In Case 71/74

NEDERLANDSE VERENIGING VOOR FRUIT EN GROENTENIMPORTHANDEL, NEDERLANDSE BOND VAN GROSSIERS IN ZUIDVRUCHTEN EN ANDER GEÏMPORTEERD FRUIT 'FRUBO', represented by J. J. A. Ellis and B. H. ter Kuile, both of the Bar of The Hague, with address for service in Luxembourg in the chambers of J. Loesch, 2 rue Goethe,

applicants,

v

COMMISSION OF THE EUROPEAN COMMUNITIES, represented by its Legal Adviser, B. Van der Esch, with address for service in Luxembourg at the office of its Legal Adviser, P. Lamoureux, 4 boulevard Royal,

defendant,

and

VERENIGING DE FRUITUNIE, represented by R. A. de Jonge, of the Utrecht Bar, with address for service at the chambers of E. Arendt, 34 B IV, rue Philippe-II,

intervener,

Application for annulment of the Decision of the Commission of 25 July 1974 concerning a procedure under Article 85 of the EEC Treaty (IV/26.602-Frubo),

THE COURT

composed of: R. Lecourt, President, J. Mertens de Wilmars and A. J. Mackenzie Stuart, Presidents of Chambers, A. M. Donner, R. Monaco, P. Pescatore, H. Kutscher, M. Sørensen and A. O'Keeffe (Rapporteur), Judges,

Advocate-General: J. P. Warner
Registrar: A. Van Houtte

gives the following

JUDGMENT

Facts

The facts and the arguments developed by the parties in the course of the written procedure may be summarized as follows:

I — Facts

An agreement concerning the organization of a system of sale by auction for fresh citrus fruit and apples and pears of non-European origin imported into the Netherlands was concluded in 1952 between the Nederlandse Vereniging voor de Fruit en Groentenimporthandel (hereinafter called 'importers' associations' and the Nederlandse Bond van Grossiers in Zuidvruchten en ander Geïmporteerd Fruit 'Frubo' (hereinafter called 'wholesalers' association').

Minor amendments were made to the agreement on 1 February 1961, 15 February 1965 and 1 August 1968.

On 8 February 1968 the agreement was made the subject of an application submitted by a Dutch citrus fruit wholesaler, the Govers en Zoon undertaking of Amsterdam, under Article 3 (2) (b) of Regulation No 17 concerning the application of Articles 85 and 86 of the EEC Treaty. As a result of this complaint, a statement of objections against the 1 August 1968 version of the agreement concluded in 1952 was, on 12 November 1969, served on the two associations concerned as well as their member-undertakings.

On 2 January 1970 the two associations mentioned above asked the Commission to declare, by Decision, that the agreement which was the subject of the statement of objections fulfilled the conditions laid down for application of Article 2 (1) of Regulation No 26. After the Commission had, on 30 June 1971, communicated to those concerned the reasons why, in its view, the conditions under which Article 2 of Regulation No 26 are to be applied had not been fulfilled, the associations concerned altered certain provisions of the agreement on 15 March 1972; then, on 21 April 1972, they notified the Commission of the agreement as amended. After receiving a second statement of objections addressed to them on 19 November 1973 the said associations made a fresh amendment of the provisions of the agreement concerning the obligation to place the fruit on the market solely through sale by auction.

After this second amendment the main provisions of the agreement appeared as follows:

1. No one may take part in the auction sales, which shall take place at Rotterdam, without authorization from the committee responsible for seeing that the provisions of the agreement are observed (Articles 2 and 3); neverthelesss, importers admitted to the auction sales may authorize exporters or foreign wholesalers to take part provided that this is exclusively in connexion with purchases of goods in transit (Article 5);

2. Authority to take part in the auction sales in the capacity of seller is granted on application to any importer established in the EEC who:

   — if he is not a member of the importers' association, gives a written undertaking to that association and the association of wholesalers that he will observe the provisions of the agreement and

— has provided a banker's guarantee of Fl. 10 000 in favour of the two associations, if this is laid down as a condition by the committee responsible for seeing that the agreement is observed (Article 2);

3. Authority to take part in the auction sales in the capacity of purchaser is granted on application to any fruit and vegetable wholesaler established in the Netherlands who:

— if he is not a member of the wholesalers' association, has given a written undertaking to that association and the association of importers that he will observe the provisions of the agreement and

— has for one year prior to submission of the application traded as a wholesaler in citrus fruit and who, in this capacity, has regularly marketed those products during the said year (Article 3);

Wholesalers not established in the Nederlands and who therefore do not regularly market citrus fruit in that country are not required to observe these conditions;

4. Importers and wholesalers allowed to take part in the auction sales in Rotterdam 'shall be prohibited from marketing in the Netherlands, otherwise than by means of an auction sale on importation, citrus fruits produced outside the EEC or apples and pears of non-European origin unless they have already been sold at an auction sale on importation (Article 9 (1)); an exception to this rule is made in cases where the fruits referred to in paragraph 1 are bought from an importer or a wholesaler established in another Member country of the EEC and by whom the fruit has actually been despatched, cleared through customs and unloaded (the condition concerning undloading not being required after 24 June 1974), (Article 9 (2)); if so required by the committee responsible for seeing that the agreement is observed, the purchaser who takes advantage of the provision in paragraph 2 must be able to show that the conditions laid down in this paragraph have been fulfilled (Article 9 (3))';

5. The obligation to proceed through import auction sales shall not apply to:

— sales in transit,

— sales to factories,

— sales of fruit whose condition is such that it cannot reasonably be offered for sale by auction,

— sales of soft fruit in negligible quantities (Article 11);

6. The Rotterdam auction sales shall take place regularly every week, at 11 o'clock on Mondays, Tuesdays and Wednesdays; fruit may be placed on sale only if the quantities involved have been notified in advance; the sale of larger quantities is authorized only if they exceed the quantity notified by 20 % or less;

7. As regards arrangements for the sales, the agreement includes a series of further provisions relating to samples of the fruit placed on sale, inspectors responsible for checking the condition of the fruit, the quantities of fruit placed on sale, sampling and so-called 'blind' sales, i.e. sales of fruit of which it has not been possible to exhibit samples in time;

8. The committee responsible for seeing that the agreement is observed may impose the following penalties for failure to observe the agreement:

— reprimand,

— notification of the breach to persons bound by the agreement,

— fine not exceeding Fl. 10 000,

— prohibition, for a specified period, from taking part in the auctions,

— exclusion from the auction sales.

Fruit, mainly citrus fruit, marketed through the Rotterdam auction sales, is of considerable volume and reaches not only the Dutch market but also the German market and, to a lesser extent, the markets of other Member States of the EEC. It offers a wide choice of origin and variety and prices are usually lower than those fetched in other countries of the Community. Approximately 80 % of citrus fruit consumed in the Netherlands comes through the Rotterdam auction sales. Nine importers established in the Netherlands regularly take part in these sales as vendors, whereas importers established in the other Member States take part only on rare occasions. The number of wholesalers authorized to obtain their supplies at these auction sales is about 350, which represents nearly all the wholesalers whose main business is marketing fruit in the Netherlands.

On 5 October 1973, 22 Dutch undertakings, who are members of the wholesalers' association, submitted an application pursuant to Article 3 (2) (b) of Regulation No 17.

After having heard the applicant parties during the administrative procedure, the Commission, by Decision of 25 July 1974:

(a) declared that the provisions made in Article 9 of the agreement concluded between the importers' association and the wholesalers' association and relating to the organization of auction sales for citrus and other fruit imported into the Netherlands and also the act of implementing these provisions were in breach of Article 85 (1) of the EEC Treaty;

(b) ordered the said associations and the undertakings taking part in the Rotterdam auction sales, listed in an Annex to the Decision, to bring the stated infringements to an end without delay.

II — Procedure

By application registered at the Court of Justice on 23 September 1974, the 'importers' association' and the 'wholesalers' association' brought an action for annulment of this Decision.

In separate applications registered at the Court of Justice on the same day, the two associations applied under two heads for suspension of operation during, respectively, the period prior to the decision to be given on the application for interim measures, and the period between that decision and the judgment of the Court in the main action.

By application registered at the Court on 30 September 1974, the 'Fruitunie' association, in which are organized the majority of the 22 wholesalers mentioned above, made an application to intervene in the proceedings concerning the application for interim relief.

By order of 15 October 1974 the President of the Court allowed the intervention of 'Fruitunie' and granted the suspension of operation of the Decision until the Court had ruled on the substance, the Order including a direction that the clauses under which penalties could be imposed on members of the consortium should not be applied in the meantime.

In the same application, 'Fruitunie' requested authority to intervene in the main action in support of the Commission's conclusions.

By Order of 23 October 1974 the Court allowed the intervention.

III — Conclusions of the parties

The applicants claim that the Court should:

— pursuant to Articles 173 and 174 of the EEC Treaty, declare the Decision of the Commission null and void;

— order the Commission to pay the costs.

The defendant Commission contends that the Court should:

— dismiss the application as unfounded;

— order the applicants to pay the costs of the action.

The intervener contends that the Court should:

— declare the application submitted by the applicants to be unfounded;

— order the applicants to pay the costs of the proceedings.

IV — Submissions and arguments of the parties

(a) First objection as to form

The *applicants* contend that there is an infringement of an essential procedural requirement in the fact that the Commission did not make any declaration in advance and by separate Decision on the applicability of Regulation Nr 26 of the Council of 4 April 1962 applying certain rules of competition to the production of and trade in agricultural products (OJ 20. 4. 1962, p. 993).

Pursant to Article 42 of the EEC Treaty, which provides that the provisions relating to rules on competition shall apply to trade in agricultural products only to the extent determined by the Council, Article 2 (1) of Regulation No 26 provides that Article 85 (1) of the Treaty shall not apply to such agreements as are necessary for attainment of the objectives set out in Article 39 of the Treaty.

In proceeding to implement Article 85 without, as required by Article 2 (3) of Regulation No 26, hearing the applicants as interested associations of undertakings, the Commission directly infringed that provision.

The *defendant* contends that, when those concerned believe they are entitled to an exemption, they are fully protected in law so long as the Commission decides within the terms of Article 85. In the present case, however, the applicants did not take advantage of the opportunities offered them to comment on the on the procedure laid down in Regulation No 26.

The *applicants* reply that decisions implementing Article 2 of Regulation No 26 which are to the advantage of undertakings ought not to be the only ones issued in the form of a Decision, but it is important for those concerned, above all when the decision adversely affects them, that it should be sent to them to enable them to lodge an appeal. As regards the administrative procedure, they relied on statements by the Director of the 'Restrictive Practices and Dominant Positions' Directorate, who told them in 1971 that the Commission accepted the agreement as being within the terms of Article 85 and that no further reference need be made to Regulation No 26.

The *defendant* makes the rejoinder that there were no grounds for publishing a Decision such as that referred to in Article 2 of Regulation No 26 and that it was even impossible to have recourse to that article once an infringement of Article 85 (1) was established. It is therefore incorrect to state that the Commission has not ruled that Article 2 of Regulation No 26 does not apply.

(b) Second objection as to form

The *applicants* blame the Commission for not having heard them and for having addressed its first statement of objections only to their affiliates. Moreover, the disputed Decision was based on the wording of Article 9 of the agreement which was, however, amended on 21 February 1974 on lines suggested by the Directorate-General for Competition, namely, by exempting fruit already imported into the EEC from the auction sale requirement.

The *defendant* denies not having sent the first statement of objections to the two associations. As regards Article 9, the applicants actually proposed an amendment in the course of the hearing. This was, with their agreement, the subject of discussion. Moreover, since the alteration did not produce any fundamental change in the situation, it was not inconsistent with observance of the correct and established procedure also to take the new article into account in the Decision.

The *applicants* reply that, at every stage of the discussion, the Commission laid down fresh requirements in respect of Article 9 and denied the existence of the promises previously given; this prevented them from organizing a systematic defence of their interests.

In reply, the *defendant* states that, as shown by the date on which the notices served by it were despatched the applicants' opportunities effectively to defend their interests were subject to no restriction either as to time or as to manner.

(c) Third objection as to form

The *applicants* contend that, as the Commission has always used auctions for calculating reference prices, it is contrary to the principles of good management and amounts to a misuse of powers to raise objections and nevertheless to continue to work on the basis of a system condemned as illegal.

The *defendant* stresses that the use of the prices reached in auctions has no connexion with the incompatibility of the agreement with the Treaty as a result of artificial concentration of supply and demand.

The *applicants* reply that this concentration is the result of the requirement to sell by auction and that it is thanks to this that Rotterdam is the most representative market for fresh citrus fruits in the EEC because the prices fetched at the auctions are openly arrived at.

The *defendant* maintains that the fact that prices find their level under conditions which are incompatible with Article 85 does not divest them of importance for the market. Even if this were not so, this would not mean any inconvenience or loss for the consortium.

(d) Fourth objection as to form

According to the *applicants* this is borne out by the fact that, despite the assurances given by the Director of the 'Restrictive Practices and Dominant Positions' Directorate by letter of 21 December 1971 that an amended version of the agreement was compatible with the requirements of Article 85 (3), the defendant, by letter of 6 November 1973, declared that 'all the facts which require to be taken into consideration are not yet available'.

The *defendant* points out that formal commitments cannot be entered into at staff level. The provisional nature of the opinion in question is apparent from the fact that it was accompanied by an invitation to notify the agreement, the first stage of the regular procedure providing for all concerned to be heard, including those who have objections to submit concerning the agreement. The concessions which the applicants made in October and December 1971 did not give wholesalers free access to the register of importers, which was the nub of the disagreement with the Commission, and, after notification of the amended agreement, the concessions had to be discussed with the undertakings who had complained.

(e) Cumulative effect of objections as to form

In the *applicants'* view, the cumulative effect of these acts or omissions, which is that it was not made possible for them to argue their case properly, is an even stronger reason for annulment of the decision.

According to the *Commission,* the question does not even arise, since none of these complaints are well-founded.

(f) First objection as to substance: inapplicability of Regulation No 26

In its Decision the Commission states:

1. that though the products covered by the agreement appear in Annex II to the EEC Treaty, the provisions of Article 2 of Regulation No 26 cannot be applied because:
   - — no agreement of farmers, farmers' associations or associations of such associations within the meaning of Article 2 (1) of the said Regulation is involved;
   - — the agreement cannot be regarded as being necessary for attainment of the objectives set out in Article 39 of the Treaty, because there is nothing whatever in common between these objectives and those of the said Article;
2. Two of the objectives set out in Article 39 are designed to increase agricultural productivity in the Community and thus to ensure a fair standard of living for growers, whereas the agreement is concerned only with imports of fruit produced outside the Community;
3. As regards the other objectives of Article 39:
   - — the stability of the market for which provisions is made in subparagraph (c) refers to adjustment of supply to demand with a view to ensuring a market for Community products at advantageous prices which remain fairly steady, whereas the object of the agreement is to ensure that the Dutch demand for fruit imports from third countries into the Community is exclusively concentrated on the supply provided by importers who take part in the Rotterdam auctions;
   - — the availability of supplies for which provision is made in subparagraph (d) essentially refers to ensuring that the Community's needs are to some extent met out of its own resources, whereas the effect of the agreement is to cut off a group of potential competitors, the wholesalers from the import trade and to oblige the others, vendors established in other countries of the EEC, to operate, without option, through the machinery of the Rotterdam auctions;
   - — even if, within the meaning of subparagraph (e), ensuring that supplies reach customers at reasonable prices constituted an objective which could hold good outside the agricultural context and could be pursued independently of the other objectives of Article 39, before an agreement could be regarded as necessary for the attainment of this objective, it would have to be the sole cause of the advantages which accrue to consumers. It is impossible, in the present case, to hold that the agreement alone enables the consumers to benefit from reasonable prices because the insertion of an intermediate stage into the distribution network removes the possibility of making substantial economies. The fact that foreign vendours are unable to get into the Dutch market means that the network incurs heavy expenditure and makes it more difficult to ensure quick delivery of fresh products.

The *applicants* contend that the stabilization of the markets referred to in Article 39 does not mean only adjustment of supply to demand in order to ensure a market for Community products but that trade in products imported from third countries should also accord with subparagraphs (c), (d) and (e). The auctions are open to any

wholesaler established in the EEC and to any Dutch wholesaler who wants to market fruit which he has bought abroad. According to the Produktschap voor Groenten en Fruit, a Dutch organization governed by public law, the movement of prices and profit margins from 1955 to 1968 registered an increase which was lower than that of the cost of living, and Professor P. B. Kreukniet, a member of the Netherlands committee on economic competition, has also stressed the beneficial effects of the auction system.

Direct imports cannot have any greater effect on prices because the latter are already about 13 % lower than on other markets in the EEC.

The *defendant* disputes the view of the applicants that, in case of conflict between the objectives of the agricultural policy and the policy on competition, under Regulation No 26 it is the agricultural policy which prevails. Articles 85 to 90 are in fact applicable to agriculture with the exception of restrictions of competition 'necessary for attainment of the objectives set out in Article 39 of the Treaty'. It is impossible to speak of the advantageous effects of an agreement in advance of the establishment of a common agricultural policy for a particular sector. The refutations in the Decision are concerned exlusively with the alleged positive effects of the agreement and not with the correlation between the agreement and the attainment of the objectives set out in Article 39. Moreover, the obligation to operate through auction sales cannot be said to be wholly responsible for the inherent advantage of having demand and supply voluntarily concentrated at one centre. That importers from other Member States and wholesalers have access to the auctions in no way alters the fact that the prohibition of direct imports does not constitute something which is essential for a common policy based on pursuit of the objectives of Article 39.

The *applicants* reply that auctions can be organized in other places in the Netherlands and that the obligation of sale by auction does not amount to a prohibition on direct imports by wholesalers, since fruit originating in the EEC, including fruit imported into the Community, can enter the Netherlands without going through the auctions. The Commission is offering a novel interpretation of the scope of Regulation No 26 according to which the agreement does not contribute to the attainment of the objectives of Aricle 39 due to the fact that its aims are quite different from those pursued by the few EEC Regulations covering citrus fruit. However, it is those very cases where the market organization is as yet non-existent or incomplete that it is essential for undertakings to conclude agreements under private law for attainment of the objectives prescribed.

The *defendant* emphasizes that, in all other Member States, the provisions governing citrus fruit and designed to attain the objectives of Article 39 work smoothly without compulsory auction sales and that this proves that Article 2 of Regulation No 26 ought not to apply to the applicants. Nor, to any greater extent, does the existence of reasonable prices make it right to apply the article. Furthermore, the Netherlands prices have not always been 13 % lower, but only on two occasions during 1974.

Finally, in its recent judgment of 10 December 1974 in *Charmasson,* Case 48/74 [1974] ECR 1383, certain national interventions under public law, after expiration of the transitional period in a sector for which no common agricultural policy had been developed, were held by the Court to be incompatible with the Treaty.

(g) Second objection as to substance: classification of the agreement as an agreement between undertakings within the meaning of Article 85 (1)

The *applicants* contend that although the article does not define the concept of

'agreements between undertakings' it can be taken for granted that there must exist a contractual relationship between the undertakings concerned. In the opinion of Professor W. L. Haardt of the University of Leiden, the agreement in dispute, concluded between two 'associations' of undertakings, must, under Netherlands law, be regarded as an agreement between associations of undertakings and can be caught by the provision of Article 85 only if it actually gave rise to obligations directly enforceable between the affiliated undertakings. This is not the position in the present case because only the associations could compel their affiliates to carry out the obligations imposed on them by the agreement.

The *Commission* stresses that the undertakings involved appear at all times to have a double capacity, as jointly responsible members of the association and as participants in the auction sales. It is in this way that, in this second capacity, wholesalers render themselves liable to the penalties to which they have consented in their first capacity and which determine their attitude towards importers.

All the elements constituting an agreement within the meaning of the judgment of the Court in *Haecht* (Case 23/67, Rec. 1967, p. 543) exist between the various undertakings to such an extent that the overall structure is the same as an agreement within the meaning of Article 85 (1).

The *applicants* reply that an understanding between individuals becomes an agreement only when it can be described as such in terms of national law. In the present case, the associations acted not in the name of their members but on their own account. The public sales are open to members and to non-members. The judgment quoted by the defendant is irrelevant.

The Commission draws attention to the judgment in *Sorema,* in which Article 65 of the ECSC Treaty was held to apply to associations 'to the extent that their own activity or that of their member undertakings tends to produce the effects referred to therein' (Case 67/63 [1964] ECR 162). It also draws attention to Article 10 of the rules of each of the two associations, by virtue of which the members are bound by a number of regulations established under these rules, among them, of course, the agreement on public sales of imports.

(b) Third objection as to substance: restriction of competition

In its Decision, the *Commission* states that:

1. Article 9 (1) of the agreement has as its object and effect the restriction of competition within the common market. The article prevents wholesalers from themselves acting as importers and thus compels them to obtain their main supplies at the Rotterdam auctions. Although this does not prevent them from also abtaining supplies in the other auctions which exist in the EEC, at Antwerp and at Hamburg, the possibilities there are very limited.

   Dutch wholesalers can neither send to the Netherlands fruit which they have themselves imported into another Member State nor buy fruit from undertakings established in other Member States of the EEC which have not cleared them through customs. There is a similar restriction on freedom of sale within the common market by importers established in the other Member States of the EEC; except by going through the auctions, the latter cannot consign to a Dutch wholesaler part of an order given in a third country which they cannot place on their national market.

2. There is no certainty that the citrus fruit in dispute, wherever it comes from, possesses the same quality or the same degree of freshness as that on offer at the big import markets of

the EEC. There is growing competition between Spanish citrus fruit, delivered by rail to the Netherlands market much more quickly, and citrus delivered by sea from more distant places. Thus, wholesalers admitted to the auctions do not always observe the provisions of the agreement and from time to time make purchases without going through the Rotterdam auction; this proves that economic interests are involved.

The *applicants* deny that the agreement in dispute restricts competition. The importers working through the auctions make their purchases in Spain a long time before the beginning of the season and for their tansport reserve the necessary space on goods trains at abnormally low rates for the whole season. A small number of wholesalers effect imports into the Netherlands outside the auctions. These consist of either German surpluses coming from the Federal Republic of Germany and put at cheap rates on the Netherlands market after avoiding the auctions and the concomitant quality controls, or arise from exclusive contracts of sale such as those concluded by the complainants, for 'selected brand oranges' coming from the same Spanish growing centres as the other but branded as Porta, Zeepaardje, Arc de Triomphe, Pochola, Vic, Giner, Four Roses and Note.

Outside the season for Spanish oranges, these wholesalers continue to go through the auctions, to which they continue to subscribe.

The wholesalers who are members of the association can, without going through the auctions, themselves import into the Netherlands citrus fruit marketed in other Member States which, if coming from third countries, has been cleared through customs. If it has not been, they can import it by using the auctions, where they can offer it to about 350 buyers. Sales are held at their request and for their benefit by importers taking part in the auctions. The wholesalers can even act as importers themselves. The fact that in order to place in the Netherlands products they have imported but not yet cleared through customs importers established in other Member States must operate through the auctions in no way restricts their freedom, as every importer established in the common market has access to the Rotterdam auctions.

An importer established in the EEC with a surplus on his hands has no better way of selling these goods in the Netherlands than by taking part in the auctions, at least in so far as his products can successfully pass the quality inspection.

The *Commission* replies that the practical consequence of the agreement is that a Maastricht wholesalers buying at the auction has no right to arrange, in conjuction with an importer or wholesaler in Liège or Aachen, or a Middelburg or Groningen wholesaler, for a truckload of Spanish oranges to come to Maastricht, or to arrange for oranges to be delivered to the nearest port in a coaster bound for Antwerp and for it to unload, at Flushing, consignments fo oranges for delivery to a particular wholesaler. In other words, foreign importers do not have free and direct access to Dutch wholesalers, whilst the latter cannot act freely and directly as importers and, in short, carry out a vertical integration of their activities.

Moreover, transport to Rotterdam, unloading there, storage, sale by auction and subsequent despatch for disposal to purchasers established in the South or North of the Netherlands represents so much additional expenditure compared with direct delivery by train to, for example, Maastricht.

Neither disposal of surpluses coming from other countries at cheap rates nor exclusive agreements with Spanish producers are in themselves objectionable transactions.

The freedom which wholesalers have to import into the Netherlands fruit imported by others in the Community or

to auction fruit which they have themeselves imported is an illusory one.

In the first case, there is an additional stage in trading, with all the concomitant expenditure. In the second case, the wholesaler who imports in order to place the goods on sale himself is forced to buy his own goods at an auction. In neither case does the process provide a realistic alternative solution to the problem of enabling a wholesaler to act as importer.

Importers established in the other Member States, for example, at Antwerp or Bremen, have no direct access to wholesalers established respectively in the South, the North or the East of the Netherlands, and can only reach them by going the long way around through auctions or after despatch and clearance through customs in their own country.

The *applicants* reply that some wholesalers also trade as importers, are entirely integrated, having their own sources of supply and their own sales centres in the Netherlands and operate independently of the public sale system. The low price levels are due to the compulsory auction sales and not to other factors, which exist everywhere in the EEC. In failing to satisfy itself whether it was dealing with systematization rather than with a restriction of competition, the Commission was working on the basis of an incorrect interpretation of Article 85 (1) of the Treaty.

The *Commission* contends that the fact that a large number of small wholesalers are forced to obtain their supplies from importers creates a degree of compulsion which in every way corresponds to the restrictive conditions referred to in Article 85 (1).

(i) Forth objection as to substance: obstacles to trade between Member States

In its decision the Commission declares that:

— The duty imposed on wholesalers by the agreement and the concomitant restriction of the freedom of sale enjoyed by importers from other Member States may affect trade between Member States, as the wholesalers attending the auctions are prevented from supplying the Dutch market with fruit which they themselves originally imported into other Member States, or with fruit freely purchased from importers and wholesalers of the other Member States.

— The restrictions imposed on the Dutch wholesalers' freedom to obtain supplies undermines the competition structure in this sector of the common market by weakening the competitive position of these wholesalers in comparison with importers and other wholesalers in the Community, and this is liable to affect the pattern of trade between Member States in such a way as to jeopardize the attainment of the objectives of a single market.

The *applicants* contend that the fact that an agreement makes different provision for imports according to whether they have been brought in from a third country or from another Member State of the EEC does not justify the conclusion that trade between Member States is affected. Article 85 draws a distinction between these two categories of imports and, although those who drafted the Treaty declared the rules on competition to be applicable, in certain clearly defined circumstances, to trade with third countries, no such agreement exists between the EEC and Spain.

Fruit imports are in no way obstructed by the Rotterdam auctions, and if, as a result of being obliged to work through this distribution network, Dutch wholesaler/importers could not keep sales exclusive, their competitive position in relation to importers would be in no way undermined because they can offer fruit they have bought in third countries for direct sale at the auctions. As for their competitive position in relation to the other wholesalers of the Community,

both groups are subject to the same rules.

The *defendant* replies that the agreement makes it difficult for, e.g., French importers of Spanish oranges to supply direct to Dutch wholesalers and for the latter to act as direct importers: these restrictions certainly affect trade between Member States. Such an effect is an example of the indirect prejudice which was the subject of the judgment of the Court in Joined Cases 6 and 7/73, *(Commercial Solvents* v *Commission* [1974] ECR 252, paragraph 32).

Moreover, the reason for implementing Article 85 (1) is not that, the agreement makes a different provision for imports according to whether they are brought in from a third country or from another Member State'. There is no relevance in a reference to the general scheme of the Treaty. On the contrary, by virtue of Articles 9 (2) and 10 of the Treaty, free circulation also applies to products coming from third countries if import formalities have been complied with.

Finally the fact that vertical integration has been made difficult for potential competitors undoubtedly reduces their competitiveness.

The *applicants* reply that importation from a third country does not constitute a trading operation between Member States and that, moreover, there is no compulsion to sell by auction fruit coming third countries and imported into the EEC (i.e. put into free circulation after clearance through customs).

The Commission is wrong in referring to the judgment of the Court in Joined Cases 6 and 7/73, in which it was held that the elimination of an important competitor (one of the three manufacturers of the article concerned in the EEC) by cutting off its export trade to third countries, altered the pattern of competition within the EEC and it was therefore of a kind to affect trade between Member States. That case cannot be regarded as a precedent because the wholesalers and importers of the various Member States are in the present case on an equal footing in the Netherlands market and no obstacle has been placed in the way of imports entering these States from other Member States or in the way of exports into those States from the Netherlands. Moreover, in legislating for the free movement of goods within the Community, the Treaty draws no distinction between those produced in the Community and those admitted into it in free circulation. But there is no question of free circulation for goods which, though in fact on Community soil, have not been cleated through customs.

In the *Commission's* view, the fact that fruit already cleared through customs is not subject to the system of sale by auction does not enter into consideration because the agreement requires clearance through customs to be carried out not by the Dutch wholesaler who wants to sell the fruit himself in the Netherlands, but by someone else. Trade between Member States is affected by the attempt to distort the course normally followed by direct imports and thus ensure that they are not proceeded with. The Commission is concerned with the absence of a free internal market for the importer, whereas the applicants refer to the opportunities of selling fruit bought at the auction sales outside the Netherlands. Finally, there is every justification for referring to *Commercial Solvents* v *Commission* because the original attempt to change the pattern of dealing on the national market was liable to have repercussions on supply within the Community.

(i) First alternative objection as to substance: indispensability of the auction sale obligation

In its Decision, the *Commission* states that:

1. By concentrating supply and demand, the system of sale by auction enables

the transport and marketing costs to be reduced in the case of the goods concerned. Though, in the present case, these advantages are present in the case of citrus fruit imported by sea from distant countries, they are practically non-existent in the case of Spain because of the disadvantages arising from the inherent inflexibility of the system. The fact that these sales are held only on certain days of the week and that there must be prior access to the goods so that samples can be selected is sometimes the cause of delay in deliveries to retailers and affects the freshness and even the quality of the fruit.

2. The economic value of a system of this kind lies in the economies effected when compared with separate action by the various operators concerned and, in the present case, is mainly reflected in more favourable import prices, which itself constitutes sufficient incentive for Dutch wholesalers to continue obtaining their supplies at the Rotterdam auction sales. The result of removing the obligation referred to would not be that the wholesalers would switch to imports by sea from distant countries but that they would, for example, conclude purchases in Spain or on the other EEC import markets every time they could get the benefit of better prices than those in Rotterdam or, when prices were the same, obtain quicker delivery of fruit in fresher condition.

3. For all these reasons, therefore, the obligation appearing under Article 9 of the agreement is not an indispensable condition for obtaining the benefits provided by the agreement.

The *applicants* contend that the consequence of removing the said obligation would be that the importers would refuse to undertake the risk of concluding supply and transport contracts in sufficient quantities to keep the Dutch market supplied at all times and seasons, that deliveries would become irregular and, consequently, the advantage of current prices would be lost.

In giving a reply which, on the basis of inaccurate factual information, contains inaccuracies on the issue whether the auction sale obligation is as indispensable condition for obtaining the benefit of public sales of imports, the Commission infringed Article 85 (3).

The Commission replies that a wholly spontaneous concentration of supply and demand at Rotterdam represents an adequate economic basis for the system of auctions and that it is not necessary, in addition, artificially to concentrate demand contrary to Article 85 (1). While it is true that a free system could cause a reduction of the volume of sales by auction, it would in no way threaten the existence of the auctions, which are held in the heart of the most thickly populated region of the Netherlands, which is served by an excellent transport network. The artificial increase in the volume of business prevents any improvement of the distribution of the products within the meaning of Article 85 (3). If the applicants' contention were upheld, it would constitute authority for any agreement masquerading as an auction sale whenever absence of an agreement would cause a falling-off in the volume of business. Moreover, sales by auction of citrus fruit have for many years been held in other parts of the Community and auctions for other products for which there is a big demand have taken place although there is no obligation to take part in them. That, without there being any obligation, the public import sales become auctions like the others confirms the correctness of the defendant's analysis and appraisal. In short, it is not true that the obligation referred to constitutes the backbone of the system of auction sales; what constitutes it is, in the case of Spanish oranges, concentration of supply and

demand for the natural outlet in Rotterdam.

The applicants deny that the Rotterdam auctions have a 'natural outlet' even taking account of their geographical position. No such 'natural outlets', determined by geography and having an automatic effect on demand, exist. If there is no longer any obligation to sell by auction and direct imports increase, it will no longer be possible to enjoy the advantages of the auctions. At this moment, those at Rotterdam are seriously threatened because certain countries, such as South Africa and Israel, are centralizing exportation of fresh citrus fruit through the medium of 'boards' set up by their governments. They are making increasing use, in the Netherlands, of the system of auctions and are paying the closest attention to developments in the present proceedings. It should be noted that 30 % of the products sold at auction come through these boards.

Moreover, only by detailed investigation of the factual position can it be determined whether the price advantage of 13 % and the benefits accruing from the diversity and continuity of supply outweigh any disadvantages. In failing to carry out such an investigation, the Commission has not only placed the wrong interpretation on the criterion of indispensability in article 85 but also made it impossible for the Court to determine whether, on the basis of the facts, taken as a whole, it was possible for the Commission to conclude that Article 85 (3) should not be applied.

The *Commission* argues that even if there is a reduction in turnover at auction sales, the balance of advantage for the public remains about the same. The danger that importers, too, may avoid auctions does not prove the allegation that the obligation to make use of them is indispensable but that importers are inclined to meet at auctions so long as this is at the expense of wholesalers.

Similarly, the applicants' statements concerning the sales agencies in certain third countries (boards) does not prove that compulsory public sale is indispensable. Apart from the fact that these boards often use importers just as brokers, it is scarcely conseivable that a small number of wholesaler/importers could regularly offer prices and conditions more favourable than well-established large-scale importers who regularly supply hundreds of other wholesalers. If wholesalers/importers offered such prices they would harm themselves because they could obtain the same fruit at a lower price at the sale by auction and the applicants have no need for concern on that point. If, on the other hand, sale by auction fetched such high prices that even the wholesaler/importers could do better on the basis of higher purchase prices, this would confirm the Commission's conclusion that, particularly in the frontier regions, the advantages of the auction sale system do not outweigh the disadvantages.

(k) Second alternative objection as to substance: Dutch market as substantial part of the common market

The *applicants* contend that there can be no mistaking the competitive character of the Rotterdam public sales since the importers are in competition with each other, just like the products on offer to wholesalers, and the wholesalers amongst themselves. Sellers from other Member States have free access to the auctions, without having, for this purpose, to conclude long-term agreements, and can even operate outside them.

Similarly there is no obstacle to purchases of products originating in other Member States, so the obilgation concerned does not, as regards a substantial part of the market in the products conerned, obstruct competition.

In reply, the *defendant* states that the fact that all wholesalers have, in a

roundabout way, access to the market through auctions, cannot be used to justify their lack of access to the frontier regions, which are the most important for direct penetration of the market by importers established in other Member States.

(l) Objections as to the reasons given for the Decision

The *applicants* contend that the grounds adduced by the Commission are based on incorrect factual data and conclusions.

The *defendant's* reply is that, having rejected the objections on substance ,it must also reject the argument that the statement of reasons is inadequate.

(m) Intervention by the 'Fruitunie' association

The *intervener* denies that purchase of surpluses at giveaway prices and deals concluded for 'selected brand oranges' are the only transactions in which it is economically profitable to import fresh citrus fruit into the Netherlands without going through the auctions.

Moreover, importers taking part in the auctions are *de facto* in an economically dominant position and this gives rise to abuses which impair perfect concentration of supply and demand. The wholesalers are thus placed at the mercy of importers, who can just ignore them. As regards prices, those for the 'extra' brands are pushed up in a way which is artificial and out of all proporting, and goods of inferior quality also fetch prices that are far too high.

There are no containers available at the auctions which would enable packaged fruit to be transported and the cost price to be substantially reduced. Again, the obligation placed on, for example, a Maastricht wholesaler to buy fruit coming from Spain through the auctions involves him in long and unnecessary delays awaiting delivery and also in additional transport costs. As the agreement applies only to wholesalers living in the Netherlands and wholesalers of other Member States are free to act as they like as regards the auctions, the effect of Article 9 is to distort the competition between, for example, Belgian and Dutch wholesalers.

Finally, the requirement concerning clearance through customs is calculated to place unnecessary obstacles in the way of wholesalers who arrange their own imports and prevent them from cooperating with other wholesalers and carriers established in third countries.

The *applicants* reply that the agruments developed by the intervener have nothing to do with the present proceedings. If the intervener had any complaints to make, it should have submitted them to the committee responsible for seeing that the agreement is observed or even to the Ministry for Economic Affairs.

As regards their price and quality, oranges imported by members of the intervening association are of the same type as those on sale at the auctions. Accordingly, nothing new was added to the quality of the range on offer to the Dutch consumer.

As for discrimination and distortion of competition, foreign wholesalers are, like their Dutch colleagues, bound by the agreement.

The obligation to clear through customs is in no way an obstacle since before they can be put into free circulation on EEC territory, goods must at some point be cleared through customs.

At the hearing on 12 March 1975 the applicants, represented by B. H. ter Kuile, of the Bar of The Hague, the Commission, represented by B. Van der Esch, its Agent, and the intervener, represented by R. A. de Jonge, of the Utrecht Bar, submitted oral observations.

The Advocate-General delivered his opinion on 22 April 1975.

Law

1 By application lodged at the Court Registry on 23 September 1974 the Nederlandse Vereniging voor Fruit en Groentenimporthandel and the Nederlandse Bond van Grossiers in Zuidvruchten en ander Geïmporteerd Fruit 'Frubo' asked the Court to annul the Decision of the Commission of 25 July 1975 finding that they had infringed Article 85 (1) of the EEC Treaty;

2 In 1952, the applicants concluded an agreement for the establishment of a system of sales by auction for citrus fruit produced outside the Community and for apples and pears of non-European origin imported into the Netherlands; since then the agreement has been the subject of several minor amendments and, on 8 February 1968, of objections from a Dutch wholesaler, submitted pursuant to Article 3 (2) (b) of Regulation No 17 implementing Articles 85 and 86 of the Treaty.

3 Article 9 of the said agreement, which is the sole subject of dispute in this case, obliges wholesalers to deal in the products in dispute through the medium of an import auction unless they were bought from an importer-wholesaler established in another Member State of the EEC where they have actually been brought in, unloaded and cleared through customs (the obligation concerning unloading having been removed in the applicant's last draft amendment addressed to the Commission on 24 June 1974).

4 Despite the exception provided for and the proposed amendment, the Decision under challenge treats the clause in dispute as constituting an infringement of Article 85.

First submission as to form

5 The applicants contend that the defendant has not, pursuant to the procedure provided for under the regulation, ruled on the applicability or otherwise of Regulation No 26 of the Council of 4 April 1962 applying certain rules of competition to production of and trade in agricultural products.

6 The defendant maintains that if, when a decision is taken applying Article 85 to agricultural products, it follows the procedure of Regulation No 17 and decides that an agreement whose exemption has been applied for does not come under Regulation No 26, this does not affect the rights of the applicants.

7 Article 1 of Regulation No 26, implementing Article 42 of the EEC Treaty, provides that the production of or trade in agricultural products are subject to the requirements of Article 85.

8 Nevertheless, Article 2 (1) of Regulation No 26 provides as follows: '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'.

9 Article 2 (2) reads: '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'.

10 Article 2 (3) reads: 'The Commission shall undertake such determination either on its own initiative or at the request of a competent authority of Member State or of an interested undertaking or association of undertakings'.

11 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 enquiries into the matters concerned.

Second submission as to form

12 The applicants criticize the Commission first for having addressed its first statement of objections of 12 November 1969 only to their members and not

to the applicants themselves and, secondly, for having, after the second statement of objections of 19 November 1973, continued the procedure on the basis of the new text of Article 9 of the agreement as it appeared after the amendment of 21 February 1974.

13 The applicants cannot claim that they were not informed by the undertakings which they organize, because the subject of the statement of objections was, of course, the agreement concluded between the two associations.

14 Moreover, the nature of the amendment of 21 February 1974 did not require a fresh statement of objections.

Third submission as to form

15 The applicants contend that the Commission has, since 1961, used the Netherlands auctions as a source of information for the purpose of fixing the reference prices for fruit and vegetables.

16 It claims that the Commission cannot, consequently, raise objections to the agreement without departing from the principles of good administration and misusing its powers.

17 The Commission could make use of the details of prices supplied by the Rotterdam auctions as statistical information enabling it to direct the common agricultural policy without thereby legitimizing the conditions imposed in the agreement or the operations of wholesalers who take part in the sales by auction.

Fourth submission as to form

18 The applicants criticize the defendant for not having taken account of assurances given by the Director of the 'Restrictive Practices and Dominant Positions' Directorate in his letter of 21 December 1971 regarding the compatibility of an amended version of the agreement with the requirements of Article 85 (3).

19 In the letter, the Director-General of Competition (sic), taking note of a specific amendment to the agreement which the applicants were prepared to accept, states that, in his view, the agreement as thus amended, can, notwithstanding the remaining restriction on competition, qualify for exemption under Article 85 (3).

20 Expressed in these terms, the opinion given could not convey any impression that it committed the Commission; nor, moreover, is the signatory authorized to enter into such a commitment.

21 The submissions as to form must, accordingly, be dismissed.

First submission as to substance

22 The applicants contend that, because the disputed Decision withheld application of Article 2 of Regulation No 26 to the disputed agreement on the ground that the agreement was not essential for the attainment of the objectives laid down under Article 39, the Decision infringed not only Article 2 but also Articles 39, 40 and 85 of the Treaty.

23 The stabilization of markets referred to in Article 39 covers not only adjustment of supply to demand in order to develop Community production but also the compatibility of trade in products imported from third countries with paragraphs (c), (d) and (e) of the said Article.

24 The agreement did, in fact, have the beneficial effect of concentrating the supply of and demand for fruit imported from third countries in the Rotterdam import auctions and thus of ensuring the stability of the market, the availability of supplies and their reaching consumers at reasonable prices.

25 The exception provided for under Article 2 (1) of Regulation No 26, however, applies only to agreements 'necessary for attainment of the objectives set out in Article 39 of the Treaty'.

26 The applicants have not shown in what respect their agreement, which is concerned with products coming from third countries, can be necessary to 'increase agricultural productivity' or to 'ensure a fair standard of living for the agricultural community', as the first two objectives of the common agricultural policy are expressed.

27 In consequence, the Commission could reasonably regard Article 2 of Regulation No 26 as inapplicable.

Second submission as to substance

28 The applicants deny that the agreement made between them is, as it has been described in the disputed Decision, an agreement between undertakings within the meaning of Article 85 (1).

29 In their view, an agreement between associations is caught by this provision only if it has actually created obligations which are directly enforceable as between the affiliated undertakings, which is not the position in the present case since only the associations themselves can compel their affiliates to discharge the obligations imposed upon them by the agreement.

30 Article 85 (1) applies to associations in so far as their own activities of those of the undertakings belonging to them are calculated to produce the results to which it refers.

31 To place any other interpretation on Article 85 (1) would be to remove its substance.

32 As an association of undertakings, the applicants are therefore subject to the provisions of Article 85.

Third and fourth submissions as to substance

33 The applicants criticize the disputed Decision for having stated that the object and effect of Article 9 of the Agreement is to restrict competition within the Common Market and to affect trade between Member States.

34 They contend that wholesalers who are members of the association can, outside the auctions, themselves import into the Netherlands citrus fruit placed on the marked by third parties in other Member States which, if it comes from third countries, has been cleared through customs in those States.

35 Importers established in other Member States have access to the Rotterdam auctions.

36 Both the defendant and the intervener, the 'Fruitunie' association which organizes wholesalers who lodged an objection pursuant to Article 3, paragraph 2 (b) of Regulation No 17, have provided numerous examples to prove that Dutch wholesalers are prevented from themselves acting as importers and that importers established in the other countries of the Community cannot, without going through the auctions, deliver fruit ot vegetables to a Dutch wholesaler subject to the provisions of the agreement, which inflicts special hardship on those based near the frontiers of the Netherlands.

37 The agreement prohibits any Dutch wholesaler who takes part in the import auctions from buying citrus fruit unless it has been already imported by third parties in another member country of the Community where it has been cleared through customs.

38 Because it restricts the freedom of members to import direct into the Netherlands, this clause is liable to interfere with the natural movement of trade and thus to affect trade between member countries.

39 All the submissions as to substance must therefore be dismissed.

First alternative submission as to substance

40 According to the applicants, the Decision infringed Article 85 (3) when it declared that the obligation to sell at the auctions was not indispensable to the attainment of the advantages flowing from the agreement, namely reduced transport and marketing costs, and more favourable import prices.

41 They contend that these advantages are in fact obtainable only by means of the disputed obligation.

42 Though the applicants have submitted arguments capable of demonstrating that the advantages in question are underwritten by the obligation in Article 9 of the agreement, they have not demonstrated that it is an indispensable condition for the proper working of the system established by the agreement and, consequently, for the advantages accruing therefrom.

43 Consequently, and in view of the measure of discretion available to the Commission on this subject, the inaccuracy of the reasons given for the disputed Decision has not been established.

Second alternative submission as to substance

44 The applicants contend that the Decision infringed Article 85 (3) in that it wrongly decided that the disputed agreement was capable of eliminating competition in respect of a substantial proportion of the products involved.

45 In their view, as the public sale obligation included in the agreement does not impede direct competition on the Dutch market, there is no obstacle which might affect a substantial proportion of the supply of the products involved.

46 As the substance of this objection is the same as that of the third and fourth objections as to substance, which have been dismissed, it is not necessary to give it separate consideration.

Costs

47 Under Article 69 (2) of the Rules of Procedure, the unsuccessful party shall be ordered to pay the costs.

48 As the applicants have failed in all their pleas they should, therefore, be ordered to pay the costs.

On those grounds,

THE COURT

hereby:

1. Dismisses the application;

2. Orders the applicants to pay the costs.

Lecourt Mertens de Wilmars Mackenzie Stuart Donner Monaco
Pescatore Kutscher Sørensen O'Keeffe

Delivered in open court in Luxembourg on 15 May 1975.

A. Van Houtte
Registrar

R. Lecourt
President

OPINION OF MR ADVOCATE-GENERAL WARNER DELIVERED ON 22 APRIL 1975

My Lords,

It appears that for many years fruit imported into the Netherlands, for the most part citrus fruit, has been sold by auction in Rotterdam. Currently, about 75 % of the citrus fruit so imported is disposed of at those auctions. Nine importers established in the Netherlands regularly sell at the auctions. Some 350 wholesalers attend as buyers.

Since 1952 the conduct of the auctions has been governed by the provisions of an Agreement made in that year between the two applicants in this case, who are respectively an association of importers and an association of wholesalers of fruit. The Agreement has been amended many times.

On 25 July 1974 the Commission adopted a Decision in which it held that the Agreement contained a restriction that infringed Article 85 of the EEC Treaty. That Decision is challanged by the applicants on no fewer than 12 grounds. Having regard to the nature of some of those grounds, I must recount in some detail the events leading up to the Decision.

In 1968 an Amsterdam wholesaler, Messrs Govers en Zonen, complained to the Commission under Article 3 (2) (b) of Regulation No 17 that the Agreement contained restrictions infringing Article 85. As a result, the Commission, on 12 November 1969, served on the applicants and on their members a notice of objections under