JUDGMENT OF THE COURT OF FIRST INSTANCE (Second Chamber)
2 July 1992 *

Contents

Facts ..... II - 1937

Procedure ..... II - 1942

Forms of order sought ..... II - 1944

The principal claim for the annulment of the Decision ..... II - 1945

1. The application of Regulation No 26 and the effects of the principles of the Common Agricultural Policy ..... II - 1945

2. The effect of the applicant's cooperative structure and the objects of the applicant cooperative society ..... II - 1947

3. The analysis of the relevant market ..... II - 1955

4. The conformity of the applicant's Regulations and general conditions with Article 85 of the Treaty ..... II - 1956

4.1. The stipulations' restrictive effect on competition ..... II - 1957

4.1.1. The no-competition clause allegedly incorporated in section 4(1)(f) of the applicant's Regulations and the concerted practices connected with the application of that clause ..... II - 1957

4.1.2. Section 5 of the Rules regarding the Emergency Assistance Scheme ..... II - 1964

4.1.3. The exclusive supply obligations to which the grant of a kit advance and entry to the competition are subject ..... II - 1975

4.1.4. Section 5 of the Standard Pelting Control Agreement ..... II - 1980

4.2. Effects on trade between the Member States and appreciable effects on competition .. II - 1985

4.3. Application of Article 85(3) of the Treaty ..... II - 1988

The alternative claim for the annulment or reduction of the fine ..... II - 1989

Costs ..... II - 1993

* Language of the case: Danish.

In Case T-61/89,

Dansk Pelsdyravlerforening, whose head office is in Glostrup (Denmark), represented by Egon Høgh and Lise Høgh, of the Copenhagen Bar, assisted by Professor Bernhard Gomard, with an address for service in Luxembourg at the office of Mr Schmaltz-Jørgensen, Manager of Den Dankse Bank International SA, 2 Rue du Fossé,

applicant,

supported by

Kingdom of Belgium, represented by Robert Hoebaer, Director of Administration in the Ministry of Foreign Affairs, External Trade and Development Cooperation, and L. Van den Eynde, Inspector-General in the Ministry of Agriculture, acting as Agents, with an address for service in Luxembourg at the Belgian Embassy, 4 Rue des Girondins,

and by

Kingdom of Denmark, represented by Jørgen Molde, Legal Adviser in the Ministry of Foreign Affairs, acting as Agent, with an address for service in Luxembourg at the Danish Embassy, 4 Boulevard Royal,

interveners,

v

Commission of the European Communities, represented initially by Ida Langermann, of its Legal Service, and subsequently by Hans Peter Hartvig, Legal Adviser, and Berend Jan Drijber, of the Legal Service, acting as Agents, with an address for service in Luxembourg at the office of Roberto Hayder, representing the Legal Service, Wagner Centre, Kirchberg,

defendant,

APPLICATION for the annulment of the decision of the Commission of the European Communities of 28 October 1988 relating to a proceeding pursuant to Article 85 of the EEC Treaty (IV/B-2/31.424, Hudson's Bay — Dansk

Pelsdyravlerforening, OJ 1988 L 316, p. 43), or in the alternative for the annulment or reduction of the fine imposed by that decision,

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

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

Registrar: H. Jung,

having regard to the written procedure and further to the hearing on 2 October 1991,

gives the following

Judgment

Facts

1 These proceedings relate to a Decision of the Commission of the European Communities ('the Commission') of 28 October 1989, by which it found that certain agreements, decisions and concerted practices of Dansk Pelsdyravlerforening (Danish Fur Breeders Association) constituted infringements of Article 85(1) of the EEC Treaty, ordered the fur breeders to terminate the infringements and to refrain from taking any such measures in the future, refused exemption under Article 85(3) and imposed a fine on Dansk Pelsdyravlerforening.

2 Dansk Pelsdyravlerforening (hereinafter 'DPF') is a Danish cooperative association. It has a membership of over 5 000 fur breeders and brings together five provincial associations. DPF's objects are to act as a link between the provincial associations, to create a spirit of solidarity and community between Danish fur breeders, to

foster the development of fur breeding in Denmark and to represent fur breeders' interests vis-à-vis the authorities and other trade sectors.

3 DPF also operates under the name Dankse Pels Auktioner (hereinafter 'DPA'), when marketing skins produced or dressed by its members.

4 Any person or group of persons breeding furs and belonging to a DPF provincial association is deemed to an (active or honorary) member of DPF. In addition, undertakings dressing skins may also become members.

5 DPF provides its members with an advisory and consultancy service, veterinary services, training possibilities, a monthly magazine and experimental and research operations. Some services are free of charge, others must be paid for.

6 DPF has introduced certain special arrangements for its members, including rules regarding an emergency assistance scheme, rules regarding a scheme of money advances in respect of young animals ('the kit advance scheme') and rules regarding entry to a competition.

7 DPA holds auctions of skins. The auction sales are public and open to all — the applicant's members or any other interested party — for the purpose of selling or buying.

8 The products concerned are undressed mink, fox, racoon and fitch skins. However, only mink and fox skins are of importance in this case. The skins are sold either by auction — which is the usual case — or, less frequently, by private sale to fur dealers. There is a small number of auction centres.

9 Denmark produces some 9 million mink and 240 000 fox skins each year. Most of those skins are sold at auctions held by DPA. Mink auctions held by DPA account for one-third of world production. Approximately 98% of the skins sold at DPA auctions are exported.

10 Hudson's Bay and Annings Ltd ('HBA'), which became in 1986 Hudson's Bay Company Properties (UK) Ltd, is the principal auctioneer of furs in the United Kingdom and has subsidiaries in Denmark, the Netherlands, Finland, Sweden and Norway. In Denmark, as elsewhere, it retains agents for the purpose of purchasing and collecting furs for auction in London.

11 On 4 January 1985, HBA applied to the Commission under Article 3 of Council Regulation No 17 of 6 February 1962, First regulation implementing Articles 85 and 86 of the EEC Treaty (OJ, English Special Edition 1959-1962, p. 87) for a finding that DPF had infringed Article 85(1) and Article 86 of the Treaty.

12 On 27 August 1985, DPF notified the following agreements and decisions to the Commission:

(a) Love for Dansk Pelsdyravlerforening ('Regulations of the Danish Fur Breeders Association');

(b) Regler for avlernes kapitalfond ('Rules of the Capital Fund');

(c) Regler for katastrofehjælpsordningen ('Rules regarding the Emergency Assistance Scheme').

DPF requested negative clearance and, in the alternative, a declaration of exemption under Article 85(3) of the EEC Treaty.

13 On 30 March 1987, the Commission decided to initiate the procedure in accordance with Article 3(1) of Regulation No 17.

14 After giving DPF the opportunity to make known its views on the Commission's objections, pursuant to Article 19(1) and (2) of Regulation No 17 and to Commission Regulation No 99/63/EEC of 25 July 1963 on the hearings provided for in Article 19(l) and (2) of Regulation No 17 (OJ, English Special Edition 1963-1964, p. 47), and after consulting the Advisory Committee on Restrictive Practices and Dominant Positions, the Commission adopted the contested decision (hereinafter 'the Decision'), the operative part of which is as follows:

'*Article 1*

1. The following agreements and decisions by associations of undertakings of the Dansk Pelsdyravlerforening (the Danish Fur Breeders Association) and concerted practices constitute infringements of Article 85(1):

(a) section 4, part 1(f) of the Regulations of the DPF which provides that active members are, *inter alia*, those "who undertake not to organize a sale or in any other way support the sale of skins in competition with the sales activity of the Danish Fur Breeders Associations" and the application of this provision;

(b) section 5 of the Regulations regarding the Emergency Assistance Scheme which refuses emergency assistance when the insured has supplied furs for sale through sales outlets other than the DPA in the year of damage or the previous financial year;

(c) the obligations on a member to supply his/her entire production for sale by the DPA:

— in the event of the member being granted a kit advance;

— in the event of the member wishing to enter the "hit list" competition;

(d) section 5 of the Standard Pelting Control Agreement which prohibits the Pelting Centre from showing or arranging the sale for dispatch of skins to anybody other than the DPA.

2. The DPF shall, to the extent that it has not already done so, terminate the infringements found in paragraph 1 and shall in future refrain from taking any measure having the same object or effect as the above restrictions.

3. An exemption under Article 85(3) for the Regulations notified to the Commission, which are referred to at paragraph 1(a) and (b), is hereby refused.

4. ...

Article 2

1. For committing the infringements referred to in Article 1, a fine of ECU 500 000 (five hundred thousand) is hereby imposed on the Danish Fur Breeders Association.

2. ...

Articles 3 and 4

...'.

15 As far as Article 85(1) is concerned, the Decision states that section 4(1)(f) of the DPF Regulations, on the one hand, and the obligation to supply the whole production of skins in order to qualify for the kit advance, to belong to the Emergency

Assistance Scheme and to enter the competition and the corresponding obligation contained in the Standard Pelting Control Agreement, on the other, have the object or effect of restricting competition. The Decision observes that application of Article 85(1) is not excluded by Article 2 of Council Regulation No 26 of 4 April 1962 applying certain rules of competition to production of and trade in agricultural products (OJ, English Special Edition 1959-62, p. 129).

16 With regard to the application of Article 85(3) of the EEC Treaty, the Decision concludes that section 4(1)(f) of the DPF Regulations, in common with the other stipulations notified, cannot qualify for exemption under that paragraph, on the ground that the relevant conditions are not met. In addition, the Decision finds that the rules on the kit advance, the conditions relating to entry to the competition and the Standard Pelting Control Agreement, which were not formally notified to the Commission, do not come within Article 4(2) of Regulation No 17, and that hence no decision in application of Article 85(3) of the EEC Treaty may be taken in respect of those agreements.

17 It should be observed that, by letters of 4 June 1987 and 26 November 1987, DPF submitted proposed amendments to certain of those rules. However, according to the Decision, with the exception of the rules for the kit advance scheme, the proposals have not been implemented. The Commission stated that it would not contemplate the possibility of granting negative clearance or exemption until the proposed amendments had been made and it had had an opportunity to examine their application.

Procedure

18 Those were the circumstances in which DPF, by application received at the Registry of the Court of Justice on 18 January 1989, brought these proceedings in which it seeks the annulment of the Decision and, in the alternative, the annulment or reduction of the fine.

19 The written procedure took place entirely before the Court of Justice.

20 By orders of 7 June 1989, the Court of Justice gave the Kingdom of Belgium and the Kingdom of Denmark leave to intervene in support of the form of order sought by the applicant.

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

22 By order of 15 May 1990, the Court of First Instance dismissed an application by Harald Andersen and Jørgen Hansen Pedersen to intervene in support of the form of order sought by the Commission.

23 By letters received at the Registry of the Court of First Instance on 18 and 21 March 1991, the principal parties answered questions put to them by the Court of First Instance by letter of 14 February 1991 from the Registrar.

24 Having regard to those answers and the report of the Judge-Rapporteur, the Court of First Instance decided to open the oral procedure without any preparatory inquiry.

25 The principal parties and the Kingdom of Belgium, as intervener, put forward oral argument and answered questions from the Court at the hearing on 2 October 1991.

Forms of order sought

26 DPF, the applicant, claims that the Court should:

(1) Principally:

declare void the Commission's Decision of 28 October 1988 in Case No IV/B-2/31.424;

In the alternative:

annul or reduce the fine imposed by the Commission in that decision;

(2) order the defendant to pay the costs.

27 The Commission, the defendant, claims that the Court should:

(1) dismiss the application as unfounded;

(2) order the applicant to pay the costs.

28 The Kingdom of Belgium, intervening, claims that the Court should:

declare that the applicant's claims are well-founded.

29 The Kingdom of Denmark, intervening, supports all the applicant's claims.

The principal claim for the annulment of the Decision

30 DPF has raised one plea in support of its principal claim; it alleges that there has been no infringement of Article 85(1) of the Treaty. The plea has four limbs. In the first place, DPF argues that the Commission has not taken account of the effects of Regulation No 26 or the principles of the Common Agricultural Policy. Secondly, it submits that regard should be had to its status as a cooperative and to its objects as a cooperative society. Thirdly, it contests the Commission's analysis of the operation of the reference market. Fourthly and lastly, the applicant claims that its Regulations and its general conditions of sale are not contrary to Article 85 of the Treaty.

1. *The application of Regulation No 26 and the effects of the principles of the Common Agricultural Policy*

Arguments of the parties

31 The applicant and the interveners claim that account should be taken of the effect of Regulation No 26 and the aims and rules of the Common Agricultural Policy on the legality of the stipulations at issue.

32 Whilst the applicant concedes that fur animals are not mentioned in Annex II to the Treaty, which is referred to in Article 38 of the Treaty, and are therefore not covered by Regulation No 26, it nonetheless considers that its activities cannot be assessed without taking account of the principles governing the Common Agricultural Policy and its objectives. The applicant points out in this connection that all its activities are connected with raising live animals with a view to selling their skins. The raising of fur animals should be regarded as an agricultural business. Fur animals appear as 'live animals' amongst the agricultural products listed in Annex II to the Treaty. In 1957, the applicant further states, fur farming accounted for an insignificant fraction of agricultural production in the Member States. In its view, this explains why there is no mention of those animals in Annex II to the Treaty.

33 The applicant also considers that it fully satisfies the objectives assigned to the Common Agricultural Policy by Article 39 of the Treaty. Thanks to the applicant's efforts, fur farming has expanded considerably in Denmark and made a major

contribution towards securing a fair standard of living for part of the agricultural population.

34 The Commission argues in response that Regulation No 26 applies only to products listed in Annex II. Even if the product concerned is ancillary to the production of a product which itself comes under the annex, Regulation No 26 is not applicable (Case 61/80 *Coöperatieve Stremsel-en Kleurselfabriek* v *Commission* [1981] ECR 851 (known as 'the rennet case')). The Commission further argues that Regulation No 26 does not generally authorize the application of restrictions of competition in the agricultural field.

35 In the view of the Belgian Government, the Commission's decision detracts from the essential principles of cooperation in agriculture. Through the setting up of farmers' associations, agricultural cooperation plays a regulatory role in members' interests and consequently fosters competition in the case of both members and non-members. The Belgian Government acknowledges that the scope of Regulation No 26 is limited, but points out that products other than those listed in Annex II to the EEC Treaty form part of agricultural production and that producers of such products belong to agricultural organizations. In addition, the Belgian Government observes that agricultural production is changing and, as a result, Regulation No 26 is applying less and less to activities linked to agriculture. Given that a characteristic of farming in the European Community is its family structure, cooperation guarantees family farms access to the market.

Findings of the Court

36 The Court of First Instance points out that, as the Court of Justice held in *Coöperatieve Stremsel-en Kleurselfabriek* v *Commission*, cited above, according to Article 42 of the Treaty, the provisions of the chapter relating to rules on competition are to apply to the production of and trade in agricultural products only to the extent determined by the Council. Article 38(3) of the Treaty provides that the products subject to the provisions of Articles 39 to 46 of the Treaty are listed in Annex II and that the Council could add other products to Annex II within two years of the entry into force of the Treaty. It was in accordance with those provisions of the Treaty that the scope of Regulation No 26 was limited in Article 1 thereof to the production of and trade in the products listed in Annex II to the Treaty.

37 As the Court held in *Coöperatieve Stremsel-en Kleurselfabriek* v *Commission*, since there are no Community provisions explaining the concepts contained in Annex II to the Treaty and that annex adopts word for word certain headings of the Customs Cooperation Council Nomenclature, it is appropriate to refer to the Explanatory Notes on that Nomenclature in order to interpret the annex. According to the Explanatory Note to, and the actual terms of, Chapter 43 of the Nomenclature, which is headed 'Furskins and artificial fur', skins and furs come under Chapter 43, in particular fox (heading 4301.60) and mink (heading 4302.11). But Chapter 43 is not mentioned in Annex II to the Treaty. Consequently, Regulation No 26 may not be applied to the manufacture of a product which does not come under Annex II to the Treaty even if it is a substance ancillary to the production of another product which itself comes under that annex (*Coöperatieve Stremsel-en Kleurselfabriek* v *Commission*). Consequently, the Court holds that since animal skins and furs are not mentioned in Annex II, which contains an exhaustive list of agricultural products, they cannot fall within the provisions of Regulation No 26.

38 That conclusion is not called in question by the circumstances — were they to be established — that (a) raising fur animals is regarded as an agricultural operation in Denmark and (b) fur farmers in Denmark have combined to form a cooperative whose activities contribute towards the achievement of aims identical to those of the Common Agricultural Policy as mentioned in Article 39 of the Treaty.

39 It follows that the first limb of the single plea, based on the applicability of Regulation No 26, is unfounded.

2. *The effect of the applicant's cooperative structure and the objects of the applicant cooperative society*

Arguments of the parties

40 The applicant and the interveners maintain that the fact that the applicant is a cooperative together with its objects as a cooperative society affect the applicability of Article 85(1) of the Treaty to the facts of this case.

41 According to the applicant, the activities of a typical cooperative consist of collaboration between self-employed farmers — the cooperative members — by virtue of which their products are processed in, and/or marketed by, a common undertaking (production and marketing associations) or products used for primary production are purchased in common (purchasing groups). Consequently, the cooperative form enables the individual or family nature of the primary businesses to be retained where justified and the common undertaking to be used for services (purchasing, sales, technical assistance and so on) which members cannot carry out individually, thus enabling production to be increased, quality improved and the conditions of competition reinforced, thereby lowering prices while helping to improve the living conditions of the agricultural population. The applicant emphasizes that in the majority of cooperative societies membership entails certain obligations vis-à-vis the cooperative, the main ones being that the members have to sell their products through the association, they may withdraw from the cooperative only after giving specified notice and withdrawal may possibly be subject to sanctions. In the applicant's view, those obligations are necessary in order to enable the society (which has only a very small capital base) to be funded and in order to protect all the members' interests in the continuance of the pooled activities. Moreover, as a result of the community of interest which exists between the members and the association, together with the solidarity and fairness on which it is based, members have to refrain from acting contrary to the association's interests, for instance by playing an active role in a competing association. The applicant goes on to point out that the economic rights of members of a cooperative are determined by the sales which they make through it and not by how much capital they put in, and the rule 'one person, one vote' is essential in the context of a cooperative.

42 As for the relationship between cooperative principles and the competition rules in the Treaty, the applicant considers that an organization whose actions are guided by such principles is not in breach of the competition rules. It appears in particular from the judgment in *Coöperatieve Stremsel-en Kleurselfabriek* v *Commission*, and in particular from the French Government's observations in that case, that 'agricultural cooperation requires the creation of preferential ties between the farmers on the one hand and the cooperative on the other' (at paragraph 22) without the rules in question being, in principle, incompatible with Article 85(1). In order to assess whether they are, it is necessary, in the applicant's view, to effect a practical

evaluation in each case of the obligations which a given cooperative imposes on its members.

43 The applicant regards itself as a typical cooperative in the traditional sense, since it brings together numerous small family fur farms in order to resolve their common problems of purchasing, quality control, disease control, marketing finished products and research and development.

The applicant explains that it opted to take the form of a cooperative both for historical reasons — in Denmark activities connected with agriculture have traditionally been organized as cooperatives and the raising of animals for their fur has developed out of agriculture — and for economic reasons, in so far as this has enabled the family-business form to be retained for fur farming. The fact that skins are marketed at auction does not make its activity any different from that of other typical cooperatives, since many other agricultural products are sold at auction.

In the case of skins, for which the relevant market is the world market, all wholesale selling takes place at auctions, which are crucial for price formation. It is only in this way that fur farmers can prepare skins of the highest possible quality and a market can be created in which products are offered — after sorting — for sale to numerous purchasers in circumstances which enable prices to be fixed in a rational manner.

According to the applicant, the market in skins is completely transparent, since the auctions which it holds are open both to DPF members and to non-members. Furthermore, its members may elect to sell all or some of their production through other sales channels. Indeed, the applicant states that, unlike other cooperatives in various Member States, it has never sought to require members to market their products through it; it is only in situations in which a member is in receipt of specific services from the applicant (emergency assistance, kit advance and so on) that he has to accept a limited obligation to supply his skins to the cooperative.

44 For its part, the Commission points out that the applicant's object is not just to look after members' interests vis-à-vis the administration and other business sectors, but also to sell skins produced or prepared by its members. Auction sales account for a very large fraction of the applicant's activities and, in that respect, they cannot be compared to those of an agricultural cooperative. In addition, the Commission emphasizes that the position of agricultural cooperatives referred to in the French Government's observations in *Coöperatieve Stremsel-en Kleurselfabriek* v *Commission* was not actually at issue in that case (see paragraph 25). The Commission takes the view that the French Government was seeking in that case to draw attention to the presence in the agricultural sector of numerous small local cooperatives which should be regarded as falling within Article 2 of Regulation No 26. That is not the position in this case. For one thing, the product in question does not come under Annex II to the Treaty. For another, the applicant is not a small local cooperative, but a cooperative society which occupies a very important position on the market in question. The Commission further remarks that the concept of an undertaking within the meaning of Article 85 of the Treaty is not linked to specific legal forms or to the manner in which the undertaking is owned (see, for example, Joined Cases 40 to 48/73, 50/73, 54 to 56/73, 111/73, 113/73 and 114/73 *Suiker Unie* v *Commission* [1975] ECR 1663 and *Coöperatieve Stremsel-en Kleurselfabriek* v *Commission*, cited above).

45 In the Belgian Government's view, in a market economy a cooperative is a specific intermediate form of undertaking between an undertaking in which all the economic entities are independent and an undertaking in which the economic entities have been integrated. The essential feature of a cooperative is the dual relationship between the society and its members. A member of a cooperative is a user of its services or a supplier of products and at the same time a contributor of capital. If a person joins a cooperative, he will benefit by its advantages. It is therefore normal that a member should undertake not to carry on his activity concurrently and in competition with the cooperative by organizing sales in competition with it. The basic principles of the cooperative movement should not be regarded as being contrary to Article 85(1) of the Treaty. By grouping small economic entities, cooperation is a form of concentration which fosters genuine competition. The stipulations to which the Decision relates pertain to the fundamental principles of cooperation. The Belgian Government maintains that the rules of competition should be applied bearing in mind the reality of the market. In Case 26/76 *Metro* v *Commission* [1977] ECR 1875, the Court of Justice recognized that the nature

and intensity of competition may vary. Referring to the Opinion of Advocate General Reischl in Case 138/79 *Roquette Frères* v *Council* [1980] ECR 3333 and in Case 139/79 *Maizena* v *Council* [1980] ECR 3393, in which he found that the rules of competition have a relative scope in the sphere of agriculture, the Belgian Government considers that the objectives laid down in Article 39 of the Treaty should also be taken into account when considering whether an agricultural cooperative complies with the competition rules.

46 The Danish Government argues that the instant case raises questions of principle regarding the relationship between the Community's competition rules and the cooperative movement. It observes that, unlike the capital of limited liability companies, a cooperative's capital depends on how many members it has and the turnover made by each member in his dealings with the cooperative. A cooperative is based on freedom to join and freedom to leave. Surpluses made by the cooperative are distributed amongst the members in proportion to the turnover they made with it and not in proportion to any capital which they may have contributed. All members have the same voting rights, irrespective of their capital contribution. Consequently, the aim of a cooperative is to create the conditions for voluntary profit-making collaboration in the interests of the members. The cooperative structure has a direct influence on members' rights and duties. As a result, each member should behave fairly towards the cooperative, that is to say, towards the other members, and members are under a duty not to act directly against the cooperative's interests.

47 In the Danish Government's view, the cooperative movement helps to achieve the aims of the Common Agricultural Policy as they are defined in Article 39 of the Treaty. Whilst admitting that Regulation No 26 does not cover the applicant's activity, since it is not an agricultural activity within the meaning of the Treaty, as furskins are not listed in Annex II to the Treaty, the Danish Government emphasizes that that regulation expresses the nature of the relationship which should prevail between the rules of the Common Agricultural Policy and the Community competition rules; consequently account should be taken of the specific conditions of agricultural production and of the advantages attaching to the use of the cooperative as a form of organization. Hence, an agreement concluded between a number of persons to set up a cooperative does not infringe Article 85(1) of the Treaty.

48 In the Danish Government's opinion, DPF is a typical agricultural cooperative. Although DPF is a society with a very significant turnover, it is none the less made up of a number of small or medium-sized producers. The situation is therefore different from that in *Coöperatieve Stremsel-en Kleurselfabriek* v *Commission*. DPF's Regulations merely reflect the establishment of the requisite links between the members and the cooperative for the cooperative to be effective, and hence able to face world competition — which is essential in relation to the competitive situation within the Community.

Findings of the Court

49 The Court recalls *in limine* that Article 85 of the Treaty applies to all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market.

50 The Court considers, in the first place, that DPF has to be regarded as an undertaking within the meaning of Article 85 of the Treaty, as emerges implicitly from the response set out above to the first limb of the single plea relating to the applicability of Regulation No 26. In the context of Community competition law, the concept of an undertaking encompasses every entity engaged in economic activity (judgment of the Court of Justice in Case C-41/90 *Höfner and Elser* [1991] ECR I-1979), regardless of the legal status of the entity, and the organization of public auction sales of skins is an economic activity. The fact that DPF is a cooperative organized in accordance with Danish law cannot affect the economic nature of its activity. Secondly, the Court considers that DPF may also be regarded as an association of undertakings, since, according to the actual wording of section 4(1) of its Regulations, it is intended to bring together, not only natural persons, but also limited companies, partnerships and any other form of firm or company, which, by its nature, also carries on an economic activity.

51 It is appropriate next to consider the relevance of the arguments put forward by the applicant and the interveners with regard to reconciling the principles governing the cooperative sector with the Community competition rules. Whilst the fact that an undertaking is organized in the particular legal form of a cooperative society does not in itself constitute conduct which restricts competition, such a mode of organization may, regard being had to the context in which the cooperative operates, nevertheless constitute a means capable of influencing the commercial conduct of the cooperative's member undertakings so as to restrict or distort competition on the market in which those undertakings carry out their commercial activities.

52 The Court is of the opinion that any cooperative — depending on the context in which it operates — may have an effect on competition in two ways if not more. First, a cooperative society, such as the one in this case, is liable — by reason of the very principles which govern it — to affect the free play of competition as regards the activity constituting its objects as a society, above all when, in the name of cooperative principles, it escapes — to a varying extent depending on the Member State concerned — the application of the rules of national law to which other forms of association by way of firms and companies are subject. Secondly, the obligations imposed on the members of the cooperative, and in particular the obligations associated with the principle of 'fidelity to the cooperative', by virtue of which the cooperative generally imposes on its members obligations to supply to it or to take supplies from it in return for the particular advantages which it grants them, are liable to influence both the economic activity of the cooperative and the free play of competition between its members and vis-à-vis third parties. Consequently, whilst, in assessing the effects on a given market of the presence of a cooperative, account may be taken of particular features of that form of association of undertakings, that exercise must be carried out *inter alia* in the light of Article 85(3) of the Treaty. There is hence no basis for the applicant and the interveners to (a) maintain that the exercise of an economic activity by a cooperative society is, as a matter of principle, not subject to the provisions of Article 85(1) of the Treaty and (b) argue that the conditions for the applicability of the Community competition rules, as such, to the cooperative sector are of a different nature to those applying to the other forms in which economic activity is organized (see the judgment in *Coöperatieve Stremsel-en Kleurselfabriek* v *Commission*). Otherwise, any Member State would be able to put a particular type of undertaking in an advantageous position in respect of its economic organization for the sole purpose of enabling the undertakings in question to be removed from the scope of the Community competition rules applicable to undertakings. The result would be a breach of the equality of undertakings, inimical to the very foundations of the Community legal order.

53 In this case, that conclusion is reinforced by the fact mentioned earlier that the applicant's Regulations enable it to include amongst its active members, not only farmers who are natural persons, but also limited companies, partnerships and any other forms of firm or company.

54 It should also be recalled that, as the Court of Justice held in Joined Cases 209 to 213/84 *Ministère public* v *Asjes and Others* [1986] ECR 1425 and in Case 45/85 *Verband der Sachversicherer* v *Commission* [1987] ECR 405, where the Treaty intended to remove certain activities from the ambit of the competition rules, it made an express derogation to that effect. That was done in the case of the production of and trade in agricultural products by virtue of Article 42 of the Treaty. This Court considers that those principles, which were laid down in the course of considering particular sectors of activity, should be transposed by analogy to certain forms and manners of organizing undertakings or economic activity. It is common ground that no provision of the Treaty excluded or modified the conditions for the application of the Community competition rules to undertakings organized in the form of cooperatives. Where appropriate, such undertakings may, like any other, have the benefit of derogations provided for in the Treaty. This would be the case, for example, if the applicant's activity were mentioned in Annex II to the Treaty and thus came within the scope of Regulation No 26, which, as this Court has already established, is not the case.

55 It follows from all the foregoing that the applicant and the interveners are not justified in maintaining that the fact that the applicant is a cooperative society and its objects as such a society may have any influence on the conditions for the applicability of the Community competition rules in this case.

56 Consequently, the second limb of the single plea, based on the effects of the applicant's cooperative structure and of its objects as a cooperative, is unfounded.

3. *The analysis of the relevant market*

Arguments of the applicant

57 For the most part, the applicant agrees with the definition of the reference market employed by the Commission. However, it complains that the Commission wrongly analysed the operation of the market. It asserts that the market in skins, in which the main products are fox and mink skins, is a global market. The transport costs for skins are low in relation to their value. Production takes place in a large number of small production units. There are about 1 000 professional buyers, working for the principal wholesalers and manufacturers in thirty different countries, in the market for undressed skins. Buyers seek skins in lots made up of a large number of skins which are similar in type, size, quality and colour. Alone, a breeder cannot meet those requirements. Only sales centres which have previously collected, sorted and matched skins are in a position to satisfy buyers' requirements, while obtaining the highest prices for skins. The prospect of selling his products at the highest prices is decisive for the breeder when he makes his choice of distribution channel. As far as buyers are concerned, competition between sales centres revolves around the assortment which the centres can make available, their confidence in the grading and in the quality of customer services, in particular the rapid dispatch of the right skins. The applicant maintains that it is clear from this analysis of the structure of the market that it is in practice impossible to sell skins efficiently by means of a large number of small distribution channels or by means of direct sales to individuals. Moreover, sales to private middlemen account for only a very small proportion of world production of skins and then only in countries where the production of skins is so limited in volume as to have no real significance for the national economy.

58 On the basis of that analysis of the market and of sales channels for skins, the applicant argues that, in point 4(i) of its decision, the Commission did not correctly analyse the operation of the market, since sales to skin dealers outside the auction system take place only to a completely insignificant extent and have no impact on the structures of the world market. What is more, the argument in point 11 of the Decision that 'the possibility of Danish farmers selling privately to buyers in other Member States is almost entirely eliminated' and the argument in point 12 that

'members are denied the possibility of making even private sales' are based on a conception of the fur market which does not reflect reality.

Findings of the Court

59 The Court holds that this limb of the plea relied on by the applicant is based on a misinterpretation of the Decision. In point 4(i) of the Decision, the Commission merely states that 'sales of furskins are either private sales to fur dealers or more usually sales by public auction'. The figures quoted in that point simply confirm that statement and the percentages which those figures represent are, moreover, fully borne out by the data given in the application. What is more, the applicant has never denied that breeders may sell through the distribution channel of private transactions. It follows that the applicant is wrong to maintain that, in describing the market, the Commission based itself on an allegedly excessively high proportion of private sales, as against sales by auction, which does not correspond to the true situation. Consequently, the Commission did not commit a factual error in assessing the manner in which the market operates.

60 It follows that the third limb of the single plea, based on the allegation that the relevant market was inaccurately described, is unfounded.

4. *The conformity of the applicant's Regulations and general conditions with Article 85 of the Treaty*

61 The applicant has set out four complaints in support of this limb of the plea: first, it maintains that its Regulations and general conditions are not contrary to Article 85(1) of the Treaty. Secondly, it criticizes the Commission for not assessing those stipulations in the context in which they are to be applied. Thirdly, it argues that the conditions referred to in the Decision have, in any event, such a minimal influence that they may be disregarded under the *de minimis* rule. Lastly, in its reply, it argues that in any case the requirements of Article 85(3) are met and the Commission should have agreed to its request for exemption under Article 85(3) of the Treaty.

62 The Court points out that, for the purposes of the application of Article 85(1) of the Treaty, the effects on competition may ensue as much from the object of the restrictive practice in question — in this case the decision to form an association of undertakings — as from its effects on the market. Competition must be understood within the actual context in which it would occur in the absence of the stipulations at issue (see, *inter alia*, Case 56/65 *Société Technique Minière* [1966] ECR 235 and Case 42/84 *Remia* v *Commission* [1985] ECR 2545).

63 It should therefore be examined in turn whether the stipulations in question are capable of falling within the prohibition set out in Article 85(1) of the Treaty and, if so, whether the effects on competition which constitute their object or effect are sufficiently significant and if so, whether the stipulations qualify for exemption under Article 85(3). Before this, it will be necessary to analyse the scope of each of the stipulations at issue in the light of Article 85(1). The Court notes that four stipulations are criticized in the Decision: first, the clause prohibiting competition in section 4(1)(f) of the applicant's Regulations; secondly, section 5 of the Rules regarding the Emergency Assistance Scheme; thirdly, the exclusive supply obligations on which DPF members' eligibility for the kit advance and for entry to the competition is dependent; and, fourthly, section 5 of the Standard Pelting Control Agreement, according to which a pelting centre may not show skins which are in store to anybody other than representatives of DPA.

4.1. The stipulations' restrictive effect on competition

4.1.1. The no-competition clause allegedly incorporated in section 4(1)(f) of the applicant's Regulations and the concerted practices connected with the application of that clause

64 The Decision states that section 4(1)(f) of DPF's Regulations infringes Article 85(1) of the Treaty, in particular because it imposes a no-competition obligation on DPF's members, thus sealing off the Danish market from competition. In section 10(i) of the Decision, the Commission claims that 'section 4, part 1(f) of the DPF Regulations imposed a no-competition obligation on its members. This obligation

in particular prohibits members from acting as collecting agents for competitors thus sealing off the Danish market against entry by competitors. The restrictive effect of the ban was augmented by concerted practices which consisted in members not consigning skins to competitors at all.'

65 According to section 4(1)(f) of DPF's Regulations:

'The members of the association Dansk Pelsdyravlerforening shall be divided into three groups:

— active members (section 1);

— ...

Any person or grouping (limited company, partnership or other) which breeds fur animals and is a member of a provincial association belonging to Dansk Pelsdyravlerforening shall be regarded as being an active member,

...

(f) [which] undertakes not to organize a sale or in any other way support the sale of skins in competition with the sales activity of Dansk Pelsdyravlerforening'.

Arguments of the parties

66 According to the applicant, section 4(1)(f) of its Regulations, which was introduced in 1946 when it took over an auction room and began trading under the name of DPA, merely requires members not to undertake activities in direct competition with the association's sales activity. That would be the case for instance if a

member were to be taken on by a competitor in order to act as a collection centre, an agent or a fur collector for a competitor. The applicant denies that that stipulation embodies any obligation to supply the cooperative, since members are perfectly free to choose the sales centre in which to sell their skins, without this having any effect on their membership. It adds that the content of this stipulation is characteristic of the regulations of a cooperative.

67 As to the effect on competition, the applicant asserts that the stipulation in question does not mean that the Danish market is closed to competition. Any competitor of the applicant is free to take on any person other than members of the applicant to purchase, collect or take delivery of skins. The applicant contests the Commission's claim that the restrictive effect is aggravated by concerted practices consisting, as far as members are concerned, of their not consigning skins to its competitors.

68 Lastly, the applicant points out that in its letter of 10 October 1985 the Commission apparently considered that the provision in question was not caught by Article 85(1). The reason for which the applicant had not complied with the request in that letter that it introduce an express stipulation stating that members could sell their skins through other distribution channels was that such a stipulation would be unnecessary and inconsistent with Danish legal tradition, which is based, in the field of cooperation, on the principle that that which is not expressly forbidden for members of a cooperative is allowed.

69 The Commission points out in the first place that the stipulation at issue is couched in very broad terms which suggest that it entails an obligation to supply to the cooperative. It adds that the applicant refused to clarify the tenor of that stipulation. The Commission further observes that section 7 of the Regulations gives the applicant's managers the power to exclude a member and that the applicant has used that power to exclude two members which had collected skins for HBA.

70 Secondly, the Commission considers that, even if section 4(1)(f) of the Regulations is construed as merely requiring members of the cooperative not to engage in activities which are in direct competition with the applicant's auction sales activity, it restricts competition. The Commission considers that the restrictive effect of the prohibition is aggravated by concerted practices preventing members from supplying skins to competitors. In addition, the Commission argues that the stipulation at issue does not fall within the areas in which the Commission and the Court of Justice have considered that a non-competition clause does not fall within Article 85(1) of the Treaty on account of the particular circumstances in which it is applied (judgment in *Remia* v *Commission*, cited above).

71 Lastly, in response to the argument based on its letter of 10 October 1985, the Commission states that that letter manifestly did not constitute a definitive decision nor did it commit the Commission (judgment in Case 71/74 *FRUBO* v *Commission* [1975] ECR 563, paragraphs 19 and 20). It points out that in its statement of objections and in its letter of 15 May 1985 it clearly indicated that the stipulation at issue restricted competition.

Findings of the Court

72 The Court considers that, in view of the parties' arguments, it is appropriate to examine, on the one hand, whether, as maintained in the decision, the stipulation at issue contains a no-competition obligation contrary to Article 85(1) of the Treaty and, on the other, whether concerted practices contrary to that provision are connected with the application of the no-competition clause.

73 As regards first the question whether the stipulation at issue contains a no-competition obligation contrary to Article 85(1) of the Treaty, the Court observes that it appears from the actual wording of the stipulation that it obliges members of DPF not to act so as to compete directly with the applicant's sales activities, even though it does not contain in itself any exclusive supply obligation. Moreover, the applicant confirmed during the oral procedure that, as the decision found, that stipulation prohibits any member of the cooperative from collecting skins for auction sales other than those held by the applicant. Consequently, the

Commission did not base itself on an incorrect interpretation of section 4(1)(f) of the Regulations in taking the view that that stipulation contained a no-competition clause.

74 It appears from the judgment in *Remia* v *Commission*, that a no-competition clause is capable of falling within the scope of Article 85(1) of the Treaty. In order to determine whether or not such a clause comes within the prohibition in Article 85(1), it is necessary to examine what would be the state of competition if the clause did not exist. In order to have a beneficial effect on competition, the aim pursued by the introduction of the clause must itself contribute to free competition. In addition, the no-competition clause itself must be necessary and proportionate to the achievement of that aim.

75 In this case, the Court should determine whether section 4(1)(f) of the Regulations must be regarded as prohibited on account of the changes in competition which are its object or effect; to that end it must examine what the state of competition would be if the clause did not exist. It appears from the Decision that it is above all vis-à-vis competitors, and not in relations between the cooperative and its members that the applicant's Regulations and general conditions have the object or effect of restricting competition within the meaning of Article 85(1) of the Treaty.

76 The Court has already established that section 4(1)(f) of the Regulations prohibits any member from collecting skins for auction sales held by undertakings other than the applicant. However, that activity consists simply of collection, dispatch and forwarding to other auction rooms, which requires no special expertise, since no sorting or matching of skins takes place at that stage. Consequently, the stipulation at issue does not relate to an activity which breeders could carry out only with the assistance of the cooperative or thanks to the experience which they have acquired in the cooperative. Consequently, the stipulation at issue prohibits the applicant's members from carrying out an activity which they could engage in if that stipulation did not exist.

77 The Court finds that the collection of skins by members of the cooperative for third parties is not a hypothetical possibility, as appears from the attempts made

by HBA to take on Danish breeders as skin collectors with a view to sales at its auctions.

78 Admittedly, the applicant and the interveners have argued that membership of a cooperative generally requires certain obligations to be fulfilled vis-à-vis the cooperative and that it is normal that members should be obliged to sell their products through the association on account of cooperatives' limited capital and the need to secure guaranteed sales through the cooperative in order to enable the cooperative's activities to be funded and to safeguard the other members' interests in the continuation of the requisite common activities. But the fact remains that, as a result of its general, unlimited nature — and hence its disproportion to the aim pursued in this case by the applicant —, the no-competition clause, which prohibits any member of the association from collecting skins for other auction sales carried out by third parties competing with the applicant and consequently makes it very difficult for those third parties to obtain actual access to the market having regard to the applicant's very strong position thereon, is caught by the prohibition set out in Article 85(1) of the Treaty. The aforementioned arguments of the applicant and the interveners, whatever their merit and the consideration which they warrant, cannot outweigh that conclusion and therefore could be considered, if appropriate, only in the light of the provisions of Article 85(3) of the Treaty for the purposes of contemplating the possible grant of exemption.

79 As regards the argument based on the Commission's letter of 10 October 1985, from which it appears, in the applicant's view, that section 4(1)(f) of the Regulations is not contrary to Article 85(1) of the Treaty, the Court observes that that letter simply states as follows: 'At present, I am inclined to the view that the first restriction ..., namely members' undertaking not to organize sales of skins which might compete with sales by Danish fur farmers and not to support in any way whatsoever the sale of skins in competition with Dansk Pelsdyravlerforening, will probably not give rise to particular problems provided that it embodies an express provision to the effect that members may sell their skins through other distribution channels'. Consequently, that letter sets out only a provisional opinion in the absence of an in-depth examination; what is more, the opinion given is subject to the amendment of the stipulations in question. Expressed in those terms, that opinion was not capable either of leading the applicant to believe that the Commission

was not entitled to reach a different conclusion subsequently or of creating any legitimate expectation for the applicant. Consequently, the argument based on the implications of the letter of 10 October 1985 must be rejected.

80 Consequently, the Court considers that the Commission has established to a sufficient legal standard that the no-competition clause in section 4(1)(f) of the applicant's Regulations, as interpreted and applied by the applicant, may restrict competition within the meaning of Article 85(1) of the Treaty.

81 Secondly, as regards the justification of the finding made in point 10(i) of the Decision, according to which 'the restrictive effect of the ban was augmented by concerted practices which consisted in members not consigning skins to competitors at all', the Court considers that reference should be made, in order to define the concept of a concerted practice, to the settled case-law of the Court of Justice and the Court of First Instance itself (see, most recently, Case T-11/89 *Shell* v *Commission* [1992] ECR II-757), which shows that the criteria of coordination and cooperation previously laid down by that case-law must be understood in the light of the concept inherent in the competition provisions of the EEC Treaty according to which each economic operator must determine independently the policy which he intends to adopt on the common market.

82 The Court finds, however, that, as the applicant argues, there is no information and no prima facie evidence as to the actual existence of such concerted practices to support the abovementioned statement of the Commission. In its decision, the Commission merely mentions certain practices without describing them or indicating what aspects of coordination and cooperation characterizing them might by virtue of the abovementioned case-law cause them to be caught by the prohibition set out in Article 85(1) of the Treaty, and moreover merely observes that the applicant refused to clarify this question. As for the arguments subsequently raised by the Commission in its written submissions to the Court, it must be held that — even assuming that they are capable of mitigating the inadequacy of the statement of reasons in the Decision in this respect — they are confined, on the one hand, to mere inferences drawn indirectly and in the abstract from findings of a general nature and, on the other, to mentioning statements made by breeders to counsel

for HBA regarding the exclusion of two members of the cooperative who had allegedly collected skins for HBA and concerning the different interpretations which might have been given to the stipulation at issue by certain breeders.

83 The Court therefore considers that the reference made in point 10(i) of the Decision to alleged concerted practices connected with the application of the stipulation at issue must be regarded as being based on materially inaccurate facts and vitiated by an error of law. Accordingly, Article 1(1) of the Decision should be annulled in so far as it links with the stipulation referred to in Article 1(1)(a) concerted practices constituting an infringement of Article 85(l) of the Treaty.

4.1.2. Section 5 of the Rules regarding the Emergency Assistance Scheme

84 According to the Decision, section 5 of the Rules regarding the Emergency Assistance Scheme infringes Article 85(1) of the Treaty, in particular because it denies competitors access to the market by sealing off their main source of supply of skins in Denmark. In point 10(ii) of the Decision, the Commission concludes that the obligation to supply all skins on which membership of the Emergency Assistance Scheme is conditional ties up the options of members of the DPF by preventing them from independently determining their sales policy. In the opening part of point 10 of the Decision it is considered that the stipulation at issue has the object or effect of restricting competition within the meaning of Article 85(1) of the Treaty.

85 Section 5 of the Rules regarding the Emergency Assistance Scheme, which is designed to compensate members of DPF for financial loss sustained because of the death of their animals from epidemics, reads as follows:

'the insured shall lose his right to benefit under the Emergency Assistance Scheme if he or his agent

...

(d) has sold skins through distribution channels other than Danske Pels Auktioner during the year in which the loss occurred (15 August — 14 August) or during the preceding year, with the exception, however, of skins which the breeder has kept for his personal use;

...'.

86 The rules for the operation of the scheme, as described by the applicant and not contested by the Commission and as they emerge from the DPF Regulations, are based on a mechanism of the mutual type and can be summarized as follows. A member of the applicant is not *ipso facto* affiliated to the Emergency Assistance Scheme; separate membership is required. A member is free to withdraw from the scheme at any time. In principle, a new member may not claim under the scheme until he has been a member for a year. The grant of emergency assistance is ancillary to any insurance taken out by the insured person in respect of the same risk. The scheme is financed by DPF withholding an amount from the sums payable each year to the trading accounts of members of the cooperative affiliated to the scheme. Since the amount which is paid into members' trading accounts is distributed among the members in proportion to the value of the skins which they have supplied for sale at auctions held by the applicant during the current year, each affiliated member contributes to the scheme in proportion to the value of the quantity of skins which he supplied. Since the Regulations of the DPF provide for the capitalization of both capital and trading accounts and members of the scheme pay their 'membership fee' by the exceptional means of debiting their trading accounts, in practical terms they use sums which otherwise would have been capitalized. Consequently, in order to keep members of the cooperative on an equal footing, those who have opted not to join the scheme are paid an amount equivalent to the amount debited from the trading accounts of members of the scheme.

Arguments of the parties

87 The applicant denies that the stipulation at issue is anti-competitive. It argues that the Emergency Assistance Scheme, which members of the cooperative are at liberty to join or not to join and to leave, was set up in 1959, when it was not

possible to obtain cover against the risk of epidemic from an insurance company for a reasonable premium. The scheme is based on the desire to provide insurance cover against epidemics on a mutual basis between members of the association in accordance with the principle of the cooperative system. The applicant states that the obligation to supply all skins to the association to which members who elect to join the scheme are subject was imposed by a decision of 23 October 1967 and stems from the fact that it is technically impossible for a member to belong to the scheme in respect of part only of his stock. It is physically impossible to confine, by marking or any other method, the benefit of emergency assistance to particular animals held on a farm and it therefore should be compulsory for the scheme to cover all the animals raised on a given farm.

88 In addition, the applicant maintains that to limit cover under the scheme to some animals on a given farm is not only technically impossible, but would be liable to give rise to abuse. In view of the way in which the scheme is financed, in order for a member of the applicant association to pay towards the funding of the scheme in proportion to the actual volume of his activity, he must forfeit the right to the compensation which would otherwise be claimable if he sells some of the skins from the animals on his farm through marketing channels other than the public auctions held by the applicant. To allow a member of the association to benefit under the scheme without at the same time requiring him to supply all his skins to the cooperative would mean that the member in question could be covered by the scheme without contributing to its funding, contrary to the principles of reciprocity and solidarity of which the Emergency Assistance Scheme is an actual embodiment. The applicant maintains that the obligation to supply all skins to the association serves to ensure that the principle that all members of the scheme should contribute equally towards funding it is applied coherently.

89 The applicant further argues that whilst, as a result of the Commission's intervention, the exclusive supply obligation was eliminated by the amendments to the DPF Regulations made by the general meeting on 28 October 1988, the cover against epidemics is no longer comprehensive, as it was formerly, unless the member who joined the Emergency Assistance Scheme has supplied all his skins to the cooperative. If he has not, the compensation payable to him in the event of an epidemic is

now merely proportional to the proportion of the member's sales made through the cooperative. It is therefore irrelevant to compare the rules before and after the amendment of the Regulations carried out in 1988; the fact that, in order to comply with the Commission's wishes, the applicant introduced this new scheme on purely practical grounds does not mean that the former system was contrary to Article 85(1) of the Treaty.

90 The applicant further argues that the reason for which the Emergency Assistance Scheme is organized in the way described above, and not by having farmers who wish to insure their animals against epidemics pay a premium for each animal on their farms, is that such a scheme would be subject to Danish legislation on insurance and the applicant is debarred from carrying out insurance business.

91 The applicant adds that systematic application of the principle of equality as between members of the cooperative is not only not anti-competitive *per se*, but has had the effect of putting it in an unfavourable position vis-à-vis its competitors. This is because the applicant has not been able to give the largest farmers more favourable terms, such as rebates or discounts, as an insurance company would do. Consequently, the Commission's argument that the exclusive supply obligation at issue has the effect of sealing off the Danish market to competitors is incorrect, since, on the contrary, that stipulation has put DPF is a more unfavourable position than its competitors, in particular HBA. Indeed, HBA offers an insurance mechanism identical in aim to that of the applicant's 1988 scheme which is free of charge to farmers who agree to supply 40% of their skins to it. The applicant maintains that its members are free to join HBA's insurance scheme. Consequently, the existence of a scheme which provides better risk cover than that afforded by the Emergency Assistance Scheme shows that that scheme does not constitute a barrier to competitors' entering the Danish market. Accordingly, the Commission's argument disregards the essential factor, which is that the offer made by DPF to its members constitutes only one of numerous offers made to traders and it is for them to decide whether and how they wish to insure themselves against losing animals as a result of epidemics.

92 Lastly, the applicant maintains that it is incorrect to argue, as the Commission does, that the justification that the exclusive supply obligation is necessary is relevant only as regards the application of Article 85(3) of the Treaty. However, the applicant considers that should the Court conclude that the stipulation at issue falls under the prohibition laid down by Article 85(1), it should be held that it is necessary in order to enable the Emergency Assistance Scheme to be implemented, and that the applicant should therefore qualify for an individual declaration of inapplicability as provided for in Article 85(3) of the Treaty.

93 The Commission submits that the fact that a member can freely decide whether or not to join the Emergency Assistance Scheme is not conclusive. It is not because a farmer is at liberty to conclude or not to conclude an agreement with the applicant with a view to qualifying for the emergency assistance which it has introduced that that agreement should be regarded as not restricting competition. With the exception of some cases which may fall within Article 86 of the Treaty, a party always freely decides to enter into an agreement. What is at issue in the Commission's view is the actual tenor of the agreement, that is to say in this case, the exclusive supply obligation imposed on members joining the Emergency Assistance Scheme.

94 In that regard, the Commission argues in the first place that, in order to assess the scope of that freedom of choice, it is necessary in any event to take into account the concerted practices connected with the application of section 4(1)(f) of the applicant's Regulations, the effect of which is that a member wishing to enjoy his rights as a member of the cooperative must sell all his skins at auctions held by the applicant. Secondly, the Commission considers that the conclusive reason why the Emergency Assistance Scheme infringes Article 85(1) of the Treaty is that it is based on a exclusivity clause. As Commission Regulations (EEC) Nos 1983/83 and 1984/83 of 22 June 1983 on the application of Article 85(3) of the Treaty to categories of exclusive distribution agreements and exclusive purchasing agreements respectively (OJ 1983 L 173, pp. 1 and 5) show, it is 'common knowledge' that exclusivity and exclusive distribution are incompatible with Article 85(1) of the Treaty.

95 The Commission adds that the exclusive supply obligation at issue limits the freedom of action of members, who are deprived of the possibility of selling their skins through marketing channels other than the cooperative's. That exclusivity clause also has effects on third parties, as it deprives them of the possibility of selling at their auctions skins from animals belonging to members of the cooperative who are affiliated to DPF's Emergency Assistance Scheme. This is a direct consequence of the exclusivity clause; the Commission refers in this connection to the judgment in *FRUBO* v *Commission*, cited above. Consequently, the insurance terms which undertakings competing with the applicant may offer the latter's members are irrelevant.

96 The Commission takes the view that the argument that the stipulations at issue are essential to the operation of the Emergency Assistance Scheme is unfounded. It claims that that argument relates to the application, not of Article 85(1) of the Treaty, but of Article 85(3). It is extremely difficult to apply simultaneously two criteria for appraising the need for a restriction of competition, one under Article 85(1), the other under Article 85(3). In view of the system of Article 85, it is logical to effect that appraisal when considering the application of Article 85(3). In any event, the Commission maintains that the Emergency Assistance Scheme coupled with an exclusive supply obligation does not fall within any of the individual economic sectors in respect of which the practice of the Commission or the case-law of the Court of Justice has recognized in certain circumstances that an exclusive supply agreement does not fall within Article 85(1) of the Treaty (Case 161/84 *Pronuptia* [1986] ECR 353).

97 Lastly, the Commission denies that an insurance scheme of the type set up by the applicant necessarily entails an obligation for members to supply skins exclusively to the cooperative. The new scheme which the applicant introduced in October 1988 does not impose such an obligation. In addition, the fact that members of the cooperative who do not participate in the scheme, that is some 25%, obtain amounts equivalent to the amounts debited from the trading accounts of members of the cooperative who are affiliated to the scheme shows, the Commission argues, that the scheme is financed by the auction sales of skins produced by members and that it is not necessary for all skins to be sold at those auctions in order for the scheme to be able to function.

Findings of the Court

98 The Court points out *in limine* that, whilst the Decision finds that the applicant occupies in fact a dominant position on the market in question, it regards the stipulation at issue as being contrary, not to Article 86 of the Treaty, but to Article 85. However, although when applying Article 86 the Court of Justice has held that the fact that an economic operator ties purchasers — even if it does so at their request — by an exclusive dealing operation was contrary to the Community competition rules (Case 85/76 *Hoffmann-La Roche* v *Commission* [1979] ECR 461 and Case C-62/86 *AKZO* v *Commission* [1991] ECR I-3359), that case-law relates only to Article 86 of the EEC Treaty and cannot be transposed to all cases in which Article 85 is applied. Contrary to the Commission's contention, exclusive commitments — some of which, moreover, may qualify under the exempting Regulations Nos 1983/83 and 1984/83 — are not intrinsically contrary to Article 85(1) of the Treaty. Whilst the Commission infers from Regulation No 1984/83 that an exclusive supply obligation falls, by reason of its nature, within the prohibition laid down by Article 85(1), it should be pointed out in that connection that, as the Court of Justice has held, whilst it is true that to grant the benefit of Article 85(3) of the Treaty to a given agreement presupposes that that agreement has already been held to fall within the prohibition imposed by Article 85(1), this does not mean that the possibility provided for in Article 85(3) of granting a block exemption enables it to be inferred that every agreement falling within the category concerned necessarily fulfils, *ipso facto*, the requirements set out in Article 85(1) (Case 32/65 *Italy* v *Council and Commission* [1966] ECR 389).

99 It has consistently been held (see, most recently, with regard to a contract for the exclusive supply of beer, Case C-234/89 *Delimitis* v *Henninger Bräu* [1991] ECR I-935; see also *Société Technique Minière*, cited above, and Case 31/80 *L'Oréal* v *De Nieuwe AMCK* [1980] ECR 3775), in order to assess an exclusive agreement in the light of Article 85(1) of the Treaty it is appropriate to consider the actual economic context in which it may produce its effects. Depending on the facts and actual circumstances in which the market in question operates, an exclusive supply agreement may, by guaranteeing to the producer sales of its products and to the distributor security of supply, be such as to intensify competition in terms of the prices and services offered to consumers on the market in question, thereby helping to improve the interplay of supply and demand in that market.

100 The principle that the scope of the obligation at issue must be assessed in the actual context in which it produces its effects cannot be subject to an exception on the ground that the obligation imposed is justified by the desire to comply with the so-called principle of 'fidelity to the cooperative'. That principle cannot have the object or effect of justifying disregard of Aricle 85(1) by cooperatives which benefit by an exclusivity clause imposed on their members.

101 The Court finds that, until it was abrogated in October 1988, the stipulation in section 5(d) of the Rules regarding the Emergency Assistance Scheme required members wishing to qualify for the emergency assistance arranged by the applicant to supply all the skins from animals bred by them to the applicant for sale at its public auctions, on pain of their forfeiting their rights to emergency assistance. That obligation applied both to sales made during the financial year in which a claim arose and to sales made during the preceding year.

102 The Court considers that it is in the light of those considerations that it should be assessed whether the exclusive supply obligation imposed on members of the cooperative wishing to have the benefit of the emergency assistance organized by the applicant has the object of affecting competition in the common market and, *ex abundante cautela*, whether the stipulation at issue has restrictive effects on competition within the meaning of Article 85(1) of the Treaty. However, in the context of the plea under consideration, which relates solely to the assessment of the stipulation at issue in the light of Article 85(1), it is not appropriate for the Court to consider whether the stipulation in question satisfies the requirements of Article 85(3) of the Treaty.

103 As regards in the first place the assessment of the object of the stipulation at issue, the Court takes the view that, as the Court of Justice has held, in order to determine whether an agreement has as its object the restriction of competition, it is necessary to examine the aims pursued by the agreement as such in the light of the economic context in which the agreement is to be applied (Joined Cases 29 and 30/83 *CRAM and Rheinzink* v *Commission* [1984] ECR 1679, paragraph 26). In the circumstances of the case, the Court considers that the analysis of the economic

context to be carried out consists of examining to what extent the stipulation at issue — which lays down an exclusive supply obligation — forms part of the system of the Emergency Assistance Scheme and of the detailed rules for the operation of the cooperative and may affect the conditions in which the Danish market in skins operates.

104 In that connection, the Court finds with regard to the content of the stipulation at issue and its effects on members' independence of decision-making that the stipulation has the result that any form of selling, apart from the auction sales held by the applicant, is precluded for members of the Emergency Assistance Scheme for two financial years, whereas the period during which members are covered against loss is limited, financial year by financial year, to one year. The applicant has not given any justification for the obligation thereby imposed on members of the cooperative seeking compensation for loss caused by an epidemic occurring in a given financial year to have supplied, for sale at the applicant's public auctions, not only all the animal skins sold in the financial year in which the claim occurred, but also all animal skins sold in the preceding financial year. In order to assess the exact implications of that obligation for the actual conditions in which the market operates, account should be taken of the dissuasive effect which such an obligation is bound to have on members of the scheme, since they are aware that in the event that they are 'disaffiliated', they run the risk of not being insured against an epidemic breaking out in a financial year on the basis of which re-affiliation is to take place. Accordingly, the argument that members of the cooperative are free to join and to leave the scheme is in any event of limited force. Consequently, the stipulation at issue, which is in no way conducive to the sound operation of the emergency assistance mechanism, contributes to the inertia of the scheme and hence leads to rigidity in the conduct of economic operators, whose decision-taking freedom it manifestly restricts.

105 In addition, the Court observes that, on the one hand, the fact that the applicant amended its Regulations on 28 October 1988 with the effect of bringing the exclusive supply obligation at issue to an end but did not maintain before the Court that this gave rise to any dysfunction of the Emergency Assistance Scheme and, on the other, the fact that — according to the applicant itself — HBA, which has also introduced an emergency assistance scheme, requires insured persons to supply to it for sale, not all, but merely 40% of their skins are sufficient in themselves to show

that the introduction of an exclusive supply obligation of the type at issue is unrelated to the organization and sound operation of such a scheme.

106 The applicant claims that the justification for the exclusive supply obligation imposed on its members is the technical impossibility of insuring only some of a breeder's animals and, moreover, the fact that it is legally impossible to introduce a 'per capita' insurance scheme owing to the fact that Danish domestic legislation debars it from carrying on insurance business. In that regard, it should be made clear in the first place that the applicant admits that, unlike the situation on the market when the Emergency Assistance Scheme was set up in 1959, members of the cooperative may now take out personal insurance cover against the risk of epidemics, as is moreover confirmed by the rule in DPF's Regulations that compensation payable by it is always to be ancillary to any compensation received under a personal insurance policy. It follows that the decision taken by the applicant to maintain — at least until its Regulations were amended on 28 October 1988 — an emergency assistance scheme imposing an exclusive supply obligation was the outcome of a choice wholly unrelated to the sound operation of the cooperative, since, on the one hand, other insurance schemes are now available to breeders and, on the other, the introduction of a mutual insurance scheme covering the risks of epidemics is completely independent of any exclusive supply obligation which might be attached to it. Secondly, the Court considers that, in view of the principle of the primacy of Community law, the applicant is not entitled in any event to justify a failure to fulfil its obligations under Article 85(1) of the Treaty on grounds of the national legislation applicable to it (see, most recently, Case T-30/89 *Hilti* v *Commission* [1991] ECR II-1439).

107 It follows that the stipulation in question requiring members affiliated to the Emergency Assistance Scheme to supply all the skins from their farms exclusively to the applicant, as appraised in its economic context, significantly curtails members' freedom of action on the market and is unrelated to the sound operation of the Emergency Assistance Scheme. Consequently, regard being had to its content and its scope, such a stipulation must be considered as having as its object the restriction, prevention or distortion of competition within the common market and it may therefore fall within the prohibition under Article 85(1) of the Treaty.

108 As regards, in the second place, the restrictive effect on competition of the stipulation at issue, the Court first observes that, although consideration of the effects of an agreement is unnecessary where, as has just been held to be the case, the agreement has in fact the object of restricting competition (see Case 123/83 *BNIC* v *Clair* [1985] ECR 391 and *Verband der Sachversicherer* v *Commission*, cited above), it is appropriate also to examine whether the stipulation at issue has the effect of restricting, preventing or distorting competition within the common market. As the Commission has argued, the relevant question as regards the effects of the stipulation at issue from the point of view of Article 85(1) of the Treaty is not whether members of the cooperative may or may not freely join the Emergency Assistance Scheme. The question is, as stated in the Decision, whether the exclusive supply obligation thereby imposed restricts competition with regard to members of the cooperative, whose freedom of decision-making it restricts, and with regard to third parties, whose access to the Danish market is impeded.

109 In that regard, the Court considers that in this case it appears from the case-file that the exclusive supply obligation at issue, taken in its economic context, has an anti-competitive effect on the market. On the one hand, as already pointed out, the applicant has a strong position on the sales market for animal skins and, on the other, 75% of the applicant's members belong to its Emergency Assistance Scheme, which, as already stated, itself leads to rigidity in economic operators' conduct. Consequently, the stipulation in question does have a restrictive effect on competition by making it more difficult for the applicant's competitors to gain access to the Danish market in question. Consequently, it is capable of falling within the prohibition under Article 85(1) of the Treaty.

110 The Court concludes that, in so far as it found that section 5(d) of the Rules regarding the Emergency Assistance Scheme has as its object or effect the restriction of competition within the common market within the meaning of Article 85(1) of the Treaty, the Decision is not based on materially inaccurate facts or vitiated by an error of law or a manifest error of assessment.

4.1.3. The exclusive supply obligations to which the grant of a kit advance and entry to the competition are subject

111 It is considered in the Decision that the obligation for members to supply their entire production for sale by DPA (a) where they have received a kit advance, and (b) where they wish to enter the competition constitutes an infringement of Article 85(1) of the Treaty, in particular because it prevents competitors from gaining access to the market in so far as it seals off their main source of supply of skins in Denmark.

112 The mechanism of the kit advance enables DPF's members to obtain an advance calculated so as to cover feed costs during the period running from the birth of the animals until the time when they reach the age when they can be slaughtered and the breeder can sell their skins. The standard application form for a kit advance as appears from the documents produced by DPF is as follows:

'The undersigned member of Dansk Pelsdyravlerforening hereby applies for a kit advance.

...

I declare my agreement to the payment of the advance on the following terms:

1. I am a member of the Emergency Assistance Scheme of DANSK PELSDYRAVLERFORENING.

2. I undertake to supply all my production of skins for sale by DANSK PELS AUKTIONER.

...'.

113 The mechanism of the prize is designed to encourage fur breeders constantly to improve their production of skins by making them compete with each other and enabling them to profit by the experience of the best breeders. A DPF member who wishes to enter the competition has to declare that he supplied all the skins he produced for sale at the applicant's auctions.

Arguments of the parties

114 The applicant explains that the kit advance scheme was introduced in order to tackle the cash-flow problems experienced by breeders in the period between the birth of the animals and the time when their skins are sold. The obligation to supply for sale at the applicant's auctions all skins produced in the year in which the member wishes to receive the kit advance constitutes the only means by which the applicant can be sure that the member will repay the advance which he has received. Under Danish law, there is no possibility for the applicant to be granted a 'preferential right' over animal skins. The obligation is limited to one year only, this period being determined by the natural breeding cycle. This situation is comparable to most contracts of this type in customary use in the agricultural sector. The applicant points out that breaches of the obligation to supply all skins produced do not carry the penalty of exclusion from DPF. Moreover, they are not penalized at all, with the exception of the fact that the conditions for obtaining emergency assistance are no longer satisfied. In addition, the applicant states that a breeder who is in receipt of a kit advance may release himself from the obligation to supply all skins produced to DPF by repaying the advance. In conclusion, the applicant considers that the rules on the kit advance are not contrary to Article 85(1) of the Treaty.

115 Lastly, as regards the exclusive supply obligation to which entry to the competition scheme is subject, the applicant points out that one of the requirements for qualifying for entry is that a minimum quantity of skins must be supplied. In order to provide an accurate indication as to which breeders' production is best, it is necessary to require all the skins produced to be supplied in order to avoid a breeder's submitting only his best skins, in which case no account would be taken of the part of his production which was of lower quality. The applicant considers that, contrary to the Commission's suggestion, it would not be feasible, on technical

grounds, to limit the obligation to supply skins merely to those of each type and colour.

116 The Commission maintains that the exclusivity clause embodied in the kit-advance scheme is incompatible with Article 85(1) in so far as the breeder undertakes to supply all his production of skins to the applicant. It is irrelevant that breaches of the obligation to supply are not penalized by exclusion from the association and that a fur farmer who has obtained a kit advance can release himself from the obligation by repaying the advance. The farmer continues to be bound to sell all his production at the applicant's auctions, because payment of the kit advance is subject to farmer's being affiliated to the Emergency Assistance Scheme. The Commission further observes that, unlike a general sales contract or an ordinary sale, the obligation in question does not relate to a predetermined number or quantity for sale at an agreed price.

117 As regards the mechanism of the prize scheme, the Commission considers that the obligation for participants to supply all their production of skins is a restriction of competition within the meaning of Article 85(1) of the Treaty. It considers that the effect on competition is appreciable, since half of all breeders, usually the largest ones, aim to take part in the scheme.

Findings of the Court

118 The Court observes that the parties agree that the possibility for a member to receive a kit advance is conditional on his supplying all his production in the year in respect of which the advance is paid for sale at auction by the applicant. Admittedly, the applicant has argued that that obligation is the only means whereby it can be sure that the member will repay the advance, since under Danish law it cannot obtain a 'preferential right' over animal skins. In principle it is indeed normal commercial practice to require security to be given for the repayment of advances. However, the Court holds that the Commission rightly pointed out at the hearing that the price of the skins is seven times the amount of the kit advance and that DPF has a charge over its members' individual accounts. The antepenultimate

paragraph of Article 8 of the 'Rules of the Breeders' Capital Fund' provides that if a member owes any amount whatsoever to DPF or DPA and it is impossible to recover that amount by any other means, the amount may be deducted from the member's capital account, after his trading account has been wound up. In addition, it follows from section 7 in conjunction with section 25 of DPF's Regulations that, in the event that a member who owes money to the cooperative refuses to honour his debt and it has not been possible to recover the money owed by means of conventional procedures, the association is entitled to exclude the member in question and set off the amount of its claim against sums deposited in the member's trading and capital accounts when the sums in those accounts are repaid. It follows that, contrary to the applicant's contention, it does not need additional financial security, such as the exclusive supply obligation at issue, in order to be sure that kit advances will be repaid. The effects of that obligation are first that members who have received a kit advance cannot determine their sales policy in complete independence and secondly that it is more difficult for the applicant's competitors to gain access to the Danish market. Accordingly, the Court holds that the exclusivity condition attaching to the grant of a kit advance may have a restrictive effect on competition within the meaning of Article 85(1) of the Treaty.

119 As for the arguments that, on the one hand, failures to fulfil the supply obligation are not penalized by exclusion from DPF and that, on the other, a breeder who receives a kit advance can release himself from that obligation by repaying the advance, the Court observes that those practices do not in any way attenuate the binding nature of the exclusive supply obligation resulting from the stipulation at issue. As for the argument that the duration of the obligation is comparable to that of most contracts customarily employed in the agricultural sector, the Court emphasizes that the possible existence of comparable contracts in other markets is irrelevant for the purpose of evaluating the nature of the obligation in question in its actual context as a restriction of competition, since the comparison in question involves markets which are completely separate from the reference market. On the contrary, as far as the reference market is concerned, it may again be noted that the applicant has a very strong position, which reinforces the nature of the contested stipulation as a restriction of competition.

120 As regards the rules governing entry to the competition, in particular the obligation for participants to supply the whole of their production for sale at the applicant's auctions, the Court considers that that supply obligation debars participants in the competition from using a sales channel other than those auctions. Consequently, that stipulation may have a restrictive effect on competition on the same terms as set out above.

121 The Court also considers that the applicant's argument that it is necessary for participants to supply all their production in order to enable the quality of the entirety of breeders' production to be properly assessed is unfounded because it is unnecessary, in order to meet that objective, for the skins covered by the prize scheme to be sold through the applicant. That activity has nothing to do with checking the quality of the skins in question.

122 As already observed, assessment of the effects of the exclusive supply obligation has to take account of its economic and social context. That obligation may combine with others to have a cumulative effect on competition (see, *inter alia*, the judgment of the Court of Justice in *Delimitis*, cited above, paragraph 14). In that regard, the Court considers that, in the circumstances of the case, the exclusive supply obligation attaching to the prize scheme together with the exclusive supply obligations under the emergency assistance and kit advance schemes — in themselves and as a result of their cumulative effect — restrict competition in so far they make it more difficult for the applicant's competitors to gain access the market because the main source of supply of skins in Denmark is largely closed to them.

123 The Court therefore considers that the Commission has proved to a sufficient legal standard that the obligation on a member to supply his entire production for sale by DPA in the event that he (a) applies for a kit advance and (b) wishes to enter the competition may restrict competition within the meaning of Article 85(1) of the Treaty.

4.1.4. Section 5 of the Standard Pelting Control Agreement

124 Point 10(ii) of the Decision reads as follows:

'The 100% obligations ... contained in the Pelting Control Agreement tie up the options of the members who are thereby prevented from independently determining their sales policy. They hinder market entry by competitors as they corner the main source of supply of skins in Denmark.'

Point 14 of the Decision states that:

'The infringements began at the latest on the following dates:

...

(iv) the 100% obligation in the Standard Pelting Control Agreement -1 January 1973'.

125 It appears from the case-file that the pelting control mechanism is based, on the one hand, on a standard pelting control agreement drawn up by DPA and, on the other hand, on a set of individual contracts concluded between DPA and breeders who wish to be given the status of pelting centres. The individual agreements have to comply with the stipulations of the standard agreement. A pelting centre, which in practice will be managed by a breeder who is a member of DPF, is a specialized centre which prepares not only its own animal skins, but also those of other breeders who do not wish to prepare their skins themselves or consider that they are not capable of doing so. DPA undertakes to maintain constant supervision over pelting centres.

126 Section 5 of the Standard Pelting Control Agreement stipulates as follows:

'the Pelting Centre undertakes solely to look after the interests of the DPA and among other things must not show their own or delivered skins to anybody other than the representative of the DPA. The Pelting Centre also undertakes not to arrange sale or another kind of dispatch of skins to buyers or sales organizations other than DPA'.

Arguments of the parties

127 The applicant argues that the Commission's reference in point 10(ii) of the Decision to 'the 100% obligations ... contained in the Pelting Control Agreement' is wrong. The applicant claims that its objective was to encourage as many members as possible to prepare their skins themselves because it is an important aspect of production and it makes for rationalization; it also enables breeders to reduce their costs to a minimum. In order to encourage breeders to prepare their skins themselves, they are given constant assistance, *inter alia* through specialized courses. Under the Pelting Control Agreement, the applicant controls the quality of the skin preparation carried out by the breeders in question, which operate pelting centres on their own account. That cooperation enables the pelting centre to be given the status of a 'professional pelting centre'. In return for conferral of that status, the pelting centres undertake not to carry out activities directly competing with the applicant's auction sales by acting as intermediaries or consignment centres for DPF's competitors. A pelting centre which has acceded to the Pelting Control Agreement could prepare skins for anybody. Any breeder could slaughter his animals, take them to the pelting centre and then recover the prepared skins in order to sell them anywhere.

128 The Commission considers that section 5 of the Pelting Control Agreement limits the options open to DPF's members and prevents them from determining independently the sales policy which they intend to pursue. In its contention, the effect of that stipulation is that a breeder who has handed over his animals for pelting to a pelting centre cannot ask the centre to allow them to be shown to one of the applicant's competitors. It is important to note in that connection that it is not the breeder himself who asks the pelting centre, for example, not to show his skins and that if he did ask the centre to show them to potential purchasers, his request would be turned down on account of the contested stipulation. In the Commis-

sion's view, that anti-competitive stipulation prevents breeders from supplying their skins to auction houses other than the applicant's, since it is not open to the pelting centre to show their products to other interested purchasers or auction houses. This conspicuously complicates the supply of skins to auction houses other than the applicant's and reinforces the supply obligations laid down elsewhere. The Commission argues that, since there was already a clause prohibiting competition in DPF's Regulations, it was superfluous to repeat it in the Pelting Control Agreement, but the applicant nevertheless did so and refused to abrogate it at the Commission's request. In addition, the fact that the stipulation at issue embodies an obligation which makes it difficult to supply skins to auction houses other than the applicant's confirms that the restrictive effects of the prohibition of competition have been reinforced by a concerted practice consisting of not supplying the applicant's competitors. That restriction of competition relates to all breeders who have their animals skinned at a pelting centre which is party to the Pelting Control Agreement, namely approximately 30% of breeders in 1984/1985 and 20% of breeders in 1987/1988.

Findings of the Court

129 The Court recalls in the first place that in Case C-269/90 *Hauptzollamt München-Mitte* v *Technische Universität München* [1991] ECR I-5469, paragraphs 13 and 14, the Court of Justice held that

'... since an administrative procedure entailing complex technical evaluations is involved, the Commission must have a power of appraisal in order to be able to fulfil its tasks.

However, where the Community institutions have such a power of appraisal, respect for the rights guaranteed by the Community legal order in administrative procedures is of even more fundamental importance. Those guarantees include, in particular, the duty of the competent institution to examine carefully and impartially all the relevant aspects of the individual case, the right of the person concerned ... have an adequately reasoned decision. Only in this way can the Court verify whether the factual and legal elements upon which the exercise of the power of appraisal depends were present.'

The principle that there must be a sufficiently precise statement of reasons, enshrined in Article 190 of the Treaty, is one of the fundamental principles of Community law which the Court has to ensure are observed if necessary by raising of its own motion a plea relating to failure to fulfil that obligation (Case 18/57 *Nold* v *High Authority* [1974] ECR 41 and Case T-45/90 *Speybrouck* v *Parliament* [1992] ECR II-33).

It should therefore be considered whether the Decision, which was taken in a context of complex economic evaluations, was adopted in conformity with the principles which have just been set forth as regards the Standard Pelting Control Agreement.

130 The Court considers that examination of Article 1(1)(d) of the Decision shows that the Commission took the view that two types of prohibitions laid down by section 5 of the Standard Pelting Control Agreement infringed Article 85(1) of the Treaty: first, the ban on pelting centres' showing skins to buyers other than buyers from DPA and, secondly, the ban on pelting centres' arranging sales, or otherwise dispatching skins, to any buyer other than DPA.

131 As regards the prohibition on pelting centres' showing skins to buyers other than DPA, the Court can but find that no reasons are set out in the Decision for that section of the operative part and that the only explanations given by the Commission in that connection are to be found in the defence and the rejoinder. However, it is settled case-law that the reasons for a decision have to appear in the actual body of the decision. The decision cannot be explained for the first time *ex post facto* before the Community Court, save in exceptional circumstances which are not present in this case (see Case 195/80 *Michel* v *Parliament* [1981] ECR 2861 and in Joined Cases 64/86, 71 to 73/86 and 78/86 *Sergio* v *Parliament* [1988] ECR 1399 and Case T-1/90 *Pérez-Mínguez Casariego* v *Commission* [1991] ECR II-143). It must therefore be held that no reasons have been given such as to provide the necessary support for that section of the operative part, which must therefore be annulled.

132 As far as concerns the ban on pelting centres' arranging sales, or otherwise dispatching skins, to any buyer other than DPA, the Court can but find that the only reasoning in the Decision which might support that section of the operative part is to be found in points 10(ii) and 14(iv) of the Decision, which are quoted above, relating to the alleged obligation to supply the whole production of skins which is claimed to be set out in the Standard Pelting Control Agreement. However, the Court considers that neither the actual wording of the stipulation at issue nor the practical procedures governing the operation of the applicant association lay down such an exclusive supply obligation, as, moreover, the Commission impliedly, but necessarily, acknowledged in the arguments in its defence.

133 As regards the actual wording of section 5 of the Pelting Control Agreement, quoted above, the Court considers that, in itself, that section does not prescribe any exclusive supply obligation, whether in the form of a requirement that breeders should deliver all their skins to pelting centres or in the form of a requirement that pelting centres should deliver all the pelts which they have processed to the applicant association for sale only at its auctions.

134 That literal interpretation is borne out by a consideration of the practical procedures governing the operation of the applicant association. The applicant has stated, without being contradicted by the Commission, that a pelting centre which has acceded to the Pelting Control Agreement may prepare skins for anybody and that any breeder is entitled to slaughter his animals, take them to the pelting centre and then recover the prepared skins in order to sell them in private transactions with skin traders or to the applicant's competitors for sale at their auctions (see paragraph 127 above). In addition, it should be recalled that the Court has held that although section 4(1)(f) of the applicant's Regulations does require members of DPF not to act so as to compete directly with the applicant's sales activities, it does not in itself contain any exclusive delivery obligation, since that provision essentially has the effect of prohibiting any member of the cooperative from collecting skins for auction sales other than those held by the applicant (see paragraph 73 above).

135 That finding is borne out moreover by the Commission's own argument, as set out in the defence and the rejoinder, since it merely maintained that the contested stipulation restricts competition and reinforces supply obligations laid down elsewhere, without claiming that section 5 of the Pelting Control Agreement itself embodies any exclusive supply obligation.

136 Hence the only part of the statement of reasons which might effectively support the finding of an infringement set out in Article 1(1)(d) of the operative part as regards the prohibition of pelting centres' organizing sales or any other form of dispatch to buyers other than buyers from DPA is erroneous.

137 It appears from all the foregoing — without its being necessary to consider whether the stipulation at issue restricts competition or reinforces the effect of other exclusive supply obligations set out elsewhere in the applicant's Regulations, since the Commission did not set out that argument in the Decision but raised it for the first time in its pleadings before the Court — that Article 1(1)(d) of the Decision must be annulled. Moreover, it also follows from all the foregoing that in its decision the Commission did not accuse the applicant of any concerted practice other than that connected with section 4(1)(f) of DPF's Regulations, on which the Court has ruled in paragraph 83. Consequently, the Court holds that, as the applicant rightly maintains, Article 1(1) should be annulled in so far as it relates to concerted practices constituting infringements of Article 85(1) of the Treaty.

4.2. Effects on trade between the Member States and appreciable effects on competition

138 In the Decision, the Commission considers that competition between the Member States is affected in so far as section 4(1)(f) of DPF's Regulations and the obligation to supply the whole production of skins to which eligibility for the kit advance, membership of the Emergency Assistance Scheme and entry to the competition are subject have as their object or effect the limitation of competitors' access to the

market by creating a *de facto* monopoly of the supply and sale of mink and fox furs in Denmark. According to the Decision, limiting or eliminating any real competition in that way has led to partitioning of the common market inasmuch as the Danish market is virtually inaccessible to DPF's competitors, and has appreciable effects on trade between Member States bearing in mind the importance of the fur sector in Denmark, which accounts for over 27% of world mink production.

Arguments of the parties

139 The applicant argues that the stipulations at issue have such a minimal effect on competition and trade between the Member States that it is possible to disregard them in accordance with the *de minimis* rule. No breeder can influence supply and, therefore, prices.

140 The Commission, which refers to Case 193/83 *Windsurfing International* v *Commission* [1986] ECR 661, argues that the stipulations at issue prevent members of the association from sending part of their production to other Member States for sale there. Citing the judgment in *Coöperatieve Stremsel-en Kleurselfabriek* v *Commission*, paragraph 13, it submits that the restriction of competition resulting from the stipulations at issue is of such a nature as to prevent competition between auction undertakings. It is irrelevant that the stipulations have other aims as well. The Commission notes that HBA has obtained a much greater proportion of skins produced in the other Nordic countries than it has in Denmark. It also points out that Danish mink furs account for 72% of Community production and that the applicant's turnover is substantially in excess of ECU 200 million.

Findings of the Court

141 In order to assess, having regard to the prohibition under Article 85(1) of the Treaty, the restrictive effect on competition which may ensue from the stipulations at issue held by the Court to be capable of having such an effect, it is appropriate to consider whether they have a sufficiently significant effect on intra-Community trade, that is to say, it is necessary in particular to verify whether it is possible to 'foresee with a sufficient degree of probability on the basis of a set of objective factors of law or of fact' that the stipulations in question 'may have an influence, direct

or indirect, actual or potential, on the pattern of trade between Member States' (judgment in *Société Technique Minière*). Consequently, it is necessary to consider whether the stipulations at issue are capable in particular of partitioning the common market, in so far as DPF's competitors are virtually prevented from gaining access to the Danish market, and thus of rendering more difficult the economic interpenetration which the Treaty is intended to create.

142 The Court considers that, in order to deal with this limb of the plea, it is appropriate to cite the following figures which were provided by the applicant itself or not challenged by it:

— first, Danish production of mink furs accounts for approximately 72% of aggregate Community production;

— secondly, of the average 9 million mink and 240 000 fox furs produced each year in Denmark, DPA sold 8 million and 185 000 respectively in 1985/1986 and 8.3 million and 190 000 respectively in 1986/1987; and

— thirdly, 98% of mink furs are exported.

The percentage of those exports which goes to other Member States varies from year to year between 33% and 46%; lastly, according to a statement made by the applicant at the hearing, it brings together 5 000 breeders and only 50 to 100 Danish breeders are not DPF members.

143 The Court considers that those figures show that a very substantial proportion of the Community production of the skins in question are marketed in accordance with the stipulations at issue. It follows that those stipulations, which the Court has already held to be capable of infringing Article 85(1) of the Treaty, are therefore liable to deflect trade flows from their natural course and thereby affect trade between the Member States. Accordingly, the Commission rightly concluded that the regulations and stipulations governing the applicant's operation, which the Court has held to be capable of infringing Article 85(1), have an appreciable effect on competition and intra-Community trade.

144 Consequently, the limb of the plea alleging insufficient effects on competition and intra-Community trade must be dismissed.

4.3. Application of Article 85(3) of the Treaty

145 In its decision, the Commission held that the regulations and rules notified could not qualify for exemption under Article 85(3) since the requirements for exemption were not fulfilled. As regards the kit advance, the conditions for entry to the competition and the Standard Pelting Control Agreement, the Decision finds that those provisions, which were not formally notified, do not fall within Article 4(2) of Regulation No 17 and are not therefore eligible for exemption under Article 85(3). Such an exemption cannot be granted in any event, according to the Decision, in so far as those provisions restrict competition in the same way as the provisions which were notified.

Arguments of the parties

146 The applicant submits in the reply that the requirements of Article 85(3) of the Treaty are fulfilled and that the Commission should in any event have granted its request for exemption under the said Article 85(3).

147 The Commission asserts that it stated in the Decision that the requirements for exemption were not satisfied and the applicant did not contest this in its application. Consequently, the Commission considers that this plea, which was raised for the first time in the reply, is inadmissible.

Findings of the Court

148 The Court finds that this plea was raised for the first time in the reply. Under the first subparagraph of Article 42(2) of the Rules of Procedure of the Court of Justice, as then in force and applicable to the Court of First Instance by virtue of the third paragraph of Article 11 of the Council Decision of 24 October 1988 establishing a Court of First Instance of the European Communities, the wording of which has largely been taken over by the first subparagraph of Article 48(2) of the

Rules of Procedure of the Court of First Instance, 'no fresh issue may be raised in the course of proceedings unless it is based on matters of law or of fact which come to light in the course of the written procedure'. Consequently, that limb of the plea is inadmissible.

149 It follows from all the foregoing that the Decision should be annulled to the following extent:

— Article 1(1), in so far as it links to the stipulation referred to in subparagraph (a) the concerted practices constituting an infringement of Article 85(1) of the Treaty;

— Article 1(1), in so far as it covers concerted practices constituting infringements of Article 85(1) of the Treaty;

— Article 1(1)(d) relating to the finding of an infringement of Article 85(1) of the Treaty as a result of section 5 of the Standard Pelting Control Agreement; and

— Article 1(2), in so far as it orders the applicant, on the one hand, to terminate alleged concerted practices and, on the other, to abolish section 5 of the Standard Pelting Control Agreement.

The alternative claim for the annulment or reduction of the fine

Arguments of the parties

150 The applicant argues that, if it has erred in law, its error is excusable. It did not think that associations and their activities in the sphere governed by the competition rules of the Treaty would be assessed on a different basis from that under Danish law. By a letter from the Monopoltilsynet dated 24 September 1986, the Danish competition authorities informed the Commission that they had found no legal basis for acting with regard to the applicant's regulations or for requiring the applicant to register with the Monopoltilsynet. The applicant further points out

that in order to show good will it has amended all the provisions of its regulations on which the Commission's decision was based.

151 The applicant observes in the reply that, as a cooperative society, it has based its commercial activities on cooperative principles, whose corollary in most countries is a general obligation of supply which attaches to membership. The applicant's rules are less restrictive and it had legitimate grounds for considering that there was no infringement of the competition rules. It had based itself on a cooperative tradition which exists in all the Member States.

152 Referring to the cases of FRUBO (Commission Decision 74/433/EEC of 25 July 1974, OJ 1974 L 237, p. 16), cauliflowers (Commission Decision 78/66/EEC of 2 December 1977, OJ 1978 L 21, p. 23), rennet (Commission Decision 80/234/EEC of 5 December 1979, OJ 1980 L 51, p. 19) and floriculture (Commission Decision 88/491/EEC of 26 July 1988, OJ 1980 L 262, p. 27), the applicant points out that the Commission did not impose fines on the cooperatives in question, even though their activities were more restrictive of competition than those at issue in this case.

153 The Commission challenges the assertion that the applicant could have committed an excusable error of law. The assessment made by the Danish authorities related solely to Danish law. The applicant should have known that all the provisions at issue, in particular the obligation exclusively to supply its auctions, were incompatible with Article 85(1) of the Treaty. The Commission maintains that it took account of the fact that, as soon as it received the statement of objections, the applicant made concrete proposals for the amendment of its regulations with a view to bringing the restrictions in question to an end. Referring to the judgments in Joined Cases 100 to 103/80 *Musique Diffusion français* v *Commission* (*'Pioneer'*) [1983] ECR 1825 and in Joined Cases 96 to 102/82, 104/82, 105/82, 108/82 and 110/82 in *IAZ International Belgium* v *Commission* (*'ANSEAU-NAVEWA'*) [1983] ECR 3369, the Commission points out that it has to have regard to the dissuasive nature of its action and to take account of a large number of factors, the nature and importance of which vary according to the type of infringement in question and the particular circumstances of the case. The Commission followed those guidelines in fixing the amount of the fine imposed in this case.

154 In the cases cited by the applicant, the Commission took the view that there was an infringement of Article 85(1) and that no exemption could be granted under Article 85(3) of the Treaty. In addition, with the exception of the rennet case, all those cases related to products coming under Annex II of the Treaty, which is referred to in Article 38 thereof. The Commission further points out that in the Meldoc case (Commission Decision 86/596/EEC of 26 November 1986, OJ 1986 L 348, p. 50) five undertakings, including four dairy cooperatives, had larger fines imposed on them than that imposed on the applicant.

155 The Danish Government considers that it is not appropriate to fine the applicant, on the ground that its members regard the regulations in question as a normal part of the particular structure of the cooperative and not as having the aim of restricting competition. It submits that there was no serious or intentional infringement of Article 85 of the Treaty in this case and that account should be taken of this as an mitigating factor.

Findings of the Court

156 The Court considers in the first place that, as regards the applicant's argument based on the fact that its excusable error was supported by the reactions of the Danish monopolies authorities, it should be pointed out that the Monopoltilsynet's letter of 24 September 1986 related only to the registration of the applicant with that authority and, in addition, as far as the stipulations covered by the Decision are concerned, was confined to the applicant's Regulations. Secondly, the Court points out that the Court of Justice has consistently held that Articles 85 and 86 of the Treaty, read in conjunction with Article 5 of the Treaty, require the Member States not to take decisions which may eliminate the effectiveness of the competition rules applicable to undertakings. Consequently, and in any event, a letter from the national — in this case, Danish — authorities relating to the conditions for the applicability of the competition rules cannot in any way be binding on the Commission as regards the application of Article 15 of Regulation No 17 (Case 298/83 *CICCE* v *Commission* [1985] ECR 1105, paragraph 27).

157 The Court considers thirdly that, as the Court of Justice has consistently held (see, most recently, Case C-279/87 *Tipp-Ex* v *Commission* [1990] ECR I-261), it is not necessary for an undertaking to have been aware that it was infringing the

prohibition laid down by Article 85 of the Treaty for an infringement to be regarded as having been committed intentionally; it is sufficient that it could not have been unaware that the contested conduct had as its object or effect the restriction of competition in the common market.

158 The Court considers that that was the case here in view, on the one hand, of the various stipulations requiring breeders to supply the whole of their production for sale at the applicant's auctions and, on the other, of the nature of the no-competition obligation laid down by section 4(1)(f) of the applicant's Regulations and of the cumulative effect of those provisions.

159 The Court also considers that the Commission decisions cited by the applicant were not such as to create a legitimate expectation in the applicant so as in particular to give it to believe that a cooperative society would, as a matter of principle, fall outside the scope of Article 85 of the Treaty. On the contrary, it appears from those decisions that the Commission has considered for a long time that certain stipulations in the regulations of cooperative societies may be contrary to Article 85(1) of the Treaty. The applicant's argument based on the claim that the Commission has never imposed a fine on a cooperative cannot be accepted either. The Commission has rightly referred to its decision in the Meldoc case, cited above. In addition, the Court points out that the Commission took into account as a mitigating factor the fact that the applicant's assets belong to its producer members, who therefore depend directly on the cooperative's profits for their income.

160 With regard to the argument based on the applicant's good will, as witnessed by the fact that it amended the stipulations at issue, the Court considers that it appears from point 14 of the Decision that the Commission has already taken into account, as a mitigating factor, the fact that the applicant made concrete proposals with a view to eliminating the restrictions complained of. It should be added that whilst Article 15(2) of Regulation No 17 provides that, in fixing the amount of the fine, regard is to be had to the gravity and to the duration of the infringement, the Commission may impose a fine even if, as in this case, the undertaking concerned amends the provisions which are contrary to Article 85(1) of the Treaty, as the amendment will take effect only as far as the future is concerned.

161 However, as held above, the Court has decided to annul parts of the operative part of the Decision on the terms set out in paragraph 149 above. In the circumstances of the case, the Court considers that a just assessment of the effects of the annulments will be made by reducing the fine imposed by 40% and that, consequently, a fine of ECU 300 000 is commensurate with the gravity and duration of the infringement of the Community competition rules which has been held to exist.

162 It follows from all the foregoing that the Decision should be annulled within the limits set out in paragraph 149 above, that the fine imposed on the applicant should be reduced from ECU 500 000 to ECU 300 000 and that the remainder of the claims in the application should be dismissed.

Costs

163 Under the first subparagraph of Article 87(3) of the Rules of Procedure of the Court of First Instance, where each party succeeds on some and fails on other heads, the Court may order that the costs be shared or that each party bear its own costs. Since in this case each party has failed on some heads, the Court considers that a just assessment of the circumstances of the case will be made by ordering each of the parties to bear its own costs. In addition, under Article 87(4) of the Rules of Procedure, the parties which intervened in support of the form of order sought by the applicant should bear their own costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Second Chamber)

hereby:

1. Annuls Article 1(1) of the Commission decision of 28 October 1988 (IV/B-2/31.424, Hudson's Bay — Dansk Pelsdyravlerforening, OJ 1988 L 316, p. 43) in so far as it is directed at concerted practices constituting infringements of Article 85(1) of the Treaty;

2. Annuls Article 1(1)(d) of that decision;

3. Annuls Article 1(2) of that decision in so far as it orders the applicant to terminate alleged concerted practices and to delete section 5 of the Standard Pelting Control Agreement;

4. Fixes the amount of the fine imposed on the applicant by Article 2 of the decision at ECU 300 000;

5. Dismisses the remainder of the application;

6. Orders the parties, including the interveners, to bear their own costs.

Cruz Vilaça Saggio

Yeraris Briët Biancarelli

Delivered in open court in Luxembourg on 2 July 1992.

H. Jung J. L. Cruz Vilaça

Registrar President