1. The proceedings provided for in Article 173 of the Treaty may be instituted only against an act adversely affecting a person's interests, in other words against an act capable of affecting a given legal position.

   Only the operative part of such an act is capable of producing legal effects and, as a consequence, of adversely affecting such interests. On the other hand the assessments made in the recitals thereto are not in themselves capable of forming the subject of an application for annulment and their legality might be open to review by the Community judicature only to the extent to which they constituted the necessary support for the operative part.

2. A decision to grant negative clearance pursuant to Article 2 of Regulation No 17 at the request of the undertakings and associations of undertakings concerned in which the Commission states that, on the basis of the facts known to it there are no grounds for it to take action under Article 85 or 86 of the Treaty satisfies the applicant and, by its very nature, can neither change his legal position nor adversely affect his interests. By contrast, the granting of negative clearance may prejudice the economic interests of a third party who, if he demonstrates sufficient legal interest, is entitled to institute proceedings for annulment before the Court of First Instance in accordance with the conditions set out in Article 173 of the Treaty.

3. An applicant who claims an interest concerning a future legal situation but without being able to demonstrate that the prejudice to that situation is already certain or who relies on a possible change in circumstances which, if it materialized, would not deprive him of the possibility of asserting his rights does not show a vested and present interest, which is a necessary condition for the admissibility of his action for annulment.

JUDGMENT OF THE COURT OF FIRST INSTANCE (Second Chamber)
17 September 1992 *

In Case T-138/89,

Nederlandse Bankiersvereniging and Nederlandse Vereniging van Banken, represented by M. van Empel, A. J. H. W. M. Versteeg, P. J. P. Verloop and J. C. M. van der Beek, of the Amsterdam Bar, with an address for service in Luxembourg at the office of Jacques Loesch, 8 Rue Zithe,

applicants,

* Language of the case: Dutch.

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 Roberto Hayder, of its Legal Service, Wagner Centre, Kirchberg,

defendant,

APPLICATION for the annulment in part of Commission Decision 89/512/EEC of 19 July 1989 relating to a proceeding under Article 85 of the EEC Treaty (IV/31.499-Dutch banks, OJ 1989 L 253, p. 1),

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

composed of: J. L. Cruz Vilaça, President, D. Barrington, C. Yeraris, C. P. Briët and J. Biancarelli, Judges,

Registrar: H. Jung,

having regard to the written procedure and further to the hearing on 21 January 1992,

gives the following

Judgment

Facts and procedure

1 This case relates to a decision of the Commission in which *inter alia* it granted negative clearance to the banking associations involved, indicating in the operative part of the decision that no action on its part was required under Article 85(1) of the EEC Treaty against the interbank agreement on transfers known as 'actie-accepten' (fund-raising acceptances) while noting in the statement of reasons on which the decision was based that the said agreement restricted competition to an appreciable extent.

2 The first of the two applicants, namely Nederlandse Bankiersvereniging (Dutch Bankers' Association, hereinafter 'NBV'), was set up in 1949 to promote the interests of the Netherlands banking sector in the broadest sense of the expression. Any individual, company or institution registered in the official Netherlands register of credit institutions may be a member of the association.

3 Of the establishments providing financial services comparable to those of the so-called all-purpose banks, the cooperative banks affiliated to the Rabobank, the banks affiliated to the Nederlandse Spaarbankbond and the Postbank are not NBV members. Most NBV members are also members of the Vereniging van Deviezenbanken (Association of Foreign Exchange Banks, hereinafter 'VDB'), the purpose of which is to promote the optimum execution of payments between residents in the Netherlands and non-residents. The central body for coordination on matters jointly affecting the NBV, the Rabobank, the savings banks affiliated to the Nederlandse Spaarbankbond and the Postbank was, at the material time, the College van Overleg der Gezamenlijke Banken (Interbank Deliberation Committee, hereinafter 'CVO').

4 The second applicant, namely the Nederlandse Vereniging van Banken (Dutch Association of Banks, hereinafter referred to as 'NVB'), was established on 8 May 1989 and commenced operations on 1 June 1989. Its objectives are to promote the national and international interests of the credit institutions listed in the Wet toezicht Kredietwezen (Law on the supervision of the credit system) and of the Netherlands banking sector in general. This association groups together several institutions in the financial sector, including the all-purpose banks which are members of the NBV. The NVB has taken over the tasks previously performed by the CVO and, in practice, the activities of the NBV and VDB.

5 On 19 March 1985, 22 October and 27 November 1986, the Commission was notified by the NBV of regulations, decisions and circulars (hereinafter 'rules') issued by it and certain other Netherlands financial organizations and of a number of agreements to which it or one of those organizations was directly or indirectly party. At the same time it asked for negative clearance under Article 2 of Regulation No 17 of the Council of 6 February 1962: First Regulation implementing Articles 85 and 86 of the EEC Treaty (OJ, English Special Edition 1959-1962, p. 87, hereinafter 'Regulation No 17') or alternatively for the grant of an exemption under Article 85(3) of the Treaty.

6 On 5 February 1987 the Commission sent the NBV a statement of objections covering part of the rules so notified.

7 As a result of that statement and after various discussions with the Commission's officers, the parties concerned rescinded or amended a large number of provisions of the rules covered by the statement of objections. The NBV formally informed the Commission accordingly by letter of 6 May 1987.

8 During the period following service of the statement of objections, the NBV, the Rabobank, the Nederlandse Spaarbankbond and the Postbank signed in two successive stages the two parts of an agreement (hereinafter 'the agreement') concerning transfers by means of forms referred to as 'actie-accepten'. The agreement provided *inter alia* that the bank collecting the transfer for its customer (the beneficiary) was to invoice the latter for HFL 1.40 for the administrative expenses of the drawee bank (the bank of the person issuing the transfer order).

9 On 18 September and 4 December 1987, the NBV notified the Commission of the first part of the agreement dealing with technical cooperation and the second part relating to the reciprocal offsetting of handling costs. As with the other notifications, the NBV asked the Commission to grant negative clearance or alternatively an exemption.

10 The hearing provided for in Article 19(1) of Regulation No 17 on the Commission's objections to the rules notified in 1985 and 1986 was held on 25 November 1987.

11 By letter of 2 February 1988 the parties to the agreement sent the Commission a copy of a notification addressed to the banks concerned indicating that the interbank commission had been retained at the level of HFL 1.10 but that the collecting

banks would thenceforth be free to decide whether or not to pass the commission on to their customer. According to the statement of the applicant at the oral procedure, that bank handling charge is at present HFL 0.55.

12 The notice from the Commission provided for in Article 19(3) of Regulation No 17 regarding the series of rules notified by the NBV, including the disputed agreement, was published in the Official Journal (C 282, p. 4) on 5 November 1988. The Commission indicated therein its intention to take a favourable decision in respect of the agreement and invited interested parties to submit their comments.

13 After obtaining the opinion of the Advisory Committee on Restrictive Practices and Dominant Positions, the Commission adopted on 19 July 1989 Decision 89/512/EEC (hereinafter the 'decision'), which was published in the Official Journal (L 253, p. 1). By that decision the Commission granted negative clearance as regards the agreement on the grounds that, whilst the agreement restricted competition, it did not have any appreciable effect on trade between Member States. The Commission also took a decision on the other rules, granting them either negative clearance or exemption under Article 85(3) of the Treaty.

14 In those circumstances the NBV and the NVB, by an application lodged at the Court Registry on 2 October 1989, brought an action under Article 173 of the EEC Treaty for the annulment of the decision in so far only as it stated that the agreement restricted competition.

15 By order of 15 November 1989, the Court of Justice referred the case to the Court of First Instance pursuant to Article 14 of the Council Decision of 24 October 1988 establishing a Court of First Instance of the European Communities.

16 The written procedure then followed the normal course before the Court of First Instance.

17 Upon hearing the report of the Judge-Rapporteur, the Court of First Instance (Second Chamber) decided to open the oral procedure without any preparatory inquiry.

18 The oral procedure took place on 21 January 1992. Counsel for the parties presented oral argument and replied to the questions put to them by the Court.

Forms of order sought by the parties

19 The applicants claim that the Court of First Instance should:

— annul the decision brought to their notice on 28 July 1989 in as far as it finds that the agreement concerning transfers by means of 'actie-accepten' restricts competition to an appreciable extent, and take any other measures appropriate;

— order the Commission to pay the costs.

20 The defendant contends that the Court should:

— declare the application inadmissible;

— in the alternative dismiss the application;

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

Admissibility

The decision

21 The decision states that the agreement lays down a uniform commission to be charged by the drawee bank to the payee bank for handling transfers by means of the forms referred to as 'actie-accepten'. Those transfers are of a predominantly voluntary nature with a mainly charitable objective (paragraph 43). After describing the parties to the agreement as undertakings or associations of undertakings within the meaning of Article 85(1) of the Treaty, the Commission expresses the opinion that the provisions of the agreement restrict competition to an appreciable extent. According to the decision, the agreement restricts the scope for the banks concerned, which account for more than 90% of total deposits and assets of the banks operating in the Netherlands, to agree bilaterally on the reimbursement of costs in a more favourable manner and to pass the benefits on to their customers (paragraphs 56 and 57). Finally, the decision expresses the view that the agreement does not have any appreciable effect on intra-Community trade, since the services concerned may be provided only between banks established in the Netherlands. In that regard, the decision emphasizes that the proportion of such services provided by branches of banks from other Member States is insignificant and that the transfers concerned have little or no connection with trade in goods or services between Member States. Similarly very few of the final consumers of the interbank services in question are established in other Member States (paragraph 59). Finally, Article 1 of the operative part of the decision states that:

'On the basis of the facts known to it, the Commission finds no grounds for action to be taken under Article 85(1) of the EEC Treaty against the following provisions notified by the Nederlandse Bankiersvereniging: ...

— agreement concerning transfers relating to fund-raising acceptances.'

Arguments of the parties

22 In its defence, the Commission claims that the application is inadmissible on two grounds: (a) the contested decision does not adversely affect the applicants, who cannot show any legal interest in bringing proceedings; (b) the decision is neither of direct nor individual concern to the NVB, to which it was not addressed.

23 As regards the first plea in law, the Commission observes first that the application relates not to the operative part of the decision but to one of the recitals, which as such does not constitute an act within the meaning of Article 173 of the Treaty. Whilst it is true that negative clearance constitutes a decision within the meaning of Article 189 of the Treaty, it could never be the subject of an application for annulment on the part of the beneficiary but only on that of an interested third party.

24 The Commission maintains secondly that the applicants' claim that a decision is composed of 'interim conclusions' is unfounded. In the opinion of the Commission, in Community law a number of conditions must often be met before an institution adopts an act adversely affecting a person's interests. According to the Commission, it is ultimately the purpose of the decision which is important. If it were possible to institute proceedings with regard to what the applicants describe as interim conclusions, the decision would lose its purpose.

25 The Commission argues thirdly that the negative clearance which was granted does not alter the legal situation of the applicants. By contrast with an exemption pursuant to Article 85(3) of the Treaty, it does not bind a national court. In this case, if a national court were to decide that the agreement was incompatible with Article 85(1) of the Treaty and to declare the agreement void in accordance with the second paragraph of that article, such an outcome would not be the consequence of the Commission's decision but that of the findings of the national court. It follows, according to the Commission, that the disputed negative clearance is not capable of producing any binding legal effect in relation to the applicants.

26 The Commission notes, fourthly and lastly, that the applicants obtained what they had sought, namely negative clearance. In the opinion of the Commission, the reasons for which such clearance was granted have no effect on their legal situation. All that matters is that they obtained negative clearance and therefore have no legal interest in taking action.

27 In order to refute the Commission's arguments, the applicants point out first that from a formal point of view negative clearance constitutes a decision within the

meaning of Article 173 of the Treaty and one which may be adopted under Article 85. In their view, that follows directly from Regulation No 17, Article 19 of which mentions a 'decision' provided for in Article 2 of the regulation. In any event, according to the applicants, negative clearance by its very nature constitutes a decision in the material sense, as that concept has been defined by the Court with regard to that article of the Treaty. In addition, the applicants point out that the Court has acknowledged the right of a third party whose legitimate interests are prejudiced by negative clearance to take action with regard to such clearance pursuant to Article 173 of the Treaty. Consequently, they consider that they cannot be placed in a less favourable position than a third party.

28 The applicants acknowledge secondly that they are not challenging the operative part of the decision. However, they dispute the Commission's view that their application is inadmissible for the reason that a recital does not constitute an act within the meaning of Article 173 of the Treaty. They emphasize in this regard that the Commission fails to recognize the fact that they are not challenging the recital but an interim conclusion with regard to Article 85 of the Treaty. Indeed, in their opinion that article is constructed in the form of a syllogism such that a number of premises (agreement, restriction of competition, effect on intra-Community trade) lead to a conclusion regarding the compatibility of the agreement in question with Article 85 of the Treaty. An interim conclusion is therefore a finding in respect of one of the constituent factors, motivated by reasoning which leads to that conclusion and stemming from a finding of fact. In the applicants' view an interim conclusion is not a preparatory act but constitutes a final assessment on the part of the Commission as to the nature of the agreement as restricting competition, an assessment which entails binding legal effects and which alters the legal situation of the persons to whom the decision is addressed.

29 The applicants maintain thirdly that they did not obtain that they had sought, since they were granted a negative clearance one of the recitals to which states that competition is restricted to an appreciable extent. They point out in this respect that they have a legal interest in bringing proceedings because the Commission's finding that the agreement restricts competition is capable of producing effects under civil law in relation to them. Although a national court is free to apply Articles 85 and 86 in an independent manner, such a finding might play an important part in the grounds of the judgment of a national court. If in regard to the effect on intra-Community trade the national court reached a conclusion other than that reached

by the Commission, the agreement would automatically be void under Article 85(2) of the Treaty. The applicants claim that as a consequence they could not legally maintain their agreement.

Assessment by the Court

30 The Court observes that the applicants do not question the operative part of the decision whereby the Commission, on the basis of the facts made known to it, granted them negative clearance, finding that there were no grounds for taking action under Article 85(1) of the Treaty with regard to the agreement concerning transfers known as 'actie-accepten'. However, the applicants request annulment of the legal assessment expressed in paragraphs 56 and 57 of the decision, according to which the agreement restricts competition within the common market to an appreciable extent. Such a request raises the question of whether the beneficiary of a negative clearance is entitled to challenge the ground or grounds of the decision without calling in question its operative part.

31 In this regard, it should be pointed out that, as the Court of Justice has consistently held, the proceedings provided for in Article 173 of the Treaty can be instituted only against an act adversely affecting a person's interests, in other words against an act capable of affecting a given legal position (see for example the judgment in Case 60/81 *IBM* v *Commission* [1981] ECR 2639); whatever the grounds on which such an act is based, only its operative part is capable of producing legal effects and, as a consequence, of adversely affecting such interests. As regards the assessments made by the Commission in the recitals to the decision at issue, whilst it is acknowledged that they do not correspond completely to the applicants' opinion, they are not in themselves capable of forming the subject of an application for annulment. Their legality might be open to review by the Community judicature only to the extent to which, as grounds of an act adversely affecting a person's interests, they constituted the necessary support for its operative part. The Court of First Instance notes that in this case not only does the act not adversely affect the applicants' interests but also that the contested recital does not constitute the necessary support for the operative part of the act. Indeed, once it has found that the agreement notified is not capable of affecting intra-Community trade, the Commission can only conclude that there are no grounds for it to intervene, whatever its assessment of the purpose or effect of the agreement on competition.

32 Furthermore, as the act in question is a decision to grant negative clearance pursuant to Article 2 of Regulation No 17 at the request of the undertakings and associations of undertakings concerned and in which the Commission states that on the basis of the facts known to it, there are no grounds for it to take action under Article 85 or 86 of the Treaty, the Court of First Instance considers that such a decision satisfies the applicant and, by its very nature, can neither change his legal position nor adversely affects his interests. By contrast, the granting of negative clearance may prejudice the economic interests of a third party who, if he demonstrates sufficient legal interest, is entitled to institute proceedings for annulment before the Court of First Instance in accordance with the conditions set out in Article 173 of the Treaty. That conclusion is corroborated by the fact that Article 19(1) and (3) of Regulation No 17 preserves the rights of third parties if the Commission intends to respond favourably to an application it has received. However, although it must be conceded that a decision to grant negative clearance may be challenged by a third party showing a legal interest, it follows from the actual structure of the said Article 19 that it cannot be inferred from that article that the beneficiary of the decision in question has the same legal remedy.

33 Finally, the Court notes that a trader must show a vested and present interest in the annulment of the contested act and that is not the case in this instance, for two reasons. First, if the interest which an applicant claims concerns a future legal situation he must demonstrate that the prejudice to that situation is already certain. In this instance the applicants rely only upon future and uncertain situations to justify their interest in applying for annulment of the contested act, namely the possibility that a national court, deciding as to the legality of the agreement in the light of Articles 85 and 86 of the Treaty, would make an assessment different from that of the Commission as to the effect on intra-Community trade whilst taking into account the Commission's assessment as to the agreement's restrictive effect on competition. Consequently, this argument must in any case be rejected without its being necessary for the Court of First Instance to consider the effects of the contested decision as far as national courts are concerned. Moreover, in case of doubt as to the scope of the Commission's decision, national courts would have the opportunity to apply to the Court of Justice for a preliminary ruling under Article 177 of the Treaty, so that in any case, in the event of a dispute, the applicants would by no means be deprived of the possibility of asserting their rights before the national court in the conditions specified in the judgment of the Court of Justice in Case 234/89 *Delimitis* v *Henninger Bräu AG* [1991] ECR I-935.

34 Secondly, if it should happen, as suggested by the applicants, that the circumstances concerning the provision of services for effecting transfers by means of 'actie-accepten' as described in paragraph 59 of the decision were to be modified in such a way that the effect on trade between Member States became significant, such a change might justify a review of the case by the Commission. In fact, under Article 2 of Regulation No 17, the Commission grants negative clearance 'on the basis of the facts in its possession'. If such a review were to lead the Commission to question the negative clearance originally granted, the applicants could refer to the Court of First Instance the decision taken as a result of a new administrative procedure. Consequently, the applicants, who thus retain the possibility of asserting their rights in future in the conditions described above, cannot maintain that any change in circumstances might be such as to make admissible the forms of order sought in this application.

35 It follows from all the foregoing considerations that it is not open to the applicants to apply to the Court for annulment of the negative clearance granted them by the Commission upon their application, on the sole ground that in the statement of the reasons on which its decision was based, the Commission found that the agreement notified restricted competition. The application must therefore be dismissed as inadmissible without its being necessary to decide as to the second ground of inadmissibility raised by the Commission on the basis of the NVB's incapacity to bring proceedings.

Costs

36 Under Article 87(2) of the Rules of Procedure of the Court of First Instance, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the applicants have failed in their submissions, they must be ordered to pay the costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Second Chamber)

hereby:

1. Dismisses the application as inadmissible;

2. Orders the applicants to pay the costs.

Cruz Vilaça Barrington

Yeraris Briët Biancarelli

Delivered in open court in Luxembourg on 17 September 1992.

H. Jung J. L. Cruz Vilaça

Registrar President