OPINION OF ADVOCATE GENERAL SAGGIO

delivered on 8 July 1999 *

I — Introduction

1. This appeal has been brought against the judgment of the Court of First Instance delivered on 14 May 1997 in Case T-77/94, between Vereniging van Groothandelaren in Bloemkwekerijprodukten and Others and the Commission of the European Communities [1] (hereinafter 'the VGB' and 'the Commission' respectively). In that judgment the Court set aside the Commission decision contained in its letter of 20 December 1993 concerning Case IV/32.751 — Florimex/Aalsmeer II, Case IV/32.990 — VGB/Aalsmeer, Case IV/33.190 — Inkoop Service and M. Verhaar BV/Aalsmeer, Case IV/32.835 — Cultra and Case IV/33.624 — Bloemenveilingen Aalsmeer III.

By that decision the Commission dismissed the complaints made by the undertakings of Vereniging van Groothandelaren in Bloemkwekerijprodukten, Florimex BV, Inkoop Service Aalsmeer BV and M. Verhaar BV, pursuant to Article 3(2) of Council Regulation No 17 of 6 February 1962, the first regulation implementing Articles 85 and 86 of the Treaty [2] (hereinafter 'Regulation No 17'), concerning the rules of the Coöperatieve Vereniging De Verenigde Bloemenveilingen Aalsmeer (hereinafter 'the VBA'), a cooperative undertaking under Netherlands law whose members are flower and ornamental plant growers. In particular, the complaints referred to an infringement of Article 85(1) of the EC Treaty (now Article 81(1) EC), with regard to the fees charged to suppliers who were not VBA members for selling their products in the cooperative area, and with regard to the organisation of the Cultra trade centre located in the same area.

2. I would point out that, according to Article 42 of the EC Treaty (now Article 36 EC), an agreement concerning agricultural products comes within the scope of application of the rules of competition contained in the EC Treaty 'only to the extent determined by the Council'.

The Council has laid down, in Council Regulation No 26 of 4 April 1962 applying certain rules of competition to production of and trade in agricultural products [3] (hereinafter 'Regulation No 26'), that 'Article 85(1) of the Treaty shall not apply to such of the agreements, decisions and practices ... as form an integral part of a national market organisation or are necessary for attainment of the objectives set out in Article 39 [now Article. 33] of the Treaty. In particular, it shall not apply to the agreements, decisions and practices of farmers, farmers' associations or associations of such associations belonging to a

* Original language: Italian.

1 — ECR II-759.

2 — OJ, English Special Edition 1959–1962, p. 87.

3 — OJ, English Special Edition 1959–1962, p. 129.

single Member State, which concern the production or sale of agricultural products or the use of joint facilities for the storage, handling or processing of agricultural products, unless the Commission finds that competition is thereby excluded or the objectives of Article 39 of the Treaty are compromised' (Article 2(1)).

II — The facts on which the Court judgment is based

3. The facts underlying the dispute in question are summarised in the judgment of the Court of First Instance, in paragraphs 1 to 44 of the grounds of the judgment. In this Opinion I shall refer only to those passages of the judgment that are of relevance in considering this appeal.

The undertakings involved [4]

4. The VBA represents over 3 000 undertakings, the vast majority of which are Dutch and a small proportion Belgian. In the Aalsmeer trading area it owns, the VBA holds auctions of floricultural products, particularly fresh-cut flowers, indoor plants and garden plants. The VBA's infrastructure is used mainly for holding auctions, but part of its complex is devoted to trade premises rented for wholesale trading in the products. The tenants of those premises are mainly cut-flower wholesalers and, to a lesser extent, indoor-plant distributors.

5. Florimex is a flower retailer with its registered office in Aalsmeer. It imports floricultural products from the Member States and from non-member States, selling them mainly to wholesalers based in the Netherlands.

6. The VGB is an association whose membership includes a large number of flower wholesalers, including Florimex. The VBG's objects are to promote the interests of the flower wholesaling trade in the Netherlands and act as an intermediary *vis-à-vis* the authorities and auctioneers.

4 — Paragraphs 1 to 4 of the judgment.

7. Verhaar BV is a wholesaler of floricultural products established in the VBA premises. Inkoop Service Aalsmeer BV is a subsidiary of Verhaar established in the Cultra commercial centre.

VBA regulations [5]

8. Article 17 of the VBA's statutes requires its members to sell their products at auctions held within the cooperative's premises. A fee or fee is charged to members for the services provided by the VBA. In 1991 that fee amounted to 5.7% of the proceeds of sale.

With regard to direct supply by distributors operating on the VBA premises, the Court judgment reveals that until 1 May 1988 the VBA auction rules included provisions preventing the use of its premises for the supply, purchase and sale of floricultural products not passing through its auctions. In practice, the VBA authorised the purchase and sale of such products, but only under certain standard contracts known as 'trade agreements' that allowed certain dealers, on conditions laid down by the VBA, to sell or supply products bought at other Netherlands auctions to purchasers recognised by the VBA, or to sellflowers of foreign origin, on payment of a fee of 5% of the value of the goods. The association also authorised the dealers established on its premises to purchase products in which it had not acted as the intermediary, on payment of a fee of 10% of the value of the product.

The 1988 Commission decision [6]

9. In 1982 Florimex submitted a complaint pursuant to Article 3(1) of Regulation No 17, with a view to reporting the VBA's infringement of Articles 85 and 86 of the EC Treaty (now Article 82 EC), with reference to its internal rules on the supply to dealers established on its premises.

10. On 5 November 1984 the VBA applied to the Commission for negative clearance pursuant to Article 2 of Regulation No 17 or a favourable decision within the meaning of Article 2 of Council Regulation No 26 of 4 April 1962, failing which an

5 — Paragraphs 5 to 10 of the judgment.

6 — Paragraphs 11 to 14 of the judgment.

exemption decision under Article 85(3) of the Treaty, with particular reference to its statutes, its auction rules, trade agreements, its general conditions from the rental of trade premises and its scale of charges for commission and fees.

11. On 26 July 1988 the Commission adopted Decision 88/491/EEC relating to a procedure pursuant to Article 85 of the EEC Treaty (IV/31.379 — Bloemenveilingen Aalsmeer) (hereinafter 'the 1988 decision').[7] The Commission stated in the operative part of that decision that:

'1. The Agreements notified to the Commission which were concluded by the VBA whereby the dealers established on the VBA premises and their suppliers were at least until 1 May 1998 required, as regards floricultural products not purchased through the VBA:

(a) to deal in and/or have delivered those products on the VBA's premises not bought through the VBA only with the consent of the VBA and under the conditions laid down by it,

(b) to store temporarily on the VBA's premises floricultural products not bought through the VBA only against payment of the fees determined by the VBA,

constitute infringements of Article 85(1) of the EEC Treaty.

The charges for the prevention of irregular use of the VBA facilities imposed by the VBA on the dealers established on its premises (10% rule HFL 0.25 levy), as well as the trade agreements concluded between the VBA and these dealers, also constitute, as notified, infringements of that provision.

2. An exemption pursuant to Article 85(3) of the EEC Treaty for agreements referred to in Article 1 is hereby refused.'

Amendments to internal rules introduced following the 1988 decision[8]

12. With effect from 1 May 1998, the VBA formally abolished its internal rules on the purchase obligations and the restrictions on the free disposal of goods as well as the system of fees, establishing a 'user fee' in their place. This system, amended on several occasions in line with guidance provided by the Commission, applies to

7 — OJ 1988 L 262, p. 27.

8 — Paragraphs 15 to 20 of the judgment.

direct deliveries to dealers established on the VBA premises and the sales transactions for which the cooperatives are no longer the intermediaries.

The user fee is levied on the basis of the number of stalks (in the case of cut flowers) or plants supplied by third parties to the dealers established on the VBA's premises. The amount of the fee is determined by the VBA on the basis of the annual average price achieved during the previous year for the various floricultural products in question. According to the VBA, a factor of about 4.3% of the annual average price for the category in question is applied. Instead of a fee levied per stalk or plant, a supplier may opt to pay a fee of 5%.

13. On 29 April 1988 the VBA also abolished with effect from 1 May 1988 the restrictions previously contained in the trade agreements up to then, in particular the restrictions on the sources of supply. Since that date three types of trade agreement have existed, covering slightly different situations (depending on whether the supplier is a tenant of VBA commercial premises, or whether it has previously held a trade agreement). All those agreements apply a fee of 3% of the gross value of the goods supplied to customers on the VBA premises. The agreements relate to products not usually grown in the Netherlands and therefore differing from those normally auctioned by cooperative members.

Reopening of the administrative procedure [9]

14. By letters of 18 May, 11 October and 29 November 1988, Florimex submitted a complaint to the Commission, registered as No IV/32.751, pointing out, *inter alia*, that the user fee was for the same purpose or had the same effect as the 10% system that had been prohibited by the Commission in its 1988 decision, and that the amount of that fee was even higher for certain products. The VGB submitted a similar complaint in a letter of 15 October 1988.

15. On 19 July 1988 the VBA notified the Commission of a number of amendments to its rules, adopted with effect from 1 May 1988, relating in particular to the provisions of the new user fee, but did not mention the new trade agreements. On 15 August 1988 it notified further changes to its rules.

16. By letters of 21 December 1988, the Commission informed Florimex and the VGB that it had initiated proceedings

9 — Paragraphs 21 to 39 of the judgment.

against the VBA and expressed the opinion that the user fee was not discriminatory by comparison with the fees payable by the VBA members and other suppliers present at the cooperative's auctions.

17. On 4 April 1989 the Commission published Notice 89/C-83/03, pursuant to Article 19(3) of Regulation No 17 and Article 2 of Regulation No 26, stating its intention to adopt a decision favourable to the VBA, concerning: the rules on auction sales by VBA members and other suppliers; the conditions attached to such sales, and therefore the user fee charged to suppliers in the event of direct supplying of dealers established on the VBA's premises.

18. By letters of 3 May 1989, Florimex and the VGB submitted their observations in response to the notice of 4 April 1989. On 7 February 1990, the VBA notified to the Commission its additional rules on the 'detailed provisions governing the user fee', allowing a supplier to make payment at a flat rate of 5% of the value of products. On the same date, the VBA notified the Commission of the new trade agreements.

19. By letter of 24 October 1990 the Commission informed the complainants of its intention to adopt a decision favourable to the VBA. The complainants repeated their arguments in letters of 26 November and 17 December 1990 and at a meeting with Commission staff on 27 November 1990.

20. By letter of 4 March 1991 the Commission informed the complainants, under Article 6 of Commission Regulation No 99/63/EEC of 25 July 1963 on the hearings provided for in Article 19(1) and (2) of Council Regulation No 17 [10] (hereinafter: 'Regulation No 99/63'), that the information obtained did not enable the Commission to uphold their complaints regarding the user fee levied by the VBA. The Commission attached a document to the letter, setting out in detail the reasons leading to this conclusion.

21. On 17 April 1991 the complainants stated in reply to the Commission that they maintained their complaints, arguing in particular that the institution had not expressed an opinion on all the heads of their complaints and therefore that the letter of 4 March 1991 could not be regarded as a communication as defined by Article 6 of Regulation No 99/63.

22. On 2 July 1992, the Commission sent the complainants' lawyer a registered letter

10 — OJ, English Special Edition 1963–1964, p. 47.

definitively rejecting the applicants' complaints regarding the user fee. In that letter (hereinafter 'the decision'), the Commission stated that the statement of reasons made therein was an addition to and explanation of the reasons expressed in the letter pursuant to Article 6, to which it referred.

23. On 21 September 1992, Florimex and the VGB instituted proceedings before the Court of First Instance in Cases T-70/92 and T-71/92 against the Commission's decision of 2 July 1992.

The Commission letter of 20 December 1993 challenged before the Court of First Instance [11]

24. By letter of 5 August 1992, headed 'IV/32.751 — Florimex/Aalsmeer II, IV/32.990 — VBG/Aalsmeer, IV/33.190 — Inkoop Service and M. Verhaar BV/Aalsmeer, IV/32.835 — Cultra and IV/33.624 — Bloemenveilingen Aalsmeer III', the Commission informed the complainants that, based on the information they had provided and through its own investigation, it did not consider that it should carry out an inquiry regarding the 'type I, II and III contracts' and the 'Cultra agreements'.

11 — Paragraphs 40 to 44 of the judgment.

With regard to the trade agreements, it stated as follows:

'The trade agreements focus on securing, as is considered necessary by the VBA, additional supply on its premises. In order to guarantee such additional supply, the VBA enters into agreements with traders who are prepared to commit themselves to offering a specific quantity of products.

The traders who enter into such trade agreements do not have to pay the user fee for the specific products mentioned in the agreement. They pay a collection fee of 3%. For other products which they offer for sale, they must pay the user fee.

Provided that they pay the user fee, all traders established on the VBA's premises may offer for sale products also offered by the holders of trade agreements.

A comparison between the financial burdens imposed by the VBA on traders who are parties to trade agreements and traders who have not concluded such agreements would indicate that the holders of trade agreements are privileged. On the other hand, they enter into obligations *vis-à-vis*

the VBA regarding the supply of certain products.

It cannot therefore be considered that the VBA applies dissimilar conditions to equivalent transactions with other trading parties, within the meaning of Article 85(1)(d) of the EEC Treaty. Moreover, the file contains no conclusive evidence that trade between Member States might be appreciably affected, even if there were a restriction of competition within the meaning of Article 85(1).'

It made the following observations on the Cultra agreements:

'The VBA and the dealers established at the Cultra centre have a contractual relationship whose purpose and effect are to restrict competition, involving both a limitation on the business activities of those dealers and a limitation on their sources of supply (this does not apply to the dealer in hydroponic plants). However, the file contains no conclusive evidence to show that trade between Member States is thereby appreciably affected. The limited economic impact on the markets in question rules this out. Since the information which the Commission has obtained in that regard comprises business secrets of the undertakings concerned, it is not possible to allow you access to it.'

The Commission concluded the letter in the following words:

'In view of those considerations, and to the extent to which it is possible to judge at this stage, continuing the procedure is likely to result in a formal rejection of the complaints.

On the basis of this — still provisional — assessment of your application, I thus have the intention of dispensing with any such formal procedure and of bringing the matter to a close. I shall take the necessary measures for that purpose unless you inform me within four weeks that you wish to maintain your complaint with a view to continuation of the procedure, and set forth the arguments on which you intend to rely to that end.'

25. On 22 December 1992, the applicants' lawyer replied on behalf of the four complainants to which the communication of 5 August 1992 had been sent, stating that certain circumstances had prevented him from reacting earlier. He stated that the applicants wished to maintain their complaints and also expressed the wish that the Commission extend the time-limit for the submission of observations and close the cases with a formal decision on the merits of the complaints. As for the trade agreements, the applicants' lawyer argued in particular, first, that the differences between the rate of the user fee and that of the fee stipulated in the trade agreements were not objectively justified and, secondly, that the Commission's position on the

impact on trade between Member States conflicted with that reached in the 1988 decision whereby trade agreements were regarded as an integral part of the VBA's rules. As for the Cultra agreements, he observed that the impact on trade between Member States should be assessed in the context of the VBA's rules as a whole, and that the turnover of the undertakings concerned exceeded the threshold stated in the Commission communication on agreements of minor importance.

26. The applicants' letter of 22 December 1992 drew no response from the Commission. Since the health of their lawyer had seriously deteriorated, the applicants appointed a new lawyer on 3 November 1993. By letter of 9 December 1993, he asked the Commission to take a position on the letter of 22 December 1992.

27. The Commission responded by a letter of 20 December 1993, in which it referred to the last paragraph of its letter of 5 August 1992, adding the following:

'When the letter of 22 December 1992 was received, the period of four weeks granted to your client to submit observations on the content of the registered letter of 5 August 1992 had expired months earlier.

The Commission Directorate-General for Competition took account of the information provided in your letter of 22 December 1992, on its own initiative. However, a provisional examination then carried out did not disclose any reason to take action under Article 85(1) or Article 86 of the Treaty.'

III — The judgment of the Court of First Instance

28. The VGB, Florimex, Inkoop Service Aalsmeer BV and M. Verhaar BV undertakings challenged the position adopted by the Commission in its letter of 20 December 1993.

The defendant raised an objection of admissibility of the appeal, claiming that the document challenged was not decisive. The decision on this objection was reserved for the final judgment by an order of 14 July 1994.

In the contested judgment, the Court declared the appeal admissible and upheld it in part, setting aside the Commission

decision 'in that part in which it dismisses the appellants' claims to the effect that type I, II and II trade agreements' [concluded by the VBA] were in breach of Article 85(1) of the Treaty'.

IV — Substance

The main appeal

29. The appellant puts forward five grounds of appeal: first, it claims that the Court erred in dismissing the objection of inadmissibility made by the VBA against the action for annulment; second, it alleges infringement and misapplication of Article 85(1) of the EC Treaty; third and fifth, it alleges breach of the principle of non-discrimination; and, lastly, by its fourth ground it alleges infringement of Article 190 of the EC Treaty (now Article 253 EC).

The first ground of appeal: inadmissibility of the action for annulment

30. By this ground of appeal, the appellant submits that the Court of First Instance wrongly dismissed the objection of inadmissibility made by the VBA against the action brought by the VGB. In particular, it contests paragraphs 76 to 88 of the judgment where the Court of First Instance states that the Commission could not regard the VGB's complaint as having been withdrawn in the absence of a response within the time-limit of four weeks which it had expressly indicated in the letter sent under Article 6 of Regulation No 99/63. According to the appellant, such a time-limit was to be considered as absolute and therefore, contrary to what had been assumed by the Court of First Instance, the effect of a failure to observe that limit should have been the definitive closure of the procedure. The appellant added that it could not be held, as the Court of First Instance has done, that in this particular case such a closure would have infringed the right of defence of the undertakings concerned, in that those rights were in fact guaranteed by the setting of time-limits to allow for the normal conduct of the administrative procedure.

On this subject, the defendant undertakings argued that Article 6 and the other provisions on the subject impose no obligation on a complainant to submit its observations on a communication such as the one in question within the time-limit indicated by the Commission, failing which the file is closed. The Court's analysis that the Commission was entitled to close a file if the undertaking concerned failed to submit its observations in good time would not legitimise the Commission's refusal to take further information into consideration, if that information were to be submitted after the time-limit set by the administration,

irrespective of whether the alleged delay was objectively justified.

31. I would begin by observing that in the proceedings at first instance the Commission raised an objection of inadmissibility against the action brought by the VGB, arguing that the decision did not contain an autonomous decision, in that it should be regarded as either a preparatory act which, as such, did not close the administrative procedure, or as an act purely corroborating the decision on closure contained in the letter of 5 August 1992.

The Court did not accept the objection, stating that the contested decision amounted to a final rejection of the complaints from the VGB and the other undertakings concerned. In particular, and to the extent relevant to the present case, the Court did not consider well founded the Commission's argument that 'the appellants had already forfeited their status as complainants [i.e. parties with an interest in the Commission ascertaining the infringement of the rules of competition of which they had complained] as of the date of their letter of 22 December 1992', because of the fact that the observations on the content of the letter of 5 August 1992 had not been submitted within the prescribed time-limit of four weeks.

On this point, the contested judgment states that: 'Although, in principle, the Commission is thus entitled to draw certain inferences from the fact that a complainant fails to reply to a letter sent under Article 6 of Regulation No 99/63 within the period laid down pursuant to that article, provided that the time-limit is reasonable, the Court nevertheless considers that the complainants' consent to closure of the procedure on its complaint cannot be irrebuttably presumed merely because the time-limit was not observed. It would not be consistent with the right to a fair hearing for the Commission to be able to close the procedure on the complaint where special circumstances might legitimately account for the failure to observe a time-limit which the Commission itself set'.

Furthermore, according to the Court, in the case in question the right to submit observations even after the time-limit set by the Commission was also justified by other reasons, in particular by: (a) the fact that the four-week period indicated in the letter coincided with a holiday period; (b) the fact that the undertakings had on several occasions demonstrated their interest in a decision as to the legality of the arrangements complained of; and lastly, (c) the fact that the delay in submitting the observations was justified by objective circumstances.

The Court therefore concluded that 'the Commission was not entitled to conclude, solely because the time-limit set in the letter

of 5 August 1992 had not been observed and without contacting the applicants, that their complaints were to be regarded as lapsed before 22 December 1992'.

The definitive rejection of the action was therefore attributable, according to the Court of First Instance, solely to the contested decision of 20 December 1993. In support of that conclusion, the Court then stated the following: 'In their letter of 22 December 1992, the applicants replied to the letter of 5 August 1992 in detail, whilst at the same time stressing that they maintained their complaints in order to enable proceedings to continue. They also specifically asked the Commission to adopt a formal decision on their complaints, as it had promised to do during the administrative procedure. In his letter of 9 November 1993, the new lawyer for the applicants asked the Commission to take a position on the letter of 22 December 1992. It is clear from the Commission's letter of 20 December 1993, in response to this request, that it had examined the letter of 22 December 1992 and concluded that the observations in it did not "disclose any reason to take action under Article 85(1) or Article 86 of the Treaty"'.

In the appeal against the Court ruling, the VBA in substance repeats some of the arguments that had been put forward by the Commission in support of its objection of inadmissibility. The VBA does not dispute that the complaints were definitively rejected, but it considers that the complaint was closed by way of the letter of 5 August 1992 and not by the contested decision, which it saw as a purely confirmatory measure. Thus, in the absence of a reply from the undertakings concerned to the letter of 5 August 1992 within the time-limits set by the Commission, the matter should have been regarded as definitively closed and the undertakings in fact forfeited the right to a decision on the merits of their complaint.

32. These arguments should be rejected, because they are based on a mistaken interpretation of the rules of the administrative procedure for investigating infringements of the rules of competition and on an erroneous assessment of the facts.

It is appropriate, in that respect, to summarise, first of all, the relevant measures regarding the administrative procedure for applying the rules of competition. Where the Commission, having received an application pursuant to Article 3(2) of Regulation No 17, considers that on the basis of the information in its possession there are insufficient grounds for granting the application, it informs the applicants of its reasons in writing pursuant to Article 6 of Regulation No 99/63. That provision states that if the information provided by the parties fails to justify the opening of an infringement procedure, the Commission is to reject the complaint, 'inform the applicants of its reasons in writing and fix a time-limit for them to submit any further comments in writing'. Once it receives

those comments, the Commission takes a final decision on whether to close the file.

The only part of that procedure that may be challenged before the court is the final act, entailing the definitive closure. The communication under Article 6, setting out the administration's provisional position on the merits of the complaint, is a preparatory act that may not be appealed against in the courts. [12]

33. In the present case, the problem arises of establishing the act which closed the administrative procedure. In considering this question, it is appropriate to review the various stages of the procedure. The complaints as to the infringements in question were submitted between May and November 1988. After a series of meetings between the administration and the undertakings concerned, on 5 August 1992 the Commission drew up the letter relating in particular to the 'trade agreements' and the 'Cultra agreements'; that letter concluded with the following words: 'On the basis of this — still provisional — assessment of your application, I thus have the intention of dispensing with any such formal procedure and of bringing the matter to a close. I shall take the necessary measures for that purpose unless you inform me within four weeks that you wish to maintain your complaint with a view to continuation of the procedure, and set forth the arguments on which you intend to rely to that end.'

It is clear from the wording of the letter that the Commission is communicating a provisional position on the existence of the infringement complained of, in relation to which it expresses only the *intention* of taking no further action on the complaint. The Commission also calls on the parties to submit their observations within four weeks, adding that in the absence of such observations *it would take the necessary measures to bring the matter to a close.* The Court of First Instance rightly — without the complainant criticising it on this count — describes this communication as a letter under Article 6 of Regulation No 99/63 on the complaints relating to the trade agreements concluded by the VBA and the organisation of the Cultra trading centre.

12 — It is known that, in the judgment of 10 July 1990, Case T-64/89 *Automec* v *Commission* [1990] ECR II-367, the Court of First Instance outlined three phases of the administrative procedure for examining complaints of infringements of the rules of competition. The procedure opens with the submission of a complaint, governed by Article 3(2) of Regulation No 17, and ends with a decision to close the file. All the Commission acts preceding the final decision are to be regarded as preparatory and therefore cannot be challenged before the legal authority. Thus, if the Community Court rules on a communication under Article 6 of Regulation No 99/63, it would in fact rule 'on questions on which the Commission has not yet had the opportunity to rule'. In reaching this decision the Court based itself on the Court of Justice's judgment of 11 November 1981 in Case 60/81 *IBM* v *Commission* [1981] ECR 2639, that declared as inadmissible an action against a communication of an appeal against a communication of claims regarding the finding that the measure is preparatory compared with the final decision. The Court states that 'if that is true of the statement of objections, the legal importance of which is greater than that of the notification provided for in Article 6 of Regulation No 99/63, it follows that the latter cannot be treated as a decision either' (see paragraphs 45 to 47). The *Automec I* judgment was followed by a series of judgments on the inadmissibility of actions for annulment in respect of communications under Article 6 of Regulation No 99/63 or other acts preceding the final decision on a complaint.

The complainants did not submit their observations until 22 December 1992, in other words after the expiry of the time-limit of four weeks that they had been allowed. In December 1993 the Commission reacted to pressure from them by taking the decision now challenged, which included the wording:

'When the letter of 22 December 1992 was received, the period of four weeks granted to your client to submit observations on the content of the registered letter of 5 August 1992 had expired months earlier.

The Commission Directorate-General for Competition took account of the information provided in your letter of 22 December 1992, on its own initiative. However, a provisional examination then carried out did not disclose any reason to take action under Article 85(1) or Article 86 of the Treaty.'

By this letter, the wording of which is altogether vague and obscure, the Commission seems to confine itself to stating that, since the undertakings had not reacted in good time, it had followed up on what had been suggested in its letter under Article 6 and in consequence had finally closed the procedure on the complaints.

34. In the present case, the Court is asked to establish whether the preparatory nature of the letter of 5 August 1992 and the final nature of the contested decision of 20 December 1993 were modified — as claimed by the Commission and the appellant — following the submission of observations outside the time-limits set by the administration.

In my opinion, the characterisation of the contested decision contained in paragraphs 85 to 87 of the Court's judgment as a decisive act is not vitiated by any error of assessment. The letter, as pointed out above, was sent at an advanced stage of the administrative procedure, specifically after the letter under Article 6 of Regulation No 99/63 and after the parties had submitted their observations. In addition, with regard to its content, that letter is the first and the only act in which the complainants are informed of the definitive rejection of their complaints. Such rejection cannot be attributed to the letter under Article 6 in which the Commission had expressly stated its intention to adopt the necessary measures to close the matter in the absence of observations. By the contested decision, the Commission therefore communicated its definitive decision on the matters complained of. The intention that the act should be definitive is also inferred from the fact that the Commission does not set any time-limit for the undertakings to submit any further observations. On this subject, I would recall that, also with

regard to competition, in the 1994 *SFEI* judgment, [13] the Court set aside the order of the Court of First Instance declaring the inadmissibility of an action seeking the annulment of a Commission act which, according to the Court of First Instance, contained a provisional assessment of the facts complained of and was therefore provisional in nature. The Court of Justice considered that a letter sent in the course of an administrative procedure in which the Commission stated that it was closing the investigation without offering the parties the opportunity to submit their observations was a definitive act, and as such could be challenged. In this judgment, the Court stated that 'a letter closing the file may be analysed as a preliminary or preparatory statement only if the Commission has clearly indicated that its conclusion is valid only subject to submission by the parties of supplementary observations'.

On the other hand, if the decision in question were to be considered as confirming the preceding letter, it could be accepted that, once the undertakings concerned exceed the time-limit they have been given for submitting their observations on a letter under Article 6 of Regulation No 99/63, the Commission is no longer required to adopt a decision to close the procedure: this obligation is expressly recognised in the Court's *Guérin* judgment of 1997. [14] This also applies in a case such as the present, in which it expressly declares, in the communication under Article 6, that it wishes to proceed by taking a final decision of rejection in the absence of reaction from the undertakings concerned, even if the undertakings demonstrate their interest in the administration's taking a definitive position on the infringements complained of.

In my opinion, the undertakings' delay in submitting observations may at most release the Commission from the obligation to consider new defence 'arguments', without however releasing it from the obligation to take account of any new facts made known by the interested parties after the time-limit expires. Indeed, it cannot be inferred from the letter under Article 6 that, if the undertakings provide such information after the time-limit for their submission, the Commission is in any event not required to take them into account. If such an obligation on the Commission were

13 — Judgment of 16 June 1994 in Case C-39/93 P *SFEI* v *Commission* [1994] ECR I-2681, in particular paragraphs 27 to 30.

14 — The Appeal Court affirmed the existence of this obligation on the Commission in its judgment of 18 March 1997 in Case C-282/95 P *Guérin Automobiles* v *Commission* [1997] ECR I-1503, in particular paragraphs 33 to 39. The Court recognised the complainants' right to bring an action for infringement of the EC Treaty, within the meaning of Article 175 of the EC Treaty (now Article 232 EC) in the event that the Commission, having sent a communication under Article 6 and having received observations, fails to initiate a procedure or take a final decision within a reasonable period. The Court thus provided a response to a question that had remained unsettled in the judgment of 18 October 1979 in Case 125/78 *GEMA* v *Commission* [1979] ECR 3173, in particular paragraphs 17 and 18, in which it had stated that communication under Article 6 'implies the discontinuance of the procedure' and therefore ends a state of inertia that can be challenged by an action under Article 175 of the EC Treaty. In the *Guérin* case, the Court considered that, after the communication containing a provisional position, the complainants were entitled, in the event of failure to adopt a final act of rejection or formal opening of the administrative procedure, to bring a new action on the grounds of infringement, to ascertain whether there had been a wrongful omission by the Commission.

to be ruled out, it would prejudice the exercise of the right of private parties to provide further information on infringements of the rules of competition that have already been the subject of complaints closed by the Commission and would therefore detract from the same right of all the parties concerned, acknowledged by Article 3(2) of Regulation No 17, to denounce infringements of the rules of competition. [15]

The fact that the contested decision merely refers, as regards its statement of reasons, to a preceding act of an apparently interim nature does not of itself render it confirmatory. The statement of reasons for an act can be reconstructed in the light of the information derived from the general context, for instance information derived from the content of preparatory acts. This is the finding arrived at by the same Court in the recent *Ufex* judgment on a decision to reject a complaint of an infringement of rules of competition. In confirming the Court of First Instance ruling in those proceedings, the Court stated that the Commission may, in a decision on the final rejection of a complaint, expressly refer to a communication under Article 6 of Regulation No 99/63, in that 'the statement of reasons for an administrative act may refer to other acts and in particular take note of the content of an earlier act, especially if this is connected'. [16] I would point out, however, that whereas in the decision contested by Ufex the Commission reproduces the content of the letter under Article 6, in the present case the Commission merely refers to the previous act without reproducing the content even in summary form. In my opinion, however, there is no reason why the Commission should not state the reasons for its own act by merely assuming the content of another act adopted in the course of the same procedure, especially if this is preparatory.

35. In the light of these considerations, I find that this first ground of appeal against the judgment of the Court of First Instance is unfounded.

The second, third, fourth and fifth grounds of appeal: discriminatory treatment of external suppliers of the cooperative.

36. In the second, third, fourth and fifth grounds of appeal the VGB complains essentially that the Court of First Instance committed a manifest error of assessment

15 — On this subject, see the *GEMA* judgment cited, paragraphs 17 and 18. Further, on the possibility of reopening an administrative procedure if new facts have arisen that may affect the Commission's position on the existence of an infringement complained of and that may entail the revocation or modification of a Commission decision, pursuant to Article 8(3) of Regulation No 17, see the Court of First Instance judgments of 28 October 1993 in Case T-83/92 *Zunis Holding and Others* v *Commission* [1993] ECR II-1169 and 8 June 1995 in Case T-7/93 *Langnese-Iglo* v *Commission* [1995] ECR II-1533, upheld by the judgment of the Court of 1 October 1998 in Case C-279/95 P *Langnese-Iglo* v *Commission* [1998] ECR I-5609.

16 — Judgment of 4 March 1999 in Case C-119/97 P *Ufex and Others* v *Commission* [1999] ECR I-1341, in particular paragraphs 55–58.

of the facts in holding that there was discrimination in treatment to the detriment of non-members of the cooperatives intending to sell their products within the VBA premises. Such discrimination, associated by the Court with the difference between the rates of fee charged for access to the cooperative structures and services, is alleged not to exist since the difference in treatment relates to undertakings offering different services, so that the VBA is not required to offer identical treatment. On the one hand, there are the direct suppliers of undertakings located within the cooperative premises and, on the other, suppliers with which 'trade agreements' are concluded. The Court of First Instance erred in finding that the VBA had not demonstrated that the contractual relations with outside undertakings differed in content and therefore undertakings renting structures from the VBA received privileged treatment. On the contrary, in the proceedings at first instance the VBA had supplied model 'trade agreements' showing that the undertakings concluding such agreements were required to rent the premises from the VBA — and therefore to pay rent to the cooperative — and were also required to supply the VBA with a particular type of product. The appellant argues that, starting from this mistaken finding of fact, the Court of First Instance infringed the provisions on competition, in particular Article 85(1) of the Treaty, in that it had considered the agreements entered into by the VBA to be prohibited agreements. The Court of First Instance, it was claimed, had also infringed the principle of non-discrimination in that it had applied the criterion of equality of treatment to agreements with different contents, whereas that principle requires that different treatment must not be accorded to the same services. Lastly, the appealed judgment is, it is claimed, vitiated by an error of law, in that the Court of First Instance, in finding that the Commission had misassessed the facts, referred to paragraphs 192 and 193 of the judgment delivered on the same day in Joined Cases T-70/92 and T-71/92, in which the Court of First Instance found an error not in the assessment of the facts but in the statement of reasons.

In arguing that there has been discrimination, the defendants essentially made two observations. First, in this case the discrimination is not between two categories of agreement, as stated by the VBA, but between different categories of undertaking. In other words, the VBA regulations, it was argued, penalised those undertakings which provide direct and unregulated supply to that cooperative, by charging them a fee of 10% of the total proceeds from the sale of the products; this fee was far higher than the amount charged to suppliers that had leased trading room on the VBA premises and which had entered into specific supply agreements with the VBA. This difference of treatment amounts to a restriction on access to the Netherlands flower market for those undertakings intending to distribute products other than those sold on the VBA premises, in particular products originating outside the Netherlands. Secondly, the defendants pointed out that the Court of First Instance had taken into consideration all the characteristics of the two types of agreement, and therefore they had been assumed as facts in the judgment and could not be

examined at appeal, where the Court of Justice can rule only as to errors in the interpretation and application of provisions of law.

37. In my view, the grounds of appeal against the Court of First Instance's ruling as to the substance of action at first instance are based on a single criticism, relating to the alleged error in the Court of First Instance's assessment of discrimination between the various suppliers not belonging to the VBA. On the basis that that was wrong in law, the VBA argues that there has been an infringement of Article 85(1) of the Treaty, breach and misapplication of the general principle of non-discrimination and, lastly, an infringement of Article 190 of the EC Treaty.

This criticism, however, manifestly relates to the findings of fact as it appears from the passages in the appealed judgment in which the Court of First Instance, comparing the positions of the outside suppliers, states that there were no similarities between the positions of the different undertakings *vis-à-vis* the cooperative, concluding, in the light of the facts obtained, that the difference in the rates applied to those undertakings was unjustified and therefore discriminatory. The discrimination lay in the difference between the fee paid by the suppliers delivering their products directly within the VBA premises (a fee that, according to the defendants, amounted to about 10% of the gross price of the products) and the fee of about 3% of the price of products charged to the suppliers entering into the abovementioned 'trade agreements'. The Court of First Instance pointed out in this respect that the Commission, in its 1992 letter, while expressly stating that 'having made a comparison of the financial charges levied by the VBA on traders that were parties to the trade agreements and those not having entered into such agreements', arrived at the conclusion that 'the former are privileged'. It goes on to say that the holders of trade agreements entered into 'obligations *vis-à-vis* the VBA justifying the difference between the 3% system and the rate of the user fee'. Based on this premiss, the Court of First Instance states that the contested decision was 'vitiated by an error of fact or assessment in so far as it stated that the difference of rate between the user fee and the 3% fee applicable to the trade agreements was justified by the existence of such obligations' (paragraphs 116 to 119).

The criticism, therefore, was not of the legal assessment of the agreement in question, and therefore the applicability of Article 85(1)(d) to the case in question, but essentially of the review conducted by the Court of First Instance as to whether, based on the facts emerging from the contested decision, the services offered by the different undertakings could be deemed to be equivalent. Such an assessment pertains to the finding of facts at first instance, and it may not, therefore, be re-examined in an appeal. The VBA also seems to allege a manipulation of the evidence by the Court of First Instance in stating that the agreement forms produced in the first instance proceedings show that the under-

takings entering into such agreements were required to accept a set of constraints which in fact justified the different rate of fees in question. Nevertheless, it appears from the grounds for the judgment that the Court of First Instance had not omitted to take those items into account — in paragraph 116, the Court of First Instance expressly refers to the rental paid by the suppliers entering into trade agreements — and based its decision on the VBA's discriminatory treatment of suppliers on a general, structured review of the relations existing between the different outside undertakings and the cooperative making the appeal.

Also unfounded is the VBA's criticism of the Court of First Instance's alleged error in law in expressly referring — in order to demonstrate the existence of an error in the Commission's assessment — to what the Court of First Instance had stated in paragraphs 192 and 193 of Joined Cases T-70/92 and T-71/92. As I have already pointed out in the Opinion in Case C-265/97 P, in the *Florimex* judgment, and in particular in the aforesaid paragraphs 192 and 193, the Court of First Instance conducted a joint review of the error in law and the inadequate statement of reasons, both of which were claimed by Florimex in contesting the decision of the Commission of 2 July 1992.

38. In the light of all the foregoing, I consider that the four grounds of appeal put forward by the VBA should be dismissed.

The cross-appeal

39. The defendants have brought a cross-appeal against that part of the Court of First Instance's judgment in which it dismisses their application for annulment of the Commission's decision on the assessment of the legality of the 'Cultra agreements'. The parties claim that the rejection of their application for annulment was based on an erroneous assessment of those agreements, in that the Court of First Instance considered them in isolation from the rest of the cooperative's internal rules, with the result that it confirmed the Commission's analysis to the effect that those agreements did not influence the common market and that therefore Article 85(1) of the EC Treaty was not applicable to them. The Court of First Instance, it was claimed, did not take into account the fact that not only small retailers but large undertakings conducted transactions in the commercial centre, and that dealing in export products also took place there.

In my view, these criticisms concern the findings and not the assessment of facts, since the arguments put forward by the defendants go to the effects on the market of transactions conducted within the Cultra centre and to the purely financial relations

between those transactions and those generally conducted on the cooperative premises. I therefore consider that this cross-appeal should be dismissed, because it is based on grounds that cannot be put forward in an appeal.

Costs

40. Under Article 69(2) of the Rules of Procedure applicable to appeal proceedings under Article 118, the unsuccessful party is to be ordered to pay the costs if they have been applied for. In the present case, there being a specific application for costs from the defendants, I propose that the Court order the appellant to pay those undertakings' legal costs, except for the costs incurred in submitting the cross-appeal. I also propose that the Commission bear its own costs, pursuant to Article 69(4) of the Rules of Procedure.

Conclusion

41. In the light of these considerations, I propose that the Court of Justice:

(1) dismiss the appeal;

(2) dismiss the cross-appeal by Vereniging van Groothandelaren in Bloemkwekerijprodukten, Florimex BV, Inkoop Service Aalsmeer BV and M. Verhaar BV;

(3) order the Coöperatieve Vereniging De Verenigde Bloemenveilingen Aalsmeer (the VBA) BA to pay the costs of these proceedings incurred by Vereniging van Groothandelaren in Bloemkwekerijprodukten, Florimex BV, Inkoop Service Aalsmeer BV and M. Verhaar BV, except for the costs arising from the bringing of the cross-appeal.