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

14 May 1997 *

In Case T-77/94,

Vereniging van Groothandelaren in Bloemkwekerijprodukten, Florimex BV, Inkoop Service Aalsmeer BV and **M. Verhaar BV,** respectively an association and three companies constituted under Netherlands law, all established in Aalsmeer, the Netherlands, represented 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 decision allegedly contained in the Commission's letter of 20 December 1993 relating to Cases IV/32.751 — Florimex/Aalsmeer II, IV/32.990 — VGB/Aalsmeer, IV/33.190 — Inkoop Service and M. Verhaar BV/Aalsmeer, IV/32.835 — Cultra and IV/33.624 — Bloemenveilingen Aalsmeer III,

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, which organizes, on its premises at Aalsmeer, auction sales of floricultural products. A part of its premises is reserved for the renting-out, in particular to wholesalers of and dealers in indoor plants, of 'processing rooms' for the purposes of wholesale trade in floricultural products.

2 The Vereniging van Groothandelaren in Bloemkwekerijprodukten (hereinafter 'the VGB') is an association comprising numerous Netherlands wholesalers of floricultural products and 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.

3 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, mainly for resale to wholesalers established in the Netherlands.

4 Verhaar BV (hereinafter 'Verhaar') is a wholesaler of floricultural products established in Aalsmeer near the VBA complex. Inkoop Service Aalsmeer BV (hereinafter 'Inkoop Service') is a subsidiary of Verhaar established in the Cultra commercial centre, on the VBA's premises (see paragraph 20 below).

B — *Supplies for auctions organized by the VBA*

5 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 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. 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*

6 Until 1 May 1988, Article 5(10) and (11) of the VBA auction rules prevented the use of its premises for supplies, purchases and sales of floricultural products not passing through its own auctions. 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.

7 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.

8 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 agreements 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.

9 However, 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.

10 Finally, 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*

11 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.

12 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 EEC 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.

13 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'). In that decision, the Commission found, in particular, that:

(1) the following provisions of the VBA rules 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).

14 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*

15 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.

16 The user fee is levied, on the basis of the number of stalks (cut flowers) or of plants supplied, on deliveries made by third parties to dealers established on the VBA's premises. The amount of the fee is determined by the VBA on the basis of the annual average prices achieved in the course of the previous year for the

various floricultural products concerned. According to the VBA, a factor of around 4.3% of the average annual price of the category concerned is applied. Instead of a fee levied per stalk or per plant, a supplier may opt to pay a fee of 5%, also covering collection of payments by the VBA.

17 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 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 (hereinafter 'the 3% fee').

18 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 fee of 3% of the gross value of the goods supplied to customers on the VBA's premises. 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 service for the collection of amounts receivable.

19 No product, therefore, is delivered on the VBA's premises without either the user fee or the 3% fee being levied.

F — *The agreements concerning the Cultra commercial centre*

20 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 of them being Inkoop Service Aalsmeer), 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 following the 1988 decision*

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

22 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.

23 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.

24 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.

25 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.

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

27 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 same 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.

28 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 (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.

29 By letters of 3 May 1989, Florimex and the 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.

30 On 3 May 1989 Verhaar and Inkoop Service Aalsmeer also lodged a complaint with the Commission concerning the Cultra agreements and the new trade agreements. That complaint was registered under No IV/33.190 — Inkoop Service/ Aalsmeer.

31 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 16, 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.

32 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.

33 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.

34 By letter of 4 March 1991, the Commission informed the complainants in accordance with Article 6 of Commission Regulation No 99/63/EEC of 25 July 1963 on the hearings provided for in Article 19(1) and (2) of Council Regulation No 17 (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.

35 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 of 4 March 1991.

36 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. In that regard, it considered in particular that the agreements and decisions concerned, as a whole, were of sufficient importance to trade between the Member States to be caught by Article 85(1) and that it was irrelevant in that connection whether each provision in isolation met the requirements of Article 85(1). 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.

37 In that document, the Commission also 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'.

38 By letter of 17 April 1991, the applicants stated in reply to the Article 6 letter of 4 March 1991 that they maintained their complaints regarding the user fee, 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.

39 By decision notified by letter SG (92) D/8782 of 2 July 1992, the Commission definitively rejected the applicants' complaints regarding the user fee.

H — *The correspondence following the letter of 2 July 1992*

40 By letter of 5 August 1992, headed 'IV/32.751 — Florimex/Aalsmeer II, IV/32.990 — VGB/Aalsmeer, IV/33.190 — Inkoop Service and M. Verhaar/Aalsmeer, IV/32.835 — Cultra and IV/33.624 — Bloemenveilingen Aalsmeer III', the Commission wrote to the applicants in the following terms:

'On the basis of the information you have provided in connection with your actions and on the basis of the information obtained by the Commission through notifications and through its own investigation, the Directorate General for Competition has, for the time being at least, closed its investigation in the present cases regarding the "type I, II and III agreements" and the "Cultra agreements".

It is most unlikely, in the light of the following observations, that your applications will be upheld.

1. The trade agreements

The trade agreements focus on securing, as is considered necessary by the VBA, additional supply on its premises. In order to guarantee such additional supply, the VBA enters into agreements with traders who are prepared to commit themselves to offering a specific quantity of products.

The traders who enter into such trade agreements do not have to pay the user fee for the specific products mentioned in the agreement. They pay a collection commission of 3%. For other products which they offer for sale, they must pay the user fee.

Provided that they pay the user fee, all traders established on the VBA's premises may offer for sale products also offered by the holders of trade agreements.

A comparison between the financial burdens imposed by the VBA on traders who are parties to trade agreements and traders who have not concluded such agreements would indicate that the holders of trade agreements are privileged. On the other hand, they enter into obligations *vis-à-vis* the VBA regarding the supply of certain products.

It cannot therefore be considered that the VBA applies dissimilar conditions to equivalent transactions with other trading parties, within the meaning of Article 85(1)(d) of the EEC Treaty. Moreover, the file contains no conclusive evidence that trade between Member States might be appreciably affected, even if there were a restriction of competition within the meaning of Article 85(1).

2. The Cultra agreements

...

The VBA and the dealers established at the Cultra centre have a contractual relationship whose purpose and effect is to restrict competition, involving both a limitation on the business activities of those dealers and a limitation on their sources of supply (this does not apply to the dealer in hydroponic plants). However, the file contains no conclusive evidence to show that trade between Member States is thereby appreciably affected. The limited economic impact on the markets in question rules this out. Since the information which the Commission has obtained

in that regard comprises business secrets of the undertakings concerned, it is not possible to allow you access to it.

In view of those considerations, and to the extent to which it is possible to judge at this stage, continuing the procedure is likely to result in a formal rejection of the complaints.

On the basis of this — still provisional — assessment of your application, I thus have the intention of dispensing with any such formal procedure and of bringing the matter to a close. I shall take the necessary measures for that purpose unless you inform me within four weeks that you wish to maintain your complaint with a view to continuation of the procedure, and set forth the arguments on which you intend to rely to that end.'

41 On 21 September 1992, Florimex and the VGB instituted proceedings before the Court of First Instance in Cases T-70/92 and T-71/92 against the Commission's decision of 2 July 1992. The Commission's letter of 5 August 1992 is annexed to the applications in those cases and is described by the applicants as a letter pursuant to Article 6 of Regulation No 99/63.

42 On 22 December 1992, the applicants' lawyer replied on behalf of the four complainants to the letter of 5 August 1992, stating that certain circumstances had prevented him from reacting earlier. He emphasized that the applicants wished to maintain their complaints and he also expressed the wish that the Commission extend the time-limit, drawing attention to the fact that the case was not urgent and the Commission had promised to bring the proceedings to a close by a formal decision against which an action might be brought. As regards the trade agreements, the applicants' lawyer stated in particular, first, that the differences between the rate of the user fee and that of the fee stipulated in the trade agreements were not objectively justified and, secondly, that the Commission's position regarding the impact on trade between Member States conflicted with that reached in the 1988 decision, in which the trade agreements had been regarded as forming an

integral part of the VBA rules. As regards the Cultra agreements, he stated in particular that the impact on trade between Member States should be assessed in the context of the whole body of the VBA's rules and that the turnover of the undertakings concerned was below the threshold laid down in the Commission notice on agreements of minor importance.

43 The applicants' letter of 22 December 1992 drew no response from the Commission. Since the health of their lawyer, who had been under medical supervision for more than a year (see the medical certificate accompanying the second request for extension of the time-limit for the reply in Cases T-70/92 and T-71/92), had seriously deteriorated, the applicants appointed a new lawyer on 3 November 1993. By letter of 9 December 1993, the new lawyer asked the Commission to take a position on the letter of 22 December 1992.

44 By letter of 20 December 1993, the Commission replied to the letter of 9 December 1993, referring to the last paragraph of its letter of 5 August 1992, and adding the following clarification:

'When the letter of 22 December 1992 was received, the period of four weeks granted to your client to submit observations on the content of the registered letter of 5 August 1992 had expired months earlier.

The Commission Directorate-General for Competition took account of the information provided in your letter of 22 December 1992, on its own initiative. However, a provisional examination then carried out did not disclose any reason to take action under Articles 85(1) or 86 of the Treaty.'

Procedure

45 By application lodged on 16 February 1994, the VGB, Florimex, Inkoop Service Aalsmeer and Verhaar instituted these proceedings against the decision allegedly contained in the Commission's letter of 20 December 1993.

46 By a separate document lodged on the same date, the applicants asked that this case be joined with Joined Cases T-70/92 and T-71/92 *Florimex and VGB* v *Commission*.

47 By a document lodged on 4 May 1994, the Commission raised an objection of inadmissibility under Article 114(1) of the Rules of Procedure.

48 By a document lodged on 17 May 1994, the VBA sought leave to intervene in Case T-77/94 in support of the Commission.

49 By order of the President of the First Chamber of the Court of First Instance of 4 July 1994, the VBA was granted leave to intervene in support of the Commission.

50 By order of the Court of First Instance (First Chamber) of 14 July 1994, the decision on the objection of inadmissibility was reserved for the final judgment.

51 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 case was consequently assigned.

52 Upon hearing the report of the Judge-Rapporteur, the Court of First Instance (Second Chamber, Extended Composition) decided to open the oral procedure without any preparatory inquiry. However, by way of measure of organization of the procedure, the Court requested the Commission and the VBA to reply in writing to a number of questions before the hearing.

53 The hearing was held on 5 June 1996, at the same time as that in Joined Cases T-70/92 and T-71/92, before the Court of First Instance composed of H. Kirschner, President, B. Vesterdorf, C. W. Bellamy, A. Kalogeropoulos and A. Potocki.

54 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 this judgment bears, pursuant to Article 32(1) of the Rules of Procedure.

Forms of order sought

55 In their application, the applicants claim that the Court should annul the decision allegedly contained in the Commission's letter of 20 December 1993. In their observations on the objection of inadmissibility, the applicants claim that the Court should reject the objection of inadmissibility and order the Commission to pay the costs.

56 The defendant contends that the Court of First Instance should:

— declare the action inadmissible;

— in the alternative, dismiss the action as unfounded; and

— order the applicants to pay the costs.

57 The intervener supports both the main and alternative forms of order sought by the defendant, and asks that the applicants be ordered to pay the costs, including those of the intervener.

Admissibility

Summary of the parties' arguments

58 The defendant maintains that the Commission's letter of 20 December 1993 merely informs the complainants of the stage reached in the procedure and does not constitute a rejection of their complaints, which have to date not been formally rejected. It states that that letter forms part of the first of the three procedural stages referred to in the judgment of the Court of First Instance in Case T-64/89 *Automec* v *Commission* [1990] ECR II-367 (hereinafter '*Automec I*'). Because of the complainants' inaction, the procedure never reached the second stage, namely the notification provided for in Article 6 of Regulation No 99/63. The letter of 20 December 1993 did not therefore affect the applicants' legal situation. In the case of a complaint, a complainant's legal situation is changed only if the Commission adopts a definitive position within the meaning of the judgment of the Court of Justice in Joined Cases 142/84 and 156/84 *BAT and Reynolds* v *Commission* [1987] ECR 4487, paragraph 12.

59 However, the Commission is required to adopt a definitive position only if the complainant avails himself of his procedural rights. In this case, the complainants' failure to react to the letter of 5 August 1992 within the time-limit notified to them, or even shortly thereafter, entitled the Commission to consider the complaint procedure closed, in accordance with the last paragraph of Point 165 of the 20th Report on Competition Policy and paragraph 45 of the order of the Court of First Instance of 30 November 1992 in Case T-36/92 *SFEI and Others* v *Commission* [1992] ECR II-2479. Since the applicants thus voluntarily declined to avail themselves of their procedural rights, they forfeited their status as complainants. In contrast to the situation in Case C-39/93 P *SFEI and Others* v *Commission* [1994] ECR I-2681, the complaint was considered closed as a result of inaction on the part of the applicants and not following an act of the Commission.

60 In those circumstances, the Commission submits that the letter of 20 December 1993 is to be regarded as an ordinary letter sent after it read the letter of 22 December 1992, on its own initiative in the discharge of its general obligation of administrative diligence. It cannot therefore be regarded as a letter pursuant to Article 6 of Regulation No 99/63, and still less as a rejection of the complaint, particularly since no statement of reasons was given, as should have been the case for such a measure. That letter indicated, without the slightest ambiguity, that the procedure on the complaint had already been closed when the applicants' letter of 22 December 1992 was received.

61 Even if it were conceded — which is not the case — that, by virtue of the judgment of the Court of First Instance in Case T-37/92 *BEUC and NCC* v *Commission* [1994] ECR II-285, the letter of 5 August 1992 must be regarded as an Article 6 letter, it does not follow that the letter of 20 December 1993 must be regarded as a challengeable rejection of the complaint. In contrast to the present case, the complainants in the *BEUC and NCC* case reacted within the time-limits and the Commission in turn responded by a detailed letter, which the Court of First Instance regarded as a decision rejecting the complaint. The defendant contends that it must be able to treat a complaint procedure as closed when the complainant has ceased to react, so that it can both make better use, in the public interest, of the limited resources available to it and ensure legal certainty for the party against whom the complaint is directed.

62 It is not, the Commission submits, possible to establish for what reason the lawyer for the applicants did not reply until December 1992 to the letter of 5 August 1992, but it is noteworthy that Florimex and the VGB had in the meantime, on 21 September 1992, instituted proceedings in Cases T-70/92 and T-71/92, and that a copy of the letter of 5 August 1992 was annexed to their applications. The period of four weeks notified in the letter of 5 August 1992 for a position to be taken on that letter was certainly not too short and, in any event, the applicants had already lost their status as complainants before 22 December 1992.

63 The Commission was not therefore under any obligation to respond to the applicants' letter of 22 December 1992. In its submission, the fact that it carried out an examination on its own initiative after receiving that letter cannot revive the complainants' procedural rights since, if that were the case, a complainant's rights would depend on whether or not the Commission undertook such an examination. In this case, the examination carried out was merely intended to determine whether the letter in question contained new information which might have prompted the Commission to act on its own initiative.

64 The intervener supports the Commission's arguments.

65 In the applicants' view, the question whether the letter of 5 August 1992 constitutes an Article 6 letter is irrelevant. The only important point is whether the letter of 20 December 1993 contains a decision. The fact that the Commission did not reply to the letter of 22 December 1992 prompts the inference that it had granted the extension of time requested by the applicants' former lawyer in that letter. The applicants state that, in its letter of 20 December 1993, the Commission did not treat the failure to observe the four-week time-limit notified in its letter of 5 August 1992 as a ground of inadmissibility, but indicated that it had examined the letter of 22 December 1992 on its own initiative, had opened an investigation and had come to the conclusion that there was no reason to take action. The applicants infer from this that the procedure on their complaints had not been closed on that date and that the letter of 20 December 1993, being much more than a purely informative letter, contains an express rejection of those complaints.

66 The import of the letter of 20 December 1993 should be assessed against the background of the previous exchanges between the parties, in particular the fact that, in its letter of 24 October 1990, the Commission had already indicated that it envisaged sending a letter closing the file and that, in its letter of 5 August 1992, it had already indicated that it would not uphold the complaints. In those circumstances, the letter of 20 December 1993 can, in its view, be regarded only as a letter closing the file within the meaning of the judgment in *SFEI and Others* v *Commission*, cited above.

67 Furthermore, in view of the time which had elapsed since the complaints were lodged on 3 May 1989, it is more reasonable to consider that they were rejected on 20 December 1993 than to assume that they had not yet been the subject of a formal decision. The Commission allows itself such long time-limits that it cannot criticize the applicants for waiting until 22 December 1992 to react to the letter of 5 August 1992. The applicants add that the Commission, which was aware from the pleadings in Cases T-70/92 and T-71/92 that they assumed that the complaints concerning the trade agreements and the Cultra agreements had yet to be examined, could not consider that they had abandoned their objections to them. By seeking an extension of the time-limit for replying and by requesting the Commission to take a definitive position, the letter of 22 December 1992 clearly indicated that the complainants maintained their complaints.

68 The reasons for the applicants' delay in reacting to the letter of 5 August 1992 can no longer be determined, but it is not impossible that they were linked to their former lawyer's illness. In any event, the applicants consider that, in the context of the related proceedings which are pending, the Commission could not consider that, as a result of the delay, they had forfeited their procedural rights; at the very least, the Commission caused those rights to revive by considering the substance of the case in its letter of 20 December 1993.

Findings of the Court

69 Essentially, the Commission relies on three main arguments, namely that: (a) the letter of 5 August 1992 forms part of the first of the three procedural stages described in *Automec I*, the procedure never having in this case led to a letter under Article 6 of Regulation No 99/63, still less a formal rejection of the complaints; (b) because of the applicants' failure to react to the letter of 5 August 1992, the complaint must be regarded as having already been closed before their letter of 22 December 1992 was received, the applicants having, through inaction, forfeited the status of complainants; and (c) the letter of 20 December 1993 therefore merely informed the complainants of the stage reached in the procedure and did not constitute a decision rejecting their complaints.

70 The Court considers, first, that the Commission's letter of 5 August 1992 must be regarded as having been sent pursuant to Article 6 of Regulation No 99/63.

71 First, in its letter of 24 October 1990 (paragraph 32, above), the Commission had already stated that it intended to close the cases in question without a formal decision unless the applicants informed it within a period of four weeks that they intended to maintain their complaints. In those circumstances, the letter of 5 August 1992, written almost two years after that of 24 October 1990, cannot be regarded as still forming part of the preliminary stage of the administrative procedure referred to in paragraph 45 of the *Automec I* judgment. Nor can it be regarded as an 'initial Commission reaction' within the meaning of the last paragraph of point 165 of the 20th Report on Competition Policy, since the Commission had already expressed that 'initial reaction' in its letter of 24 October 1990.

72 Secondly, the letter of 5 August 1992 must be appraised in the light of the earlier correspondence, and in particular having regard to the nature of the request to which it constitutes a reply (see Case T-83/92 *Zunis Holding and Others* v *Commission* [1993] ECR II-1169, paragraph 31). In that connection, the applicants reacted to the letter of 24 October 1990 by requesting in particular, in their letter of 17 December 1990, that the Commission deal formally with the complaints lodged with it (paragraph 33 above). Again, in their reply of 17 April 1991 to the Article 6 letter of 4 March 1991 concerning the user fee, the applicants complained of the lack of a comparable letter regarding the Cultra agreements and the trade agreements, and asked the Commission to send them such a letter dealing with those aspects of their complaints (paragraph 38 above). In those circumstances, the letter of 5 August 1992 must be regarded as an Article 6 letter rather than a redundant repetition of the initial Commission reaction, already notified by letter of 24 October 1990.

73 Thirdly, the Court considers that the letter of 5 August 1992 meets the formal conditions laid down for an Article 6 letter, in particular in that it indicates the reasons for which it does not appear justified to allow the complaints, explicitly refers to closing the file and imposes a time-limit for a response. The fact that the letter of 5 August 1992 does not expressly mention Article 6 cannot be regarded as decisive (see *BEUC and NCC* v *Commission*, cited above, paragraph 34).

74 The Commission's first argument must therefore be rejected.

75 As regards the Commission's second argument, that the applicants had already forfeited their status as complainants by the date of their letter of 22 December 1992, the Court can accept, in the interests of legal certainty, in particular from the standpoint of the respondent, that a complainant who lacks diligence during the administrative procedure, in particular by not replying to an Article 6 letter, may

be regarded as consenting to the definitive closure of the procedure on his complaint, announced by the Commission in the letter in question.

76 Although, in principle, the Commission is thus entitled to draw certain inferences from the fact that a complainant fails to reply to a letter sent under Article 6 of Regulation No 99/63 within the period laid down pursuant to that article, provided that the time-limit is reasonable, the Court nevertheless considers that the complainants' consent to closure of the procedure on its complaint cannot be irrebuttably presumed merely because the time-limit was not observed. It would not be consistent with the right to a fair hearing for the Commission to be able to close the procedure on the complaint where special circumstances might legitimately account for the failure to observe a time-limit which the Commission itself set.

77 The Court considers that in this case the non-observance of the time-limit of four weeks laid down in the letter of 5 August 1992, during a holiday period, did not in itself justify the conclusion that the applicants consented to the closure of the procedure on their complaints. It is apparent from all the previous correspondence between the applicants and the Commission that, for a period of more than three years, they had persistently maintained their complaints and repeatedly asked the Commission to adopt a formal decision, to enable them to bring the matter before the Court.

78 Moreover, on 21 September 1992, Florimex and the VGB instituted proceedings before the Court of First Instance in Cases T-70/92 and T-71/92, in which they criticized the Commission for not dealing with their complaints relating to the trade agreements and the Cultra agreements in its decision of 2 July 1992 concerning the user fee, and asserted that they intended to maintain those complaints.

They also indicated, at pages 27 and 28 (Florimex) and 25 and 26 (VGB) of their applications, that they regarded the letter of 5 August 1992, annexed to the applications, as an Article 6 letter, and that they therefore awaited a formal decision on their complaints.

79 Similarly, the content of the letter of 21 December 1992 finally sent by the applicants shows that they had always intended to maintain their complaints, since they requested an extension of the time-limit for submitting observations and the adoption by the Commission of a formal decision.

80 Even though it has not been possible to establish why the applicants' lawyer did not reply to the letter of 5 August 1992 until 22 December 1992, the Court cannot discount the possibility that the omission was connected with the serious illness from which he was suffering at the time.

81 In those specific circumstances, the Court considers that the Commission was not entitled to conclude, solely because the time-limit set in the letter of 5 August 1992 had not been observed, and without contacting the applicants, that their complaints were to be regarded as having lapsed before 22 December 1992.

82 Moreover, the Commission has not established that it took 'the measures necessary' to close the case, which are referred to in the letter of 5 August 1992. There is nothing to show that the procedure on those complaints was actually closed at a date prior to 22 December 1992, and the Commission's letter of 20 December 1993 does not clearly indicate that that was the case.

83 In those circumstances, the Commission's second argument, that the applicants had already forfeited their status as complainants as a result of the 'presumed closure of the procedure' on their complaints before 22 December 1992, must be rejected.

84 The defendant's third argument that, in any event, the letter of 20 December 1993 does not constitute a formal rejection of the complaints on their merits, would thus lead to the conclusion that those complaints are still pending before the Commission.

85 The Court considers, however, that that was not the case when the action was brought. In the specific circumstances of this case, the letter of 20 December 1993, read in context, is to be regarded as a definitive rejection of the complaints on their merits.

86 That conclusion is determined by the following considerations. In their letter of 22 December 1992, the applicants replied to the letter of 5 August 1992 in detail, whilst at the same time stressing that they maintained their complaints in order to enable proceedings to continue. They also specifically asked the Commission to adopt a formal decision on their complaints, as it had promised to do during the administrative procedure. In his letter of 9 November 1993, the new lawyer for the applicants asked the Commission to take a position on the letter of 22 December 1992. It is clear from the Commission's letter of 20 December 1993, in response to that request, that it examined the letter of 22 December 1992 and concluded that the observations in it did not 'disclose any reason to take action under Article 85(1) or Article 86 of the Treaty'.

87 That substantive examination of the complaints which the Commission undertook, without raising any doubt as to admissibility, cannot be regarded as having been made simply 'on its own initiative' but confirms either that the procedure on the complaints was never really closed or that the Commission, at the very least, reopened the file. Nor can that examination be regarded as 'provisional', as claimed in the letter of 20 December 1993. On the contrary, after the initial position taken in the letter of 24 October 1990 and the Article 6 letter of 5 August 1992, the Commission's response to the applicants' letters of 22 December 1992 and 9 November 1993, finding, after a re-examination of the substance, that there was

no reason to take action, can only be regarded as a definitive rejection of the complaints, the reasons for which are contained essentially in the Article 6 letter of 5 August 1992.

88 It follows that the action is admissible.

Substance

Summary of the parties' arguments

89 The applicants essentially put forward a single plea in law alleging errors of assessment by the Commission in its letter of 5 August 1992, which sets out the reasons for the decision, notified by letter of 20 December 1993, rejecting their complaints regarding, respectively, the trade agreements and the Cultra agreements.

90 The applicants first repeat their objections of a general nature concerning all the agreements used by the VBA, already put forward in Cases T-70/92 and T-71/92. The trade agreements and the Cultra agreements, like the user fee at issue in Cases T-70/92 and T-71/92, form part of a whole which is incompatible with Community competition law. They involve unjustified levies, for which nothing is offered in return, and whose only aim is to distort competition in favour of the VBA, which itself purchases floricultural products throughout the world, enters into forward contracts on a basis other than the 'auction dial' system, and thus directly competes with the traders with which it concludes the abovementioned contracts. The barrier set up by the VBA against imports of products not grown in the Netherlands, at least in large quantities or during the seasons concerned, is not intended

to guarantee a sales outlet for its members but merely seeks to free the VBA from any commercial competition. The VBA's very strong position on the market makes access to that market very difficult for third parties.

91 The trade agreements, the applicants then claim, are almost identical to the previous agreements of the same name, prohibited by the 1988 decision. The amounts paid in respect of those contracts are not justified by the services provided by the VBA in return, but merely serve to increase the traders' cost prices, thus undermining their competitive position, in particular *vis-à-vis* the VBA.

92 The trade agreements further restrict competition in that they require sales to be made only to buyers registered with the VBA.

93 Moreover, contrary to what the Commission indicated in its letter of 5 August 1992, the holders of those agreements do not give any special undertaking, with the result that dissimilar conditions are applied as compared with traders not benefiting from such contracts, who must pay the — higher — user fee.

94 In addition, the option of entering into such agreements is offered to certain traders on an arbitrary basis, the traders thus favoured being subject to the 3% fee but not having to pay the user fee. Traders who pose an excessive competitive threat to the VBA can therefore be penalized by a refusal to enter into a trade agreement.

95 The *de minimis* rule relied on by the Commission in its letter of 5 August 1992 is not applicable. The size of the market in question must be assessed in relation to

the VBA's total turnover, which exceeds HFL 2 000 million, accounted for to a considerable extent by exports to other Member States. The applicants add that in its 1988 decision the Commission proceeded on the assumption that the *de minimis* rule did not apply.

96 As regards the Cultra agreements, the applicants observe that the Commission itself regarded them in its letter of 5 August 1992 as restrictions of competition. According to the applicants, the requirement that only products from the VBA may in principle be sold at the Cultra commercial centre manifestly has an impact on supplies. To sell products obtained otherwise than through the VBA, a trader established at the Cultra centre must pay a fee of 8.6%, which is not justified by the services provided by the VBA.

97 It is not correct to say that those agreements do not appreciably affect trade between Member States or are of little economic significance. On the contrary, the volume of business at the Cultra centre derives in particular from exports, especially to Germany. Moreover, the fees paid by traders established at the Cultra centre are additional to the user fee and form part of a whole body of measures adopted by the VBA, affecting a very large volume of business, namely the total turnover of the auction sales. They thus appreciably affect trade between Member States.

98 Moreover, the Commission disregards the fact that the lack of any impact on trade between Member States, far from being a justification for the VBA's practices, is in fact a consequence thereof, since suppliers from other Member States are prevented from supplying traders established at the Cultra centre. The Commission is also wrong to draw a distinction between the various categories of floricultural products (cut and dried flowers, garden plants, indoor plants) covered by the various Cultra agreements at issue.

99 Finally, the applicants refer, in their reply, to a new fact, namely that, following a change to the rules in 1994, tenants who rent space on the auction premises are not exempted from the user fee unless they import products on their own behalf. The applicants have produced a complaint lodged with the Commission and a letter from the Commission of 6 October 1994 suspending its decision on that point for so long as Cases T-70/92 and T-71/92 are pending.

100 The defendant relies, principally, on its pleas of inadmissibility and puts forward arguments on the substance merely for the sake of completeness.

101 The trade agreements, it stresses, involve an undertaking by the traders who are parties to them to supply certain categories of products supplementing those offered by the VBA, in return for a lower rate of fee than that of the user fee.

102 The defendant finds it difficult to see what interest the applicants have in claiming that the rate of 3% is too high, since they, in particular Florimex, have always complained that 3% was not high enough.

103 The defendant further emphasizes that those agreements, and the related 3% fee, apply only to supplies to customers established on the VBA's premises, traders being free to sell their products otherwise than under the trade agreements.

104 As regards application of the *de minimis* rule to the trade agreements, the Commission considers that the VBA turnover to be taken into account should be limited to its own income (fees etc.) and cannot include the proceeds of the 'auction dial' sales received by its members.

105 The Cultra agreements, the defendant emphasizes, relate to sales to small buyers, in particular retailers, through the VBA and on its premises. Of the four applicants, only Inkoop Service Aalsmeer, with a turnover of about HFL 23 million in 1988, is bound by such an agreement, covering indoor plants.

106 The terms of those agreements, although constituting a restriction of competition, do not affect trade between Member States, since the products come either from the Netherlands or from non-member countries and in principle are sold only to small Netherlands traders. Nor is the restriction of competition appreciable, since the turnover achieved at the Cultra centre corresponds to about 8% of the VBA's turnover. The percentage would be even smaller if account were taken only of the market in indoor plants, on which Inkoop Service Aalsmeer is only one trader among many others in the Netherlands.

107 Finally, the defendant requests that the new matters raised by the applicants, not mentioned either in the letter of 20 December 1993 or in that of 5 August 1992, should be excluded from the proceedings.

108 As regards the trade agreements, the intervener states that a fee, of a type and level determined by the circumstances, is levied on each sale made by the holder of such a contract, to a purchaser approved by the VBA and established on its premises, but no fee is levied for any sale outside those premises. The trade agreements contain, for each holder, the obligation to sell specific categories of products of superior quality, supplementing those offered by the VBA, and to pay, in addition to

the 3% commission, an increased rental. A simple financial comparison with the user-fee system is not, however, valid since account should be taken of the fact that the holders of trade agreements also enjoy greater freedom, in that they are not subject to the VBA's purchasing standards, and they have the benefit of a collection service (see also the intervener's reply of 12 April 1996 to the questions put to it by the Court).

109 The trade agreements do not involve the same restrictions as those criticized in the 1988 decision. Thus, there is no restriction on competition within the meaning of Article 85(1) of the Treaty and no impact on trade between the Member States, and the applicants have produced no evidence to show otherwise.

110 The Cultra agreements relate to the sale to retailers, on a 'cash-and-carry' basis, of products purchased through the VBA. If a trader bound by a Cultra agreement wishes to sell flowers bought from third parties, he pays the 8.6% fee for sales by a 'free supplier'. The intervener emphasizes that it makes facilities available at the Cultra centre and contributes to promotion costs. It also emphasizes that the business conducted at the Cultra centre differs in nature from that of auction sales.

111 As regards the application of Article 85(1) of the Treaty to the Cultra agreements, it is not appropriate to assess their impact in relation to the VBA's total turnover. The Cultra agreements do not concern the conditions of supply with a view to resale, referred to in the 1988 decision, but the sale of VBA products and seek to serve the interests both of the organization of the auction sales and of small dealers. There is thus no appreciable impact on trade between Member States.

112 In any event, the Cultra agreements are covered by Article 2 of Regulation No 26, in that they are concluded by an association of farmers and concern the sale of

agricultural products and the use of common facilities for the processing of such products. Moreover, the agreements could qualify for an exemption under Article 85(3) of the Treaty.

Findings of the Court

113 In this case, the Commission does not invoke Article 2 of Regulation No 26 or Article 85(3) of the Treaty. In the absence of a Commission decision applying those provisions, the Court does not have jurisdiction to deal with the arguments raised on that point by the intervener.

114 Similarly, the new fact raised by the applicants in their reply — relating, essentially, to an alleged change in the user-fee system (see paragraph 99 above) — falls outside the scope of these proceedings.

The trade agreements

115 The Commission's position on the trade agreements, as it appears from the letter of 5 August 1992, is that there is no infringement of Article 85(1) of the Treaty, for the twofold reason that the VBA does not apply dissimilar conditions to equivalent transactions with other trading parties, within the meaning of Article 85(1)(d) of the Treaty, and that there is no conclusive evidence of an appreciable effect on trade between Member States, even if there were a restriction of competition within the meaning of Article 85(1).

116 As regards the first of those arguments, the Commission compares, in its letter of 5 August 1992, the financial burdens imposed by the VBA on traders who are parties to trade agreements and traders who have not entered into such agreements, and concludes that the former are privileged. The Court considers that the calculations produced by the intervener, which relate to calculation of the rent of certain holders of trade agreements who are also tenants of the VBA, do not detract from that conclusion, since the user fee is not levied on VBA tenants.

117 Nevertheless, the Commission considers that the VBA does not apply dissimilar conditions to equivalent transactions with other trading parties, within the meaning of Article 85(1)(d) of the Treaty, on the ground that the holders of trade agreements 'enter into obligations *vis-à-vis* the VBA regarding the supply of certain products'.

118 However, in paragraphs 192 and 193 of its judgment delivered today in Joined Cases T-70/92 and T-71/92 *Florimex and VGB* v *Commission*, this Court has found that it is not established that the holders of trade agreements have accepted obligations *vis-à-vis* the VBA capable of justifying the difference between the 3% fee and the rate of the user fee.

119 It follows that the letter of 5 August 1992 is vitiated by an error of fact or of assessment in so far as it is stated that the difference of rate between the user fee and the 3% fee applicable to the trade agreements is justified by the existence of such obligations.

120 As regards the second argument contained in the letter of 5 August 1992, that 'the file contains no conclusive proof that trade between Member States might be appreciably affected', the Court points out first that, in the 1988 decision, the

Commission considered that the previous trade agreements then in force formed an integral part of the VBA's rules and that those rules, as a whole, were liable to affect trade between Member States.

121 It found, in points 105 to 107 of the 1988 decision:

'(105) The VBA argues that the restrictive effects of Article 5(10) and (11) of the Auction Rules are cancelled out by the fact that wholesalers established on its premises may carry on all business activities either on the basis of special arrangements (trade agreements; HFL 0.25 levy) or on the basis of the 10% rule. This argument does not bear closer examination.

(106) Firstly, the measures concerned are not addressed to the same individuals. The 10% levy, the trade agreements and the HFL 0.25 levy apply exclusively to dealers established on the VBA's premises, whereas the provisions of the Auction Rules are also designed to deny potential suppliers of those dealers access to the auction complex (cf. the cases enumerated at 51 to 55 above).

(107) Secondly, the 10% levy, the trade agreements and the HFL 0.25 levy incontestably form an integral part of the relevant provisions of the Auction Rules. They represent the express conditions under which the prohibition in principle ceases to apply.

...

3. *Trade agreements*

(119) The trade agreements concluded between the VBA and some of its tenants lay down the conditions under which the VBA authorizes certain business activities on its premises. There is therefore a direct link between these trade agreements and Article 5(10) and (11) of the Auction Rules.

(120) The trade agreements form the contractual basis on which the tenant concerned may display and sell floricultural products on the VBA's premises. In addition, in the trade agreements types A to E the sources of supply of the products to be dealt in are precisely defined, i. e. other VBN auction sales.

(121) For their part, the [t]rade agreements type F specify the goods to be dealt in according to quantities, varieties and sales period. It is also stipulated that the goods must be imported by the tenant himself.

(122) The trade agreements therefore lead to a narrowing of the distribution channels upstream of VBA tenants. Competition between the individual sources of supply of VBA tenants is restricted.'

122 Then, with regard to the effect on trade between Member States, the Commission found in paragraphs 124 to 126 of the 1988 decision:

'(124) As a result of the abovementioned restrictions of competition, trade patterns within the Community do not develop in the same way as they would

have done had the agreements in question not existed. This state of affairs affects not only Dutch imports of products from other Member States and of goods from third countries which are in free circulation in another Member State, but above all the export of products marketed in the Netherlands.

(125) The restrictions of competition also affect trade to an appreciable extent.

(126) It remains to be seen in this connection whether each individual agreement affects trade to a sufficient extent. At all events, they form part of a body of similar agreements which together have the necessary effect.'

123 It is true that in the 1988 decision the Commission considered that the trade agreements formed an integral part of the VBA system, in so far as at that time they constituted one of the exceptions to the exclusive purchase obligation imposed on dealers established on the VBA's premises under Article 5(10) and (11) of the auction rules then in force, and that that obligation has since been removed. However, instead of an exclusive purchase obligation, the VBA has adopted the principle that direct supplies to dealers established on the premises are as a general rule subject to a levy collected by it, namely either the user fee or the 3% fee provided for in the trade agreements. The trade agreements constitute an exception to the user-fee system, a fact also expressly confirmed by the terms of those agreements (see the conditions of sale, paragraph (e) of versions I and III, and paragraph (d) of version II).

124 In those circumstances, the Court considers that the effects of the trade agreements can be assessed only by taking the user-fee system into account. Moreover, it is hardly conceivable that the VBA could maintain the 3% fee without the user-fee

system, both being applications of the general principle that any supply by third parties to buyers established on the premises is subject to the payment of a fee.

125 It is common ground in this case that, as the Commission correctly found in its decision of 2 July 1992, the user fee forms an integral part of the VBA's rules (see paragraph 36 above). It follows that the trade agreements too can be appraised only in the context of the VBA's rules as a whole. Moreover, the Commission itself followed that course in its decision of 2 July 1992 (at the end of its legal assessment), by comparing the rate of the user fee with that stipulated by the trade agreements (see paragraph 37 above).

126 However, it is not disputed that the VBA's rules as a whole are liable to affect trade between Member States, as the Commission found both in the 1988 decision (see paragraph 122 above) and in its decision of 2 July 1992 (see paragraph 36 above). Since the trade agreements form an integral part of those rules, it is of no importance whether or not, in isolation, they affect trade between Member States to a sufficient extent (see Case 193/83 *Windsurfing International* v *Commission* [1986] ECR 611, paragraph 96).

127 It follows that the letter of 5 August 1992 is vitiated by an error of assessment which led to an error in law in so far as the applicants' complaint is rejected on the ground that 'the file contains no conclusive evidence that trade between Member States might be appreciably affected'.

128 It follows from all the foregoing that the contested decision must be annulled to the extent to which it rejects the applicants' complaints concerning the trade agreements.

The Cultra agreements

129 The Cultra agreements comprise five separate exclusive purchasing agreements entered into between the VBA and five Netherlands wholesalers who undertake to buy only products from the VBA's members, exclusively through the VBA, with a view to their resale to retailers at the Cultra centre. Two of those agreements relate to the resale of cut and dried flowers, the third concerns the resale of garden plants and the last two concern the resale of indoor plants. There are thus five different agreements between undertakings situated in the same Member State, relating only to products originating in that Member State.

130 In its letter of 5 August 1992, the Commission expressed the view that the object and effect of those Cultra agreements was to restrict competition within the meaning of Article 85(1) of the Treaty, 'involving both a limitation on the business activities of the traders and a limitation on their sources of supply'. However, the Commission considers that 'the file contains no conclusive evidence to show that trade between Member States is thereby appreciably affected. The limited economic impact on the markets in question rules this out. Since the information which the Commission has obtained in that regard comprises business secrets of the undertakings concerned, it is not possible to allow you access to it.'

131 The Court is thus called on to adjudicate only as to the legality of the Commission's finding that the slight economic impact on the markets in question means that the Cultra agreements do not have an appreciable effect on trade between Member States, with the result that Article 85(1) of the Treaty does not apply.

132 According to settled case-law of the Court of Justice and the Court of First Instance, to be capable of affecting trade between Member States within the meaning of Article 85(1) of the Treaty, an agreement between undertakings must make it possible to foresee with a sufficient degree of probability, on the basis of a set of objective elements of law or fact, that it may have an influence, direct or indirect,

actual or potential, on the pattern of trade between Member States such as to give rise to the fear that it is capable of hindering the attainment of a single market between Member States (see for example Case T-77/92 *Parker Pen* v *Commission* [1994] ECR II-549, paragraph 39).

133 It is also settled that an agreement falls outside the prohibition in Article 85 when it has only an insignificant effect on the markets, taking into account the weak position which the persons concerned have on the market for the products in question (Case 5/69 *Völk* v *Vervaecke* [1969] ECR 295). In that connection, in the version in force in 1992 of its notice 86/C 231/02 of 3 September 1986 on agreements of minor importance which do not fall under Article 85(1) of the EEC Treaty (OJ 1986 C 231, p. 2), the Commission made it clear that it considers that agreements between undertakings engaged in the production or distribution of goods or in the provision of services generally do not fall under the prohibition in Article 85(1) if the goods or services which are the subject of the agreement, together with the participating undertakings' other goods or services which are considered by users to be equivalent in view of their characteristics, price and intended use, do not represent more than 5% of the total market for such goods or services in the area of the common market affected by the agreement and if the aggregate annual turnover of the participating undertakings does not exceed ECU 200 million. That figure was raised to ECU 300 million in 1994 (OJ 1994 C 368, p. 20).

134 It must first be observed that, in point 124 of the 1988 decision, the Commission found that there was an appreciable effect on trade between Member States because the agreements in question affected not only Netherlands imports of products from other Member States and of goods from third countries which are in free circulation in another Member State 'but above all the export of products marketed in the Netherlands'. The Commission took the same approach in its decision of 2 July 1992. However, the Cultra agreements are not orientated towards exports to the Netherlands but are concerned with the resale by wholesalers of products of Netherlands origin to retailers most of whom are themselves established in the Netherlands.

135 Even if it were assumed that, as the applicants assert, sales to German retailers represent a proportion of Cultra sales, that fact is not in itself sufficient to establish the existence of an appreciable affect on trade between Member States, since the applicants have produced no specific evidence to show the extent of the sales in question, in terms either of market share or of turnover.

136 Nor, the Court notes, did the applicants give any indication during the administrative procedure of the share of the market accounted for by the Cultra products. On the contrary, in their letter of 22 December 1992 in response to the Commission's letter of 5 August 1992, they expressly conceded that 'it is indeed probable that, as regard market shares, the criterion laid down in the notice on agreements of minor importance is not fulfilled. In that regard, the Cultra agreements would thus not appreciably affect trade between Member States'.

137 Nor have the applicants produced evidence to show that the turnover of the Cultra agreements exceeded the threshold of ECU 200 million laid down in the Commission notice on agreements of minor importance. Even the aggregate turnover of HFL 250 million cited by the applicants in their letter of 28 May 1996 — a figure which was not produced during the administrative procedure, is not supported by evidence and does not necessarily relate to 1992 — falls short of that threshold. Furthermore, the Commission's estimates, assessing the value of VBA sales to Cultra wholesalers at HFL 118 million at the time of the notification and HFL 93 million in 1992, confirm that the threshold of ECU 200 million laid down in its notice on agreements of minor importance had not been exceeded as regards the turnover of the Cultra agreements, even considered together.

138 However, the applicants' essential argument is that the effect of the Cultra agreements can be appraised only in the context of the VBA rules as a whole, taking account of its turnover and having regard to the fact that, taken in conjunction

with the user fee and the trade agreements, those agreements represent a substantial obstacle to penetration of the Netherlands market by exports from other Member States.

139 In that connection, the Court considers, however, that the mere fact that the turnover of the parties to the Cultra agreements, in all products, exceeded in this case the thresholds laid down by the notice on agreements of minor importance, having regard to the turnover of around HFL 2 200 million achieved by the VBA in 1992, does not allow it to conclude with certainty that the agreements in question are capable of affecting trade between Member States to an appreciable extent (see Case T-9/93 *Schöller* v *Commission* [1995] ECR II-1611, paragraph 75). That is particularly true in this case because the business of the VBA for the most part comprises the sale of floricultural products from the Netherlands to wholesalers, with a view to export, and therefore has no direct link with the Cultra agreements, which are concerned with sales to retailers able to purchase under the 'cash-and-carry' system.

140 However, it is settled case-law that consideration of the effects of an agreement for the purposes of Article 85(1) of the Treaty implies that regard must be had to the economic and legal context of the agreement, in which it might combine with others to have a cumulative effect on competition. Likewise, the cumulative effect of several similar agreements constitutes one factor among others in ascertaining whether, by a possible distortion of competition, trade between Member States is capable of being affected, particularly in so far as the agreements in question have the effect of preventing competitors from other Member States from establishing themselves on the market in question, thus hampering the economic interpenetration sought by the Treaty (Case C-234/89 *Delimitis* v *Henninger Bräu* [1991] ECR I-935, paragraphs 14 to 24, and *Schöller* v *Commission*, cited above, paragraphs 76 to 78). However, Article 85(1) of the Treaty applies only to agreements which contribute significantly to any closing-off of the market (see *Delimitis*, paragraphs 23 and 24, and *Schöller*, paragraph 76).

141 It is therefore necessary to consider whether the Cultra agreements may contribute significantly to any closing-off of the Netherlands domestic market in the products concerned, having regard to their economic and legal context.

142 In that connection, the Court has already noted that, both in its 1988 decision and in that of 2 July 1992, the Commission found that the VBA's rules concerning auction sales and direct supplies to dealers established on its premises formed a whole which affected trade between Member States, having regard in particular to the export orientation of the VBA, and therefore that it was of no importance whether or not each aspect of the VBA's rules, in isolation, affected trade between Member States (see paragraphs 36 and 122 above). The same approach is appropriate regarding the trade agreements, which form an integral part of the VBA's rules governing direct supplies to dealers established on its premises, in particular since the VBA has adopted the basic principle that no product from an outside supplier is to be delivered to its premises without a fee being levied (see paragraphs 123 to 126 above).

143 However, the Court considers that those considerations cannot automatically be transposed to the Cultra agreements. The Cultra agreements do not constitute an essential part of the VBA's rules concerning auction sales or direct supplies to dealers established on its premises, in particular with a view to export of the products concerned, but relate rather to a supplementary and separate business, namely the resale of VBA products to retailers by the 'cash-and-carry' method. It follows that those agreements have no direct link with the other aspects of the VBA's rules which are capable as a whole of affecting trade between Member States.

144 As to the possibility that the Cultra agreements, in isolation, affect trade between Member States by making it appreciably more difficult for competitors from other Member States to penetrate the Netherlands national market, the Court considers that the applicants have not produced specific concrete evidence to enable it to find

that those agreements are capable of having a significant effect in that respect. Even though the applicants, upon whom the burden of proof falls, have stated, for the first time at the hearing, that the total turnover of the Cultra agreements amounts to 10% of the Netherlands national market, they have produced no evidence to support that statement either in the present proceedings or during the administrative procedure. Nor does that figure establish a distinction between the various products concerned, in particular between cut flowers, garden plants and indoor plants, which meet different consumer needs. Moreover, in contrast to the factual circumstances in *Delimitis* and *Schöller*, cited above, the agreements in question concern only five wholesalers and therefore do not bind Netherlands retailers, who remain free to buy the products concerned from numerous other sources. The Court is therefore not in a position to find that the exclusivity imposed in this case, affecting two wholesalers of cut and dried flowers, one wholesaler of garden plants and two wholesalers of indoor plants, is liable to contribute significantly to any closing-off of the Netherlands market.

145 Finally, since the applicants have not established that the exclusivity imposed by the Cultra agreements is capable of appreciably affecting trade between Member States, the fact that a derogation from that obligation is granted only in consideration of payment to the VBA of a fee of 8.7% is not relevant to determination of the dispute. Moreover, the VBA has stated to the Court that it was not its intention to combine that fee of 8.7% with the user fee.

146 The applicants' pleas and arguments concerning the Cultra agreements must therefore be rejected.

147 It follows that the application must be dismissed, except to the extent indicated in paragraph 128 above.

Costs

148 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Where there are several unsuccessful parties the Court of First Instance is to decide how the costs are to be shared. Under Article 87(3) of the Rules of Procedure, where each party succeeds on some and fails on other heads, the Court may order that the costs be shared or that each party bear its own costs.

149 In their written pleadings, the applicants applied for costs only in their observations on the objection of inadmissibility, but at the hearing they asked that the Commission and the intervener be ordered to pay the costs. That fact does not preclude such an application being upheld (see paragraph 197 of the judgment delivered today in Joined Cases T-70/92 and T-71/92 *Florimex and VGB* v *Commission*).

150 However, as regards the substance, each party has been partially unsuccessful. In those circumstances, the Court considers that the parties should be ordered to bear their own costs.

On those grounds,

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

hereby:

1. Annuls the Commission's decision contained in its letter of 20 December 1993 concerning Cases IV/32.751 — Florimex/Aalsmeer II, IV/32.990 — VGB/Aalsmeer, IV/33.190 — Inkoop Service and M. Verhaar BV/Aalsmeer,

IV/32.835 — Cultra and IV/33.624 — Bloemenveilingen Aalsmeer III to the extent to which it rejects the applicants' complaints that the intervener's type I, II and III trade agreements infringe Article 85(1) of the Treaty;

2. Dismisses the remainder of the application;

3. Orders the parties to bear their own costs.

Vesterdorf Bellamy Kalogeropoulos

Delivered in open court in Luxembourg on 14 May 1997.

H. Jung B. Vesterdorf

Registrar President