JUDGMENT OF THE COURT OF FIRST INSTANCE
(Second Chamber, Extended Composition)

14 May 1997 *

In Joined Cases T-70/92 and T-71/92,

Florimex BV and Vereniging van Groothandelaren in Bloemkwekerijprodukten, respectively a company and an association constituted under Netherlands law, established in Aalsmeer, the Netherlands, represented initially by D. J. Gijlstra, of the Amsterdam Bar, then by J. A. M. P. Keijser, of the Nijmegen Bar, with an address for service in Luxembourg care of Stanbrook and Hooper, at the Chambers of A. Kronshagen, 12 Boulevard de la Foire,

applicants,

v

Commission of the European Communities, represented by B. J. Drijber, of its Legal Service, acting as Agent, with an address for service in Luxembourg at the office of C. Gómez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

defendant,

* Language of the case: Dutch.

supported by

Coöperatieve Vereniging De Verenigde Bloemenveilingen Aalsmeer (VBA) BA, a cooperative society constituted under Netherlands law, established in Aalsmeer, represented by G. van der Wal, a lawyer with right of audience before the Hoge Raad der Nederlanden, with an address for service in Luxembourg at the Chambers of A. May, 31 Grand-Rue,

intervener,

APPLICATION for the annulment of the Commission Decision (IV/32.751 — Florimex/Aalsmeer II and IV/32.990 — VGB/Aalsmeer) notified to the applicants by letter SG (92) D/8782 of 2 July 1992, rejecting the applications which they had each made under Article 3(2) of Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles 85 and 86 of the Treaty (OJ, English Special Edition 1959-62, p. 87),

THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES
(Second Chamber, Extended Composition),

composed of: B. Vesterdorf, President, C. W. Bellamy and A. Kalogeropoulos, Judges,

Registrar: J. Palacio González, Administrator,

having regard to the written procedure and further to the hearing on 5 June 1996,

gives the following

Judgment

Facts

A — *The parties*

The VBA

1 The Coöperatieve Vereniging De Verenigde Bloemenveilingen Aalsmeer (VBA) BA (hereinafter 'the VBA') is a cooperative society constituted under Netherlands law, whose members are growers of flowers and ornamental plants. It represents more than 3 000 undertakings, the great majority of which are from the Netherlands, a small minority being Belgian.

2 On its premises at Aalsmeer, the VBA organizes auction sales of floricultural products, in particular fresh cut flowers, indoor plants and garden plants. Those products are covered by Regulation (EEC) No 234/68 of the Council of 27 February 1968 on the establishment of a common organization of the market in live trees and other plants, bulbs, roots and the like, cut flowers and ornamental foliage (OJ, English Special Edition 1968 (I), p. 26).

3 The VBA is one of the largest undertakings of that kind in the world, with a turnover of slightly over HFL 2 200 million in 1991. The goods and services it offers are geared to export, some 90% of the cut flowers and 77% of floricultural products as a whole being exported.

4 The VBA's premises at Aalsmeer are used primarily for the actual auction sales (supplies, sales and deliveries), but an area is reserved for the renting-out of 'processing rooms' for the purposes of wholesale trade in floricultural products, in particular sorting and packaging. According to the VBA, it lets processing rooms of a total area of 285 000 m^2 (including access ways) to about 320 tenants. Those tenants are mainly cut-flower wholesalers and, to a lesser extent, dealers in indoor plants. The presence of such buyers on the premises is an important factor in ensuring the rapidity of the VBA's deliveries, particularly in view of the fact that its auction sales are export-orientated and the products are perishable.

Florimex

5 Florimex BV (hereinafter 'Florimex') is an undertaking engaged in the flower trade, established in Aalsmeer close to the VBA complex. It imports floricultural products from Member States of the European Community (for example Italy and Spain) and from non-member countries (in particular Kenya), mainly for resale to wholesalers established in the Netherlands. The Florimex group is one of the largest undertakings in the industry and operates on an international scale.

The VGB

6 The Vereniging van Groothandelaren in Bloemkwekerijprodukten (hereinafter 'the VGB') is an association comprising numerous Netherlands wholesalers of floricultural products, including Florimex and a number of wholesalers established on the VBA's premises. Its objects include promoting the interests of the wholesale trade in floricultural products in the Netherlands and liaising with the public authorities and auctioneers.

B — *Supplies for auctions organized by the VBA*

7 Article 17 of the VBA's statutes requires its members to sell through it all products fit for sale cultivated on their holdings. A fee or commission ('auction fee') 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. Certain other suppliers of Netherlands and foreign products may also sell their goods at VBA auctions in accordance with its rules, against payment of various fees in general ranging from 7.2% to 8.7% of the proceeds of sale, depending on the category of supplier concerned. However, apart from the products of the few Belgian members of the VBA, products of non-Netherlands origin may be sold through the VBA only if the varieties, quantities and delivery timetable are agreed upon in detail, for a specified importation period, in a 'framework agreement' concluded with the VBA. The VBA concludes 'framework agreements' only for varieties and quantities which represent an 'interesting' supplement to Netherlands supply.

C — *Direct supplies to dealers established on the VBA's premises: the situation prior to 1 May 1988*

8 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 particular:

(1) Under Article 5(10) of those rules, products not purchased through the VBA could be stored on the VBA's premises and buildings only against payment of a charge;

(2) Article 5(11) prohibited the purchase, sale and/or supply on the premises and in the buildings of the VBA, unless authorized by the management, of products not purchased through it.

9 In practice, the VBA granted authorization for commercial transactions on its premises in products not passing through its auctions only under certain standard contracts known as 'handelsovereenkomsten' (trade agreements) or against payment of a 10% levy.

The trade agreements

10 In its 'type A to E' trade agreements, the VBA allowed certain dealers to sell and supply to purchasers approved by it, against payment of a levy of 2.5% of the sale price, certain floricultural products bought in other auctions in the Netherlands.

11 In addition, in its 'type F' trade agreements, the VBA granted certain dealers the right to sell cut flowers of foreign origin to purchasers approved by it, against payment of a levy of 5%. Those contracts specified the quantities of products to be sold, the varieties and the authorized sales periods. They also required that the products be imported by the tenant himself.

12 Moreover, where a dealer established on the VBA's premises himself imported products of foreign origin not covered by a type F trade agreement, he was entitled to bring in the goods against payment of a levy of HFL 0.25 per package (hereinafter 'the HFL 0.25 levy'), on condition, however, that the products were not sold to other VBA purchasers.

The 10% levy

13 Save in the exceptional cases mentioned above, under Article 5(10) and (11) of the auction rules (see paragraph 8 above) commercial transactions on the VBA's premises could involve only products purchased through the VBA.

14 However, the VBA could authorize 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, intended to 'prevent irregular use of VBA facilities'. That levy (hereinafter 'the 10% levy') was paid by the purchaser.

D — *The 1988 decision*

15 In 1982, Florimex asked the Commission, under Article 3(1) of Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles 85 and 86 of the EEC Treaty (OJ, English Special Edition 1959-62, p. 87) to find that the VBA had infringed Articles 85 and 86 of the EEC Treaty, in particular regarding direct supplies to dealers established on its premises.

16 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 Council Regulation No 26 of 4 April 1962 applying certain rules on competition to production of and trade in agricultural products (OJ, English Special Edition 1959-62, p. 129), failing which an exemption decision under Article 85(3) of the Treaty, regarding, in particular, its statutes, its auction rules, its type A to F trade agreements, its general conditions for the rental of processing rooms and its scale of charges.

17 On 26 July 1988, the Commission adopted Decision 88/491/EEC relating to a proceeding pursuant to Article 85 of the EEC Treaty (IV/31.379 — Bloemenveilingen Aalsmeer, OJ 1988 L 262, p. 27, hereinafter 'the 1988 decision'). The 1988 decision concerned solely Article 5(10) and (11) of the auction rules, the trade agreements and the charges for the prevention of the irregular use of VBA facilities, namely the HFL 0.25 levy and the 10% levy, as in force until 1 May 1988 (see points 3 and 21 of the decision). In that decision, the Commission found, in particular, that:

(1) the following provisions restricted competition within the meaning of Article 85(1) of the Treaty:

— Article 5(10) and (11) of the auction rules (points 101 to 111),

— the 10% levy (points 112 to 118),

— the trade agreements (points 119 to 122), and

— the HFL 0.25 levy (point 123);

(2) those provisions restricted competition and affected trade between Member States to an appreciable extent (points 124 to 134);

(3) Article 2 of Regulation No 26 was not applicable (points 135 to 153);

(4) the conditions laid down by Article 85(3) were not fulfilled (points 156 to 159); and

(5) the prohibition of the provisions at issue did not constitute an expropriation measure (points 160 to 163).

18 The Commission then declared in the operative part of the 1988 decision:

'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, HFL 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.

3. The VBA shall take no measures having the same purpose or effect as the infringements referred to in Article 1.

...'

E — *The new VBA rules on direct supplies to dealers established on its premises*

19 As from 1 May 1988, the VBA formally removed the purchase obligations and restrictions on the free disposal of goods imposed by Article 5(10) and (11) of the auction rules, and the 10% and HFL 0.25 levies, but at the same time introduced a 'user fee' ('facilitaire heffing'). The VBA also introduced amended versions of the trade agreements.

The user fee

20 In its present version, Article 4(15) of the auction rules provides that the supply of products within the auction premises may be subject to a user fee. Under that provision, the VBA adopted, with effect from 1 May 1988, rules on user fees, which were subsequently amended, in particular in September 1988 and February 1990, after discussions with the Commission. The rules apply to direct supplies to dealers established on the VBA's premises, on the basis that the goods in question are disposed of without recourse to the VBA's services.

21 The rules, as in force in 1991, involved the following requirements:

(a) the fee is payable by the supplier, that is to say the person by whom or 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, was fixed for the period 1 July to 30 June of the following year at the following levels:

— 0.3 cents per stalk for imported ornamental foliage and garden narcissi without leaves,

— 1.3 cents per stalk for cut flowers (1.8 cents for certain flowers),

— 3.5 cents per plant (11.5 cents for certain plants),

— 14.2 cents per branch of *Cymbidium*, and

— 62.5 cents for each pot plant above size 20;

(d) the above fees are determined by the VBA on the basis of the annual average prices achieved in the previous year for the categories concerned; according to the VBA, a factor of around 4.3% of the annual average price for the category concerned is applied;

(e) according to the 'detailed provisions governing the user fee', introduced by the VBA with effect from February 1990 (see paragraph 34 below), suppliers may pay a fee of 5% as an alternative to the system described in paragraphs (b) to (d) above; that fee also includes a payment-collection service provided by the VBA;

(f) the VBA gave an undertaking to the Commission that it would use the information thus obtained only for administrative purposes;

(g) 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.

The trade agreements

22 By circular of 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. Subsequently, the provisions of the trade agreements which had imposed until then two separate rates, namely 2.5% (types A to E) and 5% (type F) of the value of the goods, were harmonized and a uniform rate of 3% was imposed with effect from 1 January 1989.

23 Since then three types of trade agreement have existed, known as 'type I, II and III' agreements, 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), but the conditions they contain are otherwise almost identical. All the agreements apply a charge of 3% of the gross value of the goods supplied to customers on the VBA's premises (hereinafter 'the 3% fee'). According to the VBA, the products concerned are for the most part those not grown in sufficient quantities in the Netherlands, such as orchids, plants of the genus *Protea* and lilies. The VBA provides a payment-collection service.

F — *The agreements concerning the Cultra commercial centre*

24 Since the VBA endeavours to increase the average size of batches put up for auction, small dealers (in general retailers) are in practice excluded from auction sales. However, they have an opportunity to buy at the 'Cultra' wholesale centre

established on the VBA's premises, comprising six 'cash-and-carry' stores, of which two are wholesalers of cut and dried flowers, two are wholesalers of indoor plants, one is a wholesaler of garden plants and one is a wholesaler of hydroponic plants. With the exception of the one selling hydroponic plants, those wholesalers are contractually required to obtain their goods through the VBA.

G — *The administrative procedure between the 1988 decision and the letter of 4 March 1991*

25 On 19 July 1988, the VBA notified the Commission of the amendments to its rules adopted with effect from 1 May 1988 (see paragraph 19 above), in particular the new user fee, but not the new trade agreements. The notification was registered under No IV/32.750 — Bloemenveilingen Aalsmeer II.

26 By a letter sent in late July 1988, the member of the Commission responsible for competition matters informed the VBA that its rules might qualify for an exemption under Article 85(3) of the Treaty, subject to formal notification of certain additional amendments then proposed by the VBA.

27 On 15 August 1988, additional amendments to the VBA rules were notified to the Commission in relation to Case IV/32.750 — Bloemenveilingen Aalsmeer II.

28 The agreements relating to the Cultra commercial centre (hereinafter 'the Cultra agreements') were also notified to the Commission on 15 August 1988, being registered under No IV/32.835 — Cultra.

29 By letters of 18 May, 11 October and 29 November 1988, Florimex formally lodged a complaint against the user fee with the Commission, registered under No IV/32.751, claiming in particular that it 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.

30 The VGB lodged a similar complaint by letter of 15 November 1988, registered under No IV/32.990.

31 By letters of 21 December 1988, the Commission informed Florimex and the VGB that it had initiated proceedings in Cases IV/32.750 — Bloemenveilingen Aalsmeer II and IV/32.835 — Cultra, with the legal consequences deriving from Article 9(3) of Regulation No 17. In those letters, the Commission expressed the opinion, in particular, that the user fee was not discriminatory by comparison with the fees payable by members and other suppliers selling at VBA auctions. As regards the Cultra agreements, the Commission was of the opinion that they had no appreciable effect on competition or on trade between Member States.

32 On 4 April 1989, the Commission published Notice 89/C 83/03, pursuant to Article 19(3) of Council Regulation No 17 and Article 2 of Council Regulation No 26, in Cases IV/32.750 — Bloemenveilingen Aalsmeer II and IV/32.835 — Cultra (OJ 1989 C 83, p. 3, hereinafter 'the notice of 4 April 1989'). In that notice, the Commission indicated that it proposed to take a favourable decision concerning the VBA rules as regards (a) supplies for auction sales by VBA members and other suppliers; (b) the conditions of sale by auction, including certain VBA rules

on quality standards and reserve prices; (c) the user fee applicable to the direct supplying of dealers established on the VBA's premises; and (d) the Cultra agreements.

33 By letters of 3 May 1989, Florimex and VGB submitted their observations in response to the notice of 4 April 1989, at the same time replying to the Commission's letters of 21 December 1988. In their letters, the applicants expressed opposition to the Commission's intention to adopt a favourable decision regarding the user fee and the Cultra agreements, and lodged formal complaints regarding the trade agreements. Subsequently, Florimex set out its complaints in greater detail by letters to the Commission of 23 May and 14 June 1989.

34 On 7 February 1990, the VBA notified to the Commission 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, with payment being collected by the VBA (see paragraph 21(e), above). On the same date, the VBA notified the new trade agreements to the Commission. Those notifications were registered under No IV/33.624 — Bloemenveilingen Aalsmeer III.

35 By letter of 24 October 1990, the Commission informed the applicants of its intention to adopt a decision favourable to the VBA in Case IV/32.750 — Bloemenveilingen Aalsmeer II regarding, in particular, the obligation to sell by auction imposed on VBA members and the user fee. It also indicated that Case IV/32.835 concerning the Cultra agreements would therefore be closed without a formal decision being adopted. The Commission also stated its intention to close the file concerning the new trade agreements and the 'detailed provisions governing the user fee' notified on 7 February 1990 (IV/33.624) without adopting a formal decision, provided that, as regards those 'detailed provisions', the VBA undertook to use the information obtained solely for accounting records in respect of the services provided by it, and in no circumstances for its own commercial purposes.

36 The applicants 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. In particular, they asked the Commission formally to process the complaints lodged with it.

H — *The Article 6 letter of 4 March 1991 and the contested decision of 2 July 1992*

37 By letter of 4 March 1991 (hereinafter 'the Article 6 letter'), 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 (OJ, English Special Edition 1963-64, p. 47), that the information obtained did not enable the Commission to uphold their complaints regarding the user fee levied by the VBA.

38 The considerations of fact and law which prompted the Commission to reach that conclusion are set out in detail in a document annexed to the Article 6 letter. The Commission also sent that document to the VBA on 4 March 1991, stating that it was the preliminary draft of a decision which it proposed to adopt under the first sentence of Article 2(1) of Regulation No 26.

39 In the part of that document entitled 'legal assessment', the Commission found, first, 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 Treaty. Secondly, it

found that those decisions and agreements were necessary for attainment of the objectives set out in Article 39 of the Treaty, within the meaning of the first sentence of Article 2(1) of Regulation No 26.

40 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 organized, 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 centralize supply (fifth and sixth recitals in the preamble to Regulation (EEC) No 1360/78).

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 centralization of supply.

Cooperative associations can in principle fulfil their task of improving the organization 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 organizations 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; Article 13 of Regulation (EEC) No 1035/72).'

41 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), 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 specializes 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 importance 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 constitutes 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 amortizing unavoidable costs and covering current operating costs.'

42 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 organization 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).

43 Finally, the Commission took the view that the effect of the user fee was similar to that of the auction reserve 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).

44 By letter of 17 April 1991, the applicants stated in reply to the Article 6 letter that they maintained their complaints regarding the user fees, the Cultra agreements and the trade agreements. They also claimed that that letter did not deal either with the Cultra agreements or with the new trade agreements, so that a letter under Article 6 of Regulation No 99/63 was lacking in that connection.

45 On 2 July 1992, the Commission sent the applicants' lawyer a registered letter with acknowledgment of receipt, bearing No SG (92) D/8782, giving notice of the definitive rejection of their complaints concerning the user fee. That letter was collected from the post office responsible for the applicants' lawyer's post-office box on 13 July 1992.

46 In that letter of 2 July 1992 (hereinafter 'the contested decision'), the Commission states that the reasons given in it supplement and clarify those given in its Article 6 letter, to which it refers. It continues:

'The Commission's appraisal under competition law is based on the whole body of decisions and agreements concerning supplies of floricultural products on the

VBA's premises. The rules on direct supplies to traders established on those premises form only part of that body. In the Commission's opinion, the whole body of those decisions and agreements is in principle necessary for attainment of the objectives indicated in Article 39 of the EEC Treaty. The fact that, to date, the Commission has not yet adopted a formal decision to that effect under Article 2 of Regulation No 26/62 does not detract from the positive attitude adopted by the Commission on this subject'.

47 Then, after dealing with a number of further arguments put forward by the applicants, it concludes:

'The Commission does not deny that other rules governing direct supplies to traders established on auction premises are conceivable. The Westland auction rules constitute a good example of that kind. Nevertheless, it is not for the Commission to compare the respective advantages and disadvantages of such rules. The traders concerned should themselves be the first to draw the requisite commercial inferences from the differences which exist.'

I — *The correspondence following the contested decision*

48 By letter of 5 August 1992, the Commission informed the applicants that it had closed its investigation into the cases concerning the trade agreements and the Cultra agreements and invited them to inform it within a period of four weeks whether they intended to maintain their complaints regarding those trade agreements and Cultra agreements.

49 On 22 December 1992 the applicants' lawyer replied to the letter of 5 August 1992, stating that circumstances had prevented him from reacting sooner and emphasizing that the applicants wished to maintain their complaints.

50 Since the state of their lawyer's health had deteriorated seriously, the applicants appointed a new lawyer on 3 November 1993 who, by letter of 9 December 1993, asked the Commission to take a position on the letter of 22 December 1992.

51 By letter of 20 December 1993, the Commission replied to the letter of 9 December 1993, stating in particular that a provisional examination of the letter of 22 December 1992, on its own initiative, had not prompted it to intervene under Article 85(1) or Article 86 of the Treaty. That letter of 20 December 1993 is the subject of Case T-77/94 *VGB and Others* v *Commission*.

Procedure

52 On 21 September 1992, Florimex and the VGB respectively brought actions T-70/92 and T-71/92 against the contested decision.

53 By a document lodged on 16 October 1992 in each of those cases, the Commission raised an objection of inadmissibility under Article 114(1) of the Rules of Procedure.

54 By order of the President of the First Chamber of the Court of First Instance of 14 June 1993, Cases T-70/92 and T-71/92 were joined for the purposes of the written and oral procedure and of the judgment.

55 By order of the Court of First Instance (First Chamber) of 6 July 1993, the decision on the objection of inadmissibility was reserved for the final judgment.

56 By order of the President of the First Chamber of the Court of First Instance of 13 July 1993, the VBA was granted leave to intervene in Joined Cases T-70/92 and T-71/92.

57 By decision of the Court of First Instance of 19 September 1995, taking effect on 1 October 1995, the Judge-Rapporteur was attached to the Second Chamber, to which the cases were consequently assigned.

58 Upon hearing the report of the Judge-Rapporteur, the Court of First Instance (Second Chamber, Extended Composition) decided to open the oral procedure. As a measure of organization of procedure, the Commission was requested to reply in writing to certain questions before the hearing. It lodged its reply on 3 April 1996.

59 The hearing in these cases, followed by that in Case T-77/94, was held on 5 June 1996 before the Court of First Instance composed of H. Kirschner, President, B. Vesterdorf, C. W. Bellamy, A. Kalogeropoulos and A. Potocki.

60 Following the death of Judge H. Kirschner on 6 February 1997, the present judgment was drawn up after deliberation by the three judges whose signature it bears, in accordance with Article 32(1) of the Rules of Procedure.

Forms of order sought

61 In their applications, the applicants claim that the Court should annul the contested decision. In their reply, they claim that the objection of inadmissibility should be dismissed and that the defendant should be ordered to pay the costs.

62 The defendant contends that the Court should:

— declare the actions inadmissible;

— in the alternative, dismiss the actions;

— order the applicants, jointly and severally, to pay the costs.

63 The intervener supports the forms of order sought by the defendant and contends that the applicants should jointly and severally bear the costs, including those of the intervener.

64 In their observations on the statement in intervention, the applicants seek the same relief as before and submit that the intervener should be ordered to pay the costs.

Admissibility

Summary of the parties' arguments

65 It is common ground in this case that the contested decision is in the form of a letter bearing the date 2 July 1992 and the words 'registered with acknowledgment of receipt', addressed to the post-office box of the applicants' lawyer, and marked for his attention. A document from the post office from which the letter of 2 July 1992 was collected has been produced to the Court. It bears on the face of it a 'notice of arrival' worded as follows: 'You may collect the undermentioned postal items during the post office opening times mentioned below'. That notice is followed by a reference to an item sent from Brussels and is date-stamped 9 July 1992. On the reverse of the document there is, *inter alia*, an acknowledgement of receipt under which there is a signature and a date stamp indicating 13 July 1992. It is common ground that the notice of arrival was placed by the postal authorities in the applicants' lawyer's post-office box and that it was on presentation of that notice that the contested decision was collected at the post office counter on Monday 13 July 1992.

66 In those circumstances, the defendant contends that the applications lodged on 21 September 1992 were lodged outside the two-month time-limit laid down in the last paragraph of Article 173 of the Treaty.

67 That period, it contends, started to run when the addressee was in a position to take cognizance of the decision (Case 6/72 *Europemballage and Continental Can* v *Commission* [1973] ECR 215, paragraph 10; Case T-12/90 *Bayer* v *Commission* [1991] ECR II-219, paragraph 19, confirmed on that point by the Court of Justice in Case C-195/91 P *Bayer* v *Commission* [1994] ECR I-5619, paragraph 21). According to the defendant, in the present case the addressee was in a position 'to take cognizance' of the communication concerned on Thursday 9 July 1992 or, at the latest, Friday 10 July, the day after the notice of arrival was placed in his post-office box, and the applications should have been lodged, having regard to the extension of time on account of distance, before 16 September 1992 at midnight. It

may be presumed that the notice was placed in the post-office box on the date which it bears, namely Thursday 9 July 1992. It is not unreasonable to expect someone who has a post-office box to empty it every day, even during holidays, and any delay is at his own risk. The defendant adds that, if the applicants' arguments were upheld, it would be possible to evade the time-limits for bringing proceedings whilst nevertheless taking cognizance of the text of the measure by other means.

68 The defendant also contends that the notification served on the applicants' lawyer, by the same means as that used for all correspondence with them, constituted valid notification, that method being in accordance with the Commission's consistent practice. A communication to the addressee's post-office box, rather than to his office, is equally valid.

69 The intervener supports the defendant's arguments.

70 According to the applicants, the time-limit for bringing proceedings must be reckoned from Monday 13 July 1992 at the earliest, that being the day on which their lawyer's clerk collected the communication at the post office counter and signed the acknowledgement of receipt. Moreover, the evidence produced does not show that the notice of arrival was placed in the post-office box on Thursday 9 July 1992, but merely that the letter arrived in Amsterdam on that date; the only certain date, established by the signature on the acknowledgement of receipt, is the date of collection of the letter on Monday 13 July 1992. Moreover, the applicants consider that, to be valid, a notification must always be made at the registered office of the undertaking concerned (Case 42/85 *Cockerill-Sambre* v *Commission* [1985] ECR 3749) and not served on its lawyer. It follows that only the taking of cognizance by the applicants themselves, which could not have occurred before 15 July 1992, is relevant.

Findings of the Court

71 According to the last paragraph of Article 173 of the Treaty: 'The proceedings provided for in this article shall be instituted within two months of the publication of the measure, or of its notification to the plaintiff, or, in the absence thereof, of the day on which it came to the knowledge of the latter, as the case may be.'

72 Pursuant to Annex II to the Rules of Procedure of the Court of Justice and Article 102(2) of the Rules of Procedure of the Court of First Instance (hereinafter 'the Rules of Procedure'), for a party residing in the Netherlands, the period of two months laid down by the last paragraph of Article 173 of the Treaty is extended by six days. If the period ends on a Saturday or a Sunday, it is extended until the end of the first following working day (Article 101(2) of the Rules of Procedure). Periods run from the day following notification (Article 102(1) and Article 101(1)(a) of the Rules of Procedure).

73 The applications were lodged on Monday 21 September 1992. They are therefore admissible if the period prescribed for bringing proceedings ended either on that day or on Sunday 20 or Saturday 19 September 1992. For that to be the case, the event which caused time to start running must therefore have occurred no later than 13 July 1992.

74 According to settled case-law, it is the responsibility of the party alleging that an action is out of time to prove on what date the decision was notified (Case T-94/92 *X* v *Commission* [1994] ECR-SC II-481, paragraph 22).

75 In the present case, it has been established that on 13 July 1992 the applicants' lawyer's clerk found the notice of arrival referring to an item 'from Brussels' in the lawyer's post-office box, presented that notice at the post office counter and was personally handed the Commission's letter of 2 July 1992.

76 On the other hand, the Court can but note the absence of any proof of the date on which the notice of arrival was lodged in the applicants' lawyer's post-office box. Since the defendant is thus unable to substantiate the factual basis of its argument that the period allowed for proceedings to be brought started on 9 or 10 July 1992, it is unnecessary to consider the consequences in law which it seeks to draw.

77 It follows that the applications are admissible.

Substance

78 The applicants put forward a number of pleas in law alleging procedural error, failure to state adequate reasons, error in law and/or manifest error of assessment. It is appropriate to group those pleas under four headings: (1) the pleas alleging procedural error in that the user fee was, wrongly, dealt with separately; (2) 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; (3) 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; and (4) 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.

1. *The pleas alleging a procedural error in that the user fee was, wrongly, treated separately*

Summary of the parties' arguments

79 The applicants claim that the Commission committed a procedural error adversely affecting them by failing to adopt a single decision dealing with all their complaints. Moreover, that error on the part of the Commission involved a failure to state adequate reasons or an error of assessment, or both.

80 The applicants state that they lodged complaints not only against the user fee but also regarding the trade agreements and the Cultra agreements, in particular in their letters of 3 May 1989. The Commission had, indeed, brought those various complaints together in a single file and promised to bring the procedure to an end by a formal decision so that the applicants could institute proceedings before the Court. Furthermore, throughout the administrative procedure, the applicants claimed that the different aspects of the VBA rules should be examined from the standpoint of their reciprocal relations, as was done by the Commission in the 1988 decision.

81 However, notwithstanding those considerations, the Article 6 letter referred only to the user fee and not to the trade agreements or the Cultra agreements. The applicants' procedural rights were therefore adversely affected in that the availability of proceedings before the Court was circumscribed by the fact that the contested decision relates to only part of their complaints. The applicants also state that they will be obliged to bring a second action before the Court if the other aspects of their complaints are formally rejected.

82 They further maintain that the Commission committed an error of assessment in that it did not consider whether the user fee was in conformity with Article 85(1) of the Treaty in the context of the other rules applied by the VBA, in particular under the trade agreements and the Cultra agreements, and failed to give reasons for its decision to consider the user fee in isolation rather than in relation to the trade agreements and the Cultra agreements.

83 The defendant contends that it was under no obligation to deal with all the complaints at the same time in a single procedure (Joined Cases 209/78 to 215/78 and 218/78 *Van Landewyck and Others* v *Commission* [1980] ECR 3125, paragraph 31

et seq.), particularly since in this case the Commission received at the same time both a notification and a complaint, which were, in addition, amended or extended on several occasions.

84 The defendant stresses, in particular, that the complaint concerning the trade agreements was lodged after the one concerning the user fee, and that those agreements were not notified until 7 February 1990, that is to say after publication of the notice of 4 April 1989. The Commission did not wish to make a definitive assessment of the trade agreements in its investigation of the complaint until it had done so in the context of the notification procedure. It stated in its letter of 24 October 1990 that it was considering a comfort letter for the trade agreements, whereas the user fee would be dealt with in the context of a formal decision concerning other aspects of the VBA rules.

85 As regards the fact that the complaint concerning the user fee was treated separately from the one concerning the Cultra agreements, the Commission contends that there is no link between the content of the two complaints, particularly since the notification of the user fee must be assessed under Regulation No 26 and that of the Cultra agreements under Regulation No 17. Its letter of 24 October 1990 indicated that, procedurally, the two complaints would be dealt with separately.

86 When it became clear that it was no longer possible to adopt a positive decision under Article 2 of Regulation No 26, on 4 March 1991 the Commission sent the Article 6 letter relating only to the user fee. After the applicants had insisted in their letter of 17 April 1991 that their other complaints should be dealt with, it chose to dispose definitively of the complaint concerning the user fee, rather than wait for the procedure on the complaints concerning the Cultra agreements and the trade agreements to reach its final stage. If it had not followed that course, the applicants would have been unable to obtain a final decision regarding the user fee in July 1992.

87 In any event, the applicants' arguments that the Commission failed to state adequate reasons and/or committed a manifest error of assessment in examining the user fee separately have no factual basis, as is apparent from the document annexed to the Article 6 letter.

88 The intervener supports the Commission's position.

Findings of the Court

89 It must be noted that the Commission considered itself ready to adopt an initial position on all the various complaints of the applicants in its letter of 24 October 1990. However, the Article 6 letter of 4 March 1991 and the contested decision of 2 July 1992 concern only the user fee. Furthermore, the fact that the Commission did not send the letter of 5 August 1992 concerning the trade agreements and the Cultra agreements until after the letter of 2 July 1992 inevitably meant that the applicants found themselves obliged to bring two different actions, in view of the time-limits laid down by the last paragraph of Article 173 of the Treaty.

90 The manner in which the administrative procedure was conducted thus gave rise to delay and inconvenience. However, the Court does not consider that those circumstances justify annulment of the contested decision.

91 The contested decision concerns only the legality of the user fee, in particular the question whether it is 'necessary for attainment of the objectives set out in Article 39 of the Treaty' within the meaning of the first sentence of Article 2(1) of Regulation No 26. On the other hand, the Commission did not refer to that provision in relation to the trade agreements and the Cultra agreements. It follows that the

absence of a decision on those other complaints can be decisive to the outcome of the present case only to the extent to which, in the contested decision, the Commission failed to take account of the aspects of the trade agreements or Cultra agreements which are capable of affecting the legality of the user fee in the light of the first sentence of Article 2(1) of Regulation No 26.

92 As regards the trade agreements, the only element mentioned by the applicants which is capable of affecting the legality of the user fee in the light of the first sentence of Article 2(1) of Regulation No 26 is their allegation that the rate of 3% laid down in those trade agreements gives rise to discrimination against suppliers who must pay the higher rate of user fee (see paragraph 188 et seq. below). However, the Commission considered that aspect in the legal assessment contained in the document annexed to the Article 6 letter, in point II.2(b), seventh subparagraph, finding that the suppliers who concluded trade agreements with the VBA also accepted obligations concerning supplies, with the result that there is no inequality of treatment (see paragraph 42 above).

93 The Commission thus did not fail to take account in the contested decision of the applicant's argument concerning the relationship between the trade agreements and the user fee, and the applicants have been able to give their views on that point in the context of these proceedings (see paragraph 188 et seq. below).

94 As regards the Cultra agreements, there is nothing in the file to show that the Commission's assessment of the legality of the user fee in the light of the first sentence of Article 2(1) of Regulation No 26 might be significantly affected by the existence of those agreements, which concern another aspect of the VBA's activities (paragraph 24 above). Moreover, Florimex itself stated in its application (page 3) that the arrangements under the Cultra agreements are of only marginal relevance to the present proceedings.

95 The plea alleging a procedural error in that the user fee was wrongly treated separately must therefore be rejected.

2. The plea alleging infringement of Article 19 of Regulation No 17 and lack of a formal decision under Article 2 of Regulation No 26

Summary of the parties' arguments

96 The applicants claim that the notice of 4 April 1989 did not cover the additional VBA rules laying down detailed provisions regarding the user fees or the new trade agreements, which were not notified until February 1990. The Commission, they assert, thus gave a positive decision on aspects of the VBA rules on which it had not invited third parties to submit their observations under Article 19 of Regulation No 17. At the hearing, the applicants also insisted that in the circumstances of this case the Commission was under an obligation to adopt a formal decision under Article 2 of Regulation No 26.

97 The defendant submits that the notice under Article 19 forms part of the administrative procedure following a notification and not the procedure leading to rejection of a complaint. It also considers that a formal decision under Article 2 of Regulation No 26 was not necessary in this case.

98 The intervener has not submitted any observations on this aspect of the case.

Findings of the Court

99 Article 19(3) of Regulation No 17 provides:

'Where the Commission intends to give negative clearance pursuant to Article 2 or take a decision in application of Article 85(3) of the Treaty, it shall publish a summary of the relevant application or notification and invite all interested third parties to submit their observations within a time-limit which it shall fix being not less than one month. ...'

100 Article 2(2) of Regulation No 26 provides that the decisions referred to in Article 2(1) are to be taken by the Commission '[a]fter ... hearing the undertakings or associations of undertakings concerned and any other natural or legal person that it considers appropriate'. According to the Article 6 letter which it sent to the VBA, the Commission interprets that provision as requiring it to make a publication similar to that provided for by Article 19(3) of Regulation No 17.

101 It is clear from the very text of those provisions that neither Article 19(3) of Regulation No 17 nor Article 2(2) of Regulation No 26 requires prior publication where the Commission proposes rejecting a complaint lodged under Article 3(2)(b) of Regulation No 17.

102 Even on the assumption that, in this case, the contested decision constituted a positive decision under Article 2 of Regulation No 26 following the notification made by the VBA, having regard in particular to the fact that the document annexed to the Article 6 letter states that 'the procedure is concerned with decisions notified to the Commission ... governing direct supplies to dealers

established on the VBA's premises', it is clear that the gist of the rules concerning the user fee was published in the *Official Journal* in the notice of 4 April 1989 (see paragraph 32 above).

103 The fact that that notice does not mention the 'detailed provisions' adopted following its publication (paragraph 34 above) is irrelevant since those detailed provisions did not change the substance of the rules in question but simply made a number of changes, in particular the introduction of a flat rate of 5%, in response to observations from third parties.

104 The fact that the notice did not mention the trade agreements is also irrelevant since the contested decision concerns the applicants' complaints in relation to the user fee and not those concerning the trade agreements with which the letter of 5 August 1992 is concerned (see paragraph 48 above).

105 It follows that, in any event, there was no failure to publish of such a kind as to adversely affect the applicants' interests in the context of these proceedings.

106 Finally, the Court considers that a formal decision adopted under Article 2 of Regulation No 26 and covering all the VBA's rules was not the only means available to the Commission in order to reject the applicants' complaints concerning the user fee. When rejecting a complaint lodged under Article 3(2)(b) of Regulation No 17, the Commission must indicate the reasons for which a careful examination of the facts and points of law brought to its notice by the complainant has not led it to initiate a procedure to establish whether Article 85 of the Treaty has been infringed. In so doing, the Commission may, in relation to the agricultural products referred to in Annex II to the Treaty, explain the reasons for which it considers that Article 2 of Regulation No 26 applies and a careful examination of

the complaint does not therefore prompt it to take the action requested by the complainant. However, the Commission's duty to the complainant to give the reasons for rejecting a complaint does not mean that it is automatically required to adopt a formal decision under Article 2 of Regulation No 26 addressed to the complainant (see by analogy Case T-575/93 *Koelman* v *Commission* [1996] ECR II-1, paragraphs 38 to 44).

107 It follows that this plea must be rejected.

3. *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*

The parties' arguments

108 The applicants' arguments concern both the statement of reasons and the correctness of the assessment contained in the contested decision, to the effect that the user fee is an essential feature of a body of agreements necessary for attainment of the objectives of the Treaty within the meaning of the first sentence of Article 2(1) of Regulation No 26.

109 The applicants claim first that the Commission did not give a duly reasoned explanation of the difference between the user fee and the 10% levy prohibited in the 1988 decision. According to the applicants, the aim of the 10% levy was to restrict the freedom of choice of dealers established on the VBA's premises and the user fee pursues the same objective and has the same effect, the changes introduced since 1988 being of no importance. That is particularly true since, for certain products with very large numbers of stalks, in particular xerophyllum tenax and narcissi, the user fee is much higher than the old levy of 10%. At the hearing, the

applicants added that since the profit margin on trade in the flowers concerned is about 1%, a fee of 5% is prohibitive for delivery of products from outside suppliers to buyers established on the VBA's premises.

110 Next, the applicants consider that the Commission did not give the requisite statement of reasons for its finding that imposition of the user fee is necessary for attainment of the objectives set out in Article 39 of the Treaty, within the meaning of the first sentence of Article 2(1) of Regulation No 26. They observe, in particular, that the position adopted by the Commission in the contested decision runs counter to that adopted in the 1988 decision (points 135 to 152) and that the VBA is the only auctioneer which imposes such a fee.

111 Such a reversal could only be justified if the agreement were necessary for attainment of *all* the objectives of the common agricultural policy (Case 71/74 *Frubo* v *Commission* [1975] ECR 563) and if the application of Article 85(1) of the Treaty jeopardized such attainment (preamble to Regulation No 26). However, the contested decision does not explain how each of the objectives identified in Article 39(1)(a) to (e) is attained.

112 In particular, the statement that the user fee is necessary to facilitate attainment of all the objectives of Article 39 of the Treaty, in particular ensuring a fair standard of living for farmers, stabilization of markets and reasonable prices for consumers, is unsupported and unconvincing, and the Commission did not adopt that position in the 1988 decision.

113 In any event, the applicants consider that the user fee distorts competition because it does not constitute real consideration for use of the facilities. Outside undertakings such as Florimex must make their own arrangements for a large proportion of the services (collection of payments, packaging, unpackaging, sorting and so forth)

provided by the VBA to its members, and the 'user' fee is therefore no such thing: the applicants use the VBA's facilities solely to bring into its premises the floricultural products which they sell to the dealers established there.

114 The view that the user fee is justified by the concentration of demand is without substance. The logistical and technical measures benefiting tenants comprise nothing more than an arrangement whereby a lorry is able to reach the tenants' premises, a service which they are entitled to expect in consideration of their high rents. In any event, the VBA's statements concerning its commercial, financial and intellectual efforts have no basis and the services referred to are not identified. The VBA's 'special distribution system' is comparable with that of numerous other auctioneers.

115 The existence of the VBA would not be threatened in the absence of the fee, which leads to inequality rather than equality of treatment between VBA members and other suppliers. The comparison drawn by the Commission between the user fee and the fees paid by VBA members is not valid because the latter fees constitute the consideration for the services provided by the VBA.

116 Moreover, the Commission has not sufficiently explained, in the contested decision, the reasons for which certain partial aspects of the user fee referred to in particular in their letter of 17 April 1991 — namely its application to (a) products not grown within the European Community, (b) products with so many stalks that the fee cannot be calculated or (c) products which are in practice not distributed through the VBA — meet the objectives of Article 39 of the Treaty.

117 Furthermore, there is no justification for making imported products subject to a fee whose impact is equal to that of the minimum auction sale price: the goods concerned are not distributed through the VBA and they are already subject to considerable import costs.

118 The defendant states first that the reasons for which it did not take action against the user fee are clearly set out in its Article 6 letter and in the contested decision: the rules applicable to it form an integral part of the VBA rules as a whole concerning direct supplies but the latter, although covered by Article 85(1) of the Treaty, also meet the conditions of the first sentence of Article 2(1) of Regulation No 26, so that Article 85(1) is inapplicable.

119 As regards the allegation that no reasons are given for divergences between the 1988 decision and the contested decision, the defendant replies that there are essential differences between the user fee and the old 10% levy, the latter having been linked in particular with an exclusive purchase obligation for tenants established on the VBA's premises, which has now been removed. The 1988 decision concerned the vertical integration of VBA tenants within the latter's sales system, and the present economic and legal context is entirely different. Nor have the applicants shown that the user fee has created a situation comparable to an exclusive purchase obligation, since suppliers and buyers are free to approach other customers or other sources of supply if the conditions offered by the VBA are unattractive. Moreover, the applicants now have the option of paying a flat rate of 5%.

120 As to whether the conditions in Article 2 of Regulation No 26 are met, the defendant considers that a sufficient statement of reasons on that point was given in the document annexed to the Article 6 letter. Similarly, the Commission's position regarding the 'partial aspects' referred to by the applicants is sufficiently explained

in the contested decision. In any event, the Commission is not required to give its views on all the arguments when rejecting a complaint (see Case T-7/92 *Asia Motor France and Others* v *Commission* [1993] ECR II-669, paragraph 31).

121 The defendant considers among other things that the user fee is intended only to ensure that the VBA's very existence is not compromised by the fact that suppliers receive the benefit of its efforts free of charge. Its impact is similar to that of the minimum auction sale price and thus ensures balanced treatment as between all suppliers. The conditions in the first sentence of Article 2(1) of Regulation No 26 are therefore fulfilled.

122 The defendant states in its rejoinder that the objectives of Article 39 require that all suppliers contribute to the VBA's investments since members, if the charges were passed on only to them, might be induced to terminate their membership. At the hearing, the Commission added that, for the VBA to be effective as a cooperative, it must have a solid foundation. If there were no fee, there would be a risk that certain members, particularly the largest, might leave the cooperative and supply direct to the wholesalers established on the VBA's premises, without paying commission and without recourse to 'auction dial' sales.

123 The user fee is thus intended to protect the cooperative itself and the role of 'auction dial' sales in price formation. It is only natural for importers too to contribute to the VBA's costs since the concentration of demand on its premises enables them to achieve significant economies of scale. Moreover, the cost of the significant economic advantage represented by the concentration of demand cannot be regarded as already included in the rent paid by the tenants and must therefore be paid for separately by non-tenant suppliers.

124 The defendant rejects the view that Florimex is more severely affected than other suppliers and emphasizes that it could opt for a flat-rate fee of 5% for products

with numerous stalks. It also denies that the fee distorts competition in favour of the VBA and to the detriment of VGB members. Calculating the fee on the basis of the number of stalks was intended to uphold price confidentiality and, in any event, the VBA has given an undertaking to use the information obtained only for administrative purposes.

125 Moreover, what is important is not the financial burden represented by the user fee for certain categories of floricultural products, such as ornamental foliage, but the need to establish whether the contribution to the financing of investments is equally apportioned among the various suppliers. The Commission considers that to be the case.

126 The intervener emphasizes first that, by contrast with the system of levies prohibited in the 1988 decision, the user fee has enabled undertakings established on the VBA's premises to deal in products which were not supplied through it. Since September 1988, the fee has been imposed only on suppliers; buyers no longer have to provide information in that regard. Nor do suppliers have to indicate the destination of the products, so the VBA can no longer have at its disposal information which is sensitive from the competition point of view and, moreover, it has given an express commitment to the Commission not to use the information which it obtains for commercial purposes. Furthermore, suppliers now have a choice between a unit fee and a flat-rate fee of 5% of the value of the products.

127 In the intervener's submission, the 1988 decision did not prohibit all types of fee levied on product supplies and no such prohibition derives from Article 85(1) of the Treaty. On the contrary, the 1988 decision, although considering the rate of 10% to be too high, accepted the principle of a fee as payment to the VBA for granting a right of user and because the undertakings established on the VBA's premises participate in a distribution system which is fundamentally beneficial (points 148 and 163).

128 As regards justification for the user fee, the distribution system enjoyed by each seller comprises more than logistical and technical measures, extending to all of the VBA's commercial, intellectual and financial efforts. In the 1988 decision, the Commission accepted the principle that the levying of a fee is justified in order to protect, first, the role of 'auction dial' sales in price formation (points 147 and 148) and, secondly, the VBA's economic interest and its establishment of a special distribution system (point 163). The intervener emphasizes that the user fee is collected not only from outside suppliers but also from sellers established on its premises who supply products which have not passed through its system.

129 At the hearing, the intervener stated in particular that the elimination of the fee would jeopardize the existence of the cooperative because certain members might consider supplying products on the VBA's premises without recourse to 'auction dial' sales. Since 80% of movements of products within the VBA's premises are carried out by 20% of the members, the effectiveness of the system depends on the wish of its largest members to remain within the system. As to the fact that such a fee is not imposed by other auctioneers, the intervener stated at the hearing that its situation is different because its site is close to Schiphol airport, which makes it attractive to third parties. Moreover, the area leased out by the VBA is much greater.

130 The intervener states that the rate of the user fee at present amounts on average to 4.5% of the value within each product category, although for certain products it is higher or lower depending on the season and the market price. A specially low tariff has been laid down for the specific products mentioned by the applicants (xerophyllum tenax and narcissi in bouquets) and it is possible to opt for a flat rate of 5%. The rules are thus as objective as possible and their legality under competition law cannot be assessed on the basis of their impact on those specific products, sold on that basis by a single trader.

131 A comparison with the fees paid by members and other suppliers selling by auction shows that the user fee is not unreasonably high and that the intervener does not gain any competitive advantage from it to the detriment of competing suppliers. In any event it is not obliged to authorize competing supplies benefiting from the services, in particular economies of scale as regards transport costs, which it 'offers' in the widest sense of the term, as a result of its concentration of demand, without requiring reasonable payment in return in order to protect both its own interests and the role of 'auction dial' selling in the formation of sale prices.

132 Finally, at the hearing the intervener referred to Case C-250/92 *Gøttrup-Klim Grovvareforening* v *Dansk Landbrugs Grovvareselskab* [1994] ECR I-5641, paragraph 35, and Case C-399/93 *Oude Luttikhuis and Others* v *Verenigde Coöperatieve Melkindustrie* [1995] ECR I-4515, paragraph 14, claiming that the fee constitutes a restriction needed to ensure the proper functioning of the cooperative and does not therefore fall within the scope of Article 85(1) of the Treaty. Similarly, it claims that the second sentence of Article 2(1) of Regulation No 26, as interpreted by the Court of Justice in *Oude Luttikhuis*, applies to this case.

Findings of the Court

Legal background

133 Article 85(1) of the Treaty provides:

'The following shall be prohibited as incompatible with the common market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market'.

134 Pursuant to Article 1 of Regulation No 26, subject to the provisions of Article 2, Article 85(1) of the Treaty applies to all agreements, decisions and practices referred to therein which relate to production of or trade in the products listed in Annex II to the Treaty.

135 The first sentence of Article 2(1) of Regulation No 26 provides:

'Article 85(1) of the Treaty shall not apply to such of the agreements, decisions and practices ... as ... are necessary for attainment of the objectives set out in Article 39'.

136 Article 39(1) of the Treaty provides:

'1. The objectives of the common agricultural policy shall be:

(a) to increase agricultural productivity by promoting technical progress and by ensuring the rational development of agricultural production and the optimum utilization of the factors of production, in particular labour;

(b) thus to ensure a fair standard of living for the agricultural community, in particular by increasing the individual earnings of persons engaged in agriculture;

(c) to stabilize markets;

(d) to assure the availability of supplies;

(e) to ensure that supplies reach consumers at reasonable prices'.

137 It is common ground in this case, and the defendant confirmed at the hearing, that, in the document annexed to the Article 6 letter, which forms an integral part of the statement of the reasons on which the contested decision is based, the Commission found that the user fee does not fall within Article 85(1) of the Treaty solely because it constitutes 'an essential feature of the VBA's distribution system', which is, according to the defendant, 'necessary for attainment of the objectives set out in Article 39 of the Treaty', within the meaning of the first sentence of Article 2(1) of Regulation No 26.

138 The Court is thus not called upon to adjudicate on the arguments put forward by the intervener at the hearing concerning the non-application of Article 85(1) of the Treaty or the possible application of the second sentence of Article 2(1) of Regulation No 26, but only on the legality of the conclusion reached by the Commission in the contested decision that the user fee falls within the first sentence of Article 2(1) of Regulation No 26.

The statement of reasons on which the contested decision is based

(a) Preliminary considerations

139 According to settled case-law, whilst the Commission is not required to discuss all the issues of fact and law raised by the undertakings concerned, the statement of reasons in any adverse decision must enable the Court to review its lawfulness and make clear to the Member States and the persons concerned the circumstances in

which the Commission has applied the Treaty (see for example Case C-360/92 P *Publishers Association* v *Commission* [1995] ECR I-23, paragraph 39).

140 The applicants claim first that the user fee is merely the re-embodiment of the old 10% levy, which did not meet the conditions of the first sentence of Article 2(1) of Regulation No 26, as the Commission found in points 137 to 153 of the 1988 decision. The statement of the reasons for the contested decision is therefore defective in that the Commission did not explain why the same conclusion should not apply in this case.

141 The Court points out that the old 10% levy was imposed on dealers established on the VBA's premises under the VBA rules then in force, which prohibited such dealers from obtaining supplies from outside suppliers without prior authority from the VBA, and were intended 'to prevent irregular use of VBA facilities' (see paragraphs 13 and 14 above, and points 48, 49, 56 and 112 et seq. of the 1988 decision). The old 10% levy was thus tied to an exclusive purchase obligation imposed on the dealers established on the VBA's premises. Moreover, the procedure for collecting that fee enabled the VBA to obtain precise information regarding its tenants' external sources of supply (see point 118 of the 1988 decision).

142 The user fee at issue in this case, on the other hand, is not connected with any exclusive purchasing obligation imposed on dealers established on the VBA's premises, that obligation having been removed following the 1988 decision (paragraph 19 above). Moreover, it is now the outside supplier, and not the purchaser, who must pay the user fee, the rate of which is calculated by a method appreciably different from that used for the old 10% levy. Finally, the VBA has given an undertaking no longer to use the information thus obtained otherwise than for administrative purposes (paragraph 21 above).

143 It follows that the mere fact that, in the 1988 decision, the Commission concluded that the old 10% levy did not meet the conditions in the first sentence of Article 2(1) of Regulation No 26 does not in itself justify the same conclusion regarding the user fee.

144 This is confirmed by point 148 of the 1988 decision, in which the Commission stated that the decision did not aim 'in any eventuality, at complete freedom of supply to VBA tenants' and that the Commission was 'fully aware that VBA tenants [were] part of a special, fundamentally beneficial distribution system'.

145 It follows that the statement of reasons for the contested decision is not defective merely because the Commission did not include in it explicit details of the difference between the user fee and the old 10% levy.

146 However, even though the factual and legal context of the user fee is not the same as that of the old 10% levy, the fact nevertheless remains that the present case is concerned with the rules of an agricultural cooperative which levies a fee on transactions between two categories of third party, namely, independent wholesalers established on the VBA's premises and suppliers wishing to supply to such purchasers either products from other Community agricultural producers or products from non-member countries which are in free circulation in the Community. Such a fee goes beyond the scope of internal relations between members of the cooperative and, by its nature, constitutes a barrier to trade between independent wholesalers and flower growers who are not members of the cooperative concerned.

147 Until now, 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.

148 Furthermore, the Commission's practice in earlier decisions has generally been to conclude that agreements not included amongst the means indicated by the regulation providing for a common organization in order to attain the objectives set out in Article 39 are not 'necessary' within the meaning of the first sentence of Article 2(1) of Regulation No 26, as observed by Advocate General Tesauro in his Opinion in *Oude Luttikhuis*, cited above (at p. I-4480).

149 The common organization of the market in live trees and other plants, bulbs, roots and the like, cut flowers and ornamental foliage, established by Regulation No 234/68 of the Council, cited above, does not provide for agricultural cooperatives to impose such a fee on third parties; nor do the Community measures applicable in other agricultural sectors referred to in the document annexed to the Article 6 letter (paragraph 40 above). Neither Regulation (EEC) No 1035/72 of the Council of 18 May 1972 on the common organization of the market in fruit and vegetables (OJ, English Special Edition 1972 (II), p. 437) nor Council Regulation (EEC) No 1360/78 of 19 June 1978 on producer groups and associations thereof (OJ 1978 L 166, p. 1) provides for a system of fees such as that set up in the present case.

150 Moreover, the Commission confirmed in reply to a question put to it by the Court that it has no knowledge of any fee similar to the user fee in other agricultural sectors, whether in the Netherlands or elsewhere in the Community.

151 In those circumstances, the Court considers 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 (Case 73/74 *Papiers Peints* v *Commission* [1975] ECR 1491, paragraphs 31 to 33).

152 That is particularly true 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 (*Oude Luttikhuis*, cited above, paragraph 23 et seq.).

153 Finally, as the applicants have submitted, it is settled case-law that the first sentence of Article 2(1) of Regulation No 26 applies only if the agreement in question is conducive to attainment of all the objectives of Article 39 (see *Frubo* v *Commission*, cited above, paragraphs 22 to 27, and *Oude Luttikhuis*, cited above, paragraph 25). It follows that the Commission's statement of reasons must show 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.

154 It is in the light of those preliminary considerations that the statement of reasons in the contested decision must be examined in relation to the three main arguments put forward to justify the user fee in the light of the first sentence of Article 2(1) of Regulation No 26, namely: 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.

(b) The statement of reasons in the contested decision as regards the survival of the VBA

155 To demonstrate that the VBA system, including the user fee, is necessary for attainment of the objectives set out in Article 39 of the Treaty, the defendant contends, primarily, that without the user fee the VBA's survival would be jeopardized. It considers, first, that the cooperative basis on which the VBA is organized, founded on the obligation placed on its members to sell by auction, is necessary

for attainment of the objectives set out in Article 39 of the Treaty, in so far as the resultant concentration of supply enables perishable floricultural products to be distributed efficiently. Secondly, it considers that the user fee is an essential feature of the VBA distribution system, without which certain of its members, in particular those which in terms of size account for a substantial part of its base, would be tempted to leave it and supply their products direct to the buyers established on its premises, without going through the auction sales and without paying fees. In such circumstances, it would be impossible to amortize the investment costs or cover the day-to-day expenses of the VBA, with the result that its very survival and, consequently, attainment of the objectives of Article 39 would be compromised.

156 As regards the first of those arguments, the applicants have not denied that the cooperative form adopted by the VBA in principle meets the objectives set out in Article 39 of the Treaty, in particular by facilitating concentration of its members' supplies and efficient distribution of their products, which are often very perishable, through auction sales. Moreover, the legal form of a cooperative is favoured both by national legislators and by the Community authorities because it encourages modernization and rationalization in the agricultural sector and improves efficiency (*Oude Luttikhuis*, cited above, paragraph 12).

157 However, the applicants dispute the Commission's second argument, maintaining, first, that the VBA's survival does not depend on the existence of the user fee and, secondly, that a distribution system dependent on its existence does not meet all the objectives of Article 39 of the Treaty, as required by the case-law of the Court of Justice.

158 As regards the first issue thus raised, namely whether the VBA's survival would be jeopardized in the absence of a user fee, the Court notes that it is a cooperative of considerable economic weight, which in 1992 accounted for about 44% of auction sales of floricultural products in the Netherlands, with a turnover of HFL 2 200 million. The Court also notes that neither the statement of reasons in the contested

decision nor the submissions of the Commission or the intervener have mentioned specific factors such as to establish the reality of the jeopardy on which their view is premissed.

159 However, since by its very nature that premiss is not susceptible of direct proof, the Court is prepared to accept, for the purposes of this judgment, the hypothesis that, if there were no user fee, certain present members of the VBA might have an interest in leaving it, so as to sell their products directly to the purchasers established on its premises without recourse to auction sales. For the purposes of this judgment, the Court is also prepared to accept that such a development involves the risk that the very viability of the VBA's system, in its present form, might be undermined.

160 The Court considers, however, that, even on the assumption that the VBA's system, in its present form, 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.

161 Whilst it is true that the concentration of supply achieved by the VBA helps in particular to improve the organization of marketing by enabling a large number of small producers to participate in the economic process on a wider-than-regional scale, thus fulfilling certain objectives of Article 39, as declared in the contested decision (see paragraph 40 above), the fact nevertheless remains that the user fee is capable of adversely affecting other Community agricultural producers who are not VBA members but whose interests are also covered by Article 39 of the Treaty.

162 In particular, 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 and constitutes at the very least a significant impediment

to the freedom of other agricultural producers to sell through the distribution channels in question. That obstacle is particularly significant in this case because the wholesalers established on the VBA's premises include a substantial number of the largest Netherlands exporters, who occupy a leading position in Community trade in floricultural products (points 131 and 132 of the 1988 decision). Those wholesalers are an important part of the machinery for distributing floricultural products in the Community, and other Community agricultural producers, including those of other Member States, have an interest in gaining access to them.

163 It follows 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 certain respects 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)). That might be the case in particular in so far as the user fee is levied on products which are not grown by VBA members, or are not in practice disposed of through auction sales, or are sold during those seasons when Netherlands supplies are not yet available.

164 Moreover, it is implicit in the defendant's arguments that the user fee is an essential means for the VBA of dissuading its membership, in particular its largest members, from leaving the VBA in order to sell direct to the purchasers established on its premises, without recourse to auction sales and the numerous related services which it offers. However, if for certain producers such direct sales to the purchasers concerned were less costly or more efficient than the VBA's present system, the user fee might, from that standpoint too, adversely affect the rational development of agriculture (Article 39(1)(a)), increases in the individual earnings of those engaged in agriculture (Article 39(1)(b)) and the prices at which supplies reach consumers (Article 39(1)(e)). A provision having the effect of excessively restricting the freedom of a member of an agricultural cooperative to leave it would be

difficult to reconcile with the objectives set out in Article 39 of the Treaty (see, by analogy, *Oude Luttikhuis*, cited above, paragraphs 15 and 16).

165 The Commission was thus confronted in the present case with a complex situation, involving the divergent and conflicting interests of smaller and larger members of the VBA, of other Community agricultural producers and of the intermediaries concerned. The Court considers that in such circumstances the Commission's statement of reasons could not be confined to the single consideration — even if proved — that the VBA's survival in its present form would be jeopardized without the user fee. The statement of reasons should also have taken account of the effects of the user fee on other Community producers, and the Community interest in maintaining undistorted competition.

166 It must be concluded that the contested decision does not weigh the beneficial effects of the user fee, in that it contributes to the survival of the VBA in its present form, against its negative effects on the other producers concerned and on freedom of competition, in particular in the sphere of wholesale trade in floricultural products.

167 The Court notes, in particular, that the contested decision contains no reasons regarding the effect of the user fee on competition, as regards wholesale transactions, between members of the VBA and other producers.

168 Similarly, the contested decision contains no explicit reasons to explain how the user fee, or a system of auction sales which cannot survive without such a fee, meets each of the various objectives laid down in Article 39(1)(a) to (e) of the Treaty in the light of the above considerations, or how the Commission reconciled those different objectives in such a way that the user fee can be regarded as 'neces-

sary' to their attainment within the meaning of the first sentence of Article 2(1) of Regulation No 26.

169 It follows that the statement of reasons given in the contested decision, as clarified in the course of the proceedings, with regard to the VBA's survival in its present form does not, by itself, constitute a sufficient statement of reasons to demonstrate that the user fee is necessary for attainment of the objectives set out in Article 39 of the Treaty within the meaning of the first sentence of Article 2(1) of Regulation No 26.

(c) Whether the user fee is justified by a real and proportionate *quid pro quo*

170 The Court also considers that, in the context of the first sentence of Article 2(1) of Regulation No 26, the Community interest in ensuring the survival of the VBA, important though it may be, cannot be reconciled with the — likewise legitimate — Community interest in ensuring access for other agricultural producers to distribution channels, unless the user fee is levied on a proportionate basis, as consideration for a service or other advantage whose value is such as to justify the amount charged.

171 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. Since the first sentence of Article 2(1) is to be interpreted strictly (paragraph 152 above), a fee having such an effect cannot be regarded as 'necessary' for attainment of the objectives set out in Article 39 of the Treaty, within the meaning of that provision.

172 According to the contested decision, the user fee is justified in consideration of the geographical concentration of supply and demand on the VBA's premises which, according to the Commission, gives rise to 'an economic advantage which is the result of significant efforts, in both tangible and intangible terms, made by the VBA'. To allow third parties to benefit from those efforts without charge (see paragraph 41 above) would constitute discrimination against VBA members.

173 It is therefore necessary to consider whether the statement of the reasons for the contested decision is sufficient to show that the user fee is justified by a real and proportionate *quid pro quo* for outside suppliers delivering to buyers established on the VBA's premises.

174 It must first be pointed out that 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, collection of payments and recovery of debts. 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. However, the defendant has not advanced that use of roadways to justify the contested fee.

175 The concentration of supply and demand on the VBA's premises is therefore the only advantage mentioned as a *quid pro quo* for the user fee levied.

176 Contrary to the applicants' submission, the Court cannot, on the basis of the documents before it, exclude the possibility that the creation, on the VBA's premises, of substantial facilities conducive to the efficient distribution of floricultural products, which are often very perishable, and the bringing-together on those premises of a large number of buyers, including the largest Netherlands exporters, represent an economic advantage for outside suppliers wishing to deliver their products to the buyers in question. In particular, the applicants have not rebutted

the intervener's assertion that the possibility of supplying floricultural products to specialized buyers grouped on a single site involves economies of scale, in particular in transport costs.

177 However, as held above (see paragraphs 171 and 172 above), a fee intended to prevent third parties from enjoying free of charge the economic advantage offered by the possibility of delivering supplies to the VBA's premises cannot be regarded as 'necessary' for attainment of the objectives set out in Article 39 unless that fee conforms with the principle of proportionality and thus does not exceed proper remuneration for the 'enhanced value' thus provided by the VBA.

178 It follows that the statement of the reasons for the contested decision must enable the parties and, if necessary, the Court to verify that the fee in question does not exceed proper remuneration for the economic advantage invoked. It is all the more important that such objective verification should be possible in this case, since it is only in exceptional circumstances that a fee levied by an agricultural cooperative on supplies by other agricultural producers to independent purchasers could be regarded as 'necessary' within the meaning of the first sentence of Article 2(1) of Regulation No 26 (see also paragraphs 146 to 153 above).

179 The Court observes that the 'economic advantage' represented by the concentration of demand 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.

180 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. According to the Commission, this mechanism establishes equality of treatment between the suppliers concerned, in that, although it is true that in consideration of their fee the suppliers selling by auction enjoy all the services of the VBA, they also accept a supply obligation *vis-à-vis* the VBA, to which the other suppliers are not subject (see paragraph 42 above).

181 That statement of reasons cannot be regarded as sufficient to justify the amount of the fee at issue. Even if it is assumed that a comparison between the rate of the auction fee and the rate of the user fee is possible, despite the fact that the first is calculated in proportion to sales and the second by stalk or pot, the Court considers that the amount of the auction fee cannot serve as a reference point for calculating the 'enhanced value' to outside suppliers of the opportunity to deliver supplies to the VBA's premises. The auction fee (of about 5.7%) is paid in return for the services offered by the VBA, in particular access to the 'auction dial' sales and additional services such as quality control, preparation, packing, unpacking, sorting and delivery of products, collection of payments and recovery of debts. However, suppliers delivering direct to dealers established on those premises do not benefit from any of those services. On the contrary, they must themselves bear equivalent sales costs and, in addition, pay the user fee, the flat rate for which is 5%.

182 Nor is the supply obligation accepted by VBA members sufficient to justify the conclusion that the amount of the user fee should be the same as that of the auction fee. The supply obligations are accepted voluntarily by VBA members in their own commercial interests in view of the numerous services received by them, whereas the user fee is imposed unilaterally on the parties concerned, without their receiving the same services.

183 The Court concludes from this that the absence in the contested decision of a sufficient statement of reasons regarding the calculation of the amount of the user fee, and in particular the absence of figures for the calculation of the various costs connected with use by the various suppliers of the VBA's different services and facilities, does not allow it to verify whether the user fee exceeds proper remuneration for that advantage. In the absence of such calculations, the Court is not in a position to verify whether the amount levied is 'necessary' for attainment of the objectives set out in Article 39 of the Treaty, in view of the divergent interests of the members of the VBA and other flower growers wishing to have access to the distribution channels.

(d) The statement of reasons in the decision as to the analogy between the effect of the user fee and that of a minimum auction sale price

184 In the contested decision, the Commission further states that the user fee is necessary for attainment of the objectives set out in Article 39 because it has an effect analogous to that of a minimum price (see paragraph 43 above).

185 That consideration does not constitute a sufficient statement of reasons to establish that the user fee is 'necessary' for attainment of the objectives set out in Article 39, within the meaning of the first sentence of Article 2(1) of Regulation No 26.

186 Although it thereby presupposes that protection of the minimum prices of an agricultural cooperative organized 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, the contested decision contains no statement of reasons either to explain the merits of that approach or to show that all the objectives of Article 39 of the Treaty are thus fulfilled. Moreover, in the sphere of the common agricultural policy, the process of price formation is normally governed by the rules on the relevant common organization of the market, namely, in this case, Regulation No 234/68, cited above. Where, as here, the rules on the common organization 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.

187 It follows from all the foregoing considerations that the applicants' plea in law as to the inadequacy of the statement of reasons on which the decision is based, as regards the application of the first sentence of Article 2(1) of Regulation No 26, must be considered well founded.

4. *The plea alleging unequal treatment as between outside suppliers and holders of trade agreements regarding the respective rates of the user fee and of the fee stipulated in the trade agreements*

The parties' arguments

188 In the applicants's view, the 3% fee laid down by the trade agreements, the holders of which are, moreover, chosen arbitrarily and unilaterally, is discriminatory. The difference between that rate and the rate of the user fee places independent importers in situations which differ considerably from one to another.

189 The defendant considers that the lower rate of fee applicable to holders of trade agreements is justified by the supply obligations which they enter into *vis-à-vis* the VBA.

190 According to the intervener, suppliers delivering under the user-fee system are not in a situation comparable to that of suppliers bound by the trade agreements, which require them to supply specific products, justifying the slightly more advantageous rate (3% instead of 5%) applied. The Commission has never criticized the principle of such trade agreements, which are intended to supplement supply in specific areas. The aspects of those agreements concerning which the Commission had raised objections were removed as from 1 May 1988.

Findings of the Court

191 The Commission justifies the difference between the 3% fee and the higher rate of the user fee by the fact that 'dealers who have concluded trade agreements with the VBA also assume such supply obligations' (see paragraph 42 above).

192 However, the trade agreements of which copies have been produced to the Court 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.

193 In 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.

194 It follows that the contested decision does not contain a sufficient statement of reasons to enable the Court to verify the merits of the Commission's finding that the difference of treatment between the two groups of suppliers concerned is objectively justified. Nor does it state any reasons in response to the applicants' assertion that the holders of trade agreements are selected arbitrarily.

195 The applicants' plea alleging unequal treatment as between outside suppliers and holders of trade agreements as regards the rate of the user fee and the rate laid down by the trade agreements must therefore be upheld.

196 It follows from all the foregoing that the contested decision must be annulled, without its being necessary to consider the other arguments put forward by the applicants.

Costs

197 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been asked for in the successful party's pleadings. In this case, the applicants asked for costs to be awarded against the defendant in their observations on the objection of inadmissibility, in their reply and at the hearing. According to the case-law of the Court of Justice and the Court of First Instance, the fact that the successful party did not apply for costs until the hearing does not mean that its request cannot be upheld (Case 113/77 *NTN Toyo Bearing and Others* v *Council* [1979] ECR 1185, and the Opinion of Advocate General Warner in that case, in particular at p. 1274; and Case T-64/89 *Automec* v *Commission* [1990] ECR II-367, paragraph 79; and Case T-13/92 *Moat* v *Commission* [1993] ECR II-287, paragraph 50). The same applies, *a fortiori*, if the application for costs is made in the pleadings exchanged in the written procedure.

198 Since the Commission has been unsuccessful, it must therefore be ordered to pay the costs. Similarly, since the applicants applied for the intervener to be ordered to pay the costs arising from its intervention in their observations on the statement in intervention and at the hearing, the intervener must be ordered to bear its own costs and to pay the costs incurred by the applicants as a result of its intervention.

On those grounds,

THE COURT OF FIRST INSTANCE
(Second Chamber, Extended Composition)

hereby:

1. Annuls the Commission decision notified to the applicants by letter SG (92) D/8782 of 2 July 1992;

2. Orders the Commission to bear its own costs and to pay the applicants' costs;

3. Orders the intervener to bear its own costs and to pay the costs incurred by the applicants as a result of its intervention.

Vesterdorf Bellamy Kalogeropoulos

Delivered in open court in Luxembourg on 14 May 1997.

H. Jung B. Vesterdorf

Registrar President