JUDGMENT OF THE COURT (Fifth Chamber)
15 December 1994 *

In Case C-250/92,

REFERENCE to the Court under Article 177 of the EEC Treaty by the Østre Landsret for a preliminary ruling in the proceedings pending before that court between

Gøttrup-Klim Grovvareforening and Others

and

Dansk Landbrugs Grovvareselskab AmbA (DLG),

on the interpretation of Articles 85 and 86 of the EEC Treaty and of Council Regulation No 26/62 of 4 April 1962 applying certain rules of competition to production of and trade in agricultural products (OJ, English Special Edition 1959-1962, p. 129),

THE COURT (Fifth Chamber),

composed of: G. C. Rodríguez Iglesias, President, acting as President of the Chamber, J. C. Moitinho de Almeida and D. A. O. Edward (Rapporteur), Judges,

* Language of the case: Danish.

Advocate General: G. Tesauro,
Registrar: H. v. Holstein, Deputy Registrar,

after considering the written observations submitted on behalf of:

— Gøttrup-Klim Grovvareforening and Others, by M. P. Vesterdorf, Legal Adviser, and B. Jacobi, of the Copenhagen Bar,

— Dansk Landbrugs Grovvareselskab AmbA, by A. Spang-Hanssen and S. Werdelin, of the Copenhagen Bar,

— the Commission of the European Communities, by H. P. Hartvig, Legal Adviser, and B. J. Drijber, of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of:

Gøttrup-Klim Grovvareforening and Others, represented by B. Jacobi, assisted by M. P. Vesterdorf,

Dansk Landbrugs Grovvareselskab AmbA, represented by A. Spang-Hanssen and S. Werdelin, assisted by J. Fejø, *Advokat*,

the Commission of the European Communities, represented by H. P. Hartvig, Legal Adviser, and B. J. Drijber,

at the hearing on 16 December 1993,

after hearing the Opinion of the Advocate General at the sitting on 16 June 1994,

gives the following

Judgment

By order of 20 March 1991 and by decision of 10 April 1992, both received at the Court on 1 June 1992, the Østre Landsret (Eastern Regional Court)

referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty a number of questions on the interpretation of Articles 85 and 86 of the EEC Treaty and of Council Regulation No 26/62 of 4 April 1962 applying certain rules of competition to production of and trade in agricultural products (OJ, English Special Edition 1959-1962, p. 129).

2 Those questions were raised in proceedings between 37 local cooperative associations specializing in the distribution of farm supplies (hereinafter 'the plaintiffs') and Dansk Landbrugs Grovvareselskab AmbA (Danish cooperative association distributing farm supplies, hereinafter 'DLG'). The plaintiffs in the main proceedings are all members of the Landsforeningen af den Lokale andel, known until 1991 as the Landsforeningen af Andels Grovvareforeninger (National Union of cooperative associations specializing in the distribution of farm supplies, hereinafter 'LAG'). The main proceedings concern the lawfulness and the economic consequences of an amendment which was made by DLG to its statutes and which led to the exclusion of the plaintiffs.

3 DLG is a cooperative society with limited liability which has existed in its present form since 1969. Its object is to provide its members with farm supplies, including fertilizers and plant protection products, at the lowest prices. In addition, it offers its members certain services, particularly in the areas of finance and insurance, undertakes to negotiate the best prices for its members' produce and gives them access to logistical resources and research facilities. It has members throughout Denmark.

4 DLG's members fall into four categories: 'A', 'B', 'C' and 'D'. 'B' members are local associations or other cooperatives whose object is trading in and/or producing goods appearing in the range of products offered by DLG. Before they were excluded, the plaintiffs were 'B' members and, because they belonged to that category, they were entitled to some extent to take part in DLG's management.

5 LAG was formed in 1975 by the 'B' members of DLG. During the 1980s, some 'B' members, dissatisfied with the prices charged by DLG on the sale of fertilizers and plant protection products, took the initiative and began themselves to import those products. As a result, they started to cooperate amongst themselves within LAG.

6 On 9 June 1988 DLG amended its statutes because of increasing competition from LAG, in spite of opposition from the 'B' members.

7 Paragraph 7 of the statutes was amended as follows:

'1. As regards "B" and "D" members, membership of, or any other kind of participation in, associations, societies or other forms of cooperative organization in competition with this association on the wholesale market, with regard to the purchase and sale of fertilizers and plant protection products, shall be regarded with effect from 1 January 1989 as incompatible with membership of DLG. The association shall offer its services as intermediary to "B" and "D" members who require them in relation to the purchase of fertilizers and plant protection products.

2. Members who, before this provision enters into force, belong to associations or participate therein in one way or another contrary to paragraph 1, shall by 31 December 1988 at the latest either cease to be members of or to work with competing associations or resign from DLG. If such a member chooses to resign from DLG, notification in writing to the association by 15 December 1988 shall be deemed to be adequate notice, so that the member resigning shall be entitled to repayment of the cooperative share capital paid up by it and of any sum paid into the development loan account, over a period of ten years, in accordance with the rules applicable to members resigning lawfully ...

3. Any infringement of paragraph 1 after that provision is brought into force on 1 January 1989 shall lead to exclusion from DLG, whether membership or cooperation contrary to the statutes took place before or after 1 January 1989. In such a situation, a member resigning shall, in the most favourable circumstances, that is, in so far as no decision has been taken to confiscate its assets in whole or in part, receive the cooperative share capital paid up by it and also any sums appearing in the development loan account, over a period of ten years, in equal instalments, the first of which shall be paid by the end of the first financial year following the member's exclusion.

4. The stricter rules applicable to "B" and "D" members of DLG shall come into force, as stated above, on 1 January 1989 which shall at the same time be the starting date for the new period of membership for "B" and "D" members ... The purpose of the new provisions is not to put obstacles in the way of "B" and "D" members making wholesale purchases of farm supplies through suppliers (agents, brokers and undertakings marketing basic products in Denmark and abroad) other than the association, as long as those substitute purchases are not made through any organized membership of or participation in other associations etc. contrary to paragraph 1.'

8 At the same time, the rules governing withdrawal and resignation were amended so that DLG membership now lasts for five, instead of ten, years.

9 It was subsequently decided that, if it proved necessary to exclude 'B' members, they would be treated as members resigning lawfully. As a result, they would obtain repayment over a period of ten years of their registered cooperative share capital, consisting of any original contribution and of a share in subsequently declared and undistributed surpluses, but would have no claim to a share in the undistributed assets, that is to say a proportional share of DLG's net worth, after deduction of share capital.

10 By letter of 29 December 1988, DLG submitted that amendment of its statutes to the Commission in order to obtain negative clearance as provided for in Article 2 of Council Regulation No 17/62 of 6 February 1962, the First Regulation implementing Articles 85 and 86 of the Treaty (OJ, English Special Edition 1959-1962, p. 87) or, alternatively, a declaration that the rules on competition are inapplicable under Article 4 of that regulation.

11 In that notification, DLG explained the objectives pursued in amending its statutes as follows:

'The aim of the abovementioned amendment to the statutes is to stand up to a few very large multinational producers of fertilizers and plant protection products in order to obtain lower purchase prices for Danish farmers and, secondarily, to prevent competitors' representatives from taking part in the association's management bodies (shareholders' committee and board of directors) in which business secrets are discussed ...'

12 Some of the 'B' members refused to comply with the amendments to the statutes, with the result that 37 local associations which were 'B' members were excluded from DLG as of March 1989.

13 The Commission has still not answered DLG's letter of notification of 29 December 1988.

14 During 1989, the amendments to the statutes of DLG were examined by the Monopoltilsynet (Danish Monopolies Office) and the Monopolråd (Danish Monopolies Board), the national competition authorities. Neither considered

that any national competition rules had been infringed. Their examination did not take into account Articles 85 and 86 of the Treaty.

15 On 1 December 1989, those 'B' members which had been expelled from DLG brought an action against that association before the Østre Landsret for the annulment of the amendments to the statutes, an order prohibiting DLG from applying the new articles and an order that the defendant should pay a sum totalling DKR 200 000 000 and compensation for the damage and disadvantages sustained as a result of their exclusion, plus interest on those sums. In support of their arguments, the plaintiffs in the main proceedings claim in particular that, by closing the Danish market to a wide variety of foreign suppliers, the amendment to DLG's statutes is contrary to Articles 85 and 86 of the Treaty.

16 By order of 20 March 1991 the Østre Landsret, taking the view that a ruling on the interpretation of Articles 85 and 86 of the Treaty was necessary in the proceedings pending before it, decided to refer the matter to the Court.

17 On 10 April 1992, it referred the following questions to the Court for a preliminary ruling:

Question 1:

Is Article 85(1) of the Treaty to be interpreted as meaning that the prohibition in that provision of certain forms of anti-competitive conduct applies to the situation where a commercial cooperative society founded in 1969 (A) makes a change in its statutes in 1988 with the purpose of excluding undertakings or associations

from membership of the society if they are participants in associations, societies or other cooperative organizations which compete with A on the wholesale market with regard to the purchase and sale of fertilisers and plant protection products, where the object of the amendment was a purchasing cooperative (B) comprising a number of A's members at the time of the change in the statutes?

Question 2:

Is it relevant to the answer to Question 1 that the change in the statutes was also intended to prevent the continuation of a situation where A's management bodies (shareholders' committee and board of directors) included persons who at the same time, either as members of the board of directors or in any other capacity, took part in or exercised actual influence over the management of the competing purchasing cooperative B, so that there was a risk of abuse for the benefit of B of the knowledge that those persons had acquired or would acquire of A's business secrets?

Question 3:

Is it relevant to the answer to Question 1 that the change in the statutes was carried out in the face of protests from a number of members who voted against the exclusion provision in the statutes in question, partly because the provision would prevent those members of undertaking A from making organized purchases of fertiliser and plant protection products outside A and partly because they considered that by purchasing through B they might be able to obtain lower prices or better conditions of sale than A could offer?

Question 4:

Is it relevant to the answer to Question 1 that as a result of their exclusion the excluded undertakings or associations were placed in the same position as members which lawfully resigned, so that

(a) on the one hand, they have no claim to a share in A's undistributed assets (a proportional share of A's net worth after deduction of share capital), but are repaid their registered share capital, about DKR 37 million, over a period of 10 years, but

(b) on the other hand, there was no confiscation of share capital, which would have been possible under paragraphs 8(4) and 7(3) of the statutes?

Question 5:

Is it relevant to the answer to Question 1 that subsequent developments have shown that the excluded members were able through B to continue their activities in respect of fertiliser and plant protection products on the Danish market for farm supplies with a market share which in terms of total turnover corresponded in 1990 to the turnover of undertaking A?

Question 6:

Is it relevant to the answer to Question 1 that the case brought before the Østre Landsret by the excluded members of A against A concerns the question

whether the excluded undertakings are entitled to a share in A's undistributed assets (cf. Question 4) and that the plaintiff undertakings have not submitted a claim to be readmitted as members of A?

Question 7:

Is it relevant to the answer to Question 1 that under A's statutes members are entitled to make purchases of fertiliser and plant protection products outside undertaking A if that is done otherwise than through an organized consortium, that is to say either individually by each member for itself or by several members together, but in that case only as a one-off common purchase of a single consignment or shipload?

Question 8:

Is it relevant to the answer to Question 1 that the provision of the statutes is formulated in such a way that cooperative arrangements managed by A for the purchase of fertiliser and plant protection products can be proposed under which A acts as an intermediary and waives any profit on the goods?

Question 9:

Is it relevant to the answer to Question 1 that after the amendment to the statutes and the exclusion of members from A it was possible for outsiders, including the excluded members, to purchase from A its entire range of goods,

including fertiliser and plant protection products, on the normal commercial wholesale conditions prevailing in the sector?

Question 10:

Is it relevant to the answer to Question 1 that the amendment to the statutes is restricted to fertiliser and plant protection products, which at the time of the amendment accounted for the shares of A's total turnover described in the introduction?

Question 11:

Is it relevant to the answer to Question 1 that satisfactory information is provided to the Østre Landsret on the nature of the products in question, including the existence and sale of substitute products, and information on the products, turnover figures and market shares of A, B and the undertakings competing with A and B?

Question 12:

Must it be assumed that fertiliser and plant protection products are covered by Council Regulation No 26/62 of 4 April 1962 and for example Council Directive 91/414/EEC of 15 July 1991 on the placing of plant protection products on the market (OJ 1991 L 230, p. 1), which refers for its legal basis in particular to Article 43 of the Treaty?

Question 13:

Is the condition in Article 85(1) and Article 86 of the Treaty regarding the effect on trade between Member States fulfilled where the purchases of fertiliser and plant protection products made through B by the excluded members at the time of the amendment to the statutes in question were in part made direct from producers established outside the Common Market?

Question 14:

How must the exemption provision in Article 85(3) of the Treaty be understood and applied in relation to the situations set out in the above questions, where it is established that the amendment to the statutes in paragraph 7 was notified to the Commission with a view to obtaining negative clearance under Article 2 of Council Regulation No 17/62 or in the alternative exemption under Article 4 of that regulation?

Question 15:

Must Article 86 of the Treaty be interpreted as meaning that an amendment to the statutes such as that described in Question 1 can constitute an infringement of that provision of the Treaty where at the time of the amendment undertaking A had the market share in fertiliser and plant protection products stated in the introduction?

Question 16:

Is it relevant for the application of Article 86 of the Treaty that at the time of the amendment to the statutes A was registered as a dominant single undertaking in the register of the Danish Monopolies Office, where such registration lapsed on 1 January 1990 in conjunction with the new law on competition introduced in Denmark with effect from the same date, and A's registration was not replaced by any new registration under that law?

Question 17:

Is it relevant for the application of Article 86 of the Treaty that on 22 February 1989 the Danish Monopolies Board stated that having regard to the circumstances described in Question 2 it did not consider that there were grounds for taking action in relation to the amendment to A's statutes?

18 In its order for reference, the Østre Landsret proceeds on the basis that DLG in essence sought to induce all the 'B' members to stop purchasing fertilisers and plant protection products outside DLG, so that within the cooperative sector in Denmark there would be just one large association purchasing supplies on behalf of Danish farmers.

19 Some figures regarding the state of the relevant markets have been provided in the order for reference, the observations submitted to the Court and the written replies to the questions put by the Court to DLG and the plaintiffs. It is apparent that in 1988, when it amended its statutes, DLG held about 36% of the Danish fertilizer market, while about 23% was held by Korn & Foderstof A/S (a limited company), about 14% by Superfos A/S (a limited company) and about 10%

by LAG. Furthermore, DLG held about 32% of the Danish market in plant protection products. After their exclusion, the plaintiffs succeeded, operating within LAG, in competing so strongly with DLG on the Danish market in farm supplies that in 1990 they held a market share similar to DLG's. It is also apparent from these figures that around 60% of total fertilizer consumption in Denmark is met by imports, both from the Member States and from non-member countries. Danish consumption of plant protection products is met almost entirely by imports.

20 The 17 questions referred by the national court can be grouped under five main heads, which can best be treated in the following order:

— the scope of the derogation from the Community competition rules in Article 42 of the Treaty and Regulation No 26/62, cited above (Question 12);

— the concept of restriction of competition in Article 85(1) of the Treaty (Questions 1 to 11);

— the concept of abuse of a dominant position in Article 86 of the Treaty (Questions 15 to 17);

— the concept of effect on intra-Community trade within the meaning of Articles 85(1) and 86 of the Treaty (Question 13);

— the jurisdiction of the national court where an application for negative clearance or for exemption is currently pending before the Commission (Question 14).

Applicability of Regulation No 26/62

21 In its first set of questions, the national court seeks to ascertain whether fertilizers and plant protection products come within the scope of the derogation from the competition rules laid down in Article 42 of the Treaty and Regulation No 26/62.

22 Pursuant to Article 42 of the Treaty, the provisions of the chapter relating to rules on competition are to apply to production of and trade in agricultural products only to the extent determined by the Council. Article 38(3) of the Treaty provides that the products subject to the provisions of Articles 39 to 46 inclusive of the Treaty are listed in Annex II to the Treaty. It adds that the Council may, within two years of entry into force of the Treaty, add other products to that list.

23 According to consistent case-law (see in particular the judgment of the Court in Case 61/80 *Coöperatieve Stremsel-en Kleurselfabriek* v *Commission* [1981] ECR 851, the 'rennet' case, paragraph 21, and of the Court of First Instance in Case T-61/89 *Dansk Pelsdyravlerforening* v *Commission* [1992] ECR II-1931, paragraphs 36 and 37), it was in accordance with those provisions of the Treaty that the scope of Regulation No 26/62 was restricted by Article 1 thereof to production of and trade in the products listed in Annex II to the Treaty. That regulation cannot therefore be applied to trade in a product which does not fall within Annex II even if it is a substance ancillary to the production of another product which itself falls within that annex. In order for the regulation to apply to fertilizers and plant protection products, those products would themselves have to fall within Annex II to the Treaty, which they do not.

24 It follows that Regulation No 26/62 does not apply in this case, and that Articles 85 and 86 of the Treaty are fully applicable.

25 That conclusion is not called into question by the fact that Directive 91/414 (cited above) was adopted specifically on the basis of Article 43 of the Treaty.

26 Suffice it to note that Article 42 is a derogating provision, the scope of which, as of Regulation No 26/62, cannot implicitly be widened by adoption of measures based on Article 43 of the Treaty, a provision which confers on the Council the power to adopt measures for the purpose of implementing the common agricultural policy.

27 The answer to the first set of questions must therefore be that fertilizers and plant protection products do not fall within the scope of the derogation from the competition rules which is laid down in Article 42 of the Treaty and Regulation No 26/62.

Restriction of competition

28 In the second set of questions, the national court seeks to ascertain whether a provision in the statutes of a cooperative purchasing association, the effect of which is to forbid its members to participate in other forms of organized cooperation which are in direct competition with it, is caught by the prohibition in Article 85(1) of the Treaty.

29 The plaintiffs in the main proceedings claim that the object or effect of such an amendment to the statutes is to restrict competition, inasmuch as the objective pursued was to put an end to 'B' members purchasing through LAG in competition with DLG, and thus to acquire a dominant position on the markets concerned.

30 A cooperative purchasing association is a voluntary association of persons established in order to pursue common commercial objectives.

31 The compatibility of the statutes of such an association with the Community rules on competition cannot be assessed in the abstract. It will depend on the particular clauses in the statutes and the economic conditions prevailing on the markets concerned.

32 In a market where product prices vary according to the volume of orders, the activities of cooperative purchasing associations may, depending on the size of their membership, constitute a significant counterweight to the contractual power of large producers and make way for more effective competition.

33 Where some members of two competing cooperative purchasing associations belong to both at the same time, the result is to make each association less capable of pursuing its objectives for the benefit of the rest of its members, especially where the members concerned, as in the case in point, are themselves cooperative associations with a large number of individual members.

34 It follows that such dual membership would jeopardize both the proper functioning of the cooperative and its contractual power in relation to producers. Prohibition of dual membership does not, therefore, necessarily constitute a restriction of competition within the meaning of Article 85(1) of the Treaty and may even have beneficial effects on competition.

35 Nevertheless, a provision in the statutes of a cooperative purchasing association, restricting the opportunity for members to join other types of competing cooperatives and thus discouraging them from obtaining supplies elsewhere, may have

adverse effects on competition. So, in order to escape the prohibition laid down in Article 85(1) of the Treaty, the restrictions imposed on members by the statutes of cooperative purchasing associations must be limited to what is necessary to ensure that the cooperative functions properly and maintains its contractual power in relation to producers.

36 The particular features of the case at issue in the main proceedings, which are referred to in the questions submitted by the national court, must be assessed in the light of the foregoing considerations. In addition, it is necessary to establish whether the penalties for non-compliance with the statutes are disproportionate to the objective they pursue and whether the minimum period of membership is unreasonable.

37 First of all, the amendment of DLG's statutes is restricted so as to cover only fertilizers and plant protection products, the only farm supplies in respect of which a direct relationship exists between sales volume and price.

38 Furthermore, even after DLG has amended its statutes and excluded the plaintiffs, it is open to 'non-members' of the association, including the plaintiffs, to buy from it the whole range of products which it sells, including fertilizers and plant protection products, on the same commercial terms and at the same prices as members, except that 'non-members' are obviously not entitled to receive a yearly discount on the amount of the transactions carried out.

39 Finally, DLG's statutes authorize its members to buy fertilizers and plant protection products without using DLG as an intermediary, provided that such transactions are carried out otherwise than through an organized consortium.

In that context, each member acts individually or in association with others but, in the latter case, only in making a one-off common purchase of a particular consignment or shipload.

40 Taking all those factors into account, it would not seem that restrictions laid down in the statutes, of the kind imposed on DLG members, go beyond what is necessary to ensure that the cooperative functions properly and maintains its contractual power in relation to producers.

41 As regards the penalties imposed on the plaintiffs as a result of their exclusion for infringing DLG's rules, these would not appear to be disproportionate, since DLG has treated the plaintiffs as if they were members exercising their right to withdraw.

42 So far as concerns the membership period, this has been reduced from ten to five years, which does not seem unreasonable.

43 It is significant, in the last analysis, that after their exclusion, the plaintiffs succeeded, through LAG, in competing vigorously with DLG, with the result that in 1990 their market share was similar to DLG's.

44 The other matters mentioned in the second set of questions referred by the national court are not such as to affect the analysis of the problem.

45 The answer to the second set of questions referred by the national court must therefore be that a provision in the statutes of a cooperative purchasing asso-

ciation, forbidding its members to participate in other forms of organized cooperation which are in direct competition with it, is not caught by the prohibition in Article 85(1) of the Treaty, so long as the abovementioned provision is restricted to what is necessary to ensure that the cooperative functions properly and maintains its contractual power in relation to producers.

Abuse of a dominant position

46 In the third set of questions, the national court seeks to ascertain whether a provision in the statutes of a cooperative purchasing association, the effect of which is to prohibit its members from participating in other forms of organized cooperation which are in direct competition with it, may constitute an abuse of a dominant position contrary to Article 86 of the Treaty.

47 The concept of a dominant position is defined in settled case-law as a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers. In general the existence of a dominant position derives from a combination of several factors which, taken separately, are not necessarily decisive (see, in particular, the judgments in Case 27/76 *United Brands* v *Commission* [1978] ECR 207, paragraphs 65 and 66, and Case T-30/89 *Hilti* v *Commission* [1991] ECR II-1439, paragraph 90).

48 It is true that in certain cases the fact that an undertaking holds a large market share may be considered to be a strong indication of the existence of a dominant position. According to the national court, at the time when DLG amended its statutes in 1988, it held around 36% of the Danish fertilizer market and 32% of the Danish market in plant protection products. While an undertaking which holds market shares of that size may, depending on the strength and number

of its competitors, be considered to be in a dominant position, those market shares cannot on their own constitute conclusive evidence of the existence of a dominant position.

49 So far as concerns the concept of abuse of a dominant position, the first point to note is that neither the creation nor the strengthening of a dominant position is in itself contrary to Article 86 of the Treaty.

50 As pointed out above (paragraph 32), the activities of cooperative purchasing associations may encourage more effective competition on some markets, if the conditions imposed on the members are limited to what is necessary to ensure that the cooperative functions properly and maintains its contractual power in relation to producers.

51 It does not appear that restrictions laid down in the statutes, such as those imposed on DLG members in the dispute in the main proceedings, exceed those limits (see paragraphs 36 to 42 above).

52 The answer to the third set of questions referred by the national court must therefore be that even if a cooperative purchasing association holds a dominant position on a given market, an amendment of its statutes prohibiting its members from participating in other forms of organized cooperation which are in direct competition with it does not constitute an abuse of a dominant position contrary to Article 86 of the Treaty, so long as the abovementioned provision is limited to what is necessary to ensure that the cooperative functions properly and maintains its contractual power in relation to producers.

Effect on intra-Community trade

53 In its fourth set of questions, the national court asks whether intra-Community trade is affected, within the meaning of Articles 85(1) and 86 of the Treaty, since the transactions involving the purchase of basic products are in part concluded directly with producers established in non-member countries.

54 The Court has consistently held that, in order that an agreement between undertakings may affect trade between Member States, it must be possible to foresee with a sufficient degree of probability on the basis of a set of objective factors of law or fact that it may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States, such as might prejudice the realization of the aim of a single market in all the Member States (see Case 42/84 *Remia* v *Commission* [1985] ECR 2545, paragraph 22). Accordingly, the effect on intra-Community trade is normally the result of a combination of several factors which, taken separately, are not necessarily decisive.

55 It is for the national court, where appropriate, to undertake the economic analysis required, in accordance with the criteria laid down in the case-law cited above. However, in view of the answers given to the previous questions, such an analysis would not seem to be necessary in the dispute in the main proceedings.

56 The answer to the fourth set of questions must therefore be that intra-Community trade may be affected, within the meaning of Articles 85(1) and 86 of the Treaty, even where the basic products concerned by a provision in the statutes are in part imported from non-member countries.

Jurisdiction of the national court

57 In its fifth and final question, the national court seeks to ascertain what are the powers of the national court where an agreement has been notified to the Commission in order to obtain negative clearance or exemption pursuant to Regulation No 17/62.

58 If the conditions for application of Article 85(1) are clearly not satisfied so that there is scarcely any risk of the Commission taking a different decision, the national court may continue the proceedings and rule on the agreement in issue (see the judgment in Case C-234/89 *Delimitis* v *Henninger Bräu AG* [1991] ECR I-935, paragraph 50).

59 In the dispute in the main proceedings, the Commission stated, in reply to a question from the Court, that in its view the amendment to DLG's statutes is not caught by the prohibition laid down in Article 85(1) of the Treaty.

60 The answer to the fifth question must therefore be that a national court has jurisdiction to rule on the lawfulness of an agreement notified to the Commission where that court considers that the conditions for application of Article 85(1) of the Treaty are clearly not satisfied.

Costs

61 The costs incurred by the Commission of the European Communities, which has submitted observations to the Court, are not recoverable. Since these pro-

ceedings are, for the parties to the main proceedings, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Fifth Chamber),

in answer to the questions referred to it by the Østre Landsret by order of 20 March 1991 and by decision of 10 April 1992, hereby rules:

1. **Fertilizers and plant protection products do not come within the scope of the derogation from the competition rules laid down in Article 42 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.**

2. **A provision in the statutes of a cooperative purchasing association, forbidding its members to participate in other forms of organized cooperation which are in direct competition with it, is not caught by the prohibition in Article 85(1) of the Treaty, so long as the abovementioned provision is restricted to what is necessary to ensure that the cooperative functions properly and maintains its contractual power in relation to producers.**

3. **Even if a cooperative purchasing association holds a dominant position on a given market, an amendment of its statutes prohibiting its members from participating in other forms of organized cooperation which are in direct competition with it does not constitute an abuse of a dominant position contrary to Article 86 of the Treaty, so long as the abovementioned provi-**

sion is limited to what is necessary to ensure that the cooperative functions properly and maintains its contractual power in relation to producers.

4. **Intra-Community trade may be affected, within the meaning of Articles 85(1) and 86 of the Treaty, even where the basic products concerned by a provision in the statutes are in part imported from non-member countries.**

5. **A national court has jurisdiction to rule on the lawfulness of an agreement notified to the Commission of the European Communities where that court considers that the conditions for application of Article 85(1) of the Treaty are clearly not satisfied.**

Rodríguez Iglesias Moitinho de Almeida Edward

Delivered in open court in Luxembourg on 15 December 1994.

R. Grass
Registrar

G. C. Rodríguez Iglesias, President,
acting as President of the Fifth Chamber