OPINION OF ADVOCATE GENERAL TESAURO
delivered on 16 June 1994 *

Mr President,
Members of the Court,

1. Is a clause in the statutes of a cooperative association set up to purchase agricultural products, under which the association may *expel* members who become members of competing organizations, compatible with the Treaty competition rules? That, essentially, is the issue in these proceedings.

The facts

2. Dansk Landbrugs Grovvareselskab AmbA (hereinafter 'DLG') is a Danish cooperative operating in the agricultural sector. Established in 1969 following the merger of three separate agricultural associations, DLG initially confined itself to distributing basic products for agriculture to local associations (also cooperatives) which, in turn, resold products to individual farmers. Over the years, DLG progressively diversified its business: its commercial activity expanded to include retailing, partly in response to similar initiatives taken by competitors not in the form of cooperatives; in addition, the range of services provided by DLG to its own members gradually widened; at present, as well as supplying various basic products (animal feeds, cereals, fertilizers, pesticides, seeds, and so forth) it provides a wide range of ancillary services: processing and marketing of certain agricultural products (cereals), financial and insurance services; and research concerning animal feeds and the quality and hardiness of vegetable species.

At present DLG's members fall into four categories:

— 'A' members: individual farmers (about 21 000);

— 'B' members: local farmers' associations (until 1988, that is to say until the contested amendments to the statutes, the local associations belonging to DLG

* Original language: Italian.

numbered 50; as a result of the events at issue in the main proceedings, 37 of those associations — as will be explained in greater detail in due course — were expelled from DLG);

— 'C' and 'D' members: other agricultural organizations, of various kinds, pursuing various aims (consumers' cooperatives, limited companies, other bodies and associations) not included in category B.

3. The Landsforeningen af Andels Grovvareforening (National Union of cooperatives specializing in the distribution of basic products for agriculture, whose name has been, since 1991, 'Landsforeningen af locale andel', hereinafter 'the Landsforeningen'), set up in 1975 by a number of B members of DLG, is a national association of local farmers' cooperatives specializing in the distribution of basic products for agriculture.

4. For a better understanding of the reasons for the setting up of the Landsforeningen and of the events which gave rise to the present proceedings, it is appropriate to outline certain changes in the structure of the Danish cooperative system. In the 1970s, two trends emerged. On the one hand, some of the local farmers' associations, already B members of DLG, allowed themselves to be taken over by the cooperative. The number of local associations thus progressively shrank to about half; moreover, as already indicated, the fact that some of the associations operating at local level were taken over by DLG enabled the latter to become directly involved in the retail distribution of basic products for agriculture.

On the other hand, over the same period a number of local associations merged with each other so that, as they expanded, the local associations found it less and less necessary (or convenient) to use DLG as an intermediary for the purchase of basic products.

A situation thus came into being in which interests diverged considerably within the Danish agricultural cooperative sector: on the one hand, DLG manifested a tendency towards total integration of the distribution process through the direct takeover of the local associations; on the other, a substantial number of local associations, now large enough to operate independently in the markets, sought to retain their commercial independence whilst continuing to be B members of DLG.

In 1975 (when the obligation of B members to obtain their supplies exclusively from

DLG was removed), the local associations began independently to purchase basic products from suppliers other than DLG. At the same time, the B members became less involved in the management of DLG, since the number of votes allowed to such members by the statutes of DLG (Article 16(3)) is proportional to the value of the business which they do with it.

5. It was in those circumstances that the Landsforeningen was set up, in 1975, by several local associations, already B members of DLG, which had declined to be absorbed entirely into DLG. Originally, the Landsforeningen was a trade association which did not engage in commercial activity of any kind.

However, in the mid-eighties, the Landsforeningen started to make collective purchases on behalf of its members of basic products for agriculture, in particular fertilizers and pesticides. The reasons given for such parallel purchases by the members of the Landsforeningen were twofold: the high prices charged by DLG to the local associations and the increasingly stiff competition from DLG in the retail sector (the sector in which the local associations operate).

6. The purchases made by the B members of DLG through the Landsforeningen weakened DLG's financial and trading position. The reduction in the volume and value of business transacted by DLG with some of its own members had an adverse impact on its assets; and since the purchase prices of fertilizers and pesticides vary considerably according to the size of the orders placed, the smaller quantities bought by DLG adversely affected the terms of trade, to the detriment of the cooperative and the other members.

7. Consequently, in June 1988 DLG decided to make a number of amendments to its statutes. In particular, the following was decided:

— membership on any basis of any association, company or other type of cooperative organization competing with DLG in the wholesale fertilizer and pesticide trade would be incompatible with category B or D membership of DLG;

— the members concerned would have to decide by December 1988 either to end their membership of organizations competing with DLG or to withdraw from DLG;

— members whose circumstances, after the entry into force of the abovementioned provisions (1 January 1989), did not conform with the statutes could be expelled from DLG by resolution of its governing board;

— B and D members would retain the right to buy fertilizers and pesticides outside DLG, provided, however, that the purchases were direct and were not made through organizations competing with DLG.

At the same time, changes were also made to the provisions concerning the right of withdrawal: that right may now be exercised every five years rather than every ten.

8. Those amendments to the statutes were submitted for examination both to the Commission and to the national competition authorities. The Commission, after asking DLG for a number of clarifications as to the scope of the new provisions, took no decision concerning them (in reply to a question put to it by the Court, the Commission stated that it would await the outcome of the present proceedings before granting, if appropriate, a negative clearance).

The national competition authorities — the Danish Monopolies Inspectorate (Monopltilsynet) and the Danish Monopolies Board (Monopolrad) — did not consider that any national competition rules had been infringed, although they observed that the amendments concerned might have an impact on competition between DLG and other independent traders, such as the Landsforeningen, and reserved the right to monitor developments in the markets concerned. It should also be noted that after 31 December 1989, following an amendment to the national legislation, DLG ceased to be registered as an undertaking holding a dominant position within the meaning and for the purposes of the Danish anti-monopoly rules.

9. In March 1989, shortly after DLG was informed of the decisions taken by the national competition authorities, 37 local associations (out of 50) — B members of DLG, who had refused to comply with the new requirements of the statutes and had not exercised the right to withdraw — were expelled from DLG.

Pursuant to a resolution of the governing board of DLG, the measure adopted against them was nevertheless put into effect not under the — more severe — conditions (loss of entitlement to refund of their financial interest in the association) applicable to expulsions, but under the conditions applicable to withdrawal.

The preliminary questions

10. The legality of the amendments to the statutes described above was challenged in legal proceedings brought by the expelled associations. The plaintiffs also claimed that DLG should be ordered to pay compensation for the damage suffered by them as a result of their expulsion.

The court seised decided to stay the proceedings and refer 17 questions to the Court of Justice for a preliminary ruling. The issues raised may, following the pattern adopted by the Judge-Rapporteur in the Report for the Hearing, be condensed into the following five points:

(1) Whether the exception to the general conditions of competition envisaged in Article 2 of Regulation No 26/62 [1] applies to pesticides, in view of the fact that they are covered by Directive 91/414/EEC; [2]

(2) Whether the amendments to the statutes of DLG described above constitute a significant restriction of competition prohibited by Article 85(1) of the Treaty where:

(a) they are intended to obviate the risk of disclosure of confidential information;

(b) they were approved against the wishes of the B members of the cooperative;

(c) the expelled B members were treated in the same way as members who had exercised the right of withdrawal;

(d) the expelled B members were in a position to continue their business in the fertilizers and pesticides sector and, in 1990, achieved an overall share of the Danish market in basic products similar to that of DLG;

(e) in the main proceedings, the plaintiffs maintain *inter alia* that they are entitled to a share of the pooled

1 — Regulation No 26/62 of the Council applying certain rules of competition to production of and trade in agricultural products (OJ, English Special Edition 1959-1962, p. 129).

2 — Council Directive of 15 July 1991 concerning the placing of plant protection products on the market (OJ 1991 L 230, p. 1).

assets of DLG, but do not seek to resume membership of DLG;

(h) the amendments to the statutes at issue allow B members to buy fertilizers and pesticides either on their own behalf or as a purchasing consortium formed specifically for each consignment of goods purchased;

(i) the amendments at issue allow B members to buy fertilizers and pesticides using DLG as a purchasing agent, without any profit being received by the latter;

(j) the amendments in question do not prevent local associations, not affiliated to DLG, from buying from DLG the full range of basic products for agriculture in which DLG deals on normal wholesale terms;

(k) the amendments at issue are limited to fertilizers and pesticides, which represent about 15% of DLG's total turnover;

(l) factual information was, or was not, placed before the national court relating in particular to the existence and sales of substitute products and the turnover and market shares of DLG, the Landsforeningen and competing traders.

(3) Whether the amendments to the statutes at issue are liable to affect trade between Member States within the meaning of Articles 85(1) and 86, having regard to the fact that the fertilizers and pesticides purchased by the Landsforeningen came, in part, from non-Community countries.

(4) Whether and under what conditions the national court may interpret and apply Article 85(3) where an agreement has been notified to the Commission with a view to obtaining a negative clearance or an exemption.

(5) Whether DLG, holding 36% of the fertilizers market and 32% of the

pesticides market, can be regarded as occupying a dominant position in those markets and, if so, whether DLG abused that position, having regard to the fact that DLG was registered as a dominant undertaking, under the Danish legislation, until the legislative amendments of 1990 and that the Danish Monopolies Board, after examining in 1989 the compatibility of the amendments to the statutes with the national monopoly rules, found no infringement thereof.

11. It must be emphasized that nowhere in the order for reference or in the other documents before the Court is a clear and complete picture given of the situation prevailing in the markets in question. For the purposes of the present analysis — subject to the further findings incumbent on the national court — reference will be made here only to the following matters.

The marketing of fertilizers and pesticides accounts for around 15% of the total turnover of DLG and the Landsforeningen.

At the time of the amendments to the statutes (1988), DLG had a market share in the distribution of fertilizers of around 36%. The Landsforeningen had a share of about 10%. For the rest, the market was divided amongst commercial operators (not cooperatives) in the following proportions: KFK, 23%; Superfos, 14%; others, 17%. It seems that the market shares were about the same in the NPK (high nitrogen content) fertilizers sub-sector, those products being particularly suitable for Danish agricultural requirements (accounting for 40% of all fertilizer consumption).

As regards the distribution of pesticides, all that is known is that in 1988 DLG held a share of about 32%.

Finally, it should be borne in mind that by 1990 the Landsforeningen had succeeded in achieving, in the distribution of basic products for agriculture, a share essentially equal to that of DLG.

(1) *Do fertilizers and pesticides come within the scope of the derogation provided for in Regulation No 26/62?*

12. Pursuant to Article 42 of the Treaty, the provisions of the chapter relating to rules on

competition are to apply to production of and trade in *agricultural products* only to the extent determined by the Council. Article 38(1) provides that 'agricultural products' means the products of the soil, of stockfarming and of fisheries and products of first-stage processing directly related to those products. Article 38(3) also makes clear that the products to which Articles 39 to 46 inclusive apply are listed in Annex II to the Treaty.

Pursuant to Article 42, the Council adopted Regulation No 26/62, which, under certain conditions, limits the application of Article 85(1) (not Article 86) to agreements regarding 'production of or trade in the products listed in Annex II to the Treaty'.

As regards the scope of the derogation provided for in Regulation No 26/62, the Court has held that it does not embrace 'a product which does not come under Annex II even if it is a substance ancillary to the production of another product which itself comes under that Annex'. [3]

The regulation therefore applies *only* to the products mentioned in Annex II, and fertilizers and pesticides are clearly *not* included.

The fact — noted by DLG — that the Council adopted, on the basis of Article 43 (the legal basis for agricultural policy measures), a directive concerning pesticides is clearly of no importance. First, a Council directive cannot have the effect of extending — and certainly not merely by implication — the scope of derogating conditions which must be strictly interpreted and of which the scope is exhaustively defined in Article 42 of the Treaty and the specific provisions of Regulation No 26/62. Secondly, there is no reason for the substantive scope of Article 43 not to be different from and broader than that of Article 42: whilst Article 42 is a derogating provision, to be interpreted strictly, under which the production of and trade in agricultural products may be removed from the scope of the ordinary competition rules, Article 43 is the general rule which vests the Council with the power to adopt the requisite agricultural policy measures in order to attain the objectives laid down by Article 39; there is nothing to prevent the Council therefore, in pursuing the aims laid down in Article 39, from adopting (as it has done [4]) measures which relate *ratione materiae* to products which are merely ancillary or incidental to the production and marketing of the agricultural products mentioned in Annex II.

3 — Judgment in Case 61/80 *Coöperatieve Stremsel- en Kleursfabriek* v *Commission* [1981] ECR 851.

4 — See the judgment in Case 131/86 *United Kingdom* v *Council* [1988] ECR 905, in which the Court held that Council Directive 86/113, which governed the dimensions of and other requirements for the cages of layer hens (something clearly not included in Annex II), could be applied to the sphere of competition mentioned in Article 43.

(2) *Do the amendments to the statutes have as their object or effect the distortion of competition?*

The opposing arguments and the analytical approach adopted here

13. The compatibility of the contested clauses with Article 85(1) is, as stated, the central issue in these proceedings. Essentially, the arguments put forward may be summarized thus. According to DLG, the 'loyalty' of the members of a cooperative is a characteristic feature of such organizations and is the natural *quid pro quo* for the advantages of membership of an association pursuing communal objectives. The fact that a member who buys outside the cooperative, becoming involved with organizations competing with that cooperative, may be expelled for that specific reason is therefore to be regarded as a logical reaction by the association to conduct which is liable to undermine its financial standing and commercial efficiency, and therefore falls entirely outside the scope of Article 85(1).

The plaintiffs in the main proceedings submit, on the other hand, that the contested clauses involve a significant and arbitrary limitation of the members' freedom of commercial activity. That restriction, transparently intended, they maintain, to consolidate the already strong position held by DLG regarding distribution of the products in question, would further reduce competition between DLG and third parties. The plaintiffs also claim that the case-law of the Court and the practice of the Commission have consistently recognized and upheld the freedom of the members of a collective purchasing organization, whether or not in the form of a cooperative, to operate independently in the market, competing with that organization. In particular, it is apparent from that case-law and practice that collective purchasing organizations conform with the competition rules, and are thus not caught by Article 85(1), only if their members are guaranteed total freedom of commercial action; [5] a limited restriction of that freedom, by consent, may qualify for an exemption under Article 85(3) but in principle continues to be covered by Article 85(1). [6] On the other hand, clauses which remove the right to buy independently, such as the 'loyalty' clauses at issue, are to be regarded outright as prohibited. [7]

5 — See for example the SOCEMAS decision of 17 July 1968 (*Journal Officiel* 1968 L 201, p. 4) and the Intergroup decision of 14 July 1975 (OJ 1975 L 212, p. 23).

6 — See in particular the National Sulphuric Acid Association decision of 9 July 1980 (OJ 1980 L 260, p. 24), in which the Commission granted an exemption to a consortium for the purchase of sulphur, made up of the main United Kingdom producers of sulphuric acid (the consortium was non-profit-making and withdrawal was possible each year), after assessing the impact on the various markets concerned and taking account of the fact that the members of the consortium had signed an exclusive purchasing commitment in respect of only 25% of their requirements.

7 — See the Coöperatieve Stremsel decision of 5 December 1979 (OJ 1979 L 51, p. 19), confirmed by the Court in the judgment of the same name, cited above, and the Hudson's Bay decision of 28 October 1988 (OJ 1988 L 316, p. 43), confirmed by the Court of First Instance judgment in Case T-61/89 *Dansk Pelsdyravlerforening* [1992] ECR II-1931. Both cases were concerned with 'loyalty' commitments given by the members of agricultural cooperatives.

The Commission, for its part, recognizes that the contested clauses are intended to dissuade members of the cooperative from joining competing organizations and that they are therefore liable to restrict competition between DLG and third parties. It states, however, that that restriction is not appreciable and is not therefore incompatible with Article 85(1). However, the Commission does not include in its observations, which are in fact very succinct, the grounds on which that conclusion might be reached.

The parties' arguments highlight the fact that in the present case two interests are in conflict: on the one hand, the interest of the association and of the members 'loyal' to it in protecting themselves from members whose action is objectively contrary to the very aims for which the association was established; on the other, the interest of the members in safeguarding their own independence as far as possible, thus reserving the right to approach, or join, organizations which are in competition with the cooperative.

Let me say straight away that according to administrative practice and the case-law, of which the plaintiffs give a clear and complete summary, it appears, at least on a first reading, that the second interest prevails over the first. Nevertheless, on closer examination, it seems that a different conclusion is called for. In my opinion, in fact, it can be contended that, in cases where a collective purchasing organization itself conforms with the requirements of protection of competition, it must be accorded the right to say whether and how it will protect itself from action by members which it considers incompatible with the common interest: and that is so for the simple reason that some restriction of the independence of the individual may be regarded as *inherent* in his very membership of any form of organized economic entity. The protection of the common interest may not, however, be regarded as absolute: in *certain circumstances*, legal or factual, it may be essential to uphold the independence of the individual in order to preclude the emergence of situations detrimental to the proper functioning of the market.

Against that background, my analysis will touch on the following points:

— the guiding criteria laid down by the Court regarding the application of Article 85(1);

— the compatibility of an agricultural purchasing cooperative such as DLG with the requirements of protection of competition;

— the reasons for which the contested clauses are not anti-competitive *in intent* for the purposes of Article 85(1);

— the circumstances in which the contested clauses might have anti-competitive *effects* within the meaning of Article 85(1).

The guiding criteria laid down by the Court regarding the application of Article 85(1)

14. Article 85(1) prohibits agreements which have as their object or effect the prevention, restriction or distortion of competition.

15. In relation to the *ratio legis* of that provision, the Court has stated that the requirements of protection of competition pursued by it cannot be defined in abstract terms but must be seen in the specific context in which the conduct of the undertakings came about. The undistorted competition sought by Articles 3 and 85 of the Treaty implies the existence in the market of *workable competition*, that is to say, the degree of competition necessary to ensure the observance of the basic requirements and attainment of the objectives of the Treaty and — in particular — the creation of a single market achieving conditions similar to those of a domestic market; that requirement means that the nature and intensity of competition may vary according to the products or services concerned and the economic structure of the relevant market sectors. [8]

16. Furthermore, according to settled case-law, in order to establish whether a particular agreement is caught by the prohibition laid down by Article 85(1), it is necessary to carry out a two-stage examination. [9]

At the first stage, it is necessary to consider whether the agreement involves, by virtue of its *object*, a restriction of competition. To that end, the aims pursued by the agreement will have to be appraised in the economic context in which it is to operate. [10] If the agreement seeks to restrict competition within the meaning of Article 85(1), it must be considered to be prohibited automatically, and its effects need not be considered. [11]

8 — Judgment in Case 26/76 *Metro* v *Commission* [1977] ECR 1875.

9 — Judgments in Case 56/65 *Société Technique Minière* v *Maschinenbau Ulm* [1966] ECR 235 and Case C-234/89 *Delimitis* v *Henninger Bräu* [1991] ECR I-935.

10 — Judgment in Joined Cases 29 and 30/83 *CRAM* [1984] ECR 1679.

11 — Judgment in Case 45/85 *Verband der Sachversicherer* [1987] ECR 405.

Where the object is not anti-competitive, the analysis must proceed to the second phase, regarding the *impact* which the agreement is *specifically* likely to have on competition. In such circumstances, the agreement will be considered prohibited if it appears likely to restrict competition *appreciably*. [12] It should also be borne in mind that the general criterion for deciding whether an agreement has the object or effect of restricting competition is how competition would have operated in the market in question in the absence of that agreement. [13]

According to that analytical approach, agreements which, viewed objectively and in the abstract, have no other function than to restrict freedom of competition between the parties, or between the parties to it and third parties, in a manner considered incompatible with the common market, will be regarded as prohibited by virtue of their object. An example might be a cartel which partitions the market and imposes production quotas or selling prices, or a clause included in a distribution contract which prohibits the import or export of the product covered by it within the common market or which prescribes the retail prices to be charged for the product in question.

Conversely, agreements capable of performing a more complex function will not be regarded as having an anti-competitive object. That applies to clauses which form an integral part of a contract and in that way contribute to defining the basis and the balance of the legal relations between the parties. Indeed, according to a fairly well-defined trend in the case-law, in order to establish whether a particular clause is anti-competitive in intent, for the purposes of Article 85(1), it is necessary to look at its function in the context of the contractual relationship of which it forms part. Against that background, the Court normally concludes that no anti-competitive object is contained in clauses which are found in the abstract to be *necessary* to ensure that a contract, which is not in itself harmful to competition, can fully discharge the legal and economic function which it pursues. For example, the Court has held that Article 85(1) is not contravened by the following, by virtue of their object (provided of course that, in certain circumstances, they do not engender anti-competitive effects):

— a non-competition clause in a contract for the transfer of a business (a contract which, in itself, seemed to the Court capable of stimulating the market), in that such a clause, if not of disproportionate duration, may be necessary to ensure that the transfer has the effect intended; [14]

12 — *Technique Minière*, cited above.

13 — *Technique Minière*, cited above.

14 — Judgment in Case 42/84 *Remia* v *Commission* [1985] ECR 2545.

— an exclusive-supply clause and a non-competition clause included in a franchising contract, in that they were necessary to ensure that that contract could discharge its typical function; [15]

— a no-challenge clause in a patent-licence agreement (granting a free licence) since — as was made clear in the Advocate General's Opinion — it was 'crucial for the equilibrium of an agreement which has neither as its object nor as its effect the prevention, restriction or distortion of competition'; [16]

— an exclusive-supply clause in a 'brewery' agreement, since it was an inherent feature of that form of cooperation between reseller and supplier, based on a convergence of interests in promoting sales of the product, which is characteristic of that specific type of contract. [17]

Moreover, as I have said, the fact that an agreement does not have an anti-competitive object does not mean that, in the specific economic context in which it is intended to operate, it cannot have *effects* that are irreconcilable with the interplay of competition in the common market. There is nothing therefore to prevent an agreement which is not anti-competitive in intent from being regarded, in a particular market situation, as incompatible with the common market, whereas the same agreement, in a different market situation, will be regarded as conforming to the requirements of the protection of competition. For the purposes of such an analysis, account must be taken in particular [18] of the level of competition, actual and potential, existing in the relevant market or markets, regardless of any intent, and it must be decided whether or not the agreement contributes significantly to a further restriction of competition in that market.

To summarize, therefore, the analysis of the object and the analysis of the effect are to be clearly distinguished. [19] The first is intended to assess, in the abstract, the objective function of a particular set of conditions in its contractual context. The second, on the other hand, is designed to establish whether, specifically, an agreement whose object is not anti-competitive is nevertheless liable, in the

15 — Judgment in Case 161/84 *Pronuptia* [1986] ECR 353.

16 — Judgment in Case 65/86 *Bayer* v *Süllhöfer* [1988] ECR 5249.

17 — *Delimitis*, cited above.

18 — See in particular the judgment in *Delimitis*, cited above.

19 — It must be emphasized that the distinction is normally disregarded by the Commission, which, in its decisions, usually makes an overall assessment, on conclusion of which it merely states that a particular agreement infringes, or does not infringe, Article 85(1). In the case-law, on the other hand, the distinction is clearly observed, at least in principle. Less clear, however, is the way in which that principle is applied. A clear-perhaps the clearest-example of the application of the analytical approach based on the distinction between object and effect is to be found in *Delimitis*, cited above.

specific market context in which it is to operate, appreciably to affect competition in the common market.

Finally, it should be borne in mind that any restrictions of competition deriving from the provisions governing relations between a cooperative and its members are subject to the rules of Article 85 et seq. [20]

The compatibility of an agricultural purchasing cooperative such as DLG with the requirements of protection of competition

17. In applying the analytical approach described above to the present case, it must be emphasized above all that the contested clauses of the statutes form part of the rules governing an agricultural cooperative which, *inter alia*, has the task of buying and distributing basic agricultural products to its members (including, notably, fertilizers and pesticides).

In that context, the clauses at issue lay down specific grounds for the expulsion of certain categories of members who decide to operate in an organized way by buying from external agencies competing with the cooperative. [21]

18. That said, it must also be observed that the setting up of a purchasing cooperative such as DLG brings into play a form of cooperation between undertakings (or associations of undertakings) which meets typical requirements of the agricultural sector and, for that reason, is looked on favourably both by national legislation and by the Community authorities. Such cooperation in purchasing promotes the efficiency of undertakings and, as a result, workable competition

20 — See the judgments in *Coöperatieve Stremsel* and *Dansk Pelsdyravlerforening*, both cited above.

21 — It is noteworthy that the clauses at issue, which lay down specific grounds for the expulsion of any member who makes purchases (of fertilizers and pesticides) by joining an organization competing with the cooperative, differ from clauses such as the non-competition clause or the exclusive-supply requirement (as indicated, an exclusive-supply requirement was included in the statutes of DLG until 1975) in that, by contrast with the latter, they do not contemplate a specific *obligation* to do or refrain from doing something (an obligation which, in turn, might, if not complied with, prompt an application for an injunction and an action in liability against the offending member). The difference is, however, of scant importance for practical purposes. In cooperative associations, a member's breach of his obligations, in particular those which we may describe generically as those requiring the member to be 'loyal' to the cooperative (non-competition, exclusive-supply arrangements, exclusive sales arrangements), is normally penalized (other remedies apart) precisely by expulsion, which as a rule entails adverse financial consequences for the person concerned. Thus, whether the association imposes on the member a specific obligation of 'loyalty', breach of which gives rise to expulsion, or does not impose such an obligation, although reserving the right to expel 'disloyal' members, the result appears to be equivalent: in both cases the expulsion represents a punishment for conduct mentioned in the statutes as being incompatible with the interests of the association and of the members in general.
Moreover, DLG, in reply to a question asked by the Court, expressly confirmed that the aim of the clauses at issue was specifically to dissuade members (the B members) from joining organizations competing with the cooperative. On a functional level, therefore, it is undisputed that the clauses at issue were intended to pursue the same purpose of securing 'loyalty' as non-competition and exclusive-supply clauses.

between them of the kind referred to in the *Metro* judgment.

A cooperative, in fact, by making collective purchases of basic agricultural products can, particularly in certain sectors, counterbalance the contractual strength of producers and suppliers. That applies especially to sectors, such as that of fertilizers and pesticides, in which production is concentrated at world level in the hands of a relatively small number of undertakings and in which it is an established fact that selling prices may vary considerably according to the volumes of products ordered. In such circumstances, the establishment of a purchasing cooperative is the natural response to the contractual strength of suppliers, whereby the terms of trade are improved in favour of the buyers.

Furthermore, in view of the nature of cooperatives, it must be concluded that the full benefits of their increased efficiency when buying basic agricultural products will, as a rule, be passed down the line to the individual members, in the form of either lower selling price or profit-sharing or the distribution of funds by some other method, at the year end.

On the other hand, there is no reason to fear that cooperation in the purchase of basic products might give rise, in this sector, to any real restriction of competition as between the members of the cooperative. As stated, the fertilizers and pesticides market is dominated, at world level, by a small circle of producers, compared with which individual farmers, and even local associations of farmers, are in an *inherently weak contractual position*. It follows that, if there were no purchasing cooperatives of a substantial size, like DLG, farmers and local associations, would be in the position of having to *accept* the decisions of the producers or independent commercial distributors; without the intermediate role of the cooperative, therefore, they would have to tolerate prices which on average would be higher, whilst at the same time not having any real opportunity to obtain more competitive supplies of the products in question.

It may therefore be concluded, on this point, that the setting up of a cooperative is a response to requirements specific to the agricultural sector and, within that sector, helps to enhance the efficiency both of the distribution of basic products and of the business of agricultural production itself, without on the other hand creating any risk of a real reduction of competition (in the sense of *workable competition*, as defined in the *Metro* judgment) between the undertakings (or associations of undertakings) involved in cooperative purchasing.

The object of the clauses at issue in relation to Article 85(1)

19. It must next be emphasized that, in an agricultural purchasing cooperative, the inclusion in the statutes of clauses providing for the expulsion of members who make purchases outside the cooperative, in competition with it, is in principle *consistent with the requirement of ensuring that the association functions properly.*

The aim of cooperating in buying, giving members an opportunity to benefit, regardless of their capital contribution, from the lower supply costs, is likely to be undermined if individuals operate on their own account outside, and in competition with, the cooperative. Above all, such conduct weakens the financial structure of the association, since the cooperative does business solely or mainly with its members, not with third parties, which means that its volume of business depends on the number of transactions between the association and its members and, therefore, on the greater or lesser 'loyalty' of the members to the cooperative. Furthermore, such conduct, by eroding the cooperative's commercial base, detracts from the terms of trade available to it in the marketplace, so that, particularly in the case of products whose prices vary greatly according to the size of the orders placed, higher costs have to be borne by the cooperative and, consequently, by those of its members who continue to obtain their supplies from it. There is thus a clear conflict between membership of a purchasing cooperative and simultaneous involvement in competing purchasing organizations.

From that point of view, therefore, the clauses at issue are designed solely to ensure that the association is able to keep as wide a commercial base as possible and thereby pursue the communal objectives for which it was set up. Accordingly, they are simply intended to ensure that a member cannot, at one and the same time, both be a member of the cooperative, enjoying the benefits which he considers most advantageous, and yet engage in conduct (making independent purchases) which clearly conflicts with the very aim (collective purchases) for which the cooperative was established.

It must therefore be concluded that the clauses at issue, providing for expulsion of any member who joins an organization competing with the cooperative, although, of course, limiting the member's freedom of action, constitute a *normal way of obtaining protection, through the statutes, against situations in which there is a conflict of interest* and are not therefore anti-competitive in intent for the purposes of Article 85(1). That, moreover, is the reason for which expulsion clauses of that kind, or other stipulations (non-competition or exclusive-supply clauses) intended to secure the 'loyalty' of members, are normally included in the

statutes of cooperatives (and in some cases are even prescribed by law). [22]

20. In any case, any other approach would lead to patently absurd results. If it were acknowledged that the clauses at issue had an anti-competitive *object*, then it would necessarily have to be inferred that each member enjoys, under Article 85(1), the *right* not to be expelled from the purchasing cooperative, even though at the same time being involved in competing purchasing organizations, which is tantamount to saying that the member enjoys a genuine right to retain membership despite engaging in conduct prejudicial to the interests of the association and of the other members. In other words, Article 85(1) would guarantee almost absolute protection (except where the conditions were met for an exemption under Article 85(3)) for members' freedom of commercial action, to the detriment of the proper functioning of the association. That interpretation, of course, puts the interests of the individual member before those of the association and leaves the latter unprotected against conduct of a member liable to destabilize it: it is thus an interpretation which openly goes against the *approbation* which the law has always displayed towards cooperatives (especially in agriculture).

The factual and legal circumstances in which the clauses at issue could produce anti-competitive effects

21. That having been established, it must next be considered whether the contested clauses have *anti-competitive* effects which are incompatible with the common market, as a result of certain specific legal and factual circumstances.

22. In that regard, the first issue is whether the members of the cooperative are able to *withdraw* from it at reasonable intervals. If that were not the case, they would be constrained to remain in the cooperative for very long periods of time and, throughout their membership, would be unable to approach competing traders or set up competing organizations. That twofold bond (the excessive duration of membership and the obligation of 'loyalty' to the cooperative throughout it) would have the effect of depriving members of any real freedom of action, with the knock-on effect of preventing third parties from developing effective competition against the cooperative. In order to avoid excessive *inflexibility* of the

22 — This solution also seems to me to be in conformity with the direction taken by the Commission in its recent Notice concerning the assessment of cooperative joint ventures pursuant to Article 85 of the Treaty (OJ 1993 C-43, p. 2). Since, in my opinion, a joint venture can also take the form of a cooperative whose members are undertakings or associations of undertakings ('the assessment of cooperative joint ventures pursuant to Article 85(1) and (3) does not depend on the legal form which the parents choose for their cooperation'), it must be observed that, according to the Commission, it is not impossible that, at least in certain circumstances (those described in paragraph 17 of this Opinion might be an example), a buyers' joint venture comprising competing undertakings might fall outside the scope of Article 85(1) (see in particular paragraph 39 of the Notice). In such a case, a clause of the kind at issue would have to be described as a mere 'ancillary restraint', in other words as a restriction 'directly related to and necessary for the ... operation of the joint venture' (see paragraph 65 of the Notice), and as such not subject to Article 85(1).

market, therefore, and in conformity with certain aspects of Commission practice [23] and the case-law of the Court, [24] it is essential, in my view, that, at least in cases where there are 'loyalty' clauses of the kind involved in these proceedings, that the members should at the same time be assured of the right to withdraw from the association at reasonable intervals, and that the length of those intervals should decrease commensurately with the lesser intensity of the competitive relationship between the association in question and third parties.

In the present case, I consider it significant that DLG, when deciding to insert the contested clauses in the statutes, also decided to reduce the membership period from ten to five years. The five-year period, which coincides with the maximum period provided for in Commission Regulation No 1984/83 for exclusive-supply contracts, should be regarded as appropriate, under normal market conditions, for the purpose of reconciling, on the one hand, the requirements of protection of competition and, on the other, the association's need to guarantee adequate stability for itself and continuity of membership.

For similar reasons, a clause in the statutes which lays down obviously excessive and disproportionate penalties where a member of a cooperative is expelled for lack of loyalty, must therefore be regarded as incompatible with Article 85(1). In the present case, however, expulsion from DLG is governed by the provisions of ordinary law; moreover, as indicated earlier, DLG waived the imposition of those penalties on the expelled B members, treating them as if they had exercised their right of withdrawal.

23. Secondly, it is necessary to establish that the competitive relationships (both actual and potential) between the cooperative and third parties are not, on the other hand, excessively rarefied. The clauses in question, as stated, restrict members' freedom of action, dissuading them from approaching or joining competing organizations. However, in a situation in which competition is, for other reasons, already very limited, such clauses, which are intended to ensure members' 'loyalty' to the cooperative, could have the side-effect of preventing third parties from entering the market or at least from competing effectively in it.

24. That could be the case where the cooperative held a very high market share, considerably larger than those of its competitors, and where, through the existence of significant barriers to access (in particular, the need to have very substantial financial, technological or business capabilities or the fact that

23 — See Article 3(d) of Regulation (EEC) No 1984/83 of 22 June 1983 on the application of Article 85(3) of the Treaty to categories of exclusive purchasing agreements (OJ 1983 L 173, p. 5).

24 — See in particular paragraph 26 of the judgment in *Delimitis*, cited above, in which, when considering the *effects* of a beer supply contract, the Court states:
'The contribution of the individual contracts entered into by a brewery to the sealing-off of that market also depends on their duration. If the duration is manifestly excessive in relation to the average duration of beer supply agreements generally entered into on the relevant market, the individual contract falls under the prohibition under Article 85(1). A brewery with a relatively small market share which ties its sales outlets for many years may make as significant a contribution to the sealing-off of the market as a brewery in a relatively strong market position which regularly releases sales outlets at shorter intervals'.

the established traders enjoy considerable customer loyalty), the entry of new economic agents into the market in question would be difficult. In such a situation, to further strengthen the existing bonds between the cooperative and its members (who are also its trading partners) is likely to deprive competitors (actual and potential) of the possibility of finding sufficient commercial outlets. Where, therefore, the competition (actual and potential) between the cooperative and third parties is excessively rarefied, it could be considered necessary to allow the members of the cooperative the right to obtain supplies from competing third parties or to set up competing purchasing organizations without thereby running the risk of expulsion from the cooperative. Also, where it holds a strong competitive position, the cooperative has even less need for protection against independent buying by its members; on the contrary, the possibility that members might act in competition with the cooperative stimulates the market and militates against inefficiency and excessive profits.

Furthermore, that seems to me, on close examination, to be the *ratio decidendi* of the judgments in which the Court of Justice and Court of First Instance have held to be incompatible with Article 85(1), certain clauses in the statutes of agricultural cooperatives which, although in different forms, were also intended to secure the total 'loyalty' to the cooperative of its members; [25] in both those judgments decisive importance is attributed to the fact that the cooperative in question held a very strong position in the market and, therefore, the clauses at issue contributed to the maintenance of that position of strength, hampering access by competing third parties. [26]

25 — The judgments in *Coöperatieve Stremsel* and *Dansk Pelsdyravlerforening*, both cited earlier.

26 — In particular, in *Coöperatieve Stremsel*, the Court stated: 'The Cooperative's rules, which require its members to purchase from the Cooperative all the rennet and colouring agents for cheese which they need, and which reinforce that obligation by stipulating the payment of a not inconsiderable sum in the event of resignation or expulsion, have clearly as their object to prevent members from obtaining supplies from other suppliers of rennet or colouring agents or from making them themselves should those alternatives offer advantages from the point of view of quality or price. *Since, according to information which has not been challenged, the members now account for more than 90% of Netherlands cheese output, those provisions in addition contribute to maintaining the present situation, in which the Cooperative is virtually the only supplier of rennet on the Netherlands market.*'
As regards the *Dansk Pelsdyravlerforening* judgment, it will be observed that the Court of First Instance emphasizes, *inter alia*, that the disputed clause makes it very difficult for competing third parties to gain access to the market, 'compte tenu de la très forte position de la requérante sur le marché' (paragraph 78). It is true that that judgment also contains statements of a more peremptory nature, from which it is to be inferred that 'loyalty' clauses are, inherently and by virtue of their very purpose, incompatible with Article 85(1) (see in particular paragraphs 98 to 110, in which the Court concludes that a requirement of selling exclusively to a cooperative has an anti-competitive object as well as anti-competitive effects). I consider, however, that the Court's dicta must necessarily be 'toned down', in other words, they must be essentially understood in relation to the particular market situation prevailing in that case. Otherwise, the repercussions would be excessive and difficult to justify. If one starts from the premise that exclusivity clauses or other 'loyalty' clauses contained in the statutes of an agricultural cooperative are, in principle, by reason of their very object, incompatible with Article 85(1), then it follows-again in principle-that an agricultural cooperative has no opportunity to protect itself against situations in which its members conduct themselves in the market in a way which clearly conflicts with the interests of the cooperative and the other members. In my opinion, on the other hand, the opposite view is the correct one: if the setting up of the cooperative is in itself in conformity with the protection of competition and with other principles laid down in the relevant legislation, the cooperative should also be given the freedom to adopt such measures as it considers appropriate for the protection of its essential interests; Article 85(1) cannot therefore be interpreted as providing absolute protection for the freedom of commercial action of members, to the detriment of the interests of the cooperative and of the other members. Any other interpretation would undermine the very stability of the cooperative and would therefore be at odds with the favour shown by the law, *inter alia* from the standpoint of the protection of competition, towards certain types of cooperation between undertakings, particularly in the agricultural sector. It is therefore only in those cases where the cooperative finds itself in a market situation in which there is an appreciable risk of adverse changes in the sphere of competition or in which the freedom of members becomes excessively restricted as a result of other stipulations (excessive length of membership, disproportionate penalties in the event of expulsion) that the specific *effects* of 'loyalty' clauses fall to be scrutinized in the light of Article 85(1).

A similar conclusion would of course have to be arrived at if the market situation were such as to give the cooperative a *dominant position* within the meaning of Article 86; in such circumstances, according to the case-law of the Court, the immediate conclusion would have to be that the 'loyalty' clause was in conformity with the requirements of that provision. [27]

25. In the present case, however, subject to those findings which are a matter for the national court, there is clearly no risk of excessive rarefication of the competition, since:

— when the contested amendments to the statutes were made, the market shares of the competing traders appeared to be substantially in balance with each other;

— the entry of new traders into the market did not encounter insurmountable obstacles, either because, apparently, the financial, technological and business capabilities required in order to gain access to a national wholesale distribution market are not enormous or because, in the present case, the new trader (the Landsforeningen) was nothing more than a new form of cooperative organization, nationally based, set up by local associations already present in the market, which already acted as commercial intermediaries for the products in question and therefore already had a large part of the infrastructure at their disposal as well as the necessary capability to bring a competing business into being.

26. Thirdly, it is necessary to examine a further objection advanced by the plaintiffs in the main proceedings. In their view, since DLG is of a conglomerate nature, in that it offers its members a wide range of goods and services, to leave the cooperative, voluntarily or by expulsion, means *de facto* losing a diversified and advantageous source of supply. Accordingly, it would therefore be particularly difficult (or even impossible) to operate outside the cooperative: *ipso facto*, the members are strongly dissuaded from withdrawing from the cooperative or rendering themselves liable to expulsion. Therefore, in order to avoid excessive inflexibility of the market, the members feel they should be guaranteed the right to obtain supplies of particular products outside the cooperative, without thereby running the risk of expulsion.

That objection seems to me to have no basis. In the first place, it is normal for departure from a cooperative, for any reason, to entail

27 — Judgments in Case 85/76 *Hoffmann-La Roche* [1979] ECR 461, Case C-62/86 *AKZO* [1993] I-3359 and Case T-65/89 *BPB* [1993] ECR II-389.

the loss of the (greater or lesser) advantages deriving from membership. Such a situation, being entirely normal, is not in any respect caught by Article 85(1). As already emphasized, that provision cannot be interpreted as granting the members of a cooperative the right to remain members and retain the benefits of membership whilst at the same time acting against the interests of the cooperative and of the other members. It is therefore incumbent on members to choose, after freely weighing up their interests, whether to withdraw from the association (or take action to bring about their expulsion) or to remain within it and comply with its statutes: once that choice has been freely exercised, the member cannot complain of any disadvantages arising from his decision.

27. The position would be different if the cooperative held a dominant position vis-à-vis its own members within the meaning of Article 86 of the Treaty; that could occur where the cooperative held a dominant position in one or more markets for goods or services or where it proved particularly onerous for its members to obtain separately from competitors *all* the goods and services that the cooperative was able to offer at the same time (in such a case, the dominant position would derive from the fact that the undertaking was in a position to offer a complete range of additional goods or services on overall terms that the competitors were unable to compete with). In the event of the cooperative holding such a dominant position, twofold protection would be available under Article 86: (i) the expulsion clause (or other form of 'loyalty' clause) would have to be regarded as prohibited, and void, for the reasons set out in paragraph 24 of this Opinion; (ii) any boycott or discriminatory measures taken by the cooperative against members (refusal to supply goods or services to expelled members or the charging of excessive prices for the goods or services provided) could amount to distinct and independent abuses within the meaning of Article 86.

However, it must be observed that, in the present case, the very basis of that argument, namely the existence of a dominant position on the part of DLG, appears to be lacking. It does not seem that DLG holds a dominant position in any of the markets for goods or services in which it operates, or that it holds such a position by virtue of its conglomerate presence on all of the markets in question. Moreover, it should also be noted that DLG operates as a commercial intermediary for the supply of goods and services and that it should not be difficult for operators like the local associations (which are also, albeit at a lower level, commercial intermediaries) to find in the market, or if necessary set up, intermediaries other than DLG in order to procure the goods and services in question.

Finally, on the same point, it must be emphasized that DLG has given a formal undertak-

ing to supply, also to non-members, the goods and services in which it deals, even though, as is right and proper, that would be on an arm's-length basis and not under the obviously more favourable conditions reserved for members.

28. In conclusion, it may be stated, on the basis of the information before the Court and subject to the findings which it is incumbent on the national court to make, that it appears that the members of DLG enjoy the right to withdraw from it at reasonable intervals, that the structure and characteristics of the market are not such as to give the impression that the introduction of the contested clauses carried with it a real risk of restriction of competition, actual or potential, between DLG and third parties and that, consequently, those clauses do not have a restrictive effect on competition within the meaning of Article 85(1).

That conclusion is supported by the developments in the market following the expulsion of the B members decided on by the cooperative pursuant to the contested clauses. Despite the expulsion, the Landsforeningen has not only continued to operate but has in fact rapidly expanded its share so as to reach, by 1990, positions similar to those of DLG. This shows that it was in fact possible for the expelled members to operate outside DLG, setting up an organization which functioned similarly as a commercial intermediary and was fully capable of competing with DLG. [28]

29. For the sake of completeness, it should also be borne in mind that some of the circumstances to which the national court drew attention in the preliminary questions also indicate that DLG has limited the scope of the contested clauses — and therefore the rigor of the 'loyalty' requirement — to what is *strictly necessary* to guarantee protection for the cooperative in situations where conflicts of interest might arise. In outline, the points mentioned are as follows:

— the contested clauses relate solely to fertilizers and pesticides (and not the other goods and services provided by DLG), in other words the only products for which, in view of price elasticity, a reduction in orders by the cooperative, provoked by

28 — From the methodological point of view, I think it is entirely correct, in assessing the impact of certain clauses on competition, also to take account of developments which have already occurred in the relevant market in the period following the entry into force of those clauses. Naturally, the developments occurring in the market cannot be the *only* factor to be considered: it is clear that in order to assess the compatibility of an agreement it is not possible to rely solely on the consequences flowing from the agreement; otherwise the absurd result would be that, in order to establish whether the agreement is in breach of Article 85, one should wait several years to see what results (and damage!) it has caused and to decide, then, whether and how to intervene. Although an analysis *a posteriori* can never take the place of an analysis *a priori* (based on an examination of the object and foreseeable effects of the agreement), that does not mean that the results actually flowing from the agreement, where ascertainable, are to be regarded as wholly irrelevant. They must be seen as a relevant factor in so far as they serve to confirm or contradict the conclusions reached on the basis of a legal and economic assessment of the object and foreseeable effects of the agreement. In that regard, see for example the SOCEMAS decision (paragraph II, sixth recital) and the Intergroup decision (paragraph 6), cited in footnote 3 above.

the independent purchases made by the Landsforeningen, was liable significantly to detract from the terms of the transaction;

— the contested clauses relate solely to purchases made by B and D members (not by the other members), in other words only those members who, by reason of their commercial importance, are in a position to undermine the interests of the cooperative by operating in competition with it;

— the contested clauses relate only to purchases made by B and D members on an organized basis, that is to say through permanent membership of associations or other competing organizations, and not purchases made, outside the cooperative, either by individual B or D members or by consortia of B or D members established on an *ad hoc* basis for a single transaction; in that respect also, it is clear that the cooperative intended only to protect itself against situations which might be particularly harmful to it;

— the contested clauses specifically allow members who regard DLG's prices as too high to use DLG simply as a purchasing agent for consignments of goods, in which case DLG waives any charge for acting as intermediary and the members who took that course lose the right to receive equalization payments at the year end in respect of the goods acquired in that way.

On the other hand, I do not consider to be relevant the other matters mentioned by the national court, namely:

— the fact that the contested clauses were introduced *inter alia* for the purpose of ensuring that the management of DLG did not include B or D members involved with competing organizations, since DLG's business secrets could in any event have been protected by laying down specific grounds disqualifying persons whose interests conflicted with those of the association from management appointments;

— the fact that the contested clauses were not adopted unanimously but against the wishes of (at least some) B members, since, in any event, for the purposes of applying Article 85(1) to a particular clause in the statutes of an association, it is unimportant whether the clause has been validly adopted in accordance with the association's internal regulations; until such time as the clause has been for-

mally removed by the parties or by the authorities, it remains subject, so long as the preconditions are met, to the application of Article 85(1);

— the fact that the expelled members are placed on the same footing as members who have exercised their right of withdrawal, since, once it is established that the expulsion clause is not in breach of Article 85(1), there is nothing to prevent the association from applying not the more favourable rules applicable to withdrawal but the rules normally applied upon the expulsion of members, including any penalties, subject only to the limitation (discussed in paragraph 21) that clearly excessive and disproportionate penalties must not be imposed;

— the fact that, in the main proceedings, the plaintiffs claimed *inter alia* that they were entitled to a share of the pooled assets of DLG, without however asking to be readmitted to membership of DLG, since, regardless of the terms in which the claim asserted in the national court is formulated, the fact remains that the plaintiffs argued that the contested clauses of the statutes were incompatible with Article 85(1), and since, in the event of the Court's confirming that incompatibility, it would be incumbent on the national court to declare those clauses void under Article 85(2) and draw the legal inferences under its own national law.

(3) *Are the contested clauses of the statutes liable to affect trade between Member States?*

30. Having regard to the foregoing considerations, it would be pointless to consider whether the contested clauses are liable to affect trade between Member States. However, for the sake of completeness, it is worth noting in the present case that the products at issue are certainly the subject of intra-Community trade and that, in particular, both DLG and the Landsforeningen have been and are involved in that trade. In those circumstances, there is no doubt that in the present case the requirement of an adverse effect on intra-Community trade may be considered satisfied.

(4) *Does the national court have jurisdiction to apply Article 85(3) of the Treaty where the agreement has been notified to the Commission with a view to obtaining a negative clearance or an exemption?*

31. In that regard, suffice it to note that, pursuant to Article 9(1) of Regulation No 17 of

6 February 1962, First Regulation implementing Articles 85 and 86 of the Treaty, [29] the Commission has sole power to adopt individual exemption decisions under Article 85(3). [30] Conversely, for the application of Article 85(1) and (2) and Article 86, the Commission's powers are concurrent with those of the national courts. In the present case, as is apparent from the observations submitted, the contested clauses are not compatible with Article 85(1); the question of an exemption under Article 85(3) does not therefore arise. It will therefore be for the national court to declare that the contested clauses are not in breach of Article 85(1).

(5) *Do the contested clauses amount to an abuse of a dominant position under Article 86 of the Treaty?*

32. As the Court has consistently held, [31] the dominant position envisaged in Article 86 of the Treaty consists in a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the market by giving it the power to behave to an appreciable extent independently of its competitors, its customers and consumers. The existence of such a position may derive from a combination of several factors which, taken separately, are not necessarily determinative. Among those factors, the existence of very large market shares (for example, in excess of 50%) is of great importance; however, a share of around 40% or even lower does not in itself prove the existence of control of the market. [32] Account must also be taken of factors such as the ratio between the market share of the undertaking concerned and that of its competitors, any advantages which the undertaking has over its competitors in terms of financial and corporate structure, commercial organization and technological know-how, and the existence of more or less intense competition. [33] Finally, stability of or changes in market share over a period of time are a further matter to be taken into account in deciding whether or not a dominant position exists. [34]

It is incumbent on the national court to apply those criteria in the case before it. It should also be made clear that in this case the information in the documents before the Court, relating in particular to:

— DLG's small market share at the material time,

29 — OJ, English Special Edition 1959-1962, p. 87.

30 — See also the judgment in *Delimitis*, cited above, paragraph 43 et seq.

31 — See, recently, the judgment in Case T-30/89 *Hilti* [1991] ECR II-1439.

32 — See the judgment in Case 27/76 *United Brands* [1978] ECR 207.

33 — Judgments in *Hoffmann-La Roche* and *United Brands*, both cited above.

34 — Judgment in *Hoffmann-La Roche*, cited above.

— the substantial balance between the market shares of DLG and those of its competitors,

— and the evolution of the respective market shares of DLG and the Landsforeningen,

— the Landsforeningen's considerable capacity to compete, together with the great potential for competition because of the lack of any significant barriers to access,

indicate that DLG did not hold a dominant position within the meaning of Article 86. A further, albeit not decisive, point in that connection is the fact that, in 1990, DLG was removed from the register of dominant undertakings provided for by Danish legislation.

Conclusion

33. In the light of the foregoing considerations, I suggest that the following answers be given to the national court:

(1) The derogation provided for in Regulation No 26/62 does not apply to products — such as fertilizers and pesticides — not listed in Annex II to the Treaty.

(2) Subject to the findings falling to be made by the national court in accordance with the criteria laid down in this Opinion, a clause in the statutes of an agricultural cooperative that makes collective purchases of basic products for agriculture, by virtue of which members may be expelled if, in order to purchase the products concerned, they join organizations competing with the cooperative, does not have the object or effect of preventing, restricting or distorting competition within the meaning of Article 85(1) of the Treaty.

(3) The requirement of an adverse effect on trade between Member States, within the meaning of Article 85(1) of the Treaty, is fulfilled in a situation such as that in the main proceedings where the products in question are the subject of intra-Community trade and it is established that the undertakings concerned can, and do, take part in such trade.

(4) The Commission has sole power to grant exemptions under Article 85(3). However, the national court has jurisdiction to apply Articles 85(1) and (2) and 86 of the Treaty.

(5) Subject to the findings falling to be made by the national court in accordance with the criteria laid down in the Opinion, the documents before the Court disclose nothing to indicate that the DLG cooperative holds a dominant position within the meaning of Article 86 of the Treaty.