Horizontal agreements

Reform is in the air; and the Commission plans to follow up its work on vertical agreements with similar work, mutatis mutandis, on horizontal agreements. (A brief report on the Commission's current proposals will be found on page 108 in this issue.) One of the problems with the introduction of block exemption regulations in the field of horizontal agreements is that, for the most part, anti-trust authorities are highly suspicious of almost all types of restrictive agreement concluded between operators at the same market level: that is, mainly, between manufacturers or between dealers or between purchasers. It follows that there are relatively few types of horizontal agreement which the Commission, or any other anti-trust authority, can safely approve by an "automatic" mechanism like that of block exemption. The two classic examples of readily permissible exemptions are specialisation agreements and research and development agreements; and block exemption regulations have covered these kinds of horizontal agreements for many years. But, in the nature of things, there are no statistics revealing the extent to which these regulations are actually invoked. They may be useful; they may never be used. The likelihood is that their usefulness is limited to a relatively small proportion of the total number of horizontal agreements.

However that may be, the Commission takes the view that the general approach adopted in the existing regulations needs to be changed. The approach hitherto has been to list the various kinds of clause usually to be found in specialisation and R & D agreements and to classify them according to whether they are acceptable, conditionally acceptable or prohibited. This follows the old pattern of block exemption regulations, whether for vertical or for horizontal agreements. The new pattern is more generalised. "The move away from a clause-based approach gives greater contractual freedom to the parties to these agreements. However, hardcore restrictions (price-fixing, output limitation or allocation of markets or customers) will generally remain prohibited." When the Commission refers to "companies holding no significant market power", it is returning to its old hobby-horse about market shares: this was a matter of controversy both in the Technology Licensing regulation and in the context of the new approach to vertical restraints. Different percentages of market shares are proposed in the context of specialisation and R & D agreements respectively.

Reforms dealing with only those two types of agreement are small beer; but the Commission is also proposing guidelines in the fields of standardisation agreements, joint marketing agreements and cooperative joint ventures. Cooperation agreements as such are not covered: the acceptable elements of cooperation agreements are probably covered by the specific provisions of the new regulations and guidelines. ■

The Novartis / AstraZeneca Case

The Commission has decided to open an in-depth investigation into the merger of the crop protection businesses of Novartis and AstraZeneca. The decision to open proceedings was reached after serious concerns had been raised in a number of markets, including fungicides for the protection of cereal crops and sugar beets and herbicides for the protection of maize.

Novartis AG (Switzerland) was created by the merger between Ciba-Geigy and Sandoz in December 1996. Novartis is a multinational group of companies operating world-wide in the field of Life Sciences. Its focus is on health care (pharmaceuticals, generics), agribusiness (crop protection, seeds, animal health) and consumer health (nutrition, self-medication). AstraZeneca (United Kingdom) was created by the merger between Astra AB and Zeneca Group PLC in spring 1999. The business activities of AstraZeneca are the research, development, production and marketing of pharmaceuticals and agrochemicals.

In the proposed merger Novartis and AstraZeneca will spin off and merge their activities in the area of crop protection into a newly incorporated company, Syngenta AG. Novartis will also transfer its seeds business to Syngenta. Syngenta would become the world's leading crop protection business. The Commission's initial investigation showed that serious doubts about the compatibility of the notified operation with the common market exist in a number of markets. The Commission therefore considers that the operation as notified is likely to lead to the creation or strengthening of a dominant position. Serious doubts were found with regard to *fungicides for the protection of cereal crops,* particularly in view of the large combined portfolio of Novartis and AstraZeneca of chemical substances in all classes and especially the new, successful strobilurin based fungicides. Serious doubts were also found with regard to *fungicides for the protection of sugar beets* and *herbicides for the protection of maize.* In addition, concerns that need further investigation have been raised for a number of other fungicides, herbicides and insecticides as well as for some seeds, plant growth regulators, seed treatment products and rodenticides.

In view of the serious doubts arising from the new entity's position in these markets, the Commission decided to initiate proceedings in accordance with the Merger Regulation. The Commission now has a maximum of four months to take a final decision on the case. The opening of a second-phase investigation is only a procedural step and is without prejudice to the final Commission decision. Pursuant to the bilateral agreement of 1991 on antitrust co-operation between the European Commission and the United States of America, the European Commission and the Federal Trade Commission have been collaborating and will continue to do so, especially if and when the two authorities identify common competition concerns, that might require a jointly pursued remedial action.

Source: Commission Statement IP/00/281, dated 21 March 2000

INTERNET ACCESS: COMMISSION RECOMMENDATION

Subject: Liberalisation

Industry: Telecommunications

Source: Commission Statement IP/00/408, dated 26 April 2000, referring to its Recommendation and Communication

(Note. It is the second of these two documents which explains the competition aspects of proposals whose general purpose is the liberalisation of local access to the Internet. At present, in the Commission's view, this is one of the least competitive parts of the telecommunications sector.)

The Commission has adopted a Recommendation calling on all Member States to enact appropriate legal and regulatory measures for incumbent telecommunications operators to provide full unbundled access to the copper local loops by 31 December 2000, under transparent, fair and non-discriminatory conditions. In addition, the Commission has adopted a complementary Communication which explains the relationship of the Recommendation to Community competition rules. According to these rules incumbent operators have an obligation to provide unbundled access to the local loop in certain circumstances. The simultaneous adoption of this Communication strengthens the Recommendation's objective to provide access to local loops for all new entrants which will increase the level of competition and technological innovation, so stimulating the provision of a full range of telecommunication services, including broadband multimedia and high-speed Internet. The present actions follow on from the Commission's e-Europe initiative and are the first step in response to the conclusions of the Lisbon European Council to bring about a substantial reduction in the costs of using the Internet and to promote access to the Information Society for all.

Commissioners Liikanen and Monti said that the local access network remained one of the least competitive segments of the liberalized telecommunications sector. The measures addressed by the Commission to Member States on unbundled access to the local loop will help stimulate competition in the local access network, giving businesses and consumers access to an affordable advanced communications infrastructure and a wide range of services. This will enable Europe to seize the full potential of the digital, knowledge-based economy in growth and jobs. The Commission is confident that the recommended unbundling of the local loop will be a major new step towards more competitive and efficient telecommunications markets, and will facilitate the accelerated development of internet services.

In December 1999, the Commission published its e-Europe initiative, a Communication to the special European Council of Lisbon, which identifies a series of possible initiatives that could be taken by Member States to encourage the take up of e-commerce and similar information society services. The Lisbon European Council of 23 and 24 March 2000 agreed with this initiative, calling

upon Member States, together with the Commission, to work towards introducing greater competition in local access networks by the end of 2000 and unbundling of the local loop in order to help bring about substantial reduction in the costs of using the Internet and promote an Information Society for all. The local loop refers to the physical circuit between the customer's premises and the telecommunications operator's local switch or equivalent facility. Permitting 'unbundled access to the local loop' means allowing other operators to use, partially or fully, the local loops installed by incumbent telephone operators, enabling them to install new cost-effective technologies such as DSL (Digital Subscriber Loop). Under full unbundled access to the local loop new entrants would have full control of the commercial relationship with their customers, and in this way, new market entrants would be able to deploy all type of new technologies and to provide competitive services to consumers, including new broadband services. This will facilitate the deployment of high speed Internet services.

The Commission Recommendation and the Communication entitled *Unbundled Access to the Local Loop: enabling the competitive provision of a full range of telecommunication services including broadband multimedia and high-speed internet* are complementary. The Communication outlines the relationship of the Recommendation to the relevant sector specific Directives, and clarifies how Competition rules apply regarding access to the incumbents' local loops. In summary, the impact of the two measures is that:

- Member States should adopt legal measures to mandate full unbundling of the incumbents' copper local loop by 31 December 2000 under cost-oriented and non-discriminatory conditions.
- Shared access to the local loop (by which the incumbent operator continues to provide the basic telephone service and the new entrant simultaneously provides high-speed services) should be granted by the above-mentioned operators on request, since it is already covered under the current Open Network Provision (ONP) rules for special network access.
- Incumbent operators providing high speed bit stream services must follow the principle of non-discrimination and make available to competitors the facilities they use for their own services.

These three identified means of access to the local loop complement each other and should all be available as market offerings. In all cases, competition rules apply, and refusals by dominant operators to open the local loop to competitors requesting access may imply various forms of abuses of dominant position under Article 82 of the Treaty, such as refusals to deal, discrimination and limitation of production, markets or technical development to the prejudice of consumers. Where access is granted, fair and non-discriminatory conditions of access are crucial for successfully opening the local loop and for the development of a competitive market telecommunications services, in particular high speed services. This requires close monitoring by National Regulatory Authorities of delays, prices and contractual arrangements between incumbents and new entrants. Several Member States have already imposed or formally fixed dates for unbundling (Austria, Denmark, Finland, Germany, Italy, Netherlands, UK). ■

STATE AIDS (ALL INDUSTRIES) : COMMISSION SURVEY

Subject : State aids

Industry : All industries

Source : Commission Statement IP/00/367, dated 11 April 2000

(Note. Although the Commission wrings its hands over the figures for state aids, it does not point a finger at the chief miscreant. Table 1 shows only too clearly that France has actually increased its level of state support during the years in question. In Table 2, an increase is shown for financial services. The two Tables are a warning to those who compete against subsidised traders in the countries and sectors concerned.)

The level of State aid granted in the European Union from 1996 to 1998 remains too high, the Commission said in its eighth annual survey on state aid, despite a decrease to an annual average of €93 billion compared with €104.2 billion in the previous three-year period. The survey covers all sectors of the economy but analyses in particular the manufacturing sector, which absorbed €33 billion a year alone. Mario Monti, EU Competition Commissioner, said that the high levels of aid gave rise to concern, in spite of the downward trend in recent years.

While the €33 billion spent for this sector are less than in the preceding period from 1994 to 1996, the overall decrease is not EU wide and depends upon only a small number of countries, in particular Germany and Italy where aid amounts fell substantially. Also in Belgium, Spain and Portugal levels of aid to manufacturing are now lower. In all other Member States, the levels of aid are increasing (see Table 1).

Substantial differences between individual Member States remain. Aid levels in relation to value added are highest in Greece and Italy and lowest in the United Kingdom and Sweden. A comparison shows that in Italy aid as a percentage of value added is six times higher than in the UK and over twice as high as in France. The differences however seem appears to be growing smaller: Member States like Sweden, the Netherlands or the UK with relatively low aid volumes have continued to increase them whereas countries like Italy and Germany are reducing their relatively high aid levels. A comparison of aid in terms of € per person employed shows that Italy ranks first, followed by Luxembourg and Ireland. The lowest aid per employee is granted in Sweden and in the United Kingdom. In the three new Member States aid levels are all far below the Community average but with a rising tendency.

The share of aid to manufacturing in the Community given in the four cohesion countries – Greece, Ireland, Spain and Portugal - has now increased from slightly under 8% to more than 9%. At the same time, the share of the four large economies has dropped from around 84% during the previous period to 80% now. This is a reassuring development because the disparities in aid spending between the richer and the less prosperous Member States conflict with the

objective of social and economic cohesion. In this context it should be noted that in addition to national state aid, industry also benefits from Community interventions by way of the Structural Funds. However, the effectiveness of these instruments in reducing disparities depends crucially on their not being outweighed by an unbalanced development in the use of state aid measures in other Member States.

As regards the overall national state aid to the economy shown in Table 2, the fifteen Member States spent on average €93 billion per year for state aid purposes during the period 1996-1998. The decrease in comparison with the €104 billion during the previous reporting period is a result of substantial reductions in aid to manufacturing and transport and smaller reductions in aid to agriculture, fisheries, coal and tourism. The Commission believes member states should reduce the overall amount of aid, in line with the Lisbon European Council's conclusions. Member states should now urgently make all efforts to carefully rethink their aid spending. Every single reduction of aid clearly reduces the distortion of competition in the single market and increases the benefits of economic and monetary union. The Commission will maintain strict state aid control as a priority. The Survey also reveals that, with 7% of overall aid, Member States still grant considerable amounts of aid on an ad hoc basis, that is, they award it to specific companies outside horizontal, regional or sectorial aid schemes. Such ad hoc aid is mainly aid for the purpose of rescuing or restructuring ailing companies. Because of the serious distortions effects on competition, these aids are strictly controlled.

The findings of this Eighth Survey on Aid emphasise the need for continuing strict control. This has led the Commission to take action along the following lines:

- Increasing transparency. User-friendly access to information on the Com-mission's state aid policy will be reinforced by a state aid register. It is also being considered whether a scoreboard could further improve transparency;
- Modernising the state aid control rules. The frameworks for environmental aid and employment aid are under revision. Legislation is being prepared to exempt certain categories of State aid - like aid for small and medium enterprises, training aid or aid not having a perceptible impact on trade - from notification requirements. Such group exemptions should ensure a reduced level of administrative effort on the part of Member States and the Commission, thereby allowing a greater focus on more complex areas of state aid control;
- Enforcing state aid control effectively outside the European Union. Strict state aid control provisions contained in the Europe Agreements signed with the candidate countries will be enforced through the finalising of implementing rules for these provisions.
- Faster recovery of illegal aid. Particular importance will be attached to a more speedy recovery of aid which the Commission has declared incompatible with the EC Treaty. ■

[Tables on next page]

1 State aid to Manufacturing	In % of value added		In € per employee		In € million	
	1994-6	**1996-8**	1994-6	**1996-8**	1994-6	**1996-8**
Austria	1,3	**1,4**	654	**719**	455	**495**
Belgium	2,5	**1,9**	1376	**1093**	931	**732**
Denmark	2,6	**2,9**	1252	**1433**	607	**712**
Germany	3,8	**2,6**	1941	**1434**	16201	**11463**
-Old Provinces	:	:	*451*	*435*	*3080*	*2856*
-New Provinces	:	:	*8783*	*6021*	*13121*	*8607*
Greece	4,8	**4,9**	925	**997**	592	**616**
Spain	2,3	**2,1**	769	**691**	1883	**1800**
Finland	1,6	**1,6**	928	**959**	366	**391**
France	1,7	**2,0**	895	**1131**	3607	**4481**
Ireland	1,3	**1,9**	909	**1458**	240	**416**
Italy	5,5	**4,4**	2419	**1955**	11040	**8864**
Luxembourg	2,2	**2,3**	1400	**1476**	46	**48**
Netherlands	1,1	**1,2**	702	**735**	602	**629**
Portugal	1,4	**1,0**	263	**188**	272	**195**
Sweden	0,8	**0,8**	421	**441**	330	**344**
United Kingdom	0,6	**0,7**	317	**334**	1358	**1454**
EUR 15	2,8	**2,3**	**1292**	**1113**	38531	**32639**

2	1994–1996	**1996–1998**
Overall national aid in € billion	*104,2*	**93.0**
Of which:		
Manufacturing sector	*38,5*	***32.6***
Agriculture	*14,5*	***13.3***
Fisheries	*0,3*	***0.3***
Coal mining	*9,1*	***7.2***
Transport	*36,7*	***32.1***
Financial Services	*2,0*	***3.3***
Tourism	*0,3*	***0.2***
Media and Culture	*0,6*	***0.7***
Employment	*1,1*	***1.4***
Training	*0,8*	***0.9***
Other Services	*0,3*	***0.9***

Source: European Commission

HORIZONTAL AGREEMENTS (ALL INDUSTRIES): COMMISSION DRAFTS

Subject: Horizontal agreements
Specialisation agreements
R & D agreements
Purchasing agreements
Marketing agreements
Market shares

Industry: All industries

Source: Commission Statement IP/00/411, dated 27 April 2000

(Note. A similar process is taking place in respect of horizontal agreements as for vertical agreements: the scheme is being rationalised and, ostensibly, simplified. The Commission has not given long for interested parties to comment: it needs to have the new system in place by the end of the year, when the old regulations expire. The draft guidelines are a useful document.)

The Commission has published draft rules and guidelines on horizontal co-operation agreements between competitors. The objective of these proposals is to clarify the application of competition rules in this area and to ensure their continuing relevance in the changing economy of today. The Commission has invites all interested parties to comment on the new draft rules. The Commission will then adopt a final version of the Regulations and Guidelines allowing these revised competition rules to come into force in the year 2001.

On the occasion of the publication of the new proposals, Mario Monti, the Commissioner in charge of competition policy, said: "This important reform project confirms our commitment to review and modernise Community rules on competition. A more effective policy towards horizontal co-operation will reduce the regulatory burden for companies, while ensuring an effective control of agreements between companies holding significant market power."

Horizontal co-operation agreements (that is, agreements between companies operating at the same level of the market) are capable of distorting competition and are liable to fall under the Community competition rules (Article 81 of the Treaty). Guidance for the assessment of these agreements is at present given by way of two 'block exemption' Regulations (on research and development (R&D) agreements and specialisation agreements respectively) and two interpretative Notices (dealing with particular issues, such as co-operative joint ventures). As the block exemption Regulations will expire on 31 December 2000, and as the existing Notices need to be updated, the Commission has engaged in a fact-finding exercise resulting in draft rules for the future assessment of horizontal co-operation. To this end, the Commission has just published a draft block exemption Regulation on the application of Article 81(3) of the Treaty to categories of specialisation agreements, a draft block exemption Regulation on

the application of Article 81(3) of the Treaty to categories of research and development (R&D) agreements and draft Guidelines on the applicability of Article 81 to horizontal co-operation agreements.

The review of the competition rules applicable to horizontal co-operation agreements started in late 1997 with a wide-ranging consultation of European companies. It showed that industry regarded the existing block exemption Regulations as too focused on legal clauses, and that there was a need for clearer guidance on the assessment of those categories of co-operation which were not covered by any block exemption. The draft documents aim to give better guidance to industry. They will replace the fragmented and partly outdated notices and regulations in this area. The review is also an essential pillar in the Commission's attempts to modernise competition policy. The approach is similar to that of the new Regulation setting out the rules for the distribution of goods and services ("vertical co-operation agreements") which the Commission adopted on 22 December 1999.

The draft block exemption Regulations are intended to replace the existing Regulations on Specialisation (Commission Regulation (EEC) 417/85) and R&D (Commission Regulation (EEC) 418/85). Compared to the existing Regulations, the drafts are designed to be more user-friendly and to have greater clarity and a wider scope of application. The new block exemptions will replace the existing system of specifically exempted clauses by a general exemption, for companies holding no significant market power, of all conditions under which undertakings pursue R&D and specialisation agreements. This move away from a clause-based approach gives greater contractual freedom to the parties to these agreements. However, hardcore restrictions (price-fixing, output limitation or allocation of markets or customers) will generally remain prohibited. The market share threshold for exemption is set at 20% for specialisation agreements, and at 25% for R&D agreements.

The draft Guidelines complement the draft block exemption Regulations. They are applicable to R&D and production agreements not covered by the block exemptions as well as to certain other types of competitor collaboration (for example, joint purchasing, or joint marketing). The Guidelines describe the general approach which should be followed when assessing horizontal co-operation agreements and set out a common analytical framework. This should help companies to assess with greater certainty whether or not an agreement is restrictive of competition and, if so, whether it would qualify for an exemption.

The draft proposals were approved by the Commission on 18 January. Since then, as foreseen by the enabling Council Regulation, they were discussed with the Advisory Committee on Restrictive Practices and Dominant Positions on 22/23 February, before being published as draft legislative texts. The draft Commission Regulations on R&D and Specialisation and the draft Guidelines are published in the Official Journal C.118 of 27.04.00 and are also available on the Internet at: http://europa.eu.int/comm/dg04/entente/other.htm.

PRICE FIXING (CUSTOMS AGENTS): THE CNSD CASE

Subject: Price fixing
Professional work
Trade associations
Undertakings

Industry: Customs agents
(Implications for other professional bodies)

Parties: Consiglio Nazionale degli Spedizionieri Doganali
Commission of the European Communities

Source: Judgment of the Court of First Instance in Case T-513/93 (*Consiglio Nazionale degli Spedizionieri Doganali v Commission of the European Communities*), dated 30 March 2000; also Court Press Release 23/2000

(Note. This decision is little more than a postscript to the substantive decision by the Court of Justice two years ago: the case is therefore reported briefly on the basis of the Court's press release. Essentially the decision confirms that a professional body may be an association of undertakings within the meaning of the Treaty; that professional activities may be covered by the rules on competition; and that professional tariffs may be treated as restrictions on competition and therefore constitute an infringement.)

The Court of First Instance has applied Articles 85 and 86 of the Treaty to an association of undertakings, regardless of the fact that the association derives its powers from national legislation. (This legislation has been held by the Court of Justice to be incompatible with the Treaty.) In Italy the work of independent customs agents (which includes the completion of customs clearance formalities) is regulated by Law No 1612/1960. This requires customs agents to be authorised and entered in the national register of customs agents. It also regulates the Consiglio Nazionale degli Spedizionieri Doganali (CNSD). One of the tasks of the CNSD, which is recognised as a body governed by public law, is to draw up the compulsory tariff for customs services, failure to comply with which entails penalties including being struck off the register. In 1988 the CNSD adopted the tariff (subsequently approved by decree of the Minister for Financial Affairs) setting minimum and maximum charges for each customs transaction or professional service concerning monetary, commercial or fiscal matters. The CNSD is empowered to grant derogations from that tariff.

In 1993, following a complaint against the tariff, the Commission adopted a decision declaring that Italian customs agents are "undertakings" engaged in an economic activity and that the CNSD is "an association of undertakings". The Commission took the view that the tariff in force gave rise to restrictions on competition likely to affect intra-Community trade. It found that the principles of free competition had been contravened and called on the CNSD to terminate the infringement immediately. The Court of Justice had already declared (in 1998)

that the Italian legislation, in requiring the CNSD to set a tariff compulsory for all customs agents, conflicted with Community competition law. But the CNSD applied to the Court of First Instance for annulment of the Commission decision. It maintained that customs agents were not undertakings and that the CNSD did not constitute an association of undertakings. Its decisions were not decisions adopted by associations of undertakings and consequently the tariff neither restricted competition nor affected intra-Community trade.

However, the Court held that the term "undertaking" covered any entity engaged in an economic activity, regardless of its legal status or the way in which it was financed; any activity consisting in offering goods and services on a given market was an economic activity. As the Court ruled in 1998, in so far as customs agents offer services for payment and assume financial risks, they are engaged in an economic activity. Accordingly, the CNSD is an association of undertakings, regardless of its public law status.

The Court of First Instance examined the question whether the restrictive effects on competition were attributable solely to operation of the national legislation or whether independent action on the part of the CNSD was at least partly responsible. The Italian Law requires the CNSD to adopt a tariff, but is silent as to the level of charges; it does not specify maximum levels or criteria for setting charges. Nor does it determine the way in which charges are to be applied or provide that a separate charge must be made for each operation. The CNSD has in practice applied substantial increases to the minimum charges previously in force and established how the charges are to be applied, thereby curtailing considerably the freedom of organisation enjoyed by customs agents among themselves, preventing them from reducing charging costs or offering tariff reductions to customers. The CNSD also availed itself of the options legally available to it of according derogations in certain cases from the minimum charges; of authorising customs agents acting on behalf of a principal or agent to charge reduced fees; and of exempting from the tariff certain categories of customs services. This shows that the CNSD enjoyed a broad discretion in the implementation of national legislation which could have accommodated a different approach - one that would not have restricted competition in the sector. In practice, the nature and scope of competition in the sector were shaped by decisions taken by the CNSD itself.

The Court of First Instance concluded, therefore, that the tariff constituted a restriction of competition attributable to the CNSD. Lastly, in view of the fact that, even after the creation of the internal market (31.12.1992), customs formalities must be completed for various types of transaction and may require the services of an independent but duly accredited customs agent, the Court of First Instance states that the tariff affects trade between Member States.

SUPPLY RESTRICTIONS (FLOWERS): THE VBA CASE

Subject: Supply restrictions
Procedure
Complaints
Agriculture

Industry: Wholesale flower supply
(Implications for other industries)

Parties: VBA (full name below)
VGB (full name below)
Florimex BV
Commission of the European Communities

Source: Judgment of the Court of First Instance in Case C-265/97 P (*Coöperatieve Vereniging De Verenigde Bloemenveilingen Aalsmeer BA (VBA) Florimex BV and Vereniging van Groothandelaren in Bloemkwekerijprodukten (VGB) v Commission of the European Communities*), dated 30 March 2000

(Note. This long running case has finally come to rest with this decision by the Court of Justice. It concerned the levying of auction fees which complainants considered to be a form of supply restriction. The Commission thought that the restrictions were necessary to the conduct of the business and rejected the complaints. The Court of First Instance disagreed with the Commission and annulled its decision. The Court of Justice considers that the Court of First Instance was in error on certain points but not to such an extent as to justify overruling its judgment. The judgment of the Court of Justice is interesting for its discussion in paragraph 95of the "precedence of the common agricultural policy over the rules on competition"; for its criticism in paragraph 115 of the Court of First Instance for failing to "draw the necessary distinction between the requirement to state reasons and the substantive legality of the contested decision"; for confirming in paragraph 121 "that, if the grounds of a judgment of the Court of First Instance reveal an infringement of Community law but the operative part appears well founded on other legal grounds, the appeal must be dismissed"; and for emphasising in paragraph 138 that "an appeal [to the Court of Justice] may be based only on grounds relating to the infringement of rules of law, to the exclusion of any appraisal of the facts". The judgment is also interesting for having disappointed both the appellants, whose appeal was rejected, and the Commission, whose actions were criticised and whose decision was not reaffirmed.)

Judgment

1. By application lodged at the Court Registry on 19 July 1997, the Coöperatieve Vereniging De Verenigde Bloemenveilingen Aalsmeer BA (hereinafter the VBA) brought an appeal pursuant to Article 49 of the EC Statute of the Court of Justice against the judgment of the Court of First Instance of 14 May 1997 in Joined Cases T-70/92 and T-71/92 Florimex and VGB v Commission (the contested judgment), by which it annulled the Commission Decision (IV/32.751

Florimex/Aalsmeer II and IV/32.990 VGB/Aalsmeer, the contested decision) contained in a letter of 2 July 1992, rejecting the complaints lodged by Florimex BV (hereinafter Florimex) and Vereniging van Groothandelaren in Bloemkwekerijprodukten (hereinafter the VGB) concerning the levying of fees for the use of the VBA's premises which it charges in respect of the supply of products by suppliers who are not members of the VBA.

Facts before the Court of First Instance

2. According to the contested judgment, 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 (paragraph 1).

3. On its premises at Aalsmeer (Netherlands), the VBA organises auction sales of floricultural products. Those products are covered by Regulation 234/68 of the Council on the establishment of a common organisation of the market in live trees and other plants, bulbs, roots and the like, cut flowers and ornamental foliage.

4. The VBA's premises at Aalsmeer are used primarily for the actual auction sales, but an area is reserved for the renting-out of processing rooms for the purposes of wholesale trade in floricultural products, in particular sorting and packaging. Those tenants are mainly cut-flower wholesalers (paragraph 4).

5. 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 and from non-member countries, mainly for resale to wholesalers established in the Netherlands (paragraph 5).

6. 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 (paragraph 6).

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 (paragraph 7).

8. Until 1 May 1988, the VBA auction rules, contained in Article 5(10) and (11), included provisions designed to prevent the use of its premises for supplies, purchases and sales of floricultural products not passing through its own auctions (paragraph 8).

9. In practice, the VBA granted authorisation for commercial transactions on its premises in such products only under certain standard contracts known as trade agreements or against payment of a 10% levy (paragraph 9).

10. In its trade agreements, the VBA allowed certain dealers to sell and supply to purchasers approved by it certain floricultural products bought in other auctions

in the Netherlands or cut flowers of foreign origin to purchasers approved by it, against payment of a levy (paragraphs 10 and 11).

11. Following a complaint from Florimex, the Commission adopted on 26 July 1988 Decision 88/491/EEC relating to a proceeding pursuant to Article 85 of the EEC Treaty (IV/31.379 Bloemenveilingen Aalsmeer).

12. In the operative part of that decision the Commission declared, in particular, that the agreements concluded by the VBA whereby the dealers established on the VBA's premises and their suppliers were required to deal in or have delivered on them floricultural products not bought through the VBA only with the consent of the VBA and under the conditions laid down by it and to store temporarily on the VBA's premises floricultural products not bought through the VBA only against payment of a fee determined by the latter, constitute infringements of Article 85(1) of the EC Treaty (now Article 81(1) EC).

13. It found moreover that the charges for the prevention of irregular use of the VBA facilities imposed by the VBA on the dealers established on its premises as well as the trade agreements concluded between the VBA and those dealers also constituted, as notified to the Commission, such infringements (paragraph 18).

14. With effect from 1 May 1988, the VBA formally removed the purchase obligations and restrictions on the free disposal of goods imposed by its auction rules, as well as the contested system of charges, but at the same time introduced a user fee. The VBA also introduced amended versions of the trade agreements (paragraph 19).

15. In the version at the material time, Article 4(15) of the auction rules provided that the supply of products within the auction premises could 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. The rules applied to direct supplies to dealers established on the VBA's premises, on the basis that the goods in question were disposed of without recourse to the VBA's services (paragraph 20).

16. The rules, as in force in 1991, included 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, which is subject to annual review, is levied on the basis of the number of stalks (cut flowers) or plants supplied and fixed at levels which vary according to various categories of product;

(c) the fee is 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;

(d) according to the detailed provisions governing the user fee, introduced by the VBA with effect from February 1990, suppliers may pay a fee of 5% as an alternative to the system described in paragraphs (b) and (c) above;

(e) 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 (paragraph 21).

17. By circular of 29 April 1988, the VBA removed, with effect from 1 May 1988, the restrictions previously contained in the trade agreements. Since then three types of trade agreement have existed. All those agreements apply a charge 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 (paragraphs 22 and 23).

18. By letters of 18 May, 11 October and 29 November 1988, Florimex formally lodged a complaint against the user fee with the Commission. The VGB lodged a similar complaint by letter of 15 November 1988 (paragraphs 29 and 30).

19. At the end of the administrative procedure, by letter of 4 March 1991 (hereinafter the Article 6 letter), the Commission informed the complainants, in accordance with Article 6 of Commission Regulation 99/63/EEC on the hearings provided for in Article 19(1) and (2) of Council Regulation 17 of 1963, that the information obtained did not enable the Commission to uphold their complaints regarding the user fee levied by the VBA (paragraph 37).

20. 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 26 of the Council of 1962 applying certain rules of competition to production of and trade in agricultural products (paragraph 38).

21. 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 EC Treaty (now Article 33 EC), within the meaning of the first sentence of Article 2(1) of Regulation 26 (paragraph 39).

22. First of all, as regards the application of the first sentence of Article 2(1) of Regulation 26 to direct supplies to 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 specialises in exports, wishes to be in a position to achieve its object as an undertaking, in other words if it seeks to be able to develop and maintain its position as an important source of supply for international trade in flowers, it is necessary, because of the perishable and fragile nature of the products dealt in (floricultural products), that the export dealers should be geographically close to it. Geographical concentration of demand on its premises, which the VBA seeks in its own interest, is the consequence not only of the fact that a full range of products is offered there but also, and most importantly, of the fact that those dealers have services and facilities available there which help them carry on their trade.

"The geographical concentration of supply and demand on the VBA's premises 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 amortising unavoidable costs and covering current operating costs (paragraph 41)."

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

"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 (paragraph 42)."

24. Finally, in the sixth subparagraph of point II.2(b), 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" (paragraph 43).

25. By letter of 17 April 1991, Florimex and the VGB stated in reply to the Article 6 letter that they maintained their complaints regarding the user fees (paragraph 44).

26. On 2 July 1992, the Commission sent the applicants' lawyer a registered letter, with form of acknowledgment of receipt, which stated that the reasons given in it supplement and clarify those given in its Article 6 letter, to which it refers. The Commission 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 dealers 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 26/62 does not detract from the positive attitude adopted by the Commission on this subject (paragraphs 45 and 46)."

27. On 21 September 1992, Florimex and the VGB respectively brought actions, in Cases T-70/92 and T-71/92, against the contested decision (paragraph 52).

[The outcome of the proceedings in the Court of First Instance, described in detail in paragraphs 28 to 60, was as follows.]

61. In those circumstances, the Court of First Instance annulled the contested decision without finding it necessary to consider the other pleas put forward by Florimex or the VGB.

[Paragraphs 62 and 63 consider a procedural matter (VBA's application, which was rejected, to be heard after the Advocate-General had given his Opinion).]

The appeal

64. In support of its appeal, the VBA puts forward eight grounds of appeal.

65. The first, fourth, fifth and sixth grounds of appeal concern both the thoroughness of the review carried out by the Court of First Instance of the Commission's decision and the accuracy of its assessment. The second and third pleas relate to the delimitation, by the Court of First Instance, of the subject-matter of the dispute. The seventh and eighth grounds of appeal concern other specific criticisms which the Court of First Instance made in respect of the contested decision.

[Paragraphs 66 to 92 set out the arguments of the parties.]

The first, fourth, fifth and sixth grounds of appeal

93. So far as concerns those four grounds of appeal, which it is appropriate to examine together, the Court points out, first, that it is settled case-law that the

statement of reasons required by Article 190 of the EC Treaty (now Article 253 EC) must be appropriate to the act at issue and must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted the measure in question in such a way as to enable the persons concerned to ascertain the reasons for the measure and to enable the competent Community Court to exercise its power of review. The requirement to state reasons must be evaluated according to the circumstances of each case, in particular the content of the measure in question, the nature of the reasons given and the interest which the addressees of the measure, or other parties to whom it is of direct and individual concern, may have in obtaining explanations. It is not necessary for the reasoning to go into all the relevant facts and points of law, since the question whether the statement of reasons meets the requirements of Article 190 of the Treaty must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question (see, in particular, Case C-367/95 P, *Commission v Sytraval and Brink's France*, paragraph 63).

94. So far as concerns a Commission decision rejecting a complaint in a competition matter on the basis of the first sentence of Article 2(1) of Regulation 26, it must next be observed that the Court of First Instance was right to require, on the strength of the judgments in Case 71/74, *Frubo v Commission* and Case C-399/93, *Oude Luttikhuis and Others v Verenigde Coöperatieve Melkindustrie*, that the statement of reasons on which the decision is based must show how the agreement between the members of a cooperative satisfies each of the objectives of Article 39 or how the Commission was able to reconcile those objectives so as to enable that derogating provision, which must be interpreted strictly, to be applied.

95. Furthermore, the precedence which the common agricultural policy takes over the objectives of the Treaty in the field of competition, relied upon by the applicant, cannot exonerate the Commission from carrying out an examination aimed at ascertaining whether the objectives set out in Article 39 of the Treaty are actually attained by the said agreement.

96. Finally, the applicant's reference to the judgment of the Court of First Instance in Case T-24/90, *Automec v Commission,* is entirely irrelevant. In paragraph 80 of that judgment, the Court of First Instance found that, where the Commission has decided to close the file on a complaint without carrying out an investigation, the review of legality which the Court of First Instance must undertake focuses on the question whether or not the contested decision is based on materially incorrect facts or is vitiated by an error of law, a manifest error of appraisal or misuse of powers. In the light of those principles, the Court of First Instance then examined whether the Commission had given a proper statement of reasons for its decision in the light of, in particular, the Community interest in the case as the priority criterion.

97. It follows that the statement of the reasons for a decision rejecting a complaint for lack of Community interest in it is also not immune to judicial review.

98. Moreover, it was not on reasoning of that kind that the Commission relied in order to reject the complaint before it, but rather on reasoning based on the

applicability of the first sentence of Article 2(1) of Regulation 26. It follows that the Court of First Instance committed no error in law in examining whether that reasoning was consistent and complete.

99. It follows from the foregoing considerations that the Commission was required to state reasons for its decision by showing how the agreements concluded within the VBA were necessary for the attainment of each of the objectives set out in Article 39 of the Treaty or, in any event, how those objectives could be reconciled. It is therefore not necessary to examine on their merits the grounds of the judgment of the Court of First Instance concerning the impact of the measures introduced by Regulation 234/68 or the scope of the Commission's decision which exceeded, according to the Court of First Instance, that of the earlier decisions.

100. Those considerations did not have in the present case any impact on the extent of the obligation to state reasons for the contested decision, which the Court of First Instance correctly assessed in the light of the first sentence of Article 2(1) of Regulation 26.

101. As regards the statement of the reasons for the contested decision, in so far as it relates to the VBA's survival, the complaint put forward by the applicant and the Commission that the Court of First Instance erred in law by examining the user fee in isolation is unfounded.

102. While it did not make specific findings of fact, the Court of First Instance did however set out a number of general considerations concerning the effects which the user fee was capable of having on other Community agricultural producers who were not members of the VBA.

103. In light of the effects which the user fee was capable of producing in respect of a number of operators whose interests number among those mentioned in Article 39 of the Treaty, the Court of First Instance could properly take the view that a statement of reasons justifying such a fee on the ground of its beneficial effects only with respect to the members of the VBA was inadequate.

104. If the provisions in the statutes of a cooperative governing relations between itself and its members do not automatically escape the prohibition laid down in Article 85(1) of the Treaty (*Oude Luttikhuis*, cited above, paragraph 13), the same must be true a fortiori of provisions which produce effects vis-à-vis third parties which have not subscribed to them.

105. It follows, moreover, from the judgment in *Oude Luttikhuis*, cited above, that, as the appellant has stated, examination of the restrictions established by a cooperative must not solely relate to their effects, taken as a whole.

106. Moreover, contrary to what the Commission maintains, the considerations regarding the interests of the other Community agricultural producers and the Community interest in maintaining undistorted competition clearly relate to the subject-matter of the complaints. Whether the first sentence of Article 2(1) of Regulation 26, which has direct consequences for the situation of the

complainants, applies depends specifically on those interests being taken into account.

107. It follows from the foregoing that the Court of First Instance was right in holding that the statement of the reasons for the contested decision, in so far as it relates to the VBA's survival, was inadequate for the purpose of establishing that the user fee was necessary for the attainment of the objectives mentioned in Article 39 of the Treaty.

108. As regards the question whether the user fee had to be justified by an actual and proportionate quid pro quo, the finding of the Court of First Instance that the concentration of supply and demand on the VBA's premises is the only economic advantage mentioned as a quid pro quo in return for such a fee is a finding of fact which cannot be challenged on appeal.

109. Moreover, it should be observed that in the paragraph of the contested decision where that question was considered the point was whether the VBA was obtaining, by means of the user fee, an unjustified advantage the effect of which was to restrict competition. The Commission came to the view in that respect that the various user fees could not be criticised where they guaranteed equal treatment of all supplies with a view to sale by auction and of direct supplies to dealers established on the VBA's premises.

110. However, even though, in the contested judgment, the Court of First Instance went further than the Commission in explaining how the user fee could constitute a disguised restriction on competition, it restricted itself, in the further course of its reasoning, to following the analysis of the Commission, according to which the various methods of supply had to be treated equally.

111. In that regard, the Court of First Instance did not regard as adequate the reason that the suppliers selling by auction and the outside suppliers paid approximately the same level of fee. Given that the concentration of supply and demand on the VBA's premises was the only advantage from which the outside suppliers benefited, the Court of First Instance held that equality of treatment of all suppliers was not established.

112. It must be observed that the contested decision clearly states the reasons for which the Commission considered that suppliers selling by auction and outside suppliers on whom the user fee was levied were treated equally.

113. It follows that, in that respect, a sufficient statement of reasons was given for the contested decision.

114. In that connection, it must be remembered that infringement of Article 190 of the Treaty and manifest error of assessment are two distinct pleas, each of which may be raised in proceedings under Article 173 of the Treaty. The first, alleging absence of reasons or inadequacy of the reasons stated, goes to an issue of infringement of essential procedural requirements within the meaning of that article and, involving a matter of public policy, must be raised by the Community judicature of its own motion. By contrast, the second, which goes to the

substantive legality of the contested decision, is concerned with infringement of a rule of law relating to the application of the Treaty within the meaning of Article 173 itself, and can be examined by the Community judicature only if it is raised by the applicant (see *Commission v Sytraval and Brink's France*, cited above, paragraph 67).

115. It is clear from the contested judgment that the Court of First Instance did in fact criticise the Commission for having committed a manifest error of assessment. Thus, it did not draw the necessary distinction between the requirement to state reasons and the substantive legality of the contested decision.

116. It must nevertheless be pointed out that that error in law is of no relevance to the outcome of the case.

117. The contested decision was in actual fact vitiated by a manifest error of assessment and that error was raised by the defendants at first instance.

118. First, the Commission committed a manifest error of assessment in considering that it sufficed to compare the rates of the fees to which the various suppliers were subject in order to satisfy itself that equal treatment was guaranteed as between them. Such an approach does not take account of the fact that those suppliers who were not members of the VBA benefited from only one advantage deriving from the concentration of supply and demand, whereas the members of the VBA could call on numerous other services.

119. Secondly, as is clear from paragraphs 108, 113 and 114 of the contested judgment, Florimex and the VGB criticised the Commission for having committed an error of assessment so far as concerns the quid pro quo for the user fee.

120. It follows that, even though the Court of First Instance should have dismissed the pleas alleging inadequacy of the reasons stated for the contested decision, it was bound to uphold the plea relating to manifest error of assessment, which is well founded.

121. It should be borne in mind that it is settled case-law that, if the grounds of a judgment of the Court of First Instance reveal an infringement of Community law but the operative part appears well founded on other legal grounds, the appeal must be dismissed (see Case C-30/91 P, *Lestelle v Commission*, paragraph 28, and Case C-294/95 P, *Ojha v Commission*, paragraph 52).

122. It follows that the first, fourth, fifth and sixth grounds of appeal must be dismissed.

The second and third grounds of appeal

123. By its second and third grounds of appeal, the VBA challenges paragraphs 137 and 138 of the contested judgment, in which the Court of First Instance held that it was not called upon to adjudicate on the arguments put forward by the VBA 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 26, but only on the legality of the conclusion reached by the Commission in the contested decision of 2 July 1992 that the user fee falls within the first sentence of Article 2(1) of Regulation 26.

124. First, the VBA submits that the Commission did not restrict its assessment to the first sentence of Article 2(1) of Regulation 26. In the document appended to the Article 6 letter, referred to in paragraph 41 of the contested judgment, the Commission stated that the user fee was an essential feature of the VBA distribution system, which was a condition for the application of the second sentence of Article 2(1) of Regulation 26. The VBA contends, accordingly, that rejection of the complaint implicitly entails the application of that provision.

125. Secondly, the VBA submits that the Court of First Instance should have verified whether the Commission had taken account of the fact that Community competition law does not preclude a cooperative society from applying and maintaining in force restrictions which are necessary to ensure that it functions properly and maintains its contractual power in relation to producers (Case C-250/92, *DLG*, paragraphs 34 and 35). According to the judgment in *Oude Luttikhuis*, cited above, such restrictions do not fall within the scope of Article 85(1) of the Treaty.

126. In that connection, it need merely be observed that the Commission based the contested decision on the single ground that the user fee was an essential feature of the VBA distribution system, which was, according to the Commission, necessary to the 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 26, and that it is the application of that latter provision which was the subject-matter of the action brought by Florimex and the VGB before the Court of First Instance. The Court of First Instance was therefore right not to adjudicate on the arguments put forward by the VBA 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 26.

127. The second and third grounds of appeal must therefore be dismissed.

The seventh ground of appeal

128. By its seventh ground of appeal, the VBA submits that the Court of First Instance wrongly held, in paragraphs 184 to 186 of the contested judgment, that the Commission also based its rejection of Florimex's and the VGB's complaints on the ground that the user fee had an effect analogous to that of an auction reserve price, and consequently found that such a consideration did not constitute a sufficient statement of reasons.

129. In that regard, the VBA submits that the passage in question of the document appended to the Article 6 letter has no significance of its own and that the Court of First Instance was not entitled to refer to it in order to annul the contested decision.

130. The VBA puts forward a number of arguments to show that the user fee cannot have the same object or the same effect as a set of rules establishing a minimum price.

131. It should be observed that the VBA itself maintains, correctly, that that part of the statement of the reasons for the contested decision has no significance of its own. Even though the Court of First Instance expressly referred to that ground, the said decision was based on other factors and vitiated in their respect, as has already been held in this judgment, by defects which justify its annulment.

132. It follows that the complaint raised by the VBA against that part of the reasoning of the Court of First Instance is of no consequence.

The eighth ground of appeal

133. By its eighth ground of appeal, the VBA submits that the Court of First Instance erred in law by requiring that the charges levied by the VBA on holders of trade agreements be equal to the charge levied on direct outside suppliers, unless it could be proved that there is a difference between the two types of supply.

134. Article 85 does not, according to the VBA, prohibit it from distinguishing between the various means of supply when determining fees and, by virtue of its freedom of contract, it may choose the undertakings with which it intends to enter into trade agreements. Article 85(1) of the Treaty is not applicable to agreements which an undertaking concludes with various other undertakings and in which different rates are applied. In the present case, VBA decided unilaterally to conclude trade agreements and to levy a user fee on direct supplies. On the other hand, it did not give an undertaking to third parties that it would apply and maintain different rates.

135. The Commission refutes the finding of the Court of First Instance that the trade agreements do not provide for specific supply obligations. Such contracts, on the contrary, specify the variety of flowers to which they apply and it is only in respect of the supply of such products that a trader benefits from the reduced rate of 3%. A trade agreement is offered only to a trader willing to supply the requisite varieties of flowers.

136. As regards the reasons given for the contested decision in that respect, the Commission points out that it is not required to examine, in a decision rejecting a complaint, all the assertions made by the complainant.

137. In that connection, it must be observed that, in paragraphs 191 to 194 of the contested judgment, the Court of First Instance, like the Commission, considered that equality of treatment had to be guaranteed as between the various suppliers. It examined the only argument which the Commission and the VBA put forward in order to justify the difference in the rate of the user fee, namely the existence of supply obligations imposed on the holders of trade agreements. The Court of First Instance found that such specific supply obligations did not exist. Such a finding is a finding of fact.

138. Under Articles 168a of the EC Treaty (now Article 225 EC), and 51 of the EC Statute of the Court of Justice, however, an appeal may be based only on grounds relating to the infringement of rules of law, to the exclusion of any appraisal of the facts (see, in particular, Case C-8/95 P, *New Holland Ford v Commission*, paragraph 25).

139. The Court of First Instance alone has jurisdiction, first, to make a finding as to the facts, save where the substantive inaccuracy of such findings is apparent from the documents submitted to it and, second, to assess those facts (*New Holland Ford v Commission*, cited above, paragraph 25). Furthermore, such inaccuracy must be obvious from the documents before the Court without its being necessary to undertake a fresh assessment of the facts (*New Holland Ford v Commission*, cited above, paragraph 72).

140. In the present case, the arguments put forward in support of the view that the trade agreements provided for specific supply obligations, arguments which moreover are essentially identical to those submitted before the Court of First Instance, do not reveal the existence of a manifest substantive error in the findings of fact made by the Court of First Instance in that connection.

141. It is, however, true that the Court of First Instance considered that the contested decision did not contain a sufficient statement of reasons to enable it to verify the merits of the Commission's finding that the difference of treatment between the two groups of suppliers concerned was objectively justified, while at the same time it criticised the Commission for having committed an error of assessment on that point.

142. None the less, on the same grounds as those set out in paragraphs 115 to 119 of the present judgment, that error in law remains irrelevant to the outcome of the case.

143. First, the absence of any supply obligation found by the Court of First Instance so far as concerns the holders of trade agreements shows that the Commission committed a manifest error of assessment in considering (see paragraph 23 of the present judgment) that there was equality of treatment between those persons and the other suppliers on whom the user fee was levied.

144. Secondly, it may be seen from paragraph 188 of the contested judgment that Florimex and the VGB had specifically argued before the Court of First Instance that the difference between the rate provided for by the trade agreements and the rate of the user fee was discriminatory.

145. It follows that the eighth ground of appeal must be dismissed.

146. It is clear from all the foregoing considerations that the appeal must be dismissed in its entirety.

[Paragraph 147 considers the question of costs; see the ruling below.]

Court's Ruling

The Court hereby:

1.Dismisses the appeal;

2.Orders Coöperatieve Vereniging De Verenigde Bloemenveilingen Aalsmeer BA (VBA) to bear its own costs and to pay those of Florimex BV and Vereniging van Groothandelaren in Bloemkwekerijprodukten (VGB) relating to the proceedings before the Court of Justice;

3.Orders the Commission to bear its own costs. ■