OPINION OF ADVOCATE GENERAL TESAURO

delivered on 12 September 1995 *

1. In the present proceedings, the Court is asked to clarify the relationship between Article 85 of the Treaty and Council Regulation No 26/62 of 4 April 1962 applying certain rules of competition to production of and trade in agricultural products [1] and, in that context, to trace the dividing line between the powers of the Commission and the jurisdiction of the national courts.

The facts

2. I shall briefly outline the facts of the main proceedings: they all relate to the legality of the obligation imposed on members by the statutes of an agricultural cooperative to pay a resignation fee on withdrawing or being expelled from the cooperative.

(a) *Case C-319/93*

3. Mr Dijkstra, a Dutch dairy farmer, was expelled, by resolution of its general meeting, from CZI De Torenmeter W. A. (hereinafter 'De Torenmeter'), the cooperative of which he was a member, for failing to deliver all his milk production to it. [2] Following that decision, De Torenmeter, which subsequently absorbed Friesland (Frico Domo) Coöperatie BA (hereinafter 'FFD'), called on Mr Dijkstra to pay, under Article 13 of its statutes, a resignation fee equal to 10% of the average price received by him for the milk delivered over a period of one year. [3]

When the matter was brought before it, the Rechtbank, Leeuwarden, upheld De Torenmeter's claim. In the appeal brought against that judgment in the Gerechtshof, Leeuwarden, Mr Dijkstra alleged nullity, by virtue of Article 85 of the Treaty, of the clauses of the statutes of the cooperative which: (a) require members to deliver all their milk production to the cooperative; (b) require them to pay a resignation fee; (c) require them to give a

* Original language: Italian.

1 — OJ, English Special Edition 1959-1962, p. 129.

2 — That obligation is laid down in Article 17 of the statutes of the cooperative.

3 — More specifically, Article 13 of the statutes provides:
'1. Any natural person who ceases to be a member in the circumstances provided for in Article 8(b), (c) or (d)' [that is to say, following resignation or exclusion], 'or any legal person who ceases to be a member in any of the circumstances provided for in Article 8, shall be required to pay a resignation fee in response to a first written request from the governing board of the cooperative.
2. The resignation fee shall be equal to 10% of the average annual amount paid to the member under Article 33 for the milk delivered to the cooperative over the last five financial years of his membership or — if he has been a member for less than five years — the period of his membership.'

period of notice to exercise their right of withdrawal; [4] (d) require the cooperative to be financed by means of an annual contribution of funds from members. [5]

De Torenmeter responded by contending that Article 85 did not apply to the case, by virtue of the special derogation contained in Article 2(1) of Council Regulation No 26.

4. In view of the uncertainty as to how that provision should be interpreted and certain doubts as to the division of jurisdiction between the Commission and the national courts, the Gerechtshof, Leeuwarden, decided to stay the proceedings and refer the following questions to the Court for a preliminary ruling:

'(1) Does the second sentence of Article 2(1) of Regulation No 26/62 applying certain rules of competition in the agricultural sector, which relates to agreements, decisions and practices of farmers, farmers' associations or associations of such associations belonging to a single Member State, have an independent meaning, so that national courts must presume that such agreements, decisions and practices are valid so long as the Commission has not found that they exclude competition or jeopardize the aims of Article 39 of the EEC Treaty?

(2) If the answer is yes, is it a requirement for a Commission finding to that effect that the Commission has set out its opinion in a decision issued pursuant to Article 2(2)?

(3) If the answer is no, must national courts, when it is claimed in proceedings before them that an agreement concluded or decision taken by an agricultural cooperative is void because it conflicts with Article 85 of the EEC Treaty, and the cooperative relies on the second sentence of Article 2(1) of Regulation No 26/62, submit the matter to the Commission for its assessment?'

(b) *Case C-40/94*

5. Exactly the same questions have been referred to the Court by the Arrondissementsrechtbank, 's-Hertogenbosch, in similar proceedings brought by 13 ex-members of the Coöperatieve Zuivelvereniging

4 — Article 10(2) of the statutes provides that if a member gives notice of withdrawal to the cooperative at least two months before the end of the financial year, the withdrawal is to take effect at the end of that year; otherwise, it will take effect at the end of the next year.

5 — Article 37 of the statutes.

Campina BA, which in 1991, following a merger with Melkunie Holland BA, became Coöperatieve Vereniging Zuivelcoöperatie Campina Melkunie BA (hereinafter 'Campina').

Mr Van Roessel and the other 12 plaintiffs in the main proceedings terminated their membership of Campina between 1990 and 1992. Those members who had left before 1 January 1991 were asked by the cooperative to pay, under Articles 15 and 16 of its statutes as then in force, compensation equal to 10% of the annual average of the amounts paid to them for the milk delivered in the five years preceding their withdrawal. The members who left after that date, on the other hand, were required, by virtue of Article 60 of the new statutes, to pay a levy of 4% of the price received by them for their milk in the year prior to the year of their withdrawal. Campina unilaterally set those amounts off against the sums still owing to the members in question.

6. It should be noted that Campina had changed the provisions of its statutes regarding withdrawal following the commencement of proceedings against it under Article 85 of the Treaty. The Commission had decided, in particular, that the amount of the resignation fee, as originally determined, made it excessively difficult for members to leave the cooperative and ultimately extended for an indefinite period the further obligation imposed on them to deliver all the milk they produced to the cooperative. It followed that not only the economic freedom of the members but also the possibility of Campina's competitors obtaining milk supplies were restricted in a manner incompatible with the Community competition rules.

Following negotiations during the administrative procedure, Campina gave an undertaking, which was accepted by the Commission, to amend the disputed provisions of its statutes so as to allow its members to terminate their membership on three different dates during the year, by giving notice of two years, without having to pay any compensation. The members also had to be allowed to disregard that procedure and give less notice — three months — but in such circumstances it was accepted that withdrawal could only be on a single date during the year and a resignation fee would have to be paid, at the reduced rate of 4%. Although it considered that the exclusive supply obligation, combined with the new provisions on members' withdrawal, still involved restrictions of competition, the Commission nevertheless decided that those limitations were acceptable, in view of the specific structure of the market, and concluded that they qualified for the exemptions provided for in Regulation No 26. The Commission therefore closed the file and published details of the agreement reached in its Report on competition policy for 1991. [6]

6 — *XXIst Report on Competition Policy*, paragraphs 83 and 84.

7. That said, it must be observed that in the main proceedings the plaintiffs alleged that the provisions concerning the resignation fee were incompatible with Articles 85 and 86 of the Treaty, and thereby void, at least in so far as the amount to be used as a basis for calculating the resignation fee exceeded 4% of the average turnover achieved by the member concerned in the five years prior to his withdrawal. Accordingly, having regard to the importance to the decision to be given in the proceedings of the conditions for the application of Regulation No 26, the national court stayed the proceedings and referred to the Court the same preliminary questions as those in Case-319/93.

(c) *Case C-224/94*

8. The facts in this case are basically no different from those in Case C-40/94. On leaving the cooperative of which they had been members, Melkunie Holland BA (hereinafter 'Melkunie Holland'), which they did before its merger with Coöperatieve Zuivelvereniging Campina BA, which took place — as stated earlier in 1991, Willem de Bie and 14 other farmers were required to pay a resignation fee, under Article 15 of the cooperative's statutes, equal to 4% of the value of the milk they had delivered to the cooperative in the year before their membership ceased. In that connection it should be noted that, apart from the different amount of compensation, the conditions applied by Melkunie Holland upon cessation of membership were substantially the same as those applied by Campina before it amended its statutes in 1991.

Before the Arrondissementsrechtbank, 's-Hertogenbosch, the outgoing members claimed that the relevant provisions of the statutes of Melkunie Holland were incompatible with Article 85 of the Treaty. In particular, they maintained that the conditions for withdrawal were more restrictive than those which the Commission had considered acceptable in the Campina case. For its part, the cooperative contended, first, that the disputed clauses of its statutes, relating as they did to a particular type of association, were to be regarded as irrelevant for the purposes of Article 85(1); in the alternative, it contended that those clauses fell within the exemption in Article 2(1) of Regulation No 26, until otherwise decided by the Commission, which had not intervened in its case.

9. Thus, in view of the uncertainties as to the interpretation of that provision and the scope of the derogation from the Community provisions for which it provided, the Arrondissementsrechtbank, 's-Hertogenbosch, decided to stay the proceedings and refer to the Court the same questions as those submitted by the Gerechtshof, Leeuwarden, and by another Chamber of the Arrondissementsrechtbank itself. It also submitted three further questions to the Court

in order to eliminate any possible doubt as to the division of jurisdiction between the Commission and the national courts. More specifically it asks:

'(1) Should Article 2(2) of Regulation No 26, in conjunction with Article 1 of that regulation, be interpreted as meaning that, so long as the Commission has not determined by decision pursuant to Article 2(2) that an agreement fulfils the positive requirements for exemption laid down in Article 2(1), Article 85(1) of the EEC Treaty is directly applicable as a result of Article 1 of Regulation No 26?

(2) Would the answer to Question 1 be different as regards a finding by the Commission pursuant to the last part of the second sentence of Article 2(1) of Regulation No 26 that competition is excluded or that the objectives of Article 39 of the EEC Treaty are jeopardized?

(3) If Questions 1 and 2 must be answered in the negative, is the national court nevertheless entitled to declare on its own account the derogating rules set out in Article 2(1) of Regulation No 26 inapplicable because the Commission has intimated, albeit in a manner otherwise than by decision, that Article 2(1) of Regulation No 26 is not applicable, or should it request the Commission to take a formal decision and stay the proceedings until such time as the Commission has ruled on the matter by means of a decision?'

(d) *Case C-399/93*

10. The facts of this case are largely similar to those of Cases C-40/94 and C-224/94. In this case too, on withdrawing from the cooperative of which they were members, the Verenigde Coöperatieve Melkindustrie Coberco BA (hereinafter 'Coberco'), Oude Luttikhuis and eight other farmers were called on to pay a resignation fee which the cooperative then unilaterally collected by set-off against outstanding amounts payable to the members in question. That fee becomes payable under Article 17 of the statutes whenever membership is terminated by exclusion or withdrawal, and is equal to 2% of the sums paid to the member for the milk delivered over the last five full years of his membership, which thus amounts to about 10% of the annual average payment that he received from the cooperative over the five years prior to withdrawal or exclusion.

The amount thus arrived at is reduced, however, by 10% where the person concerned can claim at least eight years' membership of the cooperative, and by a like percentage for each additional year, up to a maximum of 80% in the case of membership exceeding 15 years. A temporary, but important, limit on the decrease of the resignation fee is laid down, however, in Article 13 of the statutes, which treats farmers who are members of the cooperative at the start of the 1990 accounting year as having become members, solely for the purposes of applying that provision, on that date.

Finally, where membership has been for less than five years, the fee payable is equal to 2% of the amount arrived at on the basis of the sums paid to or by the member for the milk supplied and received during his membership, multiplied by the number arrived at by dividing the figure 60 by the number of full months of his membership.

Pursuant to Article 13(2) of the statutes, withdrawal takes effect as from the end of the current financial year if notice is given before 1 July; otherwise, at the end of the following financial year.

11. In the Arrondissementsrechtbank, Zutphen, the plaintiffs, who also refer to the solution agreed to by the Commission in the Campina case, claim that those provisions are void by virtue of Article 85 of the Treaty, at least in so far as the amount of the resignation fee exceeds 4% of the average annual amount paid by the cooperative to the outgoing member over the five years prior to withdrawal or exclusion. The national court, entertaining doubts as to the compatibility of the provisions of the statutes concerning the resignation fee with Article 85 of the Treaty and Article 2(1) of Regulation No 26, referred to the Court for a preliminary ruling the following questions, which in some degree complement those in Cases C-319/93, C-40/94 and C-224/94:

'(1) What criteria should be applied in this case to decide whether Coberco's arrangements for resignation of membership conflict with Article 85(1) of the Treaty?

(2) What criteria should be applied to decide whether the arrangements in question fall within the exceptional arrangements in Regulation No 26 of the Council of the EEC?'

12. As regards the circumstances prevailing on the market in question, I shall merely mention for the purposes of my analysis — without prejudice to such further findings as fall to be made by the national court — the following points taken from the documents before the Court.

In 1991, there were 13 cooperatives operating in the Netherlands in the dairy processing industry, which dealt with about 85% of the milk produced in that country. Their aggregate turnover hovered around HFL 10 500 million a year. The three largest cooperatives, namely Campina, Coberco and Frico Domo, all parties to proceedings before the national courts, alone took up 70% of production and their membership included about 87% of Dutch farmers.

The exemption provided for by Regulation No 26

13. By virtue of Article 42 of the Treaty, the provisions of the chapter relating to competition rules are to apply to production of and trade in agricultural products — being those listed in Annex II to the Treaty (Article 38(3)) — only to the extent determined by the Council.

On the basis of that provision, the Council adopted Regulation No 26, Article 1 of which makes Articles 85 to 90 of the Treaty and provisions made in implementation thereof applicable to all agreements, decisions and practices regarding production of or trade in the products in question, subject to the provisions of Article 2 of that regulation. Article 2(1) provides:

'Article 85(1) of the Treaty shall not apply to such of the agreements, decisions and practices referred to in the preceding article as form an integral part of a national market organization or are necessary for attainment of the objectives set out in Article 39 of the Treaty. In particular, it shall not apply to agreements, decisions and practices of farmers, farmers' associations, or associations of such associations belonging to a single Member State which concern the production or sale of agricultural products or the use of joint facilities for the storage, treatment or processing of agricultural products, and under which there is no obligation to charge identical prices, unless the Commission finds that competition is thereby excluded or that the objectives of Article 39 of the Treaty are jeopardized.'

Article 2(2) and (3) indicate the authority competent to verify whether an agreement benefits from the special derogation contained in paragraph 1 and the procedure to be followed for that purpose. In particular, they provide:

'After consulting the Member States and hearing the undertakings or associations of undertakings concerned and any other natural or legal person that it considers appropriate, the Commission shall have sole power, subject to review by the Court of Justice, to determine, by decision which shall be published, which agreements, decisions and practices fulfil the conditions specified in paragraph 1.

The Commission shall undertake such determination either on its own initiative or at the request of a competent authority of a Member State or of an interested undertaking or association of undertakings.'

14. On the basis of those provisions, therefore, the general applicability of the Community competition rules to production of and trade in agricultural products is subject to certain limits, all of which, in the last analysis, stem from the need not to impede attainment of the objectives of the common agricultural policy. As regards the first category of agreements contemplated by Article 2(1), that is to say those forming part of national market organizations, it is now clearly of very limited importance if it is borne in mind that the majority of products are now covered by common organizations of the markets, which have superseded organizations operating at national level.

The only derogation which is of any importance is therefore the one relating to agreements necessary for the attainment of the objectives of Article 39 of the Treaty. However, in practice that provision has been interpreted by the Commission restrictively, so that, in order to fall within that category, it is not sufficient for a given agreement to pursue the objectives of Article 39: it must also constitute the only and the best means of doing so. Only in such circumstances can it be regarded as necessary for the purposes of that provision. [7]

Where, therefore, there is a common organization of the market, the Commission has consistently examined the compatibility of the agreement with the rules setting up that organization, which lay down the general objectives of the common agricultural policy for the production sector in question. In so doing, it has normally concluded that there is no need for agreements which are not included amongst the means indicated by the regulation providing for a common organization in order to attain the objectives laid down in Article 39 or which cannot, in any event, come within the rules laid down in that regulation. [8]

15. The Commission's practice has been upheld by the case-law of the Court. In its judgment in *Frubo*, [9] it considered, for example, that the Commission was justified in

7 — See the *Frubo* decision of 25 July 1974 (OJ 1974 L 237, p. 16, in particular paragraph III(3)).

8 — See the decisions: *European Sugar Industry*, of 2 January 1973 (OJ 1973 L 140, p. 17, part III), *Frubo*, cited above, *Preserved Mushrooms*, of 8 January 1975 (OJ 1975 L 29, p. 26, paragraph II(4)), *Cauliflowers*, of 2 December 1977 (OJ 1978 L 21, p. 23, paragraph III(2)), *Milchförderungsfonds*, of 7 December 1984 (OJ 1985 L 35, p. 35, paragraphs 19 and 20), *Meldoc*, of 26 November 1986 (OJ 1986 L 348, p. 50, paragraph 54), *Bloemenveilingen Aalsmeer*, of 26 July 1988 (OJ 1988 L 262, p. 27, paragraph 142) and *Sugar Beet*, of 19 December 1989 (OJ 1990 L 31, p. 32, paragraph 90).

9 — Case 71/74 [1975] ECR 563, paragraphs 22-27. See also the judgments in Joined Cases 40-48, 50, 54-56, 111, 113 and 114/73 *Suiker Unie* [1975] ECR 1663, paragraphs 211-224, Case 258/78 *Nungesser* [1982] ECR 2015, paragraphs 17-21, and Case 212/87 *Unilec* [1988] ECR 5075, in particular paragraphs 18-20.

authorizing an agreement under Article 2 of Regulation No 26 since, although the agreement in question contributed to stabilization of the markets and regularity of supplies at fair prices for consumers, that is to say attainment of the three objectives indicated in Article 39, it had nevertheless not been shown that it was necessary to 'increase agricultural productivity' or 'ensure a fair standard of living for the agricultural community', those being two of the main objectives of the common agricultural policy.

That interpretative approach, which it would be inappropriate to consider restrictive, must of course be approved. In determining the exact scope of the derogations contained in Article 2 of Regulation No 26, it is impossible to disregard the radical changes which have occurred in the legislative context in which it came into being, as a result of the progressive implementation of the common agricultural policy. The creation of common organizations of the markets for most agricultural products, including measures intended to encourage initiatives by and between the various sectors to help match supply to the needs of the market or, again, the policy of fostering producers' associations in order better to respond to the need, specific to that economic sector, to concentrate supply and stabilize prices, make it necessary to rely, in assessing how far a particular agreement is needed for the attainment of the aims laid down in Article 39, more on the considerable body of secondary legislation which has emerged than on the general criteria identified in 1962. [10] In other words, only if Article 2 of Regulation No 26 is considered in relation to the other measures adopted in the agricultural sector is it possible to determine what room there might be for agreements limiting competition in addition to those expressly allowed or imposed as part of the measures for implementation of the common agricultural policy.

16. That logical and systematic approach, together with a progressive approach, intended to bring legislative provisions — needless to say within the limits allowed by their wording — into line with changes in socio-economic circumstances, must also be followed in interpreting the second sentence of Article 21 of Regulation No 26. That sentence, which did not appear in the Commission's initial proposal and was introduced at the request of the European Parliament for the main purpose of fostering agricultural cooperatives, has lent itself to two different readings.

According to the first, the second part of Article 2(1) does not function independently

10 — For a detailed analysis of developments in the common agricultural policy, and further bibliographical references, see Olmi, 'Politique agricole commune', in *Le droit de la CEE* (Commentaire Megret), Volume 2, Brussels 1991, in particular Chapter IV, 'Les principes généraux de la politique agricole commune', p. 259 et seq.

but merely provides an example of the agreements which qualify for the special derogation provided for in the first part of that article. [11] To that end, emphasis has been placed on the wording of the provision, especially the expression 'in particular, it shall not apply' which links the two sentences. The Commission has adopted that interpretation on various occasions when applying the provision, inferring from it the further consequence that Article 85(1) is inapplicable to a given agreement concluded between agricultural producers or implemented in the context of their associations only where the conditions laid down in the first part of the article are fulfilled, in other words where it is shown that the agreement forms an integral part of a national market organization or is necessary for attainment of the objectives laid down in Article 39 of the Treaty. [12]

17. A second interpretative approach, also adopted by the Commission in its early decisions in this matter, [13] and recently put forward by it again, [14] *inter alia* in the present proceedings, perceives in the second sentence of Article 2(1) a separate exception or, in any event, an extension of the circumstances in which Article 85 is inapplicable by virtue of the first sentence. [15] The exception to the Community competition rules is thereby extended, having regard to the particular requirements of agricultural production and the particular importance in this sphere of organization on a cooperative basis, to those agreements which, although not necessary for attainment of the objectives of the common agricultural policy, nevertheless would not endanger the pursuit of that policy.

The purpose of the provision is in fact, it is argued, to reverse the burden of proof in favour of the cooperatives and consortia of agricultural businesses: in other words, the latter are not required to show that an agreement, having the characteristics therein described, is necessary for the purposes of Article 39 but, on the contrary, it is for the Commission to prove that it is incompatible in certain respects with objectives laid down by the Treaty. [16] Until such a finding is

11 — To that effect, see De Cockborne, 'Les règles communautaires de concurrence applicables aux entreprises dans le domaine agricole', in *Revue trimestrielle de droit européen*, 1988, p. 293; Van Bael and Bellis, *Competition Law of the EEC*, Bicester, 1990, p. 425 et seq. and Ritter, Braun, Rawlinson, *EEC Competition Law*, Deventer, 1991, p. 566 et seq.

12 — See, for example, the decisions in *Milchförderungsfonds*, cited above, paragraph 21, *Meldoc*, cited above, paragraph 55, and *Bloemenveilingen Aalsmeer*, cited above, paragraph 150.

13 — See the decisions in *Frubo*, cited above, paragraph III(1), and *Cauliflowers*, cited above, end of paragraph III(3).

14 — See the decisions in *Scottish Salmon Board* of 30 July 1992 (OJ 1992 L 246, p. 37, paragraphs 22 to 23).

15 — See, for example, Ries and Guida, 'L'application des règles de concurrence du Traité CEE à l'agriculture', in *Cahiers de droit européen*, 1968, p. 60 et seq. in particular pp. 169-172; Ottervanger, 'Antitrust and agriculture in the common market', in *Fordham Corporate Law Institute*, 1990, p. 203 et seq. and Olmi, 'Politique agricole commune', cited above, in particular pp. 280 and 281.

16 — See in that connection Ottervanger, op. cit., p. 219. Similar conclusions are also reached by certain authors who see the second sentence of Article 2(1) as a mere illustration of the first part of the provision: for example, De Cockborne, op. cit., p. 307, who considers that the purpose of the provision is to lay down less onerous conditions for agricultural cooperatives.

made, the agreements in question should be regarded as provisionally valid.

18. However, that the second sentence of Article 2(1) is not intended either to extend the cases in which the Community competition rules are inapplicable beyond the limits laid down in the first sentence or to introduce a special procedure for the application of those rules to the category of agreements referred to therein is apparent not only from a reading of the provision but also from the preamble to the regulation. In particular, the third and fourth recitals [17] show that it was intended to limit the application of Article 85 of the Treaty in the agricultural sector only to the extent to which attainment of the objectives of the common agricultural policy might thereby be undermined. It is in that context that 'special attention' in the case of farmers' organizations is warranted, it being presumed that the conditions for a derogation are normally fulfilled. That said, because the limits on the applicability of Article 85 are in this case the same as those laid down in general and since, in addition, the aim of the regulation is to make the competition rules applicable to the agricultural sector, that presumption does not exclude the possibility that those agreements might nevertheless be caught by the prohibition contained in Article 85(1) where it is found that in practice they 'jeopardize attainment of the objectives of Article 39 of the Treaty'.

19. If that is the correct interpretation of Article 2(1), it follows that all agreements which meet the criteria laid down therein are subject to the same conditions. In particular,

— by contrast with the position where exemptions are granted under Article 85(3) of the Treaty, the undertakings concerned do not have to notify the agreement and await a favourable decision from the Commission before they can give effect to the agreement, since the derogation from the prohibition in Article 85(1) is laid down directly by Regulation No 26: any decision by the Commission is, therefore, declaratory in nature;

— again because there is no obligation for the undertakings to make any notification, the decision whereby the

17 — 'whereas the rules on competition relating to the agreements, decisions and practices referred to in article 85 of the treaty and to the abuse of dominant positions must be applied to production of and trade in agricultural products, in so far as their application does not impede the functioning of national organisations of agricultural markets or jeopardize attainment of the objectives of the common agricultural policy;
whereas special attention is warranted in the case of farmers' organisations which are particularly concerned with the joint production or marketing of agricultural products or the use of joint facilities, unless such joint action excludes competition or jeopardizes attainment of the objectives of article 39 of the Treaty'.

Commission, pursuant to Article 2(2), establishes that the conditions for the derogation are met takes effect as from the date of conclusion of the agreement;

— the declaration that Article 85(1) is inapplicable is made without any limitation as to time and cannot be made subject to conditions and obligations, since Regulation No 26 contains no provision similar to Article 8 of Regulation No 17 [18] regarding exemptions under Article 85(3).

20. In the light of the foregoing considerations, it is clear that agreements between agricultural producers do not enjoy provisional validity until such time as a Commission decision finds that the derogation provided for in Regulation No 26 does not apply to them. As already stated, the purpose of the statement 'unless the Commission finds that competition is thereby excluded or that the objectives of Article 39 of the Treaty are jeopardized' is in fact to define the limits within which the special conditions therein laid down are applicable.

Moreover, any other interpretation of the provision would, as the French Government has taken care to point out, imply granting national courts jurisdiction to determine whether, in cases before them, a particular agreement may qualify for the derogation in question, which would constitute a clear encroachment upon the exclusive powers in such matters vested in the Commission by Article 2(2) of the regulation.

The power to apply the special rules in Regulation No 26

21. The scope of the exception to the application to agriculture of the competition rules laid down in the Treaty having been thus defined, it is now necessary to consider what procedure should be followed for the implementation of Regulation No 26. As just indicated, by virtue of Article 2(2), the Commission has exclusive jurisdiction to determine, on its own initiative or at the request of interested parties, after consulting the Member States and hearing the views of the undertakings or associations of undertakings which it considers appropriate, in what cases agreements, decisions or practices meet the conditions laid down in paragraph 1.

18 — Council Regulation of 6 February 1962, first regulation implementing Articles 85 and 86 of the Treaty (OJ, English Special Edition 1959-62, p. 87). Article 8(1) provides: 'A decision in application of Article 85(3) of the Treaty shall be issued for a specified period and conditions and obligations may be attached thereto.'

In the light of the foregoing observations, I consider that such exclusive jurisdiction vests in the Commission only for the purpose of declaring that the preconditions for exemption are actually satisfied and consequently adopting a positive decision recognizing that the prohibitions laid down in Article 85(1) do not apply to the agreements, decisions or practices under review. The exclusivity of the Commission's jurisdiction is intended, as made clear in the fifth recital in the preamble to Regulation No 26, 'to avoid compromising the development of a common agricultural policy and to ensure certainty in the law and non-discriminatory treatment of the undertakings concerned ...'. And it is only in such cases that the special procedure provided for in Article 2(2), in particular prior consultation of the Member States, is to be followed.

22. Where, on the other hand, the Commission is of the opinion that in a given case no exceptions may be allowed to the competition rules, it is not required to adopt, before its decision prohibiting the agreement, a separate decision as to non-fulfilment of the conditions for a derogation laid down in Article 2(1). As the Court observed in *Frubo*, cited above, 'to require the Commission to consult the Member States even in cases where it is in no doubt that the exceptions provided for under Regulation No 26 cannot apply would oblige the Commission to fulfil unnecessary formalities and needlessly delay inquiries into the matters concerned'. [19]

It must therefore be concluded that, where the conditions for an agreement to qualify for the exemption are not met, the principle laid down in Article 1 of Regulation No 26, namely that Article 85 and provisions adopted to implement it are to apply to the production of and trade in agricultural products, can operate to the full. What does this mean in practice? First, that, in order to apply Article 85, it is necessary to follow, with regard to such agreements as well, the normal procedure in competition matters, as laid down in Regulation No 17. Secondly, that any Commission decision establishing an infringement of Article 85(1) takes effect under Article 85(2) of the Treaty and Article 1 of Regulation No 17 as from the inception of the infringement, without prejudice however to the possibility that the Council may issue express directions to the contrary with respect to specified categories of agreements in a regulation adopted on the basis of Article 42 of the Treaty. [20] Thirdly, that the national courts have concurrent jurisdiction with the Commission in applying Article 85(1) and (2) and therefore may declare void an agreement concluded in the agricultural sector where it is clear that the conditions

19 — Case 71/74, cited above, paragraph 11.

20 — This happened, for example, in Article 17 of Council Regulation EEC No 1360/78 of 19 June 1978 on producer groups and associations thereof (OJ 1978 L 166, p. 1).

for a derogation laid down in Regulation No 26 are not fulfilled. [21]

23. In this context too, therefore, the problem arises of reconciling the need to avoid conflicts between Commission decisions and those of national courts before which it is claimed that an agreement between agricultural producers or associations thereof is covered by the special exemption laid down in Regulation No 26 with the obligation of those same courts to determine the claims of the parties. In practice, as the Commission has emphasized in these proceedings, the problem does not essentially differ from that which arises regarding the application of Article 85(3). To resolve this matter, reference may therefore be made to the principles expounded by the Court in *Delimitis*. [22]

No particular difficulty arises where the national court, initially called on to establish whether the conditions for the application of Article 85(1) are met, reaches the conclusion that the agreement in question is not caught by the prohibition laid down therein. In such circumstances, the Court may continue the proceedings and give judgment in the case before it.

24. Where, on the other hand, on conclusion of this first stage of its review, it concludes that the agreement, by virtue of its object or effects, is liable to prevent or distort competition, the court must then determine whether it meets the formal requirements laid down in the second sentence of Article 2(1) in order to qualify for the exemption: in other words, whether the participants are all farmers or associations of farmers or associations of such associations, whether they belong to a single Member State, whether the agreement concerns the production or sale of agricultural products or the use of joint facilities for the storage, treatment or processing of agricultural products and, finally, whether the parties to it are under no obligation to charge the same prices.

Now, where those requirements are met, the national court must, finally, assess to what extent it is probable, in the light of the criteria developed by the case-law of the Court of Justice and the Commission's decision-making practice, that the agreement might qualify for an exemption under Article 2 of Regulation No 26. To that end, and without prejudice to the possibility of staying the proceedings and referring a question to the

21 — See, to that effect, Ritter, Braun and Rawlinson, op. cit., p. 569; and Bellamy and Child, 'Common Market Law of Competition', London, 1993, p. 825 et seq., particularly at p. 830. That view was also put forward by Advocate General Mayras in his Opinion in *Suiker Unie*, cited above, at p. 2066. A partially different view, based on a different interpretation of the scope of the exemption provided for by Regulation No 26, is expressed by De Cockborne, op. cit., p. 317, according to which the national courts may, by virtue of the direct applicability of Article 85 of the Treaty, declare void the agreements referred to in the first sentence of Article 2(1) where the conditions laid down therein for the derogation from the competition rules are not fulfilled, but may not do so in the case of agreements between agricultural producers without a prior Commission decision overturning the presumption of validity attached to such agreements by the second sentence of Article 2(1).

22 — Case C-234/89 *Delimitis* [1991] ECR I-935.

Court under Article 177, the national court may take into account, among the factual considerations which might assist it in reviewing individual cases and understanding the Commission's approach, the information contained in the annual reports on competition policy. Once it has formed the conviction that the agreement in question, or particular parts of it, do not meet the conditions for a derogation under Article 2(1), it may declare it void under Article 85(2) of the Treaty.

25. Where on the other hand the national court considers that the agreement at issue may possibly meet the conditions laid down in Regulation No 26, it must then assess, within the limits and according to the methods laid down by its procedural law, whether to stay the proceedings in order to allow the interested parties to seek a decision from the Commission under Article 2(3) or to obtain information for itself, on the basis of the principles laid down by the Court in relation to Article 85(3) — which may be applied by analogy — as to what stage has been reached in any procedure which the Commission may have commenced and as to the probability that the Commission will give an official decision on the agreement at issue or, again, to obtain the economic and legal information which the Commission is able to supply to it. [23]

23 — See *Delimitis*, cited above, in particular paragraphs 49-53. The principles laid down by the Court on that occasion have been 'codified' in Commission Communication 93/C 39/05 on cooperation between national courts and the Commission in applying Articles 85 and 86 of the EEC Treaty (OJ 1993 C 39, p. 6).

Applicability of Article 85

26. The compatibility of the clauses of the statutes concerning the resignation fee with Article 85(1) of the Treaty and Article 2(1) of Regulation No 26 is on the other hand the central issue in Case C-399/93. The views advanced on the subject may be summarized as follows. According to Coberco, in view of its very purpose, which is to guarantee participating farmers greater power in determining market prices and, therefore, better remuneration for their work through the joint exploitation of their raw material, agricultural cooperation requires particularly close links to be established between cooperatives and their members. Secondly, the fact that the cooperative's investments in production capacity are based on the quantity of raw material produced by its members in its view justifies, first, the members' obligation to deliver all the milk they produce to the cooperative — which is matched by the latter's obligation to buy it — and, secondly, the inclusion in the statutes of clauses, such as that concerning the resignation fee, designed to ensure some stability of membership. Those obligations, it argues, merely give effect to the more general duty of 'loyalty' to the cooperative, which is a characteristic of such organizations and is the natural corollary of the benefits which the member secures from being part of an organization based on mutualism. Against that background, the condition concerning the resignation fee more particularly reflects the financial solidarity required of members and

is also necessary to guarantee the cooperative's continuity and standing vis-à-vis third parties. Since, therefore, limitation of the individual's independence in order to safeguard the common interest must be regarded as an inherent feature of membership of any kind of organized economic body, it follows, in Coberco's view, that Article 85(1) has no bearing on the clause in question.

27. The plaintiffs in the main proceedings submit, on the other hand, that the disputed clauses significantly restrict members' freedom of action as traders: the obligation to pay a fee on leaving the cooperative, together with the obligation to deliver to the cooperative all the milk produced throughout the period of membership, it is argued, deprives members for a very considerable period of the possibility of approaching competitors even where to do so would be economically more advantageous. Secondly, the existence of similar clauses in the statutes of the main Dutch milk processing cooperatives has the effect of making the market extremely inflexible, so that third parties cannot effectively compete with the undertakings already established in that market. The Commission's observations coincide to a considerable extent with those of the plaintiff.

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

As regards the criteria to be observed in applying that provision to a specific case, the Court has made clear that the requirements of the protection of competition which that provision seeks to uphold are to be defined according to the specific context in which the undertaking's conduct occurs. Since, therefore, the undistorted competition referred to in Articles 3 and 85 of the Treaty implies the existence in the market of workable competition, in other words sufficient competition to justify the conclusion that the fundamental requirements and aims of the Treaty are being respected — in particular the creation of a single market — it is possible that the nature and intensity of competition may vary to an extent dictated by the products or services in question and the economic structure of the relevant market sectors. [24]

29. Therefore, in order to determine whether a particular agreement falls within the prohibition in Article 85(1), it will be necessary first to establish whether, by virtue of its object, it involves any restriction of competition. To that end, it will be necessary to examine the aim pursued by the agreement, having regard to its economic context. [25] If the agreement, in itself, serves no other purpose than to restrict freedom of competition, within the meaning of Article 85(1), between the parties or between the

24 — Case 26/76 *Metro* v *Commission* [1977] ECR 1875. I refer to my Opinion in Case C-250/92 *DLG* [1994] ECR I-5641 for a fuller analysis of the criteria laid down by the Court for the application of Article 85(1); here, I shall merely mention the essential points.

25 — See to that effect Joined Cases 29/83 and 30/83 *CRAM* [1984] ECR 1679.

parties and competing third parties, it must be considered to be prohibited automatically, and its effects need not be considered. [26]

Accordingly, clauses which form an integral part of a particular contract and help to determine the basis and balance of the legal relations between the parties will not normally be anti-competitive in intent. [27]

Where the object of the agreement is not anti-competitive, it is necessary to proceed to the second stage of the analysis and consider what specific effects on competition the agreement is likely to have. If it is found that it is in any way liable to restrict competition to an appreciable extent, it will then be regarded as prohibited. [28]

Finally, it must be borne in mind that the Court of Justice and the Court of First Instance have consistently held that the organization of an undertaking in the specific legal form of a cooperative, although not in itself representing conduct restrictive of competition, may nevertheless be liable to influence the trading conduct of its members so as to restrict or distort competition in the market in which those undertakings operate. It follows that the provisions of the statutes which govern relations between a cooperative and its members do not fall outside the scope of Article 85 et seq. of the Treaty. [29]

30. In applying those principles to this case, it is necessary to consider the clauses of the statutes concerning termination of the relationship between the cooperative and a member together with those which impose on the member the obligation to sell the milk he produces exclusively to the cooperative. It should also be borne in mind that, in general, the establishment of a cooperative for the processing of or trade in agricultural products brings into being a type of cooperation between undertakings viewed favourably both by the national legislature and by the Community authorities, in that it helps to modernize and rationalize the agricultural sector and, ultimately, contributes to the efficiency of undertakings and effective and efficient competition between them.

In those circumstances, the inclusion in the statutes of clauses which require the members to deliver their entire production to the

26 — Case 45/85 *Verband der Sachversicherer* [1987] ECR 405.

27 — See, in that connection, Case 42/84 *Remia* [1985] ECR 2545, Case 161/84 *Pronuptia* [1986] ECR 353, Case 65/86 *Bayer* [1988] ECR 5249 and Case 234/89 *Delimitis*, cited above.

28 — See to that effect Case 56/65 *Société Technique Minière* [1966] ECR 235.

29 — See the judgments in Case 61/80 *Coöperatieve Stremsel* [1981] ECR 851, in particular paragraphs 12 and 13, Case 250/92, cited above, in particular paragraphs 28-40, and Case T-61/89 *Dansk Pelsdyravlerforening* [1992] ECR II-1931, in particular paragraphs 49-55.

cooperative or to pay a particular amount in the event of resignation, is, provided that it does not make withdrawal — *de facto* — impossible, a response to the need to enable the cooperative to function properly, particularly where it is first entering the market or is at an early stage of operation. Indeed, it may be concluded that only if such clauses are included, for the purpose of providing the cooperative with the widest possible commercial base and some stability of membership, will the members be prepared to assume the financial responsibilities deriving from the contract concluded by them. Those clauses in the statutes of a cooperative thus provide a way of safeguarding against conduct which might undermine its financial structure and very survival. That is why such clauses, intended to guarantee members' 'loyalty', are included in the statutes of cooperatives: it follows that, viewed in those terms, they do not display an anti-competitive object of the kind referred to in Article 85(1).

That approach, whereby the clauses at issue are recognized, in the abstract, as being necessary to ensure that the constitution of the cooperative is capable of fulfilling the legal and economic function assigned to it, essentially reflected in the mutualistic nature of the activities involved, is also consistent with the favourable attitude apparent in Community law towards cooperatives, in particular, as stated earlier, in the agricultural sector.

31. That said, it is necessary to establish whether the clauses at issue nevertheless have anti-competitive *effects* incompatible with the common market, as a result of specific legal and factual circumstances.

An assessment of this kind, particularly as regards the scope of the requirement of exclusive deliveries imposed on the members of the cooperative, must, according to settled case-law, [30] take account of the actual economic context in which it operates. It is therefore in the light of the circumstances and actual operating conditions of the market concerned that the overall effect on competition of those clauses must be examined. Although the exclusive supply obligation, guaranteeing the farmer-producer the sale of his products and the cooperative certainty of supplies, is not contrary by virtue of its object to Article 85(1) but, rather, is a suitable way of increasing competition in that it fosters the consolidation of new undertakings in the market, helping to make them more efficient, it may, nevertheless, be viewed differently where, as a result of the economic context in which it is introduced, it has the effect of making the market excessively inflexible or even giving rise to inefficiency and excess profits.

30 — See Case 56/65, cited above (in particular at p. 250), Case 23/67 *Brasserie de Haecht I* [1967] ECR 407 (in particular at p. 415), Case 31/80 *L'Oréal* [1980] ECR 3775, (in particular paragraph 19), Case C-234/89, cited above (in particular paragraphs 14-26), Case C-250/92, cited above (in particular paragraphs 31-34), and Case T-61/89, cited above (in particular paragraphs 99-104).

In carrying out such an assessment, regard must be had to the number and size of the undertakings operating in the market and, against that background, the position of the cooperative, [31] since clearly, if the cooperative holds a strong competitive position, it is less needful of protection against independent action by its members. It must be pointed out in that connection that, in declaring incompatible with Article 85(1) certain clauses intended to ensure that members of a cooperative display 'loyalty', the Court of Justice and the Court of First Instance have attributed particular importance to the fact that the cooperatives in question occupied a very important position in the market and that, as a result, the clauses were in reality intended to safeguard that position of strength, hampering access by competitors. [32]

32. Secondly, it is necessary to establish whether the agreement in question operates in isolation or whether, on the other hand, it forms part of a complex of agreements of similar content under which a very considerable number of producers of the raw material concerned are bound by exclusive supply commitments. Where the latter is the case, it is necessary to determine whether the cumulative effect of similar exclusivity commitments, considered as a whole, together with other aspects of the economic and legal context of the particular agreement at issue, run counter to Article 85(1). To that end, particular account must, as already indicated, be taken of the impact of that complex of similar provisions on the ability of third-party competitors to gain access to the market. [33]

33. As regards the other factors which might be relevant to the compatibility or otherwise of the clauses of the statutes with the competition rules, the most important is the possibility, of which members must be assured, of withdrawing from the cooperative at reasonable intervals, since, otherwise, the members would, on the one hand, be compelled to remain in the cooperative for extremely long periods of time and, on the other, be deprived, throughout their period of membership, of the chance to approach competitors. A twofold requirement of that kind would deprive members of any effective freedom of action and, at the same time, would prevent third parties from effectively competing against the cooperative. Finally, it should be considered whether that result, namely the committing of members to the cooperative for excessive periods, might flow from other clauses of the statutes which impose excessive and disproportionate obligations on members wishing to leave the cooperative.

31 — The need to take account of the economic importance of the cooperative, and in particular whether it is a new organization coming into the market or one which already holds a consolidated position, in examining clauses designed to ensure 'loyalty' on the part of members is put forward by Jacobi and Vesterdorf in 'Cooperative societies and the Community rules on competition', in *European Law Review*, 1993, p. 271 et seq.

32 — See Case 61/89, cited above, in particular paragraphs 12 and 13, and Case T-61/89, cited above, in particular paragraph 78.

33 — For examples of the application of those criteria to examination of the effects of beer supply contracts, see the judgments cited above in Case 23/67, in particular at pages 415 and 416, and Case 234/89, in particular paragraphs 19-26.

34. As regards the present case, from the information given earlier regarding the circumstances prevailing in the market concerned and the other details apparent from the documents before the Court, it seems that, after various mergers and concentrations over the years, Coberco is one of the three major cooperatives operating in the Netherlands in the milk processing sector. It has thousands of members, including numerous smaller local cooperatives, and it processes about 30% of national milk production. Its annual turnover places it among the largest companies in the Netherlands.

Clauses similar to those at issue are also found in the statutes of the other Dutch cooperatives operating in the same sector, in particular, as indicated by the documents in Cases C-319/93 and C-40/94, in the statutes of FFD and Campina, those being the other two largest milk and dairy cooperatives, which, together with Coberco, as indicated in the first part of these observations, process about 85% of the milk produced in the Netherlands.

The restriction of competition deriving from those clauses is also made particularly appreciable by the fact that the exclusive supply requirement imposed on the members is, where they withdraw from the cooperative (except in the case of Campina, which amended its statutes on this point following the commencement of proceedings against it by the Commission under Article 85(1)), associated with the obligation to pay a resignation fee which, representing a significant financial burden, constitutes a considerable obstacle to withdrawal. It does not seem to me that the position is significantly changed by the fact that, by virtue of Article 17(1) of the statutes of Coberco, the amount of that fee, which — it will be remembered — is equal to 10% of whatever the member received on average per year from the cooperative over the five years preceding withdrawal, decreases as from the eighth year of membership.

35. For Article 85(1) to be applicable, however, the agreement must be detrimental to intra-Community trade. In that connection, it need merely be observed that, as Coberco itself concedes, there are no technical difficulties preventing a milk processing undertaking from obtaining supplies from milk producers located at considerable distances from the processing plant, since milk can be transported in the frozen state, without impairment of quality, even over long distances. There is thus nothing to stop milk and dairy products businesses in countries bordering the Netherlands from obtaining supplies from Dutch farmers. That is also confirmed by the fact that the administrative procedure against Campina was initiated following a complaint from a competing Belgian cooperative. [34] The cumulative effect of all the disputed clauses is thus seriously to hamper, if not prevent, effective competition throughout the Dutch market in the product in question and also to make economic

34 — See the *XXIst Report on Competition Policy*, paragraph 83.

interpenetration of the various national markets more difficult. [35]

36. In the present case, therefore, and subject to further findings falling to be made by the national court, I consider that, in view of the size and importance of the cooperative on the market, the existence of a complex of agreements of similar content which bind a large number of Dutch farmers, the fact that the members' obligation to deliver all their milk to the cooperative is reinforced by clauses which require an outgoing member to pay a resignation fee on withdrawal, the serious restriction of the economic freedom of members and likewise of the freedom of competitors of the cooperative to buy the milk produced by the members of the cooperative in question, the clauses at issue have the effect of contributing to a restriction of competition incompatible with Article 85(1).

Applicability of Regulation No 26 to the statutes of Coberco

37. It does not seem to me that the clauses at issue can qualify for an exemption under Regulation No 26. There is no doubt that, because of the fragmentation of milk supply in the Netherlands amongst a large number of relatively small farms, the creation of cooperatives or other forms of associations of farmers designed to concentrate their supplies is certainly consistent with attainment of the objectives of Article 39 of the Treaty.

It is also true that, in assessing the compatibility of the obligations imposed by the statutes of a farming cooperative on its members with the derogation provided for in Regulation No 26, due importance should be attached to the specific features of the link between that special form of association and its members, which is attributable to the fact that the latter are at the same time the suppliers and/or the users of the goods and services produced by the cooperative of which they are members. Although, therefore, the obligations attaching to the members constitute the counterpart of special advantages conferred on them by the cooperative and, as a result, the restriction on members' freedom of commercial action deriving from the commitment to deliver all or part of their production to the cooperative is justified by the need to determine with sufficient precision the quantity of the product which the cooperative will have to process and sell and the services which it will have to provide, those restrictions of competition must be limited to what is necessary in order to ensure the proper functioning of the cooperative, *inter alia* by guaranteeing a degree of continuity and stability of membership, and to attain the objectives in pursuit of which the special conditions in Regulation No 26 were introduced. As regards the exact scope of the derogation from the application of the competition rules to the agricultural sector

35 — In that connection, see Case 61/80, cited above, paragraphs 14 and 15.

provided for in that regulation, that point is covered by my earlier remarks.

38. Accordingly, it seems to me to be entirely disproportionate to the aim pursued to impose withdrawal conditions like those contained in Coberco's statutes, since, in view of *inter alia* the strong competitive position of the cooperative, the obligation imposed on members in all cases to pay a resignation fee equal to 10% of the average price paid over a period of a year ultimately, by reason of its economic cost, entails a kind of involuntary membership. Also, those conditions, as pointed out by the Commission, cannot be regarded as conforming to the objectives of the common agricultural policy, in particular that of improving the individual income of farmers, since it denies the latter the benefits of competition between the various processing undertakings regarding purchase prices of the raw material.

I therefore consider, in line with the position taken by the Commission in the Campina case, that members should in any event, albeit subject to a period of notice such as to preclude adverse effects for the cooperative and the other members, be guaranteed the possibility of withdrawing from the cooperative without paying any compensation, such a payment being justifiable, within reasonable limits, only where the members are allowed to decline to give the prescribed 'long' period of notice. [36]

39. In view of the foregoing considerations, I suggest that the Court give the following answers to the questions submitted by the Gerechtshof, Leeuwarden, and the Arrondissementsrechtbank, 's-Hertogenbosch:

— The agreements, decisions and practices of farmers, farmers' associations or associations of such associations referred to in the second sentence of Article 2(1) of Council Regulation No 26/62 of 4 April 1962 applying certain rules of

36 — Nor does it seem to me, moreover, that such clauses could qualify for an individual exemption under Article 85(3) of the Treaty, since it is hardly arguable that the restriction which they impose is 'indispensable'.

competition to production of and trade in agricultural products are not to be presumed to be valid so long as the Commission has not found that they exclude competition or jeopardize the aims of Article 39 of the Treaty.

— By virtue of Article 2(2) of that regulation, the Commission has exclusive jurisdiction to determine, on its own initiative or at the request of interested parties, which agreements, decisions or practices fulfil the conditions for an exemption from the competition rules under Article 2(1).

— A national court, before which it is claimed that a clause in the statutes of an agricultural cooperative is invalid under Article 85(1) of the Treaty, may, where the cooperative seeks to rely on Article 2(1) of Regulation No 26/62, continue the proceedings and give judgment in the dispute before it in those cases where the conditions for the application of Article 85(1) are clearly not fulfilled, or it may determine that the clause in question is void under Article 85(2) if it has formed the conviction that it does not satisfy the conditions for an exemption under Article 2(1) of Regulation No 26/62; in case of doubt, the national court may, where it is found appropriate to do so, obtain, in accordance with the national procedural rules, further information from the Commission or enable the parties to seek a decision from the Commission.

As regards the questions submitted by the Arrondissementsrechtbank, Zutphen, I suggest that the Court give the following answer:

— Subject to the findings falling to be made by the national court in accordance with the criteria set out in this Opinion, the clauses in the statutes of a milk producers' cooperative, requiring the members, first, to deliver all their production to the cooperative, and, secondly, in the event of withdrawal, to give

notice of at least six months and pay a fee equal to 2% of the price paid to them by the cooperative for the milk delivered over the last five years, are prohibited by Article 85(1) and may not be exempted under Article 2(1) of Council Regulation No 26 of 4 April 1962; in that connection, it is important to take account of the economic and legal context of those obligations, in particular the existence in the market concerned of a complex of agreements of similar content and the position in that market held by the cooperative.