* [1998] ECR II-3645, paragraph 125 et seq. and finally Case T-111/96 *ITT Promedia* v *Commission* [1998] ECR II-2937, paragraph 79.

which also applies when the file is closed due to the absence of a Community interest likely to justify the opening of an investigation. [17]

The Court's assessment of the inadequacy of the statement of reasons for the contested act is confirmed by the fact that the contested decision, although not occurring after the formal opening of the investigation, is not limited to a rejection of the complaint on the ground that the complaints are manifestly unfounded but considers the substance of the circumstances and establishes that, even though the user fee produces restrictive effects on competition in the Netherlands market for floricultural products, it is not, however, prohibited under Article 85(1) of the EC Treaty as the agreement at issue comes within the scope of Article 2 of Regulation No 26. The Commission therefore, as rightly observed by Florimex, rejected the complaint on the basis of an analysis which, by applying a specific exemption, considers an agreement to be lawful even if, taken on its own, it is likely to produce restrictive effects on competition.

It is therefore significant that, as is apparent from the Court's judgment, the complaints of Florimex and the VGB regarding the VBA's agreement were lodged during 1988, whereas the decision rejecting the complaint dates from 1992 and that therefore, before rejecting the complaints, the Commission had conducted a careful investigation which involved both the complainants and the VBA cooperative.

Given therefore that the Commission had conducted an investigation and in view of the content of the contested decision which involves complex issues and the application of an exemption, I consider that the Court's assessment of the requirement on the Commission to state reasons for a decision of this kind is not open to complaint.

It therefore follows that the first part of the first ground of appeal is unfounded.

— The review of the legality of the act by the Court of First Instance

31. The second and third parts of the first ground of appeal concern the conditions under which the Court can review the legality of the act. I will therefore summar-

17 — This case-law dates from the *Automec II* case (Case T-24/90 *Automec* v *Commission* [1992] ECR II-2223, paragraphs 77 to 85 in particular) in which the Court maintained that the complaint of an infringement can be rejected where this does not present a 'Community interest', therefore establishing in this case that the Commission 'must set out the legal and factual considerations which led it to conclude that there was insufficient Community interest to justify investigation of the case' and that this statement of reasons is subject to judicial review. See also in this same respect Case T-37/92 *BEUC and NCC* v *Commission* [1994] ECR II-285, paragraph 47.

ise together the positions of the parties in this respect.

32. In putting forward the second and third parts of the first ground of appeal, the VBA claims that, when reviewing the facts in the light of the legal framework of Article 2 of Regulation No 26, the Court did not limit itself to verifying whether there was a manifest error in the characterisation of these facts but conducted a complex and in-depth analysis of the facts at issue. According to the VBA, this is contrary to the case-law of the Court of Justice according to which only manifest errors in the characterisation of the facts can justify annulment. During the procedure before the Court of First Instance, the latter instead asked the Commission to prove its assessment of the facts to be well founded and, thus, the burden of proving the legality of the act fell on the Commission, thereby indicating that the burden of proving its objections on this point is not the responsibility of the appellant. The Court also conducted a full and in-depth examination of the facts found in the acts and, by so doing, replaced the Commission in conducting an administrative review. According to the appellant, this was not compatible with the administrative nature of the acts and therefore compromised legal certainty itself. The VBA finally observes that, whereas Florimex cited in its appeal both the inadequacy of the statement of reasons and the error in the characterisation of the facts, the Court in its judgment examined the foundation of these two pleas only in respect of the allegation that adequate reasons were not given, although conducting a careful examination of the assessment of the facts appearing in the Commission decision.

However, the defendant undertakings maintain that the VBA's complaints are based on an incorrect reading of the judgment. The Court did not actually annul the decision as vitiated by an incorrect assessment of the facts but in so far as it was vitiated by an inadequate statement of reasons. In other words, the Court regarded as inadequate the reasons given by the administration to justify the characterisation of the user fee as a fee charged to non-members of the cooperative which was 'necessary for attainment of the objectives laid down in Article 39 of the Treaty'.

33. The second part of the first plea which concerns the extent of the review by the Court of the contested act is also unfounded. It is settled case-law that, 'although as a general rule the Community judicature undertakes a comprehensive review of the question whether or not the conditions for the application of Article 85(1) are met, its review of complex economic appraisals made by the Commission is necessarily limited to verifying whether the relevant rules on procedure and on the statement of reasons have been complied with, whether the facts have been accurately stated and whether there has been any manifest error

of appraisal or a misuse of powers'.[18] Any error in the application of the competition rules which may result from incorrect reconstruction and characterisation of the facts must therefore be for the Court to ascertain, even when the appraisals of their appropriateness from a technical-economic viewpoint are based on criteria not open to review by the Court.

I would observe that, in this case, the examination carried out by the Court — so far as relevant to the present procedure — concentrated on the facts provided by the Commission on five points which were: the alleged necessity of the user fee for the survival of the cooperative, the effects of the user fee, access to the Netherlands market for non-members of the VBA, the allocation to the user fee of the same function as that of the 'minimum price' in the context of the common organisation of the market and, finally, the absence of unequal treatment between non -members. The Court found that the findings made by the Commission in the decision in relation to these five points were not corroborated by the facts to which the decision refers. With regard to those facts, the Court limited itself to examining the well-foundedness of their legal characterisation. The Court therefore took the view that they did not correspond in any of the aforementioned aspects to the legal framework which the Commission had applied. It therefore annulled the decision on the ground of inadequacy of the statement of reasons and the incorrect application of the relevant competition rules and, more specifically, of the combined provisions of Article 85(1) of the EC Treaty and the first sentence of Article 2(1) of Regulation No 26.

I consider that, by acting in that way, the Court remained within the limits of its competence. Contrary to the contention of the cooperative, the Court's examination concerned the legal characterisation of the findings of fact (as described above). This examination did not review the appraisal of the facts (with particular regard to economic considerations) but only the appraisal of the adequacy of these facts, as stated by the Commission, with regard to the legal conclusions which, based on such appraisal, that institution considered itself able to make.

34. In the third part of the first ground of appeal, the VBA claims that the Court committed an error of law in that it decided that the reasons given were not adequate by taking into account, not the adequacy of the facts on which the act was based, but the substance of that act and in particular the allegedly incorrect application of the

18 — See Case C-7/95 P *Deere* v *Commission* [1998] ECR I-3111, paragraph 34. See also the Court of Justice judgments to which the above case refers, in particular Joined Cases 142/84 and 156/84 *BAT and Reynolds* v *Commission* [1987] ECR 4487. The judgments on decisions rejecting complaints on competition include the aforementioned cases of T-24/90 *Automec* v *Commission* (paragraph 80) and T-387/94 *Asia Motor France and Others* v *Commission* (paragraph 33).

competition rules to the agreement concluded between members of the VBA.

I would point out that, contrary to the Commission's conclusions, in the appeal brought before the Court, Florimex invoked both the infringement of the competition rules and the inadequacy of the statement of reasons and that the arguments made in support of these pleas essentially concerned the alleged incorrect characterisation of the information provided to the Commission by the interested undertakings, particularly with regard to the effects produced by the agreement on the market. The Court took the two pleas together and ruled jointly — in paragraph 108 et seq. — on the 'pleas alleging that the first sentence of Article 2(1) of Regulation No 26 is inapplicable and that adequate reasons were not given in that regard'. From the examination of the parties' arguments the Court concluded that the Commission had not provided, in the decision, all the elements needed to include the case at issue within the scope of the derogation referred to in the first sentence of Article 2(1) of Regulation No 26. The Court confirmed in essence that, in view of the findings of facts by the Commission, it was not justified to find that the circumstances at issue came under the agreements mentioned in Article 2 and could therefore benefit from the derogation which this provision specifies.

This being so, to maintain, as the appellant does, that the Court annulled the decision solely on the basis of the inadequacy of the statement of reasons for the act is contrary to the letter and general scheme of the contested judgment. The Court actually annulled the decision because it considered that the Commission had not conducted a sufficiently in-depth examination of the case at issue before finding the VBA rules, and in particular the user fee, to be compatible with the objectives of the common agricultural policy. It follows that the Court decided that the arguments invoked in support of both pleas for annulment were founded and it therefore annulled the decision because, on the basis of the results of the administrative investigation, the circumstances at issue could not be compared to the type of agreement provided for by this provision since it excludes the application of the competition rules to agreements in the agricultural sector. In other words, in this case, by carrying out a joint analysis of the arguments — based on the error of law and the inadequacy of the statement of reasons — put forward in support of the two pleas invoked in the application for annulment, the Court considered not only that the reasons stated for the act were inadequate but also that an error of law had been made in the application of the competition rules.

This part of the first plea for annulment must therefore also be rejected.

35. The case of *Commission* v *Sytraval and Brink's France* in which the Court of Justice ruled on an appeal brought by the Commission against the judgment of the Court of First Instance of 28 September 1995 does not allow a different conclusion to be reached. In that judgment, the Court of Justice found that the Court of First

Instance had committed an error of law by failing 'to draw the necessary distinction between the requirement [for the administration] to state reasons and the substantive legality of' the contested decision. The judgment of the Court of First Instance concerned the decision rejecting the complaint objecting to State aid granted by the French Republic. The Court of First Instance annulled the decision rejecting the complaint on the ground that inadequate reasons were given. In its appeal, the Commission maintained that the Court of First Instance had been wrong in 'treating the purely procedural requirement to state reasons as a matter concerning the substantive legality of the decision'. The Court of Justice accepted this, finding that the Court of First Instance had examined the pleas based on the inadequacy of the statement of reasons together with the manifest error of assessment (in that there was an incorrect characterisation of the facts) and had accordingly annulled the contested decision based 'solely on infringement of Article 190 of the Treaty'. By proceeding in this way, the Court of First Instance had, 'on the basis of an alleged insufficiency of reasoning, ... criticised the Commission for a manifest error of assessment attributable to the inadequacy of the investigation carried out by that institution'. According to the Court of Justice, the Court of First Instance therefore committed an error of law (paragraphs 68 to 72).

Such a precedent, which actually involves a conclusion which is irrelevant to this decision as the Court of Justice did not annul the contested judgment — and therefore constitutes only an *obiter dictum* — concerns different circumstances from those in this case and is not therefore relevant to the present case. In *Florimex*, the Court of First Instance expressly affirmed its desire to deal jointly with the two pleas, as is apparent from paragraph 153. In this way, it not only examined in detail whether the plea alleging infringement of the competition rules was well founded (although this examination was carried out together with that on the parallel plea alleging infringement of the requirement to state reasons: see paragraphs 139 to 186), but also acknowledged, in the concluding part of the judgment (paragraph 187) that, as things stood, the derogation referred to in Article 2 could not be applied to the agreement. It is therefore reasonable and justified to interpret the contested judgment as meaning that, setting aside any actual inaccuracies in the wording used, the Court of First Instance considered that the decision was vitiated not only by an insufficiency of reasons but also by an error of law, and thus it annulled that decision for both those reasons.

This analysis fits perfectly with the overall context of the dispute. A judgment which solely bases the nullity of the act on alleged inadequate reasons reflects only partially the problem raised and does not respond adequately to the complaints made by the appellants. Furthermore, the Court of Justice has the power and the duty, in its appellate jurisdiction, not only to determine the real desire of the parties, as is apparent from the pleas put forward in the appeals, but also to determine the logical and legal route which has led the Court of First Instance to reach the contested judgment, by teasing out the decisive elements without being distracted by pernicious formalism.

36. It follows that this part of the ground of appeal is also unfounded.

*The second ground of appeal alleging infringement and incorrect application of the second sentence of Article 2(1) of Regulation No 26*

37. In its second ground of appeal, the appellant invokes the infringement and incorrect application of the second sentence of Article 2(1) of Regulation No 26 which provides that Article 85(1) of the EC Treaty does not apply to certain agreements of farmers 'unless the Commission finds that competition is thereby excluded or that the objectives of Article 39 of the Treaty are jeopardised'. The appellant criticises the Court of First Instance for having wrongly considered, in paragraph 138 of the judgment, that it was not required to adjudicate on the application of the second sentence of Article 2(1), taking the view that the Commission decision was based solely on the derogations mentioned in the first sentence of Article 2 and that therefore only the general derogation indicated in this provision applied.

The VBA observes that, contrary to the Court's conclusion, the Commission examined the possibility of applying the second sentence of Article 2(1) because, in the preliminary draft decision to which the Court's judgment refers, in paragraph 41, the Commission accepted that the user fee constituted an essential feature of the VBA distribution system and was therefore relevant for the purposes of applying the derogation referred to in the second sentence of Article 2(1) of Regulation No 26.

In addition, the VBA recalls that in the decision the Commission reasserts on several occasions the cooperative nature of the VBA, clearly referring to the provisions of the second sentence of Article 2(1).

As a matter of law, the appellant underlines that, according to the settled case-law of the Court of Justice, the cases appearing in the second sentence of Article 2(1) are particularisations of the general rule expressed in the first part of paragraph 1. From this premiss, the appellant seems to draw the inference that, although referring expressly to the first part of this provision, the decision was in fact based on paragraph 1 as a whole. Moreover, the second part of this paragraph, which refers to farmers' associations, seems to include the activities of cooperatives and therefore seems to apply in this case. The second part of Article 2 allows the derogation to be applied in a simplified manner, that is by simply ascertaining whether the agreement hinders the attainment of the objectives referred to in Article 39 of the EC Treaty. In recent judgments *Oude Luttikhuis and Others*[19] and *Dijkstra and Others*,[20] the Court of Justice confirmed that Article 2 must be understood as containing three categories of derogation (the first applies to agreements in the context of a national market organisation, the second applies to agreements necessary for attainment of the objectives set out in Article 39 of the EC Treaty and the third applies to the cases referred to in the second sentence of Article 2(1)) and that therefore the agree-

19 — Case C-399/93 *Oude Luttikhuis and Others* v *Verenigde Coöperatieve Melkindustrie Coberco* [1995] ECR I-4515.

20 — Joined Cases C-319/93, C-40/94 and C-224/94 *Dijkstra* v *Friesland* [1995] ECR I-4471.

ments referred to in the second sentence have the same general scope as those referred to in the first sentence. On the other hand, the VBA claims that this case-law dates from after the contested decision and that it cannot therefore be taken into account for the purpose of assessing the legality of this decision.

On the second ground of appeal, the defendants maintain that the Court of First Instance was not required to review the decision on the basis of a provision which the contested decision did not take into account. In any case, the defendants add that, had it conducted such an examination, the Court of First Instance would have concluded that the conditions required for the application of the derogation referred to in the second sentence of Article 2(1) were not met in this case, essentially for three reasons: (a) the members of the cooperative are not established in a single Member State because this cooperative also includes undertakings which are established outside the Netherlands; (b) the agreement does not cover strictly national activities and, therefore, the organisation of the market in the Netherlands, but specifically covers products originating from other Member States and even from third countries, and (c) finally, the user fee does not cover relations between members of the agricultural cooperative but only non-members and therefore this fee constitutes a sort of customs duty payable in order to access the Netherlands market.

38. This plea for annulment is also unfounded. I would observe, firstly, that, in the letter sent to Florimex and the VGB under Article 6 of Regulation No 99/63, the Commission confirmed that, in accordance with the first sentence of Article 2(1) of Regulation No 26, Article 85(1) of the EC Treaty was inapplicable to agreements concluded between the members of a cooperative because these agreements are instruments necessary for attainment of the objectives set out in Article 39 of the EC Treaty. The Commission reached this conclusion by reviewing the legality of the agreement on the basis solely of the first sentence of Article 2(1), thus referring to the objectives of the agricultural policy in general and not to the possibility of the agreement at issue coming under one of the categories of agreements mentioned in the second sentence of paragraph 1.

In respect of this complaint, the Court of First Instance states that Florimex invoked, as the third ground of nullity, the infringement of Article 2(1) only with regard to its first sentence. The VBA, intervening in the procedure at first instance in support of the defendant, invoked in its oral arguments the application to this case of the second sentence of Article 2(1) of Regulation No 26. In ruling on this ground of nullity, the Court of First Instance set out — in paragraph 138 — the limits of the dispute observing that, with regard to the content of the contested decision, it was not 'called upon to adjudicate on the arguments put forward by the intervener at the hearing ... but only on the legality of the conclusion reached by the Commission in the con-

tested decision that the user fee falls within the first sentence of Article 2(1) of Regulation No 26'.

Given the wording of the decision and the complaints put forward in the action for annulment by Florimex, it was completely justified for the Court of First Instance to conduct its review of the legality of the decision by reference only to the first sentence of Article 2(1). If the assessment of the legality of the act had been conducted on the basis of a provision other than that invoked by the appellant and used by the Commission as the basis for its decision, the Court of First Instance would have overstepped the limits of the dispute which are apparent from the arguments invoked by the appellants who specifically based the alleged illegality of the act solely on the first sentence of Article 2(1).

In any event, even accepting (which I do not), as the appellant maintains, that the second part of Article 2(1) constitutes a particularisation of the first and is therefore devoid of any independent legal scope, it must, however, be accepted that, where the application to an agreement of the first part of Article 2 is excluded, the second part must therefore also be regarded as inapplicable.

*The third ground of appeal alleging infringement and incorrect application of Article 85(1) of the EC Treaty*

39. In its third ground of appeal, the VBA criticises the judgment of the Court of First Instance for not having considered, contrary to settled case-law, [21] that the user fee constitutes a restriction on competition intended to ensure that 'the cooperative functions properly and maintains its contractual power in relation to producers' and that this therefore constitutes an infringement of Article 85(1) of the EC Treaty.

According to the defendants, in making this contention the VBA has incorrectly interpreted the case-law of the Court of Justice on the application of the competition rules to agreements establishing cooperatives. In their opinion, the Court of Justice's judgment actually concerned only those provisions which, unlike those at issue, affect solely the subjective interests of non-members of the cooperative. They maintain, in any case, that in the contested decision the Commission considered the application of the prohibition referred to in Article 85 to have been established. Therefore this ground of appeal does not involve the review of the legality of the contested act either.

40. I fully agree with the observations made by Florimex. In essence, the coopera-

21 — See in particular Case C-250/92 *Gøttrup-Klim and Others v Dansk Landbrugs Grovvareselskab* [1994] ECR I-5641, paragraphs 34 and 35.

tive basis its arguments on the premiss that Article 85(1) does not apply in the present case because the agreement did not produce restrictive effects on competition. However, this premiss is incorrect. Contrary to what the VBA maintains in its appeal, in its decision the Commission did not rule out the application to the VBA rules of Article 85(1) of the EC Treaty on the ground that the restrictions on competition contained in these rules were necessary to ensure the survival of the cooperative and that the cooperative form of the VBA did not actually have any effect on free competition in the sector. On the contrary, the Commission took the view that, just as the 1988 decision had considered that the 'buyers established on the VBA's premises constituted a large enough group to make the restrictions on competition agreed with them come under the prohibition on agreements referred to in Article 85(1) of the EC Treaty', the agreements referred to by the contested decision assumed, in the same way, the same economic importance and therefore came under the prohibition on agreements producing restrictive effects on competition (point 1 of the letter under Article 6). The Commission then considered whether the derogation referred to in Article 2 applied in this case. The VBA's rules were assessed specifically with regard to the object of the activity of the undertakings involved in this cooperative and those rules were taken to involve an agreement producing anti-competitive effects (point 2 of the letter under Article 6).

Since the contested decision starts explicitly from the premiss that the agreement was contrary to the competition rules and as Florimex has not disputed this aspect of the decision (in that it has not disputed that the agreement comes under the prohibition referred to in Article 85(1) of the EC Treaty) but claims on the contrary the non-application of the derogation, the Court of First Instance did not commit an error of law but merely noted the position (favourable to the appellants) adopted on this point by the Commission.

41. It follows that this ground of appeal must also be rejected.

*The fourth, fifth, sixth, seventh and eighth grounds of appeal alleging infringement and incorrect application of the first sentence of Article 2(1) of Regulation No 26*

42. In the fourth to eighth grounds of appeal, the VBA pleads infringement and incorrect application of the first sentence of Article 2(1) of Regulation No 26 — which specifies that Article 85(1) of the EC Treaty does not apply to agreements in agricultural matters 'as form an integral part of a national market organisation or are necessary for attainment of the objectives set out in Article 39 of the Treaty' — having regard to the assessments made of the various arguments alleging illegality of the user fee set out in paragraphs 146 to 196 of the judgment.

I will firstly consider the fourth ground of appeal, which raises different points of law from those raised by the last four pleas. I will then examine the fifth, sixth, seventh and eighth grounds of appeal together.

— The fourth ground of appeal

43. In the fourth ground of appeal, the VBA alleges the infringement and incorrect application of the first sentence of Article 2(1) maintaining that, in paragraphs 146 to 153 of the judgment, the Court of First Instance erred in considering that, as the Commission based its decision on an extensive interpretation of Article 2 which was different from that on which earlier decisions on the issue were based, 'it was incumbent on the Commission to set out its reasoning in a particularly explicit manner'. According to the VBA, the error of interpretation made by the Court of First Instance was due to the fact that it examined the legality of the user fee without taking account of all the VBA's rules. In the VBA's opinion, the user fees should instead be examined in the overall context of the obligations connected with the VBA's main activity which involves organising auctions of floricultural products.

In that connection, the VBA questions the relevance, in the judgment on the application of Article 2, that neither the legislation on the common organisation of the market in floricultural products nor the rules on other common organisations of markets refer to contracts for the trade in these products, but concern only the quality of the products and the rules on ensuring compliance with the provisions on the import and export of products originating from third countries.

In relation to this ground of appeal, the Commission points out that the Court of First Instance based its judgment on two incorrect conclusions. Firstly, it incorrectly analysed the user fee imposed by the VBA with no regard for the other rules of the cooperative whereas the Commission took account of all the relationships governed by the various agreements and rules of the cooperative. Secondly, the Court of First Instance incorrectly considered that a decision such as that at issue, which involves the non-application of the competition rules, must show that the agreement at issue contributes to the attainment of *all* the objectives set out in Article 39 of the EC Treaty.

44. In this respect it seems appropriate to recall the words of the Court of First Instance in paragraphs 146 to 153 of the judgment.

The Court of First Instance firstly observes that to date 'the Commission has never found that an agreement between the members of a cooperative which affects free access by non-members to agricultural

producers' channels of distribution is necessary for attainment of the objectives set out in Article 39 of the Treaty'. The Court then states that the Commission's practice in earlier decisions has been to conclude that these agreements are generally not included among 'the means indicated by the regulation providing for a common organisation in order to attain the objectives set out in Article 39' and that they cannot be included within the provisions of the regulation on the common organisation of the market. Like the basic regulations of other common organisations of markets, the regulation on the common organisation of the market in live plants and floricultural products does not provide for 'agricultural cooperatives to impose such a fee on third parties'. According to the Court, under these circumstances 'it was incumbent on the Commission to set out its reasoning in a particularly explicit manner, since the scope of its decision goes appreciably further than that of earlier decisions'. Referring to the cases of *Frubo* v *Commission*[22] and *Oude Luttikhuis and Others*,[23] the Court adds that this is particularly true in a case such as this because 'constituting as it does a derogation from the general rule in Article 85(1) of the Treaty, Article 2 of Regulation No 26 must be interpreted strictly'. It follows that it must be apparent from a decision like this, adopted pursuant to the first sentence of Article 2(1), how 'the agreement at issue satisfies each of the objectives of Article 39. In the event of a conflict between those sometimes divergent objectives, the Commission's statement of reasons must, at the very least, show how it was able to reconcile them so as to enable the first sentence of Article 2(1) of Regulation No 26 to be applied.'

45. In essence, the VBA criticises the Court, on one hand, for having considered the user fee without having regard to the other obligations and rights arising from the cooperative's rules and, on the other hand, for having considered that the absence of an explicit reference, in the basic regulations of common organisations of markets, to the possibility of establishing a user fee generally excludes the possibility of applying the derogation referred to in the first sentence of Article 2(1) of Regulation No 26.

46. Both these complaints are unfounded.

With regard to the first complaint, the Court rightly considered that the user fee does not have an effect solely on the internal relationships between the cooperative members but that it affects non-members more. The Court also considered that the user fee produces restrictive effects on competition in the Netherlands market in floricultural products. The Court inferred from this that it was incumbent on the Commission to examine the compatibility of the cooperative's rules with the objectives of the agricultural policy in a more detailed manner than it did in the contested decision and that it could not merely note, in general terms, that, notwithstanding its restrictive effects, the agreement was lawful in so far as it was necessary to the survival of the cooperative.

22 — Case 71/74 *Frubo* v *Commission* [1975] ECR 563.
23 — Case C-399/93, referred to in footnote 20.

That complaint is therefore unfounded. The Court's reasoning that, taking into account the effects on competition of the user fee, it was necessary to examine in particular detail the compatibility of the provisions of the VBA's rules with the objectives of the common agricultural policy for the sector cannot be regarded as unlawful. Such an examination could not, as the Commission believes, be limited to taking into account the advantages arising for the cooperative's members from the payment of the user fee but rather, given the circumstances of the case, had to cover also consequences for non-members.

The second complaint is also unfounded. As I have said, in this complaint the VBA claims that the Court committed an error of law by maintaining that, in the absence in the regulations on the common organisations of markets of a provision providing for a user fee such as that at issue, the Commission was required to take into consideration, in the statement of reasons for its decision, all the effects produced by the imposition of this fee, in light of the objectives of the common agricultural policy set out in Article 39 of the Treaty. This view seems completely correct. If the legislature has not expressly provided for the possibility of imposing the payment of a user fee on undertakings which use the facilities of a cooperative, the Commission can consider that this fee is compatible with the objectives of the common agricultural policy only if its restrictive effects on competition are in all cases consistent with attainment of the aims of the agricultural policy in the sector. In the present case, this circumstance has not been demonstrated and has not been taken into consideration in any respect.

There is also no foundation for the complaint made by the Commission that the incorrect interpretation by the Court of the first sentence of Article 2(1) of Regulation No 26 was due to the fact that, in adopting a decision under this provision, the Commission should have shown 'how the agreement at issue satisfies each of the objectives of Article 39'. On the contrary, it must be observed that this confirmation by the Court (which is actually based on the case-law of the Court of Justice referred to in the same paragraph 153 of the contested judgment) does not have unrestricted scope but is interpreted by taking into account the fact that the Court of First Instance also confirmed that 'in the event of a conflict between those sometimes divergent objectives, the Commission's statement of reasons must, at the very least, show how it was able to reconcile them so as to enable the first sentence of Article 2(1) of Regulation No 26 to be applied'. According to the Court of First Instance, the logic of Article 2 requires the acceptance that several of these objectives can, solely in terms of the common organisation of the market or the agreement at issue, be in contradiction with each other and that this contradiction must be overcome, if necessary, by giving priority to some of these objectives over others.

47. It follows that this ground of appeal is also unfounded.

— The fifth, sixth, seventh and eighth grounds of appeal

48. In its last four grounds of appeal, the VBA disputes the legality of the findings and characterisation of the facts as contained in paragraphs 155 to 198 of the judgment in which the Court of First Instance examines the main arguments which the Commission used to justify the application of the first sentence of Article 2(1) of Regulation No 26 to the user fee. Those grounds of appeal essentially concern 'the need to ensure the survival of the VBA; the existence of a *quid pro quo* for the user fee, and the fact that the user fee has an effect analogous to that of a minimum auction sale price' (paragraph 154). These paragraphs also examine the complaint made by Florimex in its appeal before the Court of First Instance on the unequal treatment between the various suppliers who have access to the VBA facilities.

In examining the legality of the user fee, the Court of First Instance starts from the principle that, 'even on the assumption that the VBA's system ... can be maintained only on the basis of the user fee, it does not automatically follow that the user fee or a system of auction sales necessitating such a fee fulfils all the conditions of Article 39 of the Treaty, in accordance with the case-law of the Court of Justice'. It adds that a fee levied by an agricultural cooperative on supplies by non-member producers to independent buyers normally has the effect of increasing the price of such transactions, that it 'constitutes at the very least a significant impediment to the freedom of other agricultural producers to sell through the distribution channels in question' and that 'that obstacle is particularly significant in this case because the wholesalers established on the VBA's premises include ... the largest Netherlands exporters, who occupy a leading position in Community trade in floricultural products (points 131 and 132 of the 1988 decision)'. The Court of First Instance draws the conclusion from this that 'even though the VBA's system meets certain of the objectives set out in Article 39 of the Treaty, the user fee is capable of operating ... in a manner inimical to those objectives, in particular by preventing producers who are not members of the VBA from increasing their individual earnings (Article 39(1)(b)), by impeding the availability of supplies from those other producers (Article 39(1)(d)) and by precluding price developments which are favourable from the consumer's point of view (Article 39(1)(e))' (points 155 to 169).

In its decision, the Commission maintains that the user fee constitutes the *quid pro quo* of the services offered by the VBA to external suppliers. The Court observes in this respect that, if 'the user fee were not justified by real value of that kind, or if its amount exceeded the value thus given, it would have the effect of placing certain agricultural producers at a disadvantage, thereby benefiting existing members of the VBA, and would constitute a disguised restriction of competition, with no sufficient objective justification'. On the basis of the accepted facts, the Court concludes that, in this case, 'the outside suppliers from whom the user fee is collected do not use the numerous services offered by the VBA, such as auction sales, checking of products, packing, unpacking, sorting, col-

lection of payments and recovery of debts' and that 'similarly, the actual use of the VBA's facilities by third parties is limited to the use of roadways on the premises to make deliveries to the commercial premises of the wholesalers concerned'. In the Court's opinion, it therefore follows that 'the concentration of supply and demand on the VBA's premises [as is apparent from the contested decision] is therefore the only [effective] advantage mentioned as a *quid pro quo* for the user fee levied'. The Court also observes that this economic advantage 'is described in the contested decision only in very general terms, without specifying how the value of that advantage, and the amount of the resultant user fee, can be calculated and expressed in actual figures, taking into account, as appropriate, specific financial data concerning for example the income, margins and costs of the VBA, the investments made by it and the value of any economies of scale enjoyed as a result by third parties, and of the extent to which the rent paid by the buyers established on the premises already reflects the economic advantage invoked'. It follows that 'the only justification put forward in the contested decision regarding the amount of the user fee relates to the fact that suppliers selling by auction and outside suppliers who do not use the auctions pay approximately the same rate of fee' (points 170 to 183).

Another line of reasoning deployed by the Commission to support the contested decision is that the user fee has an effect analogous to that produced by the imposition of a minimum price on agricultural products. According to the Court, such reasoning presupposes 'that protection of the minimum prices of an agricultural cooperative organised on the basis of auction sales takes precedence over the interest of other agricultural producers who are not members of the cooperative in selling their products freely to independent dealers'. Given that in principle it is the provisions on the common organisations of agricultural markets which determine the price of products, 'where, as here, the rules on the common organisation contain no specific provision, it must be presumed that the price formation mechanism desired in that area is that of free competition, without such mechanism being affected by private agreements under which cooperative groups impose a fee on transactions between other agricultural producers and independent dealers'. It follows, according to the Court, that this aspect of the decision is also insufficiently reasoned (points 184 to 187).

As for the alleged unequal treatment between suppliers, the Court observes that the Commission considers that the difference of rate between the fee of 3% of the price of the products, charged to suppliers who conclude 'trade agreements', and that of the user fee, which is in general set higher, is justified and therefore lawful. On this point, the defendant maintains that 'dealers who have concluded trade agreements with the VBA also assume such supply obligations'. However, the Court observes that 'the trade agreements of which copies have been produced ... do

not provide for specific supply obligations. The various trade agreements grant dealers the right to sell and deliver supplies on the VBA's premises, but do not impose specific obligations in that regard. According to the explanations given by the intervener's representative at the hearing, the 'obligation' consists in the fact that, if the holder of a trade agreement does not sell the contractual products to the VBA's satisfaction, the agreement, which is for a term of one year, is simply not renewed.' Under those circumstances, the Court considers that 'the existence of certain specific and precise obligations capable of justifying the difference of rate between the 3% fee which certain outside suppliers are allowed to pay and the user fee paid by other outside suppliers has not been adequately established' (points 191 to 196).

49. In its *fifth ground of appeal* the VBA maintains that the Court erred in considering that the user fee constituted an obstacle to access to the Netherlands market in floricultural products. Instead, it maintains that this fee only affected a specific type of supply by undertakings established on the VBA's premises and specifically those originating from outside suppliers delivering their products directly to such undertakings. Secondly, the VBA maintains that the Court was mistaken in considering that the user fee influenced the level of prices of products sold to the consumer as the dealers/suppliers alone paid the fee. Thirdly, it claims that the fact that the VBA membership includes the largest Netherlands undertakings in the sector did not justify the user fee being regarded as sealing off the market in question and favouring the reinforcement of the position of these undertakings in this market.

In the *sixth ground of appeal*, the VBA disputes the Court's assessment that the user fee constitutes a *quid pro quo* which is not proportionate to the benefits and services offered by the VBA. In the VBA's opinion, the user fee constitutes the *quid pro quo* for a large number of different services provided by the VBA which, contrary to what is claimed in the judgment, are not limited solely to use of the premises and roadways within the cooperative's premises. In addition, the amount of the user fee was fixed by the VBA in agreement with the Commission and following an investigation carried out by experts in the sector. The amount was calculated on the basis of general criteria rightly taking into account the difficulty of establishing the precise *quid pro quo* for all the services provided.

In its *seventh ground of appeal*, the appellant disputes, in essence, that the user fee can be regarded as a minimum price analogous to that fixed for the common organisation of the market. In this context, the VBA recalls that the user fee applies only to sales of products to dealers established on the VBA's premises and that the price of the individual products is in principle established totally freely during auctions organised by the cooperative itself.

Finally, in the *last ground of appeal*, the VBA maintains that the Court wrongly determined the existence of unequal treatment between suppliers making direct supplies and those concluding 'trade agreements' with the cooperative in that, contrary to what the Court maintains, the fees are the *quid pro quo* for the various benefits and services.

50. In my opinion, with the exception of the seventh ground of appeal, but only with regard to the substantive issues which it raises, these grounds of appeal can be merged into one complaint based on an allegedly incorrect finding of facts by the Court regarding: (a) the effects of the user fee on the outside undertakings and on the price of products sold to the consumer (fifth ground of appeal); (b) the disproportion between the services actually provided by the cooperative and the amount of the user fee incumbent on outside suppliers (sixth ground of appeal) and (c) the difference in treatment between the various suppliers of the VBA (eighth ground of appeal).

51. In its seventh ground of appeal, the appellant claims that the Court erred in having characterised the user fee as a minimum market price. This complaint raises a point of law the substance of which should be examined as it particularly concerns the Court's assessment of the illegality of a minimum price for agricultural products established on a contractual basis. I would merely point out, in this respect, that the Court of First Instance rightly considered that, in the absence of price fixing for agricultural products in the context of the common organisation of the markets, it is not possible to describe as lawful agreements between undertakings on the prices of products. This is confirmed by the express exclusion of agreements under the 'agricultural derogation' referred to in the second sentence of Article 2(1) of Regulation No 26. It follows that, in this respect, the complaint in question is unfounded. Otherwise, like the fifth, sixth and eighth grounds of appeal, this ground of appeal amounts to a dispute about the findings of the fact by the Court since, in essence, it involves the actual effect of the fee on the final price of the product.

52. It must be borne in mind that an appeal brought against a judgment of the Court of First Instance must be limited to grounds of law and, according to the settled case-law of the Court of Justice, it cannot involve the re-examination of the assessment of the facts made at first instance. The Court of First Instance has 'exclusive jurisdiction ... to establish the facts except where the substantive inaccuracy of its findings is apparent from the documents submitted to it'. This means that 'when the Court of First Instance has established or assessed the facts, the Court of Justice has jurisdiction under Article 168a of the [EC] Treaty [now, after amendment, Article 225 EC] to review the legal characterisation of those facts by the Court of First Instance and the legal conclusions it has drawn from them'.[24] It follows that the fifth, sixth

24 — See in particular the case of *Deere* v *Commission* referred to in footnote 19 (paragraph 18 et seq.).

and eighth grounds of appeal and the seventh in part, which all concern the facts, must be regarded as inadmissible.

53. In view of all the foregoing observations, I therefore consider that the last four grounds of appeal for annulment are unfounded.

## Costs

54. Under Article 69(2) of the Rules of Procedure which, pursuant to Article 118, applies to the appeal procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. In this case, given the express request made in this respect by Florimex and the VGB, I propose that the Court of Justice order the appellant to pay the costs which those parties have incurred. I also propose that the Court of Justice order the Commission to bear its own costs, in accordance with Article 69(4) of the Rules of Procedure.

## Conclusion

55. In the light of the foregoing, I propose that the Court:

(1) dismiss the appeal;

(2) order the appellant to pay the costs incurred by Florimex BV and Vereniging van Groothandelaren in Bleomkwekerijprodukten at this stage of the proceedings.