JUDGMENT OF THE COURT (Fifth Chamber)

30 March 2000 *

In Case C-265/97 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, 31 Grand-Rue,

appellant,

APPEAL against the judgment of the Court of First Instance of the European Communities (Second Chamber, Extended Composition) of 14 May 1997 in Joined Cases T-70/92 and T-71/92 *Florimex and VGB* v *Commission* [1997] ECR II-693, seeking to have that judgment set aside,

the other parties to the proceedings being:

Florimex BV and Vereniging van Groothandelaren in Bloemkwekerijprodukten (VGB), established in Aalsmeer (Netherlands), represented by J.A.M.P. Keijser, of

* Language of the case: Dutch.

the Nijmegen Bar, with an address for service in Luxembourg at the Chambers of A. Kronshagen, 22 Rue Marie-Adélaïde,

applicants 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, Florimex BV and

Vereniging van Groothandelaren in Bloemkwekerijprodukten (VGB) 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 Court Registry on 19 July 1997, the Coöperatieve Vereniging De Verenigde Bloemenveilingen Aalsmeer BA (hereinafter 'the VBA') brought an appeal pursuant to Article 49 of the EC Statute of the Court of Justice against the judgment of the Court of First Instance of 14 May 1997 in Joined Cases T-70/92 and T-71/92 *Florimex and VGB* v *Commission* [1997] ECR II-693 ('the contested judgment'), by which it annulled the Commission Decision (IV/32.751 — Florimex/Aalsmeer II and IV/32.990 — VGB/Aalsmeer, 'the contested decision') contained in a letter of 2 July 1992, rejecting the complaints lodged by Florimex BV (hereinafter 'Florimex') and Vereniging van Groothandelaren in Bloemkwekerijprodukten (hereinafter 'the VGB') concerning the levying of fees for the use of the VBA's premises which it charges in respect of the supply of products by suppliers who are not members of the VBA.

Facts before the Court of First Instance

2 According to the contested judgment, the VBA is a cooperative society constituted under Netherlands law, whose members are growers of flowers and ornamental plants. It represents more than 3 000 undertakings, the great majority of which are from the Netherlands, a small minority being Belgian (paragraph 1).

3 On its premises at Aalsmeer (Netherlands), the VBA organises auction sales of floricultural products. Those products are covered by Regulation (EEC) No 234/68 of the Council of 27 February 1968 on the establishment of a common organisation of the market in live trees and other plants, bulbs, roots and the like, cut flowers and ornamental foliage (OJ, English Special Edition 1968 (I), p. 26) (paragraph 2).

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

5 Florimex is an undertaking engaged in the flower trade, established in Aalsmeer close to the VBA complex. It imports floricultural products from Member States of the European Community and from non-member countries, mainly for resale to wholesalers established in the Netherlands (paragraph 5).

6 The VGB is an association comprising numerous Netherlands wholesalers of floricultural products, including Florimex and a number of wholesalers established on the VBA's premises (paragraph 6).

7 Article 17 of the VBA's statutes requires its members to sell through it all products fit for sale cultivated on their holdings. A fee or commission ('auction fee') is invoiced to the members for the services provided by the VBA. In 1991, that fee amounted to 5.7% of the proceeds of sale (paragraph 7).

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

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

10 In its trade agreements, the VBA allowed certain dealers to sell and supply to purchasers approved by it certain floricultural products bought in other auctions in the Netherlands or cut flowers of foreign origin to purchasers approved by it, against payment of a levy (paragraphs 10 and 11).

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

12 In the operative part of that decision the Commission declared, in particular, that the agreements concluded by the VBA whereby the dealers established on the

VBA's premises and their suppliers were required to deal in or have delivered on them floricultural products not bought through the VBA only with the consent of the VBA and under the conditions laid down by it and to store temporarily on the VBA's premises floricultural products not bought through the VBA only against payment of a fee determined by the latter, constitute infringements of Article 85(1) of the EC Treaty (now Article 81(1) EC).

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

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

15 In the version at the material time, Article 4(15) of the auction rules provided that the supply of products within the auction premises could be subject to a user fee. Under that provision, the VBA adopted, with effect from 1 May 1988, rules on user fees, which were subsequently amended. The rules applied to direct supplies to dealers established on the VBA's premises, on the basis that the goods in question were disposed of without recourse to the VBA's services (paragraph 20).

16 The rules, as in force in 1991, included the following requirements:

(a) the fee is payable by the supplier, that is to say the person by whom or on whose instructions the products are brought on to the auction premises. Delivery is monitored at the entry to the premises. The supplier is required to indicate the name and nature of the products concerned, but not their destination;

(b) the fee, which is subject to annual review, is levied on the basis of the number of stalks (cut flowers) or plants supplied and fixed at levels which vary according to various categories of product;

(c) the fee is determined by the VBA on the basis of the annual average prices achieved in the previous year for the categories concerned. According to the VBA, a factor of around 4.3% of the annual average price for the category concerned is applied;

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

(e) a tenant of a processing room who brings goods onto the VBA's premises is exempt from the user fee if he has purchased the products in question at another flower auction in the Community or has imported them on his own behalf into the Netherlands, provided that he does not resell them to dealers on the auction premises (paragraph 21).

17 By circular of 29 April 1988, the VBA removed, with effect from 1 May 1988, the restrictions previously contained in the trade agreements. Since then three types of trade agreement have existed. All those agreements apply a charge of 3% of the gross value of the goods supplied to customers on the VBA's premises. According to the VBA, the products concerned are for the most part those not grown in sufficient quantities in the Netherlands (paragraphs 22 and 23).

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

19 At the end of the administrative procedure, by letter of 4 March 1991 (hereinafter 'the Article 6 letter'), the Commission informed the complainants, in accordance with Article 6 of Commission Regulation 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 37).

20 The considerations of fact and law which prompted the Commission to reach that conclusion are set out in detail in a document annexed to the Article 6 letter. The Commission also sent that document to the VBA on 4 March 1991, stating that it was the preliminary draft of a decision which it proposed to adopt under the first sentence of Article 2(1) of Regulation No 26 of the Council of 4 April 1962 applying certain rules of competition to production of and trade in agricultural products (OJ, English Special Edition, Series I 1959-1962, p. 129) (paragraph 38).

21 In the part of that document entitled 'legal assessment', the Commission found, first, that the provisions concerning supplies for auction sales and the rules on

direct supplies to dealers established on the VBA's premises formed part of a body of decisions and agreements concerning the supply of floricultural products on the VBA's premises which were covered by Article 85(1) of the Treaty. Secondly, it found that those decisions and agreements were necessary for attainment of the objectives set out in Article 39 of the EC Treaty (now Article 33 EC), within the meaning of the first sentence of Article 2(1) of Regulation No 26 (paragraph 39).

22 First of all, as regards the application of the first sentence of Article 2(1) of Regulation No 26 to direct supplies to dealers established on the VBA's premises, the Commission considered, in point II.2(b), that:

'The user fees constitute an essential feature of the VBA distribution system, without which its competitive capacity and therefore its survival would be compromised. Consequently, they are also necessary for attainment of the objectives set out in Article 39.

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

The geographical concentration of supply and demand on the VBA's premises constitutes an economic advantage which is the result of significant efforts, in both tangible and intangible terms, made by the VBA.

If dealers were able to enjoy that benefit without paying for it, the VBA's survival would be compromised because the resultant discriminatory treatment of suppliers linked with the VBA would prevent it from amortising unavoidable costs and covering current operating costs' (paragraph 41).

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

'It is clear from a comparison of the auction fees and the user fees that broad equality of treatment is guaranteed as between suppliers. Admittedly, a proportion of the auction fees, which cannot be precisely determined, represents payment for the service provided by the auction, but in so far as the rate of the auction fees can be compared with that of the user fees in this case, that service is a *quid pro quo* for the assumption of supply obligations. Dealers who have concluded trade agreements with the VBA also assume such supply obligations. Consequently, the rules on user fees do not have effects which are not compatible with the common market' (paragraph 42).

24 Finally, in the sixth subparagraph of point II.2(b), the Commission took the view that the effect of the user fee was similar to that of the auction reserve price. According to the Commission: '(t)he lower the price actually achieved, the greater the fee. As a result, supply is discouraged at times of excess supply, which is certainly desirable' (paragraph 43).

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

26 On 2 July 1992, the Commission sent the applicants' lawyer a registered letter, with form of acknowledgment of receipt, which stated that the reasons given in it supplement and clarify those given in its Article 6 letter, to which it refers. The Commission continues:

'The Commission's appraisal under competition law is based on the whole body of decisions and agreements concerning supplies of floricultural products on the VBA's premises. The rules on direct supplies to dealers established on those premises form only part of that body. In the Commission's opinion, the whole body of those decisions and agreements is in principle necessary for attainment of the objectives indicated in Article 39 of the EEC Treaty. The fact that, to date, the Commission has not yet adopted a formal decision to that effect under Article 2 of Regulation No 26/62 does not detract from the positive attitude adopted by the Commission on this subject' (paragraphs 45 and 46).

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

28 By a document lodged on 16 October 1992 in each of those cases, the Commission raised an objection of inadmissibility under Article 114(1) of the Rules of Procedure of the Court of First Instance (paragraph 53).

29 By order of the Court of First Instance (First Chamber) of 6 July 1993, the decision on the objection of inadmissibility was reserved for the final judgment (paragraph 55).

30 By order of the President of the First Chamber of the Court of First Instance of 13 July 1993, the VBA was granted leave to intervene in Joined Cases T-70/92 and T-71/92 (paragraph 56).

The contested judgment

31 By the contested judgment, the Court of First Instance allowed the application and annulled the contested decision.

32 First of all, it stated, at paragraph 137 of the contested judgment, that, in the document annexed to the Article 6 letter, which formed an integral part of the statement of the reasons on which the contested decision is based, the Commission found that the user fee did not fall within Article 85(1) of the Treaty solely because it constituted 'an essential feature of the VBA's distribution system', which was, according to the Commission, 'necessary for attainment of the objectives set out in Article 39 of the Treaty', within the meaning of the first sentence of Article 2(1) of Regulation No 26.

33 For that reason, the Court of First Instance took the view, in paragraph 138, that it was thus not called upon to adjudicate on the arguments put forward by the VBA at the hearing concerning the non-application of Article 85(1) of the Treaty or the possible application of the second sentence of Article 2(1) of Regulation No 26, but only on the legality of the conclusion reached by the Commission in the contested decision that the user fee falls within the first sentence of Article 2(1) of Regulation No 26.

34 In examining the pleas in law alleging that the first sentence of Article 2(1) of Regulation No 26 was not applicable and that adequate reasons were not given in that regard, the Court of First Instance examined, in particular, the statement of reasons on which the contested decision was based and set out a number of preliminary considerations.

35 In particular it stated at paragraph 146 that the case before it was concerned with the rules of an agricultural cooperative which levied a fee on transactions between two categories of third party, namely, independent wholesalers established on the VBA's premises and suppliers wishing to supply to such purchasers either products from other Community agricultural producers or products from non-member countries which were in free circulation in the Community. Such a fee, according to the Court of First Instance, goes beyond the scope of internal relations between members of the cooperative and, by its nature, constitutes a barrier to trade between independent wholesalers and flower growers who are not members of the cooperative concerned.

36 In paragraph 147, the Court of First Instance pointed out that, until then, the Commission had never found that an agreement between the members of a cooperative which affects free access by non-members to agricultural producers' channels of distribution was necessary for attainment of the objectives set out in Article 39 of the Treaty.

37 The Court of First Instance went on to state, in paragraphs 148 to 150 of the contested judgment, first, that the Commission's practice in earlier decisions had generally been to conclude that agreements not included amongst the means indicated by the regulation providing for a common organisation in order to attain the objectives set out in Article 39 were not 'necessary' within the meaning of the first sentence of Article 2(1) of Regulation No 26, secondly, that the common organisation of the market in live trees and other plants, bulbs, roots and the like, cut flowers and ornamental foliage, established by Regulation No 234/68 did not make provision for agricultural cooperatives to impose such a fee on third parties and, thirdly, that the Commission had confirmed that it had no knowledge of any fee similar to the user fee in other agricultural sectors. The Court thus held, in paragraph 151, that it was incumbent on the Commission to set out its reasoning in a particularly explicit manner, since the scope of its decision went appreciably further than that of earlier decisions. It made reference in that respect to Case 73/74 *Papiers Peints* v *Commission* [1975] ECR 1491, paragraphs 31 to 33.

38 In paragraph 152, the Court of First Instance, referring to Case C-399/93 *Oude Luttikhuis and Others* v *Verenigde Coöperatieve Melkindustrie* [1995] ECR I-4515, paragraphs 23 to 28, further held that the obligation to state reasons was all the more stringent because, since it constitutes a derogation from the general rule in Article 85(1) of the Treaty, Article 2 of Regulation No 26 must be interpreted strictly.

39 As a further preliminary consideration, the Court of First Instance pointed out, in paragraph 153, that the first sentence of Article 2(1) of Regulation No 26 applies only if the agreement between the members of a cooperative is conducive to attainment of all the objectives of Article 39. In support of that finding, it cited Case 71/74 *Frubo* v *Commission* [1975] ECR 563, paragraphs 22 to 27, and *Oude Luttikhuis*, cited above, paragraph 25. Moreover, the Commission's statement of reasons should have shown how the agreement at issue fulfilled each of the objectives of Article 39 or, at the very least, how the Commission was able to reconcile those sometimes divergent objectives so as to enable the first sentence of Article 2(1) of Regulation No 26 to be applied.

40 It is in the light of those preliminary considerations that the Court of First Instance examined the statement of reasons for the contested decision in relation to what it considered to be the three main arguments put forward to justify the user fee in the light of the first sentence of Article 2(1) of Regulation No 26, namely: the need to ensure the survival of the VBA; the existence of a *quid pro quo* for the user fee; and the fact that the user fee has an effect analogous to that of an auction reserve price.

41 As regards the need to ensure the VBA's survival, the Court of First Instance first of all acknowledged, at paragraph 156, that the cooperative form adopted by the VBA in principle met the objectives set out in Article 39 of the Treaty. While doubting that the VBA's survival was threatened if there were no user fee, the Court none the less accepted, in paragraph 159, the hypothesis that, if there were no such fee, certain present members of the VBA might have an interest in leaving it and that such a development entailed the risk that the very viability of the VBA's system might be undermined.

42 The Court of First Instance considered, however, that it did not automatically follow that the user fee or a system of auction sales necessitating such a fee fulfilled all the conditions of Article 39 of the Treaty, in accordance with the case-law of the Court of Justice. It found *inter alia*, in paragraph 161, that the user fee was capable of adversely affecting other Community agricultural producers who were not VBA members but whose interests were also covered by Article 39 of the Treaty.

43 In particular, the Court of First Instance took the view, in paragraph 162, that a fee levied by an agricultural cooperative on supplies by non-member producers to independent buyers normally has the effect of increasing the price of such transactions and constitutes at the very least a significant impediment to the freedom of other agricultural producers to sell through the distribution channels in question.

44 In paragraph 163, the Court of First Instance concluded that, even though the VBA's system meets certain of the objectives set out in Article 39 of the Treaty, the user fee is capable of operating in certain respects in a manner inimical to those objectives, such as those referred to in Article 39(1)(b), (d) and (e), by preventing producers who are not members of the VBA from increasing their individual earnings, impeding the availability of supplies from those other producers and precluding price developments which are favourable from the consumer's point of view.

45 The Court of First Instance found, moreover, in paragraph 164 that, if for certain producers direct sales to the purchasers established on its premises were less costly or more efficient than the VBA's present system, the user fee might, as an essential means, for the VBA, of dissuading its membership, in particular its largest members, from leaving the VBA, adversely affect the rational development of agriculture, increases in the individual earnings of those engaged in agriculture and the prices at which supplies reach consumers, contrary to the objectives set out in Article 39(1)(a), (b) and (e) respectively. In the view of the Court of First Instance, such a provision would have the effect of excessively restricting the freedom of a member of an agricultural cooperative to leave it and would be difficult to reconcile with the objectives set out in Article 39 of the Treaty.

46 Having thus established that the Commission was confronted with a complex situation, involving the divergent and conflicting interests of smaller and larger members of the VBA, of other Community agricultural producers and of the intermediaries concerned, the Court held, at paragraph 165, that in such circumstances the Commission's statement of reasons could not be confined to the single consideration that the VBA's survival in its present form would be jeopardised without the user fee. The statement of reasons should also, according to the Court, have taken account of the effects of the user fee on other Community producers and the Community interest in maintaining undistorted competition.

47 In paragraphs 166 to 168, the Court of First Instance found that there was no statement of reasons of that nature; nor were any explicit reasons given to

explain, first, how the user fee, or a system of auction sales which cannot survive without such a fee, met each of the various objectives set out in Article 39(1)(a) to (e) of the Treaty or, secondly, how the Commission reconciled those different objectives in such a way that the user fee can be regarded as 'necessary' to their attainment within the meaning of the first sentence of Article 2(1) of Regulation No 26.

48 So far as concerns the question as to whether the user fee was justified by an actual and proportionate *quid pro quo*, the Court of First Instance also held, in paragraph 170, that, in the context of the first sentence of Article 2(1) of Regulation No 26, the Community interest in ensuring the survival of the VBA, important though it may be, could not be reconciled with the — likewise legitimate — Community interest in ensuring access for other agricultural producers to distribution channels, unless the user fee is levied on a proportionate basis, as a *quid pro quo* for a service or other advantage whose value was such as to justify the amount charged.

49 In fact, in paragraph 171, the Court of First Instance found that, if the user fee were not justified by real value of that kind, or if its amount exceeded the value thus given, it would have the effect of placing certain agricultural producers at a disadvantage, thereby benefiting existing members of the VBA, and would constitute a disguised restriction of competition, with no sufficient objective justification. Since the first sentence of Article 2(1) of Regulation No 26 is to be interpreted strictly, a fee having such an effect could not be regarded as 'necessary' for attainment of the objectives set out in Article 39 of the Treaty, within the meaning of that provision.

50 In paragraphs 172 to 175 the Court of First Instance stated that the concentration of supply and demand on the VBA's premises was therefore the only advantage mentioned as a *quid pro quo* for the user fee levied by it.

51 The Court of First Instance concluded, in paragraph 178, that the statement of the reasons for the contested decision must enable the parties and, as the case may be, the Court itself to verify that the fee in question does not exceed proper remuneration for the economic advantage invoked.

52 The Court of First Instance observed, in paragraph 179, that the 'economic advantage' represented by the concentration of demand was described in the contested decision only in very general terms, without specifying how the value of that advantage, and the amount of the resultant user fee, could be calculated and expressed in actual figures.

53 In paragraphs 180 and 181 the Court of First Instance rejected the justification that the amount of the user fee approximately corresponded to the auction fee, which established equality of treatment as between the suppliers concerned in that although those selling by auction enjoyed all the services of the VBA, they also accepted a supply obligation *vis-à-vis* the VBA to which the other suppliers were not subject.

54 In the absence of figures in the contested decision for the calculation of the various costs connected with use by the various suppliers of the VBA's different services and facilities, the Court of First Instance found that it was not in a position to verify whether the user fee exceeded proper remuneration for that advantage or whether the amount levied was necessary for attainment of the objectives set out in Article 39 of the Treaty.

55 As to the reasoning in the contested decision to the effect that the user fee was analogous to that of an auction reserve price, the Court of First Instance observed in paragraph 185 that that consideration did not constitute a sufficient statement of reasons to establish that the user fee was necessary for attainment of the objectives set out in Article 39, within the meaning of the first sentence of Article 2(1) of Regulation No 26.

56 Thus, the Court of First Instance found, in paragraph 186, that the contested decision contained no statement of reasons to explain the merits of the approach according to which the protection of the minimum prices of an agricultural cooperative organised on the basis of auction sales takes precedence over the interest of other agricultural producers who are not members of the cooperative in selling their products freely to independent dealers. Nor did the contested decision, according to the Court of First Instance, contain any statement of reasons to show that all the objectives of Article 39 of the Treaty were thus fulfilled.

57 From all the foregoing considerations the Court of First Instance concluded at paragraph 187 that the plea in law as to the inadequacy of the statement of reasons on which the contested decision was based, as regards the application of the first sentence of Article 2(1) of Regulation No 26, must be held to be well founded.

58 The Court also upheld the plea alleging unequal treatment as between outside suppliers and holders of trade agreements as regards the rate of the user fee and the rate laid down by the trade agreements.

59 In that connection, the Court found in paragraph 192 that the trade agreements did not provide for specific supply obligations, which justified a rate lower than that of the user fee. The only 'obligation' consisted in the fact that, if the holder of a trade agreement did not sell the contractual products to the VBA's satisfaction, the agreement, which was for a term of one year, was simply not renewed.

60 The Court of First Instance concluded, in paragraph 194, that the contested decision did not contain a sufficient statement of reasons to enable it to verify the merits of the Commission's finding that the difference of treatment as between the two groups of suppliers concerned was objectively justified.

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

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

62 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).

63 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 appeal

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

65 The first, fourth, fifth and sixth grounds of appeal concern both the thoroughness of the review carried out by the Court of First Instance of the Commission's

decision and the accuracy of its assessment. The second and third pleas relate to the delimitation, by the Court of First Instance, of the subject-matter of the dispute. The seventh and eighth grounds of appeal concern other specific criticisms which the Court of First Instance made in respect of the contested decision.

The first, fourth, fifth and sixth grounds of appeal

66 By its first ground of appeal, the VBA claims that the Court of First Instance committed an error in law in applying unduly stringent requirements as to the statement of the reasons on which the contested decision was based. In doing so, the Court of First Instance disregarded the discretion which the Commission enjoys under Article 39 of the Treaty in conjunction with Article 2(1) of Regulation No 26.

67 The VBA observes in that respect that the five objectives of the common agricultural policy, set out in Article 39(1) of the Treaty, could prove to be inimical and run counter to competition law. In that context, Article 2(1) of Regulation No 26 must, according to the VBA, be understood as giving precedence to the objectives set out in Article 39 of the Treaty. The VBA refers, in that regard, to Case C-311/94 *Ijssel-Vliet* [1996] ECR I-5023, paragraph 31.

68 The VBA maintains that the extent of the obligation to state reasons varies according to the measure in question and that, in a decision rejecting a complaint in matters of competition, the Commission is not required to take a position on all the arguments put to it by the complainants but may instead restrict itself to setting out the facts and legal arguments which are of central importance in the scheme of the decision.

69 As regards the thoroughness of the review of the legality of the contested decision, the VBA submits that the Court of First Instance should have restricted itself to verifying whether the Commission had committed a manifest error of assessment. According to the VBA, the Court of First Instance, while purporting to analyse the account of the facts set out in the decision, undertook a very detailed examination of the accuracy of the assessment of the merits carried out by the Commission. The Court of First Instance thus infringed the second paragraph of Article 173 of the EC Treaty (now, after amendment, the second paragraph of Article 230 EC).

70 The Court of First Instance, moreover, failed to take account of the powers of the Commission, which had considered that all the VBA's rules fell within the scope of Article 85(1) of the Treaty but satisfied the conditions laid down in Article 2(1) of Regulation No 26, when it held that the user fee as such fell within the scope of Article 85(1) of the Treaty and that it was therefore necessary to examine whether the conditions laid down in Article 2(1) of Regulation No 26 were fulfilled with respect to that fee.

71 Furthermore, the VBA claims that, according to the judgment of the Court of First Instance in Case T-24/90 *Automec* v *Commission* [1992] ECR II-2223, the Commission is not required to make a finding of infringement and may reject a complaint for lack of Community interest. If in cases such as the present one the Commission were required to prove that the rules of a cooperative society were necessary for the attainment of each of the objectives of the common agricultural policy, it would have to reject many more complaints on the basis of that case-law. The VBA doubts whether such a tendency is in conformity with the general interest.

72 In response to the first ground of appeal, Florimex and the VGB submit that, in the context of Regulation No 26, the Commission does not have any discretionary power, but may only ascertain whether or not it is satisfied that the conditions laid down in Article 2(1) of that regulation have been met. Since that provision constitutes an exception to Article 85(1) of the Treaty, which must be interpreted strictly, the Court of First Instance could not, according to Florimex and the VGB, be satisfied with a marginal review of the contested decision. Accordingly, the obligation to provide a statement of reasons had to be strictly observed.

73 According to Florimex and the VGB, the Court of First Instance did indeed draw a distinction between the requirement to state reasons and the assessment of the merits. Moreover, the view according to which the user fee was covered, as such, by the prohibition laid down in Article 85(1) of the Treaty was not made by the Court itself but fully expounded by Florimex and the VGB during the proceedings.

74 The Commission states that the present case raises an essentially institutional issue, concerning the distribution of competences between itself and the Court of First Instance, as well as the scope and thoroughness of review by the Court of decisions rejecting complaints lodged by individuals against other individuals. According to the Commission, such review must only be marginal. Accordingly, it fully endorses the first ground of appeal put forward by the VBA.

75 By its fourth ground of appeal, the VBA submits that the Court of First Instance erred in law in its finding that the contested decision was based on an interpretation of the first sentence of Article 2(1) of Regulation No 26 that was broader than the interpretation the Commission had given it in earlier decisions.

76 The VBA claims that it is wrong to consider that any restriction agreed upon or adopted in the context of an agricultural cooperative must of itself be necessary for the attainment of the objectives set out in Article 39 of the Treaty. On the contrary, if such a cooperative contributes to the attainment of the objectives referred to in Article 39 of the Treaty and if, in view of its importance, the user fee proves to be essential and proportionate in that context, it is no longer necessary, in the view of the VBA, to review the user fee in the light of the objectives set out in Article 39 of the Treaty.

77 The VBA challenges, moreover, the reasoning of the Court of First Instance to the effect that the Commission concluded that the agreements which are not included among the range of means provided for by rules establishing a common organisation for the attainment of the objectives referred to in Article 39 are not

necessary. The VBA claims that not every common organisation of the market has a complete and exhaustive set of rules. In the present case, the scope of Regulation No 234/68 is more restricted than the common organisation of the markets in most other agricultural sectors.

78 Florimex and the VGB submit, on the other hand, that the disposal of agricultural products is affected by the imposition of a fee on dealings between third parties which are not members of the cooperative and purchasers. They contend, in reliance on paragraphs 12 and 13 of the judgment in *Oude Luttikhuis*, cited above, that the fact that the cooperative as such is not regarded as a practice restrictive of competition does not mean that the provisions in the statutes of that cooperative automatically fall outside the prohibition in Article 85(1) of the Treaty.

79 The Commission argues that the preliminary considerations put forward by the Court of First Instance are based on a premiss which is wrong in three respects: first, it is not correct to describe the user fee as a fee on transactions between third parties. That fee is, rather, levied in exchange for the opportunity offered to producers who are not members of the cooperative to deliver and to sell flowers on the VBA's premises. Next, it is also inaccurate to state that the user fee as such falls within the scope of the prohibition laid down in Article 85(1) of the Treaty, since such a view does not follow, in any event, from the contested decision. Finally, it is erroneous to assume that the rules relating to the user fee cannot be justified under the first sentence of Article 2(1) of Regulation No 26 unless it contributes to the attainment of each of the objectives set out in Article 39 of the Treaty, with a separate statement of reasons in respect of each objective.

80 By its fifth ground of appeal, the VBA rejects the conclusion arrived at by the Court of First Instance that the account of the facts set out in the contended decision, so far as concerns the VBA's survival in its current form, is not sufficient, by itself, to demonstrate that the user fee was necessary for attainment of the objectives set out in Article 39 of the Treaty.

81 The Court of First Instance erred in its examination of the effects of the user fee by observing that it was capable of adversely affecting other Community agricultural producers who were not VBA members and that it would have the effect of increasing the price of transactions between such producers and independent buyers. That assessment of the facts is not at all borne out by the documents before the Court. The conclusion that the user fee prevented producers who were not members of the VBA from increasing their individual earnings is thus also incorrect.

82 The VBA criticises, furthermore, the conclusion arrived at by the Court of First Instance that the Commission should have provided a more detailed statement of reasons as regards whether the user fee constituted a means of dissuading members of the VBA from leaving it and could have adverse effects on certain of the objectives set out in Article 39 of the Treaty. That conclusion is not compatible with the premiss of the reasoning of the Court of First Instance, which admits the hypothesis that the user fee was necessary in order to prevent the auctions from losing their usefulness.

83 Florimex and the VGB claim that the Court of First Instance was right in examining the question whether the specific rules satisfied all the conditions in Article 39 of the Treaty, even if the cooperative as such met in principle the objectives set out in that provision. As for the restrictive effects on competition exerted by the rules on the user fee, Florimex and the VGB maintain that that matter was thoroughly dealt with before the Court of First Instance.

84 The Commission endorses the arguments of the VBA and states that if it is accepted that the cooperative society meets the objectives set out in Article 39, the same must necessarily be true as regards the system of auction sales, which requires a user fee.

85 So far as concerns the restrictive effects allegedly exerted over competition by the user fee, the Commission acknowledges that what is involved is an assessment by the Court of First Instance of the facts, but it maintains that findings of fact that are not borne out by the documents before the Court of First Instance and which are clearly wrong cannot avoid censure by the Court of Justice.

86 Moreover, the finding that the user fee prevented producers who are not members of the VBA from increasing their individual earnings is not relevant to the present case, since the applicants at first instance are wholesalers. Likewise, the Commission maintains that the considerations regarding the interests of the other Community agricultural producers and on the Community interest in maintaining undistorted competition as well as the rules for leaving the cooperative which are applicable to its members bear no relation to the subject-matter of the complaints.

87 By its sixth ground of appeal, the VBA alleges that the Court of First Instance committed an error in law by declaring that a fee charged in the interest of the VBA's survival could not be accepted unless it be levied, on a proportionate basis, as a *quid pro quo* for a service or other advantage.

88 The VBA criticises that reasoning, maintaining that any undertaking may, ordinarily, define the conditions for access to its site or premises. None of the possible derogations to that rule requires to be applied in the present case.

89 It is moreover incorrect to say that the outside suppliers on whom the user fee was levied did not derive a benefit from the numerous services offered by the VBA.

90 In any event, according to the VBA, the Court of First Instance committed an error in law by requiring that the statement of the reasons for the contested decision be such as to enable it to verify that the fee at issue was appropriate remuneration and that its amount did not exceed the value of the economic advantage from which the outside direct suppliers benefited.

91 Florimex and the VGB contend, on the other hand, that it was right to regard the user fee as a disguised restriction on competition, inasmuch as it prevented third parties from obtaining access to the market. In order for it to fall within the scope of the derogation provided for in Article 2(1) of Regulation No 26, it had therefore to be justified by a *quid pro quo* proportionate to its value.

92 The Commission, following, in this respect, the VBA, maintains that the requirement that the user fee be justified by an actual and equitable *quid pro quo* has no legal basis. To the extent that it criticises the absence of specific figures and calculations relating to the amount of the user fee in the statement of the reasons for contested decision, the reasoning of the Court of First Instance does not concern the statement of reasons, as such, but rather the assessment of the facts on which it is based.

93 So far as concerns those four grounds of appeal, which it is appropriate to examine together, the Court points out, first, that it is settled case-law that the statement of reasons required by Article 190 of the EC Treaty (now Article 253 EC) must be appropriate to the act at issue and must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted the measure in question in such a way as to enable the persons concerned to ascertain the reasons for the measure and to enable the competent Community Court to exercise its power of review. The requirement to state reasons must be evaluated according to the circumstances of each case, in particular the content of the measure in question, the nature of the reasons given and the interest which the addressees of the measure, or other parties to whom it is of direct and individual concern, may have in obtaining explanations. It is not necessary for the reasoning to go into all the relevant facts and points of law, since the question whether the

statement of reasons meets the requirements of Article 190 of the Treaty must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question (see, in particular, Case C-367/95 P *Commission* v *Sytraval and Brink's France* [1998] ECR I-1719, paragraph 63).

94 So far as concerns a Commission decision rejecting a complaint in a competition matter on the basis of the first sentence of Article 2(1) of Regulation No 26, it must next be observed that the Court of First Instance was right to require, on the strength of the judgments in *Frubo* v *Commission* and *Oude Luttikhuis*, cited above, that the statement of reasons on which the decision is based must show how the agreement between the members of a cooperative satisfies each of the objectives of Article 39 or how the Commission was able to reconcile those objectives so as to enable that derogating provision, which must be interpreted strictly, to be applied.

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

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

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

98 Moreover, it was not on reasoning of that kind that the Commission relied in order to reject the complaint before it, but rather on reasoning based on the applicability of the first sentence of Article 2(1) of Regulation No 26. It follows that the Court of First Instance committed no error in law in examining whether that reasoning was consistent and complete.

99 It follows from the foregoing considerations that the Commission was required to state reasons for its decision by showing how the agreements concluded within the VBA were necessary for the attainment of each of the objectives set out in Article 39 of the Treaty or, in any event, how those objectives could be reconciled. It is therefore not necessary to examine on their merits the grounds of the judgment of the Court of First Instance concerning the impact of the measures introduced by Regulation No 234/68 or the scope of the Commission's decision which exceeded, according to the Court of First Instance, that of the earlier decisions.

100 Those considerations did not have in the present case any impact on the extent of the obligation to state reasons for the contested decision, which the Court of First Instance correctly assessed in the light of the first sentence of Article 2(1) of Regulation No 26.

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

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

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

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

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

106 Moreover, contrary to what the Commission maintains, the considerations regarding the interests of the other Community agricultural producers and the Community interest in maintaining undistorted competition clearly relate to the subject-matter of the complaints. Whether the first sentence of Article 2(1) of Regulation No 26, which has direct consequences for the situation of the complainants, applies depends specifically on those interests being taken into account.

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

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

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

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

111 In that regard, the Court of First Instance did not regard as adequate the reason that the suppliers selling by auction and the outside suppliers paid approximately the same level of fee. Given that the concentration of supply and demand on the

VBA's premises was the only advantage from which the outside suppliers benefited, the Court of First Instance held that equality of treatment of all suppliers was not established.

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

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

114 In that connection, it must be remembered that infringement of Article 190 of the Treaty and manifest error of assessment are two distinct pleas, each of which may be raised in proceedings under Article 173 of the Treaty. The first, alleging absence of reasons or inadequacy of the reasons stated, goes to an issue of infringement of essential procedural requirements within the meaning of that article and, involving a matter of public policy, must be raised by the Community judicature of its own motion. By contrast, the second, which goes to the substantive legality of the contested decision, is concerned with infringement of a rule of law relating to the application of the Treaty within the meaning of Article 173 itself, and can be examined by the Community judicature only if it is raised by the applicant (see *Commission* v *Sytraval and Brink's France*, cited above, paragraph 67).

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

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

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

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

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

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

121 It should be borne in mind that it is settled case-law that if the grounds of a judgment of the Court of First Instance reveal an infringement of Community law but the operative part appears well founded on other legal grounds, the appeal must be dismissed (see Case C-30/91 P *Lestelle* v *Commission* [1992] ECR I-3755, paragraph 28, and Case C-294/95 P *Ojha* v *Commission* [1996] ECR I-5863, paragraph 52).

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

The second and third grounds of appeal

123 By its second and third grounds of appeal, the VBA challenges paragraphs 137 and 138 of the contested judgment, in which the Court of First Instance held that it was not called upon to adjudicate on the arguments put forward by the VBA concerning the non-application of Article 85(1) of the Treaty or the possible application of the second sentence of Article 2(1) of Regulation No 26, but only on the legality of the conclusion reached by the Commission in the contested decision of 2 July 1992 that the user fee falls within the first sentence of Article 2(1) of Regulation No 26.

124 First, the VBA submits that the Commission did not restrict its assessment to the first sentence of Article 2(1) of Regulation No 26. In the document appended to the Article 6 letter, referred to in paragraph 41 of the contested judgment, the Commission stated that the user fee was an essential feature of the VBA distribution system, which was a condition for the application of the second sentence of Article 2(1) of Regulation No 26. The VBA contends, accordingly, that rejection of the complaint implicitly entails the application of that provision.

125 Secondly, the VBA submits that the Court of First Instance should have verified whether the Commission had taken account of the fact that Community competition law does not preclude a cooperative society from applying and maintaining in force restrictions which are necessary to ensure that it functions properly and maintains its contractual power in relation to producers (Case C-250/92 *DLG* [1994] ECR I-5641, paragraphs 34 and 35). According to the judgment in *Oude Luttikhuis*, cited above, such restrictions do not fall within the scope of Article 85(1) of the Treaty.

126 In that connection, it need merely be observed that the Commission based the contested decision on the single ground that the user fee was an essential feature of the VBA distribution system, which was, according to the Commission, necessary to the attainment of the objectives set out in Article 39 of the Treaty, within the meaning of the first sentence of Article 2(1) of Regulation No 26, and that it is the application of that latter provision which was the subject-matter of the action brought by Florimex and the VGB before the Court of First Instance. The Court of First Instance was therefore right not to adjudicate on the arguments put forward by the VBA concerning the non-application of Article 85(1) of the Treaty or the possible application of the second sentence of Article 2(1) of Regulation No 26.

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

The seventh ground of appeal

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

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

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

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

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

The eighth ground of appeal

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

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

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

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

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

138 Under Articles 168a of the EC Treaty (now Article 225 EC), and 51 of the EC Statute of the Court of Justice, however, an appeal may be based only on grounds relating to the infringement of rules of law, to the exclusion of any appraisal of the facts (see, in particular, Case C-8/95 P *New Holland Ford* v *Commission* [1998] ECR I-3175, paragraph 25).

139 The Court of First Instance alone has jurisdiction, first, to make a finding as to the facts, save where the substantive inaccuracy of such findings is apparent from the documents submitted to it and, second, to assess those facts (*New Holland Ford* v *Commission*, cited above, paragraph 25). Furthermore, such inaccuracy

must be obvious from the documents before the Court without its being necessary to undertake a fresh assessment of the facts (*New Holland Ford* v *Commission*, cited above, paragraph 72).

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

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

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

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

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

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

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

Costs

147 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 Florimex and the VGB 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 Florimex and the VGB. The Commission, which has also been unsuccessful, must bear its own costs.

On those grounds,

THE COURT (Fifth Chamber)

hereby:

1. **Dismisses the appeal;**

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

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

Moitinho de Almeida Sevón Puissochet

Jann Wathelet

Delivered in open court in Luxembourg on 30 March 2000.

R. Grass D.A.O. Edward

Registrar President of the Fifth Chamber