JUDGMENT OF THE COURT (Fifth Chamber)

30 March 2000 *

In Case C-266/97 P,

Coöperatieve Vereniging De Verenigde Bloemenveilingen Aalsmeer BA (VBA), established in Aalsmeer (Netherlands), represented by G. van der Wal, of the Brussels Bar, with an address for service in Luxembourg at the Chambers of A. May, 398 Route d'Esch,

appellant,

APPEAL against the judgment of the Court of First Instance of the European Communities (Second Chamber, Extended Composition) of 14 May 1997 in Case T-77/94 *VGB and Others* v *Commission* [1997] ECR II-759, seeking to have that judgment set aside,

the other parties to the proceedings being:

Vereniging van Groothandelaren in Bloemkwekerijproducten (VGB), Florimex BV, Inkoop Service Aalsmeer BV and **M. Verhaar BV**, established in Aalsmeer

* Language of the case: Dutch.

(Netherlands), represented by J.A.M.P. Keijser, of the Nijmegen Bar, with an address for service in Luxembourg at the Chambers of A. Kronshagen, 22 Rue Marie-Adélaïde,

defendants at first instance,

and

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

defendant at first instance,

THE COURT (Fifth Chamber),

composed of: J.C. Moitinho de Almeida, President of the Sixth Chamber, acting as President of the Fifth Chamber, L. Sevón, J.-P. Puissochet, P. Jann (Rapporteur) and M. Wathelet, Judges,

Advocate General: A. Saggio,
Registrar: L. Hewlett, Administrator,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 17 December 1998, at which Coöperatieve Vereniging De Verenigde Bloemenveilingen Aalsmeer BA (VBA) was represented by G. van der Wal, Vereniging van

Groothandelaren in Bloemkwekerijproducten (VGB), Florimex BV, Inkoop Service Aalsmeer BV and M. Verhaar BV by J.A.M.P. Keijser and the Commission by W. Wils, of its Legal Service, acting as Agent,

after hearing the Opinion of the Advocate General at the sitting on 8 July 1999,

gives the following

Judgment

1 By application lodged at the Registry of the Court of Justice on 19 July 1997, 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 Case T-77/94 *VGB and Others* v *Commission* [1997] ECR II-759 (hereinafter 'the contested judgment') by which it annulled the decision of the Commission contained in a letter of 20 December 1993 (hereinafter 'the contested decision'), refusing to act on the complaints lodged by the Vereniging van Groothandelaren in Bloemkwekerijproducten (hereinafter 'the VGB'), Florimex BV (hereinafter 'Florimex'), Inkoop Service Aalsmeer BV (hereinafter 'Inkoop Service Aalsmeer') and M. Verhaar BV (hereinafter 'Verhaar') concerning the trade agreements concluded by the VBA with a number of its suppliers.

2 By document lodged at the Registry of the Court of Justice on 30 October 1997, the VGB, Florimex, Inkoop Service Aalsmeer and Verhaar brought a cross-appeal against the contested judgment in so far as it had dismissed their pleas in law and arguments concerning the Commission's refusal to uphold their complaints against the agreements relating to the Cultra commercial centre (hereinafter 'the Cultra agreements') concluded by the VBA with certain wholesalers.

The facts before the Court of First Instance

3 It is apparent from the contested judgment that the VBA is a cooperative society constituted under Netherlands law, whose members are growers of flowers and ornamental plants, which organises, on its premises at Aalsmeer, Netherlands, auction sales of floricultural products. A part of its premises is reserved for the renting-out, in particular to wholesalers of and dealers in indoor plants, of 'processing rooms' for the purposes of wholesale trade in floricultural products (paragraph 1).

4 The VGB is an association comprising numerous Netherlands wholesalers of floricultural products and wholesalers established on the VBA's premises (paragraph 2).

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 third countries, mainly for resale to wholesalers established in the Netherlands (paragraph 3).

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

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 5).

8 Until 1 May 1988, Article 5(10) and (11) of the VBA's auction rules prevented the use of its premises for supplies, purchases and sales of floricultural products not passing through its own auctions. In practice, the VBA granted authorisation for commercial transactions on its premises in products not passing through its auctions only under certain standard contracts known as 'handelsovereenkomsten' (trade agreements) or against payment of a 10% levy (paragraph 6).

9 Under those trade agreements, the VBA allowed certain dealers to sell and supply to purchasers approved by it, against payment of a levy, certain floricultural products bought in other auctions in the Netherlands or cut flowers of foreign origin (paragraphs 7 and 8).

10 Following a complaint from Florimex, the Commission adopted Decision 88/491/EEC on 26 July 1988 relating to a proceeding pursuant to Article 85 of the EEC Treaty (IV/31.379 — Bloemenveilingen Aalsmeer, OJ 1988 L 262, p. 27, hereinafter 'the 1988 decision') (paragraph 13).

11 In the operative part of the 1988 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, first, to deal in and/or have delivered on the VBA's premises floricultural products not bought through the VBA only with the consent of the VBA and under the conditions laid down by it and, secondly, to store on the VBA's premises such products only against payment of a fee determined by the latter constituted infringements of Article 85(1) of the EC Treaty (now Article 81(1) EC).

12 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 14).

13 As from 1 May 1988, the VBA formally removed the purchase obligations and restrictions on the free disposal of goods imposed by its auction rules but at the same time introduced a 'user fee' ('facilitaire heffing'). The VBA also introduced amended versions of the trade agreements (paragraph 15).

14 The user fee is levied, on the basis of the number of stalks (cut flowers) or of plants supplied, on deliveries made by third parties to dealers established on the VBA's premises. The amount of the fee is determined by the VBA on the basis of the annual average prices achieved in the course of the previous year for the various floricultural products concerned. According to the VBA, a factor of around 4.3% of the average annual price of the category concerned is applied. Instead of a fee levied per stalk or per plant, a supplier may opt to pay a fee of 5%, also covering collection of payments by the VBA (paragraph 16).

15 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 the agreements apply a fee of 3% of the gross value of the goods supplied to customers on the VBA's premises. According to the VBA, the products concerned are for the most part those not grown in sufficient quantities in the Netherlands (paragraphs 17 and 18).

16 Small dealers, in general retailers, are in practice excluded from the auction sales. However, they have an opportunity to buy at the Cultra commercial centre established on the VBA's premises, comprising six 'cash-and-carry' stores, of

which two are wholesalers of cut and dried flowers, two are wholesalers of indoor plants (one of them being Inkoop Service Aalsmeer), one is a wholesaler of garden plants and one is a wholesaler of hydroponic plants. With the exception of the one selling hydroponic plants, those wholesalers are contractually required to obtain their goods through the VBA (paragraph 20).

17 On 19 July 1988, the VBA notified the Commission of a number of amendments to its rules, relating in particular to the new user fee, but that notification did not concern the new trade agreements. On 15 August 1988, additional amendments to the VBA rules were notified to the Commission (paragraphs 21 and 23).

18 The Cultra agreements were also notified to the Commission on 15 August 1988 (paragraph 24).

19 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 25 and 26).

20 By letters of 3 May 1989, Florimex and the VGB expressed their opposition to the Commission's intention to adopt a favourable decision regarding the user fee and the Cultra agreements, and lodged formal complaints regarding the trade agreements (paragraph 29).

21 On 3 May 1989 Verhaar and Inkoop Service Aalsmeer also lodged a complaint with the Commission concerning the Cultra agreements and the new trade agreements (paragraph 30).

22 On 7 February 1990, the VBA notified the new trade agreements to the Commission (paragraph 31).

23 By letter of 24 October 1990, the Commission informed the complainants of its intention to adopt a decision favourable to the VBA, in particular with regard to the obligation to sell by auction imposed on VBA members and the user fee. It also indicated that the file concerning the Cultra agreements would be closed without a formal decision being adopted. The Commission also stated its intention to close the file concerning the new trade agreements without adopting a formal decision (paragraph 32).

24 The complainants repeated their arguments in letters of 26 November and 17 December 1990 and at a meeting with Commission staff dealing with the matter on 27 November 1990. In particular, they asked the Commission formally to process the complaints lodged with it (paragraph 33).

25 By letter of 4 March 1991, the Commission informed the complainants, in accordance with Article 6 of Commission Regulation No 99/63/EEC of 25 July 1963 on the hearings provided for in Article 19(1) and (2) of Council Regulation No 17 (OJ, English Special Edition 1963-64, p. 47), that the information obtained did not enable the Commission to uphold their complaints regarding the user fee levied by the VBA (paragraph 34).

26 The considerations of fact and law which led the Commission to reach that conclusion are set out in detail in a document annexed to the aforementioned letter of 4 March 1991 (paragraph 35).

27 In that document, the Commission concluded:

'It is clear from a comparison of the auction fees and the user fees that broad equality of treatment is guaranteed as between suppliers. Admittedly, a proportion of the auction fees, which cannot be precisely determined, represents payment for the service provided by the auction, but in so far as the rate of the auction fees can be compared with that of the user fees in this case, that service is a *quid pro quo* for the assumption of supply obligations. Dealers who have concluded trade agreements with the VBA also assume such supply obligations. Consequently, the rules on user fees do not have effects which are not compatible with the common market' (paragraph 37).

28 By letter of 17 April 1991, the complainants stated in reply to the letter of 4 March 1991 that they maintained their complaints regarding the user fee, the Cultra agreements and the trade agreements. They also claimed that that letter did not deal either with the Cultra agreements or with the new trade agreements, so that a letter under Article 6 of Regulation No 99/63 was lacking in that connection (paragraph 38).

29 By decision of 2 July 1992, the Commission definitively rejected the applicants' complaints regarding the user fee (paragraph 39).

30 By letter of 5 August 1992, the Commission wrote to the applicants in the following terms:

'On the basis of the information you have provided in connection with your actions and on the basis of the information obtained by the Commission through

notifications and through its own investigation, the Directorate General for Competition has, for the time being at least, closed its investigation in the present cases regarding the "type I, II and III agreements" and the "Cultra agreements".

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

1. The trade agreements

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

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

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

A comparison between the financial burdens imposed by the VBA on traders who are parties to trade agreements and traders who have not concluded such

agreements would indicate that the holders of trade agreements are privileged. On the other hand, they enter into obligations *vis-à-vis* the VBA regarding the supply of certain products.

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

2. The Cultra agreements

...

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

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

On the basis of this — still provisional — assessment of your application, I thus have the intention of dispensing with any such formal procedure and of bringing the matter to a close. I shall take the necessary measures for that purpose unless you inform me within four weeks that you wish to maintain your complaint with a view to continuation of the procedure, and set forth the arguments on which you intend to rely to that end' (paragraph 40).

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

32 On 22 December 1992, the applicants' lawyer replied on behalf of the four complainants to the letter of 5 August 1992, stating that certain circumstances had prevented him from reacting earlier. He stated that the applicants wished to maintain their complaints and he also expressed the wish that the Commission extend the time-limit of four weeks mentioned in the aforementioned letter (paragraph 42).

33 That letter of 22 December 1992 drew no response from the Commission. Since the health of their lawyer had seriously deteriorated, the applicants appointed a new lawyer on 3 November 1993. By letter of 9 December 1993, the new lawyer asked the Commission to take a position on the letter of 22 December 1992 (paragraph 43).

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

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

The Commission Directorate-General for Competition took account of the information provided in your letter of 22 December 1992, on its own initiative. However, a provisional examination then carried out did not disclose any reason to take action under Articles 85(1) or 86 of the Treaty' (paragraph 44).

35 By application lodged on 16 February 1994, the VGB, Florimex, Inkoop Service Aalsmeer and Verhaar instituted proceedings before the Court of First Instance against the contested decision (paragraph 45).

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

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

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

The contested judgment

39 So far as concerns admissibility, the Court of First Instance found, in paragraph 69 of the contested judgment, that, essentially, the Commission relied on three main arguments, namely that: the letter of 5 August 1992 formed part of the first of the three procedural stages described in Case T-64/89 *Automec* v *Commission* [1990] ECR II-367, the procedure never having in this case led to a letter under Article 6 of Regulation No 99/63, still less a formal rejection of the complaints; because of the applicants' failure to react to the letter of 5 August 1992, the complaint was to be regarded as having already been closed before their letter of 22 December 1992 was received, the applicants having, through inaction, forfeited the status of complainants; and the letter of 20 December 1993 therefore merely informed the complainants of the stage reached in the procedure and did not constitute a decision rejecting their complaints.

40 First of all, as regards the first argument, the Court of First Instance held, in paragraph 70, that the Commission's letter of 5 August 1992 was to be regarded as having been sent pursuant to Article 6 of Regulation No 99/63.

41 Secondly, as regards the Commission's second argument, that the applicants had already forfeited their status as complainants by the date of their letter of 22 December 1992, the Court of First Instance accepted, in paragraph 75, that a complainant who lacks diligence during the administrative procedure, in particular by not replying to a letter pursuant to Article 6 of Regulation No 99/63, may be regarded, in the interests of legal certainty, as consenting to the definitive closure of the procedure on his complaint, announced by the Commission in such a letter.

42 The Court of First Instance nevertheless considered, in paragraph 76, that a complainant's consent to closure of the procedure on his complaint cannot be irrebuttably presumed merely because the time-limit was not observed. It held that it would not be consistent with the right to a fair hearing for the Commission to be able to close the procedure on the complaint where special circumstances might legitimately account for the failure to observe a time-limit which the Commission itself set.

43 The Court of First Instance considered, in paragraph 77, that in the instant case the non-observance of the time-limit of four weeks laid down in the letter of 5 August 1992, during a holiday period, did not in itself justify the conclusion that the applicants consented to the closure of the procedure on their complaints. It pointed out that, for a period of more than three years, they had persistently maintained their complaints and repeatedly asked the Commission to adopt a formal decision.

44 The Court of First Instance held, in paragraph 78, that that conclusion was corroborated by the fact that, on 21 September 1992, Florimex and the VGB had instituted proceedings before it in Joined Cases T-70/92 and T-71/92, in which they criticised the Commission for not dealing with their complaints relating to the trade agreements and the Cultra agreements in its decision of 2 July 1992 concerning the user fee, and stated that they intended to maintain those complaints.

45 In paragraph 79, the Court of First Instance also found that the content of the letter of 22 December 1992 finally sent by the applicants showed that they had always intended to maintain their complaints, since they requested an extension of the time-limit for submitting observations and the adoption by the Commission of a formal decision.

46 The Court of First Instance considered that it could not discount the possibility that the delay with which the applicants' lawyer had replied to the letter of 5 August 1992 could be attributed to the serious illness from which he was suffering at the time.

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

48 Finally, so far as concerns the third argument of the Commission, the Court of First Instance considered, at paragraph 85, that in the specific circumstances of the case before it, the letter of 20 December 1993, read in context, was to be regarded as a definitive rejection of the complaints on their merits. It thus held that the action was admissible.

49 With regard to the trade agreements, the Court of First Instance first examined the argument that the VBA did not apply dissimilar conditions to equivalent transactions with other trading parties, within the meaning of Article 85(1)(d) of the Treaty. It pointed out, in paragraph 116, that, in its letter of 5 August 1992, the Commission had concluded, after comparing the financial burdens imposed by the VBA on traders who are parties to trade agreements and traders who have not entered into such agreements, that the former were privileged. The Court of First Instance considered that the calculations produced by the VBA, which related to calculation of the rent of certain holders of trade agreements who were also tenants of the VBA, did not detract from that conclusion, since the user fee was not levied on VBA tenants.

50 The Court of First Instance referred to its judgment delivered on the same day in Joined Cases T-70/92 and T-71/92 *Florimex and VGB* v *Commission* [1997] ECR II-693, paragraphs 192 and 193, and observed, in paragraph 118, that, contrary to what the Commission claimed, it had not been established that the holders of trade agreements had accepted obligations *vis-à-vis* the VBA capable of justifying the difference between the 3% fee from which certain outside suppliers benefited and the rate of the user fee.

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

52 Secondly, as regards the argument put forward by the Commission that the file contained no conclusive proof that trade between Member States might be appreciably affected, the Court of First Instance pointed out first, in paragraph 120, that, in the 1988 decision, the Commission considered that the previous trade agreements then in force formed an integral part of the VBA's rules and that those rules, as a whole, were liable to affect trade between Member States.

53 Next, the Court of First Instance observed, in paragraph 123, that, instead of an exclusive purchase obligation, the VBA had adopted the principle in its new trade agreements that direct supplies to dealers established on its premises were as a general rule subject to a levy collected by it, namely either the user fee or the 3% fee provided for in the trade agreements.

54 In those circumstances, the Court of First Instance considered, in paragraphs 124 and 125, that the trade agreements could be appraised only in the context of the VBA's rules as a whole.

55 Finally, in so far as it was not disputed that the VBA's rules as a whole were liable to affect trade between Member States, the Court of First Instance found, in paragraph 126, that it was of no importance whether or not, in isolation, they affect trade between Member States to a sufficient extent.

56 The Court of First Instance accordingly annulled the contested decision to the extent to which it rejected the applicants' complaints concerning the trade agreements.

57 As regards the Cultra agreements, the Court of First Instance was called on to adjudicate only as to the legality of the Commission's finding that the slight economic impact on the markets in cut and dried flowers and garden and indoor plants meant that the Cultra agreements did not have an appreciable effect on trade between Member States, with the result that Article 85(1) of the Treaty did not apply.

58 In this connection, it first of all observed, in paragraph 134, that the Cultra agreements were not directed towards exports but were concerned with the resale by wholesalers of products of Netherlands origin to retailers most of whom were themselves established in the Netherlands.

59 The Court considered, in paragraph 135, that, even if it were assumed that, as the applicants asserted, sales to German retailers represented a proportion of Cultra sales, that fact was not in itself sufficient to establish the existence of an appreciable affect on trade between Member States, since the applicants had produced no specific evidence to show the extent of the sales in question, in terms either of market share or of turnover.

60 Next, as regards the applicants' essential argument that the effect of the Cultra agreements could be appraised only in the context of the VBA rules as a whole, taking account of the fact that, taken in conjunction with the user fee and the trade agreements, those agreements represented a substantial obstacle to penetration of the Netherlands market by exports from other Member States, the Court of First Instance considered, in paragraph 143, that the Cultra agreements did not constitute an essential part of the VBA's rules concerning auction sales or direct supplies to dealers established on its premises, in particular with a view to export of the products concerned, but related rather to a

supplementary and separate business, namely the resale of VBA products to retailers by the 'cash-and-carry' method. The Court concluded that those agreements had no direct link with the other aspects of the VBA's rules which were capable taken as a whole of affecting trade between Member States.

61 Finally, as to the possibility that the Cultra agreements, in isolation, affected trade between Member States by making it appreciably more difficult for competitors from other Member States to penetrate the Netherlands national market, the Court of First Instance held, in paragraph 144, that the applicants had not produced specific concrete evidence to enable it to find that those agreements were capable of having a significant effect in that respect.

62 The Court of First Instance therefore rejected the applicants' pleas and arguments concerning the Cultra agreements.

The application for leave to submit written observations following the Advocate General's Opinion

63 By letter of 2 December 1999 addressed to the Registry of the Court of Justice, the VBA applied for leave to submit written observations after the Advocate General had delivered his Opinion on 8 July 1999, which had only reached it a few days earlier. It relies in that respect on the case-law of the European Court of Human Rights concerning the scope of Article 6(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms, in particular on the judgment of 20 February 1996 in *Vermeulen* v *Belgium* (*Reports of Judgments and Decisions*, 1996 I, p. 224).

64 For the reasons given by the Court of Justice in its order of 4 February 2000 in Case C-17/98 *Emesa Sugar* [2000] ECR I-665, it is not appropriate to grant that application.

The main appeal

65 In support of its appeal, the VBA puts forward five grounds of appeal.

The first ground of appeal

66 By its first ground of appeal, the VBA submits that the Court of First Instance wrongly held the action to be admissible. In particular, it erred in law in finding that the right to a fair hearing precludes the closure of the procedure on complaints where the complainants do not respond to a letter pursuant to Article 6 of Regulation No 99/63 within the time-limit set for that purpose if special circumstances legitimately account for the failure to observe such a time-limit.

67 In this connection, the VBA states that time-limits are set in the interests of good administration and legal certainty, in particular in respect of the undertaking which is the subject of the complaint. In any event, in the present case there are no special circumstances which might legitimately account for the failure to observe such a time-limit.

68 In the first place, the fact that the time-limit covered a holiday period does not constitute, according to the VBA, such a circumstance, given that it was incumbent upon the complainants to apply to the Commission for an extension of

that time-limit. Secondly, neither does the fact that the complainants had maintained their complaints for several years constitute a special circumstance. The institution of proceedings in Cases T-70/92 and T-71/92 by Florimex and the VGB also suggests that they intended to concentrate on that aspect of the matter and that, moreover, they were not about to respond to the letter under Article 6 of Regulation No 99/63. Thirdly, the VBA states that the complainants' lawyer worked intensively on their case, even during the period after the aforementioned letter was sent, despite his health problems.

69 In those circumstances, the VBA contends that the statement of the Court of First Instance that it could not discount the possibility that the failure to reply within the time-limit set by the Commission was connected with the serious illness from which he was suffering at the time is pure speculation and is not supported by the documents before the Court of First Instance.

70 It should be observed, first of all, that the VBA has not called in question the finding of the Court of First Instance that the Commission's letter of 5 August 1992 was to be regarded as having been sent pursuant to Article 6 of Regulation No 99/63.

71 Next, in finding that special circumstances could preclude the Commission from closing the procedure on complaints where the complainant has not responded to a letter under Article 6 of Regulation No 99/63 within the time-limit set by the Commission, the Court of First Instance correctly balanced the requirements of good administration and legal certainty on the one hand against those of ensuring the procedural safeguards provided for complainants on the other.

72 Finally, the Court of First Instance was right in finding that circumstances such as those obtaining in the present case were special circumstances which could legitimately account for the failure to observe a time-limit laid down in the letter under Article 6 of Regulation No 99/63.

73 It follows from the foregoing that the Court of First Instance was right in holding that, in the specific circumstances of this case, the letter of 20 December 1993, read in context, was to be regarded as a definitive rejection of the complaints on their merits.

74 Accordingly, the first ground of appeal must be dismissed.

The second to the fifth grounds of appeal

75 By its second to fifth grounds of appeal, the VBA calls in question the finding of the Court of First Instance that the letter under Article 6 of Regulation No 99/63 was vitiated by an error of fact or of assessment in so far as it stated that the difference of rate between the user fee and the 3% fee applicable to the trade agreements was justified by the existence of obligations entered into by holders of trade agreements *vis-à-vis* the VBA.

76 By its second ground of appeal, the VBA submits that any difference in rates is not the result of an agreement concluded between two or more undertakings. It maintains that it decided unilaterally to conclude trade agreements providing for a 3% levy and to apply the user fee to direct supplies.

77 In that connection, it must be observed that the Court of First Instance confined itself to examining the two arguments on which the Commission had based the rejection of the complaints regarding the trade agreements, namely that the VBA did not apply dissimilar conditions to equivalent transactions with other trading parties, within the meaning of Article 85(1)(d) of the Treaty, and that there was

no conclusive evidence of an appreciable effect on trade between Member States. On the other hand, the Court of First Instance was not called upon to rule on whether or not there existed an agreement between undertakings.

78 It must be borne in mind that an appeal must indicate precisely the contested elements of the judgment which it is requested to have set aside and also the legal arguments which specifically support that request (see, in particular, the order in Case C-317/97 P *Smanor et Ségaud* v *Commission* [1998] ECR I-4269, paragraph 20).

79 To allow a party to put forward for the first time before the Court of Justice a plea in law which it has not raised before the Court of First Instance would be to authorise it to bring before the Court of Justice, whose jurisdiction in appeals is limited, a case of wider ambit than that which came before the Court of First Instance. In an appeal the jurisdiction of the Court of Justice is thus confined to review of the findings of law on the pleas argued before the Court of First Instance (see, in particular, the order in Case C-422/97 P *Sateba* v *Commission* [1998] ECR I-4913, paragraph 30).

80 It follows that the second ground of appeal must be dismissed as inadmissible.

81 By its third ground of appeal, the VBA submits that there is no discrimination as between the holders of trade agreements and direct suppliers, inasmuch as there are differences between their situations. The holders of trade agreements had to bear higher rental charges, they were exempt from the purchasing standards, which was why they had to pay a rental supplement to the VBA, and they were obliged to guarantee a specific additional supply.

82 By its fourth ground of appeal, the VBA submits that the Court of First Instance committed an error in law in considering that the user fee was not levied on VBA's tenants.

83 Thus, the Court of First Instance did not carry out a comparison with the rent which was to be paid by the tenants of a trading area who have concluded a trade agreement with the VBA and the rent paid by other tenants. Contrary to what is stated in the judgment of the Court of First Instance, the user fee is also levied on dealers established on the premises of the VBA where they deal in products which do not come from the VBA and then supply them to other dealers who are also established on its premises.

84 By its fifth ground of appeal, the VBA criticises the Court of First Instance for having made a manifestly erroneous finding in holding that it had not been established that the holders of trade agreements had accepted obligations *vis-à-vis* the VBA capable of justifying the difference between the 3% arrangement from which certain outside suppliers benefited and the rate of the user fee. In so far as, in paragraph 119 of the contested judgment, the Court of First Instance found an error of fact or of assessment in the letter pursuant to Article 6 of Regulation No 99/63, its conclusion is, moreover, in contradiction with the one it arrived at in Joined Cases T-70/92 and T-71/92, in which it found that the statement of reasons for the contested decision did not establish to the requisite legal standard the existence of such obligations.

85 Referring to the wording of the various trade agreements, produced at first instance, the VBA claims that it rents out trading areas only to purchasers who present an interest for it, and not to flower traders who wish to establish themselves on its premises for reasons other than the purchase of VBA products. The holders of trade agreements are in a special situation inasmuch as they are intended to guarantee an additional supply. Since the activity of the holders of such agreements relates to products which are not sold on the VBA's premises,

they are exempt from the obligation to purchase the VBA's products. However, they pay a rent supplement to compensate for that exemption.

86 The VBA maintains that the trade agreements are concluded in respect of products that are specifically designated. Exemption from the user fee applies only to those products, which are subject to a levy of 3%. If the holder of a trade agreement does not guarantee the additional supply of a product as specified in the contract, the VBA terminates the contract, trade agreements always being concluded for a term of a year.

87 In those circumstances, the VBA claims that the Court of First Instance committed an error in law in considering that the holders of trade agreements enjoyed an unjustified advantage.

88 The Commission contends that the contested judgment contradicts the judgment in *Florimex and VGB* v *Commission*, cited above, inasmuch as, in the latter, the Court of First Instance held, wrongly in the Commission's submission, that the user fee, taken in isolation, was contrary to Article 85(1) of the Treaty, whilst, in the contested judgment, the Court of First Instance accepted that the user fee formed an integral part of the VBA's supply rules as a whole.

89 On the other hand, the Commission submits that the trade agreements are separable from the VBA's rules in so far as they are entered into with certain traders and contain specific conditions.

90 By those grounds of appeal, which it is appropriate to consider together, the VBA contests the findings of the Court of First Instance that, first, the trade agreements

do not provide for specific supply obligations and, secondly, the user fee is not levied on its tenants. Such findings relate to the facts of the case.

91 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* [1998] ECR I-3175, paragraph 25).

92 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 without its being necessary to undertake a fresh assessment of the facts (*New Holland Ford* v *Commission*, cited above, paragraph 72).

93 In the present case, the arguments put forward by the VBA 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.

94 As to the alleged contradiction between the contested judgment and the judgment in *Florimex and VGB* v *Commission*, cited above, in which the Court of First Instance described as an inadequate statement of reasons what it held, in the contested judgment, to be an error of fact or of assessment, reference should be made to the judgment delivered today in Case C-265/97 P *VBA* v *Florimex and Others*, paragraphs 140 to 143, from which it follows, first, that the Court of First Instance committed an error in law when it held that the contested decision did not contain a sufficient statement of reasons in that regard and, secondly, that the aforementioned decision was vitiated in that respect by a manifest error of

assessment. The Court of First Instance was therefore right, in the contested judgment, in finding that the Commission had committed an error of assessment on that point.

95 As regards the Commission's argument that there is a contradiction between, on the one hand, the statement, in paragraph 125 of the contested judgment, that the user fee is an integral part of the VBA's rules and, on the other, the allegedly isolated examination of the user fee in the judgment in *Florimex and VGB* v *Commission*, cited above, it need merely be observed that, in the contested judgment, the Court of First Instance was only called upon to examine whether the effects of the trade agreements were to be appraised in the context of the rules on supplies to the VBA's premises as a whole. By replying to that question in the affirmative, the Court of First Instance committed no error in law and did not prejudge the question whether the user fee could, by itself, infringe Article 85(1) of the Treaty.

96 It follows that the third to fifth grounds of the appeal must be dismissed.

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

The cross-appeal

98 So far as concerns the dismissal of the application to the extent that it relates to the Cultra agreements, the VGB, Florimex, Inkoop Services Aalsmeer and

Verhaar have brought a cross-appeal against the contested judgment, claiming that, contrary to the findings of the Court of First Instance, those agreements clearly favour the sale of VBA products, which are Netherlands products. Those agreements therefore exert a potential influence on the patterns of trade between Member States. Moreover, those who benefit from the Cultra agreements export on a large scale. It is not true that only small retailers have recourse to sellers who have entered into such agreements. Since the Court of First Instance did not take account of that factor, it committed an error in law.

99 In that regard, it need merely be observed that, by those arguments, the parties who have brought the cross-appeal sought to challenge findings of fact made by the Court of First Instance in paragraphs 134 to 139 and in paragraphs 144 and 145 of the contested judgment. As has been stated in paragraphs 90 to 92 of the present judgment, such findings cannot be effectively challenged on appeal.

100 Accordingly, the cross-appeal must be dismissed.

Costs

101 Under the first paragraph of Article 122 of the Rules of Procedure, where the appeal is unfounded or where the appeal is well founded and the Court of Justice itself gave final judgment in the case, the Court is to make a decision as to costs. Under Article 69(2) of the Rules of Procedure, which apply to appeal proceedings

by virtue of Article 118, the unsuccessful party is to be ordered to pay the costs if they are applied for in the successful party's pleadings. Since the VGB, Florimex, Inkoop Service Aalsmeer and Verhaar have requested that the VBA be ordered to pay the costs and the latter has been unsuccessful, it must be ordered to bear its own costs and pay the costs incurred by the abovementioned association and companies relating to the appeal. On the other hand, since the latter have been unsuccessful in their cross-appeal, they must be ordered to bear their own costs and pay the costs incurred by the VBA relating to the cross-appeal. The Commission, which has been essentially unsuccessful, must bear its own costs.

On those grounds,

THE COURT (Fifth Chamber)

hereby:

1. **Dismisses the main appeal and the cross-appeal;**

2. **Orders Coöperatieve Vereniging De Verenigde Bloemenveilingen Aalsmeer BA (VBA) to bear its own costs and to pay those of Vereniging van**

Groothandelaren in Bloemkwekerijproducten (VGB), Florimex BV, Inkoop Service Aalsmeer BV and M. Verhaar BV relating to the appeal;

3. Orders Vereniging van Groothandelaren in Bloemkwekerijproducten (VGB), Florimex BV, Inkoop Service Aalsmeer BV and M. Verhaar BV to bear their own costs and to pay those of Coöperatieve Vereniging De Verenigde Bloemenveilingen Aalsmeer BA (VBA) relating to the cross-appeal;

4. Orders the Commission of the European Communities to bear its own costs.

Moitinho de Almeida Sevón Puissochet

Jann Wathelet

Delivered in open court in Luxembourg on 30 March 2000.

R. Grass

Registrar

D.A.O. Edward

President of the Fifth Chamber