

II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 26 July 1988

relating to a proceeding pursuant to Article 85 of the EEC Treaty
(IV/31.379 — Bloemenveilingen Aalsmeer)

(Only the Dutch text is authentic)

(88/491/EEC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community,

Having regard to Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles 85 and 86 of the Treaty⁽¹⁾, as last amended by the Act of Accession of Spain and Portugal, and in particular Article 3 (1) thereof,

Having regard to the applications filed by Florimex BV, Aalsmeer, and Van der Burg Bloemen BV, Aalsmeerderbrug, both in the Netherlands, on 8 September 1982 and 15 December 1982, respectively, pursuant to Article 3 of Regulation No 17 for a finding that the cooperative society 'De Verenigde Bloemenveilingen Aalsmeer', Aalsmeer, Netherlands, has infringed Articles 85 and 86 of the EEC Treaty,

Having regard to the notification pursuant to Article 4 of Regulation No 17 which was filed on 5 November 1984 by the cooperative society 'De Verenigde Bloemenveilingen Aalsmeer' and which concerned its Statutes and Auction Rules, several standard form contracts concluded with growers and dealers, its General Conditions for the Rental of Processing Rooms and its Scale of Charges,

Having regard to the Commission's decision of 12 June 1986 to initiate proceedings in this case,

Having given the Cooperative Society 'De Verenigde Bloemenveilingen Aalsmeer' the opportunity, pursuant to Article 19 (1) of Regulation No 17 in conjunction with 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⁽²⁾, the opportunity of being heard on the matters to which the Commission has taken objection,

Having heard Florimex BV and Van der Burg Bloemen BV in accordance with Article 19 (2) of Regulation No 17 and Regulation No 99/63/EEC,

Having consulted the Advisory Committee on Restrictive Practices and Dominant Positions,

Whereas :

I. FACTS

A. The products and the subject of the proceeding

1. The products

- (1) The present proceeding relates to trade in live plants and floricultural products, and in particular in cut flowers and indoor and garden plants (Chapter 6 of the Brussels tariff nomenclature), hereinafter called 'floricultural products'.

2. The subject of the proceeding

- (2) The subject of the proceeding is agreements, notified to the Commission, between the cooperative society 'De Verenigde Bloemenvei-

⁽¹⁾ OJ No 13, 21. 2. 1962, p. 204/62.

⁽²⁾ OJ No 127, 20. 8. 1963, p. 2268/63.

lingen Aalsmeer' (VBA), whose registered office is in Aalsmeer, Netherlands, and the flower traders established on its premises, which, until at least 1 May 1988, governed those traders' business activities on the VBA's premises.

- (3) The present proceeding concerns neither the, likewise notified, decisions of the VBA and agreements governing its own business activities, nor the new rules introduced on 1 May 1988 governing the business activities of flower traders on the VBA premises.

- (4) The Commission has deferred assessment of the latter facts.

B. The undertaking

- (5) The VBA is a cooperative society constituted under Netherlands law on 13 May 1968, formed through the amalgamation of existing firms of auctioneers, having its registered office in the municipality of Aalsmeer, Netherlands, and registered in the Haarlem commercial register.

- (6) The object of the VBA is to further the interests of its members by promoting the sale of flowers and other ornamental plants (Article 3 (1) of the Statutes).

Membership of the VBA is open to natural persons and legal persons engaged in the business of cultivating the abovementioned products (Article 5 (1) of the Statutes).

- (7) On 31 December 1984⁽¹⁾, the VBA had 4 147 members, representing 3 711 undertakings; a few of the members were Belgian growers, who have been admitted as members since 1983 (17 members in 1983).

- (8) The VBA achieves its object mainly through the holding of auction sales, at which not only members' products, but also products of other Dutch and foreign growers are put up for auction by the growers themselves or by dealers.

- (9) Total turnover amounted to Fl (...) ⁽²⁾ in 1984 (Fl (...) in 1983). The VBA is an 'export auction', i.e. the goods and services it offers are geared to the export of the products purchased through it. Some

90 % of the cut flowers sold through the VBA are exported; in the case of floricultural products as a whole, the relevant figure is some 77 %.

- (10) The VBA's main sources of income are the fees it charges suppliers (members and non-members) and the rents it collects from its tenants. In 1984 the VBA earned in this way Fl (...) in 'provisies' (commission) and 'bemiddelingskosten' (brokerage). That same year, the basic rent for the processing rooms came to Fl (...).

C. The proceeding

1. Complaint by Florimex BV (Case IV/30.768)

- (11) On 8 September 1982, Florimex BV (Florimex), whose registered office is in Aalsmeer, applied to the Commission pursuant to Article 3 (1) of Regulation No 17 for a finding that the VBA had infringed Articles 85 and 86 of the EEC Treaty.

- (12) Florimex is an undertaking engaged in the flower trade which has been operating since 1970 and in which Florimex Verwaltungs-GmbH, Nürnberg, Germany, has a majority holding. The Florimex group of undertakings, which operates worldwide, is considered to be one of the largest flower dealers in the world.

- (13) In 1972 Florimex, which had been admitted to the VBA as a buyer, rented a processing room from the VBA. Starting in 1974, Florimex regularly concluded with the VBA agreements ('concept-overeenkomsten' and 'handelsovereenkomsten') governing the sale through the VBA or on its premises of products imported into the Netherlands by Florimex.

- (14) Differences of opinion soon arose, however, between the Contracting Parties; Florimex wished to sell larger quantities than the VBA was willing to allow.

- (15) In 1981 Florimex terminated its business relationship with the VBA and brought an action for damages before the Haarlem District Court on the ground that an economically justifiable business activity had been frustrated as a result of actions and conduct of the VBA which infringed Articles 85 and 86 of the EEC Treaty.

- (16) By order on 29 January 1985, the Court stayed the proceedings to give the Parties an opportunity to obtain a Commission decision in relation to:

— VBA's request for the application of Article 2 (1) of Regulation No 26/62,

— VBA's request for the application of Article 85 (3) of the EEC Treaty,

⁽¹⁾ The statistical data used in this Decision refers mostly to the years 1983 and 1984. Subsequent developments have not, as far as it is known, resulted in material change to these figures since these dates.

⁽²⁾ In the published version of the Decision, some figures have hereinafter been omitted, pursuant to the provisions of Article 21 of Regulation No 17 concerning non-disclosure of business secrets.

— Florimex's complaint alleged infringements of Articles 85 and 86 of the EEC Treaty.

2. *Complaint by Van der Burg Bloemen BV (Case IV/30.828)*

(17) On 15 December 1982, Van der Burg Bloemen BV, now known as 'Brug Bloemen BV', (Brug Bloemen), whose registered office is in Aalsmeerderbrug, applied to the Commission pursuant to Article 3 (1) of Regulation No 17 for a finding that the VBA had infringed Articles 85 and 86 of the EEC Treaty.

(18) Brug Bloemen, which likewise belongs to the Florimex group of undertakings but has ceased trading, imported into the Netherlands flowers from third countries, in particular Kenya. These products were generally air-freighted into the Community via Frankfurt. Brug Bloemen offered the goods for sale to Dutch wholesalers.

(19) Brug Bloemen maintains that the VBA, by means of the processing room rental agreements it concludes with all major wholesalers in the Netherlands, controls those dealers' sources of supply. Firms such as Brug Bloemen, which compete with the VBA for access to the wholesale trade, are, it is alleged, thereby denied these sales opportunities.

3. *Notification by the Cooperative Society 'De Verenigde Bloemenveilingen Aalsmeer' (Case IV/31.379)*

(20) On 5 November 1984 the VBA applied to the Commission pursuant to Article 2 of Regulation No 17 for negative clearance or, pursuant to Article 2 of Regulation No 26⁽¹⁾, for exemption from the prohibition laid down in Article 85 (1), pursuant to Article 85 (3), of the EEC Treaty in respect of the following decisions and agreements:

- Statutes,
- Auction Rules⁽²⁾,
- Contractzenderschaps-overeenkomst,
- Concept-overeenkomst,
- Handelsovereenkomsten (types A to E),
- Handelsovereenkomst (type F),
- Contract overgegeven sierteeltprodukten,

— General Conditions for the Rental of Processing Rooms,

— Scale of Charges.

(21) The present proceeding concerns only provisions in the Auction Rules, the General Conditions for the Rental of Processing Rooms, the 'handelsovereenkomsten' and part of the Scale of Charges, concerning improper use of VBA facilities.

D. The VBA's premises

(22) In various publications the VBA describes its auction building as 'the building with the largest basal area in the world'. A decision taken by the VBA in 1985 to increase the area in use from (...) square metres to (...) square metres at a cost of Fl (...) gives an idea of its size. The infrastructure thus created serves mainly the auction process itself: supply-sale by auction-shipment. The VBA places many other facilities at buyers' disposal to help in the resale of the goods.

(23) Various organizations are housed on the VBA's premises, from which they provide their services relating to trade in floricultural products; these include carriers (e.g. KLM), customs agents, forwarding agents, the 'Bedrijfschap' and the plant health control service.

(24) Part of the auction building is rented out as 'processing rooms'. These are premises on which flower dealers can practise every aspect of their trade.

(25) The VBA contends that it is economically necessary for the running of its business to bring about a concentration of demand. This necessity flows from the requirement of continuity, without which there can be no regular auction sales. It is indispensable, moreover, owing to the perishable nature of the product in question, to keep marketing channels as short as possible. The export wholesale trade has particular need of a quick turnover.

(26) The VBA tries to ensure that goods are delivered within 30 minutes of their being knocked down. As soon as the day of the auction commences, the lots purchased are able to be continuously received and processed so that as soon as the day of auction ends all flowers are ready for dispatch or have already been delivered.

⁽¹⁾ OJ No 30, 20. 4. 1962, p. 993/62.

⁽²⁾ The VBA notified the version of its Auction Rules dated 15 January 1981. In February 1986 the VBA management adopted a new set of auction rules. The new Auction Rules are basically the same as the provisions scrutinized here.

E. The VBA's leasing policy

- (27) Of the approximately (...) purchasers admitted to the VBA, some of whom are foreign undertakings, (...) (August 1985) rent processing rooms on the VBA's premises. This group of purchasers, which consists of exporters, accounts for some (...) % of the VBA's total turnover. The tenants of processing rooms are mainly cut flower wholesalers and to a lesser extent dealers in indoor plants. Hardly any dealers in garden plants have a processing room at the VBA.
- (28) Applications for the rental of a processing room or a larger processing room are decided by the VBA on the strength of an application form and talks with the applicant. In this connection the VBA pays particular attention to the current volume of purchases effected on its premises by tenants of comparable rooms and to the economic importance of the applicant concerned (e.g. his ability to supply certain markets with products acquired through the VBA). This is the basis for determining the type and size of the processing room allotted to the (prospective) tenant.
- (29) The total area set aside by the VBA for processing rooms amounted in 1984 to (...) square metres. The annual basic rent therefor came to Fl (...). The VBA has informed the Commission that the income from the rental (...) its costs.
- (30) In July 1985 another (...) square metres or so of rentable space was needed for processing rooms. The waiting list at that time included (...) wholesalers who were already tenants but who wished to rent more space, and (...) new applicants (the annual volume of purchases by the latter amounted to (...)).

F. The agreements, which existed until at least 30 April 1988.

- (31) The processing rooms let by the VBA on its premises to admitted purchasers are leased on the basis of the General Conditions for the Rental of Processing Rooms. Article 2 (2) of these General Conditions provides that the provisions of the Auction Rules form part of the rental agreements.
- (32) The Auction Rules contain two provisions of importance to the business activities of dealers established on the VBA's premises:
- pursuant to Article 5 (10), products which are purchased neither at the VBA nor through the agency thereof may be stored on the site and in the buildings of the VBA only against payment of a fee,
 - Article 5 (11) prohibits products which are not purchased through the VBA from being dealt in and/or handed over on the site and in the buildings of the VBA, unless the management has consented thereto.
- (33) The sources of supply and marketing channels of such dealers/exporters are thus subject to the following contractual arrangements:
1. *Activities not requiring the express consent of the VBA*
- (34) According to the above provisions, in the absence of the VBA's consent transactions are possible on its site and in its buildings only where they involve products purchased through the VBA.
- (35) For the completion of the arrangements relating to these transactions (keeping of the accounts) the VBA offers a special service on the basis of the 'contract overgegeven sierteelprodukten'.
2. *Activities requiring the express consent of the VBA*
- (a) Products purchased at other auctions in the Netherlands
- (36) The VBA gives certain dealers the opportunity to sell and supply from rooms rented from it certain floricultural products purchased at other auction sales in the Netherlands to buyers admitted to the VBA.
- (37) The VBA concludes with the dealers concerned standard form contracts known as 'handelsovereenkomsten' (trade agreements). The accounts in respect of these transactions are kept by the VBA, which also sees to the collection of the purchase price.
- (38) These 'handelsovereenkomsten' are subdivided into categories based on the type of product concerned:
- A = cut flowers,
 - B = plant arrangements,
 - C = dried flowers and dried flower arrangements,
 - D = dried flowers and dried flower arrangements not sold from a processing room,
 - E = cut flower arrangements.
- (39) The wording of the contracts is the same for all categories. The fee payable to the VBA amounts to 2,5 % of the purchase price. In 1983 total turnover in respect of such business amounted to Fl [...].

- (40) Other purchases at other auction sales in the Netherlands by dealers established on the VBA's premises are permitted by the VBA on the basis of the principle of reciprocity which applies between Netherlands auction houses, on condition that the products are not resold to purchasers admitted to the VBA.

(b) Products of foreign origin

'Handelsovereenkomsten type F'

- (41) If dealers established on the VBA's premises wish to sell to other purchasers admitted to the VBA cut flowers of foreign origin which they themselves import, they may do so if the VBA has concluded with them a 'handelsovereenkomst type F'. Varieties, quantities and sales period are precisely defined in these contracts.

- (42) The products involved are usually exotic products which are less suited to being sold by auction owing to price fluctuations.

- (43) Goods must first be ordered before they are sold and the sale must be arranged through the VBA.

- (44) The VBA charges the seller a fee amounting to 5 % of the goods' value. In 1983 total turnover amounted to Fl (...).

Fl 0,25 levy

- (45) If the dealer established on the VBA's premises imports products of foreign origin himself, he is authorized, against payment of a levy amounting to Fl 0,25 per package, to bring the goods onto the VBA's premises and to process them there, on condition, however, that the products are not resold to other VBA purchasers.

- (46) These transactions are monitored thus :

- when floricultural products are delivered to the VBA's premises, both the supplier and the recipient must possess documents which indicate on whose instructions the products are being delivered and for whom on the VBA's premises they are intended. The recipient must draw up an 'advice note' for the carrier,
- the carrier must produce this document on request to the VBA monitoring service,
- the recipient must also submit to the VBA on request a document showing that the products concerned are being imported for his own account and at his own risk,

- the recipient must ensure that the abovementioned documents are transmitted without delay to the VBA, which then processes them and collects the levy.

- (47) To ensure compliance with these conditions, the VBA has placed at the main entrance to the auction building a letter-box reserved for the abovementioned documents in which the carrier can deposit the copies intended for the VBA on his arrival at the premises. The VBA has also instructed its monitoring service to carry out spot checks in order to verify whether the conditions are being observed. If the monitoring service finds that the conditions are not being observed, the VBA management is informed. As a rule the VBA management then gives the person concerned a written warning; if the offence is repeated, the management imposes a fine.

(c) Other sources of supply and marketing channels

- (48) Pursuant to Article 5 (10) and (11) of the Auction Rules, all transactions by a dealer established on the VBA's premises which do not fall into one of the abovementioned categories are prohibited on the site and in the buildings of the VBA.

- (49) These transactions are as follows :

- the sale outside the framework of a 'handelsovereenkomst types A to E' to purchasers admitted to the VBA of products which were acquired from another Netherlands auction house,
- the sale outside the framework of a 'handelsovereenkomst type F' to purchasers admitted to the VBA of products imported by the dealer established on the VBA's premises for his own account, and this even where the Fl 0,25 levy has been paid,
- the purchase ('having delivered') of products from a Dutch source (grower, dealer, agent), where such source is not a Netherlands auction house.

- (50) The following real-life examples of the application of these provisions by the VBA have been given to the Commission :

- (51) In 1976 and 1977 the VBA imposed a ban on (...), to prevent it from supplying imported goods to purchasers established on the VBA's premises.

- (52) In May 1977 by circular No 374 the VBA reminded its processing room tenants of their contractual obligations. On the basis of a decision of the present-day Vereniging van Bloemenveilingen in Nederland (VBN), only goods the busi-

ness arrangements regarding which have been or are being handled by the management of a Netherlands auction house may be delivered to the VBA's premises.

- (53) On 15 October 1980 the VBA pointed out to Brug Bloemen that offering for sale or supplying products to purchasers established on the VBA's premises was forbidden.
- (54) On 25 November 1980 the VBA imposed on Florimex a conventional penalty because imported products had been supplied from the processing room rented from the VBA to other VBA tenants.
- (55) By letters dated 20 and 21 January 1981 the VBA withheld from Florimex its consent to the sale of certain imported products to dealers established on the VBA's premises.

G. Charges for the prevention of irregular use of VBA facilities

- (56) The Scale of Charges notified to the Commission includes, in addition to the various payments for 'services rendered by the VBA' (commissions), the so-called 'charges for the prevention of irregular use of VBA facilities'. These charges amount in principle to 10 % of the value of goods and are payable by the recipient. According to the VBA, they are the precondition for its authorizing the activities set out at 49 above.
- (57) The Fl 0,25 levy (see 45 above) is also such a charge. According to the VBA, the levy was set at a low level in response to pressure from the purchasers admitted to it.
- (58) As regards collection, the conditions attaching to the Fl 0,25 levy apply. Instead of the 'advice note', however, a so-called 'receipt list' is used under the 10 % rule. This list indicates the purchaser's registration number, the serial number, the article code, the description, the length code, the department, the quantity, the price, the packing code and the delivery date.
- (59) Even at the Commission's express request, the VBA has not stated at what time the 10 % levy came into effect and in what way the dealers established on the VBA's premises were informed thereof. Not one instance of its application has been reported. In contrast to all the other fees and charges, the VBA has not declared any income from this levy.
- (60) The Commission has learned, however, that the VBA has reminded certain tenants of the application of this levy. Brug Bloemen states in its complaint that the VBA has drawn the attention of customers of Brug Bloemen established on the

VBA's premises to a 10 % charge. After the opening of the present procedure and receipt of the Statement of Objections, the VBA pointed out to Florimex in a letter dated 9 July 1986 that the 10 % levy is still payable by all dealers.

H. Details of the geographical location of the Dutch export wholesale trade

- (61) The Commission has gathered information about the geographical location of their business premises from 23 of the 1731 exporters who are registered with the Bedrijfschap voor Groothandel in Bloemkwekerijprodukten (duty to register). These 23 exporters account for 32 % of all Dutch exports of ornamental plants, which in 1984 were worth Fl 3 169 million (Bedrijfschap voor de Groothandel in Bloemkwekerijprodukten, 1984 annual report, p. 26).
- (62) (...) of these 23 exporters are VBA tenants (export earnings Fl (...) ⁽¹⁾).

I. The VBA's business activities

1. Supply

- (63) The VBA's total turnover is achieved by means of the sale (auction by auction dial, 'administrative auction' and agency) of products supplied by
 - (...) member firms
 - (...) 'guest' suppliers
 - (...) contract suppliers
 - (...) 'free' suppliers
 - (...) suppliers of foreign produce
 (1984 figures).
- (64) Supplying takes places on the following basis:
 - (a) Members of the VBA
- (65) Pursuant to Article 17 of the Statutes members of the VBA are required to sell all marketable products through the VBA. Membership, which is conditional on acceptance of the obligation to auction produce, can be resigned by giving notice three months before the end of the calendar year (Article 9 (2) of the Statutes). Members are charged a fee (commission) for the VBA's services. In 1984 this came to 4,7 % of the proceeds of the sale (reduced to (...) by profit sharing.)

⁽¹⁾ The Commission has not disclosed any further details in this respect to the VBA because they are to be regarded as business secrets of the third undertakings concerned. This confidential information was left out of account when this Decision was adopted.

(b) 'Guest' suppliers

- (66) 'Guest' suppliers are members of other Netherlands auction houses affiliated to the VBN who are (partly) exempted under individual agreements from the obligation to auction their produce through those auction houses and who sell their produce (also) through the VBA with its agreement.

In 1984 the rate of commission for 'guest' suppliers was 6,2 % (members' commission plus 1,5 %).

(c) Contract suppliers⁽¹⁾

- (67) On the basis of 'contractzenderschaps-overeenkomsten' the VBA allows Dutch producers (such contracts are also concluded with a few foreign producers in respect of indoor plants) who are not members of a Netherlands auction house to sell their own products through it. The contract supplier informs the VBA by means of a binding notification half-yearly in advance of the varieties and quantities to be supplied. The duration of the contracts is from six to 18 months. They are automatically renewed thereafter for a further period of one year unless terminated on one month's notice before the end of the year.

- (68) The amount of commission payable depends on the extent of the commitment entered into *vis-à-vis* the VBA:

- members' commission plus 1 % if no other Netherlands auction house is supplied,
- members' commission plus 2 % if during the contract year a quantity is supplied which is at least equal to the average quantity supplied over the previous three years,
- members' commission plus 3 % in all other cases.

(d) 'Free' suppliers

- (69) 'Free' suppliers are growers or dealers in Dutch products who are neither members of a Netherlands auction house nor have entered into any commitment *vis-à-vis* the VBA regarding quantities or delivery schedules. Until 1986 the rate of commission for 'free' suppliers was 10 %. Since 1 January 1987 the rate of commission has been 8 % for 'free' supplier-growers and 10 % for 'free' supplier-dealers.

⁽¹⁾ At the beginning of 1988, VBA introduced a general fee of Fl 2 per unit of flowers, and Fl 4 per unit of plants. By this, the fees of the contract suppliers and the 'free' suppliers were equalized such that this type of contract no longer in fact exists.

(e) Suppliers of foreign produce

- (70) With the exception of the products of the small number of Belgian VBA members, products of non-Dutch origin may be sold through the VBA only if the varieties, quantities and delivery schedule are precisely determined in agreement with the VBA in a 'concept-overeenkomst' covering an import period. This rule is based on Article 10 (2) of the Auction Rules, which provides that imported products may be supplied only with the management's written consent.

- (71) Foreign growers and Dutch and foreign dealers may contract with the VBA. The VBA concludes 'concept-overeenkomsten' only for varieties and quantities which represent an interesting complement to the Dutch goods on offer. The VBA reserves the right to withdraw with immediate effect the right to participate in the auction if the delivery schedule or the quality standards required by it are not adhered to. In 1984 the rate of commission for suppliers of foreign produce was 8 %.

- (72) Sales through the VBA in 1983 can be broken down as follows:

Members	Fl ... million	(...)
'Guest' suppliers	Fl ... million	(...)
Contract suppliers	Fl ... million	(...)
'Free' suppliers	Fl ... million	(...)
Foreign produce	Fl ... million	(...)
	Fl ... million	(100 %)

2. Conditions of sale by auction

- (73) The conditions of particular importance as regards sale through the VBA include the provisions on quality standards and reserve prices.

(a) Quality standards

- (74) Article 13 of the Auction Rules provides that, prior to their sale, products supplied for auction must be divided into quality categories by experts appointed by the VBA, the final decision in any dispute lying with the management.

- (75) Article 14 (1) of the Auction Rules empowers the management to destroy any products supplied for auction which do not meet the minimum quality requirements.

The quality requirements applied by the VBA are based on standards drawn up by the VBN.

(b) Reserve prices

- (76) On the basis of a VBN decision, for each product offered for sale through the VBA there is a reserve price. Article 21 of the Auction Rules provides that products which do not reach their reserve price are deemed not to have been sold. Article 5 (15) of the Auction Rules provides that only the management of the VBA may dispose of unsold products, which are destroyed.
- (77) The reserve prices applicable are much lower than the average auction prices. In 1985 an average of (...) % of the daily supply was not sold. In times of plentiful supply and weak demand, as is usually the case at the beginning of the holiday period in July, it sometimes happens, however, that on certain auction days and for certain varieties more than (...) % of the quantity supplied is not sold and is therefore destroyed.

J. Horizontal cooperation between auctions in the Netherlands

- (78) The Dutch flower auctions all come under the umbrella of the VBN, whose registered office is in Leiden. The Statutes of this association require members to include in their own statutes and regulations *inter alia*
- an obligation on the part of members to auction products (Article 13 (1) (b)),
 - the decisions taken at association level (Article 13 (1) (c)).
- (79) The association's management is empowered pursuant to Article 20 of the Statutes to adopt provisions binding on members in particular as regards
- quality standards and quality control,
 - conditions of auction and terms of payment,
 - sorting and packing,
 - reserve prices and indemnities.
- (80) At management meetings and at meetings of the numerous committees the following matters, among others, are discussed and decided :

Import policy

- (81) Exchange of the import plans of the individual members as regards quantities, varieties and origin.

Sales statistics

- (82) Exchange of detailed information on a daily, weekly, monthly and yearly basis concerning quantities, varieties and prices.

Marketing

- (83) Coordination of members' marketing and sales promotion measures on the basis of joint market research.

Coordination

- (84) Regular exchange of views on topical issues, with the participation of the directors of VBN members.

Other matters

- (85) — Conditions of admission for suppliers and purchasers, in particular as regards the supplying of purchasers established on auction premises,
- rates of commission and fees.

K. The market**1. General**

- (86) No data are available on the quantities and value of floricultural products produced and consumed in the Community as a whole. The Institut für Gartenbauökonomie at the University of Hanover has, however, documented in its 1984 yearbook of international horticultural statistics the growth in the turnover of those Community flower marketing centres which in 1970 had an annual turnover in excess of 1 million Swiss francs.
- (87) For the non-Dutch marketing centres, this growth was as follows :

(in million Sfrs)

	1960	1970	1975	1980	1982	1983
Auctions						
Odense	12,1	50,7	64,7	89,4	91,9	98,0
Aarhus	9,0	29,6	42,7	59,7	64,0	66,4
Aalborg	2,4	4,8	8,1	12,5	10,1	9,5
Neuss	14,8	72,5	85,3	108,9	109,2	112,7
Straelen	10,7	42,0	62,3	129,5	127,4	195,5
Aal	(¹)	12,5	12,6	10,1	10,7	11,9
Producer central markets						
Pescia	(¹)	60,2	84,0	145,4	154,1	164,3

(in million Sfrs)

	1960	1970	1975	1980	1982	1983
Recipient central markets						
Copenhagen	48,6	92,2	89,7	92,6	78,3	79,5
Hamburg central market	36,0	107,2	133,7	150,5	144,8	(¹)
Berlin	(¹)	(¹)	101,8	96,8	93,6	(¹)
Düsseldorf	(¹)	44,2	(¹)	63,1	59,8	60,6
Cologne	15,9	39,6	41,9	51,1	48,7	51,4
Mannheim	(¹)	(¹)	23,1	32,3	33,4	32,9
Bielefeld	(¹)	(¹)	12,7	17,5	17,3	16,7
Brussels	10,1	20,1	25,7	33,6	(¹)	(¹)

(¹) Not applicable

2. EEC trade

(1984 in thousands of ECU — Source: Statistical Office of the European Communities)

	Cut flowers (Common Customs Tariff 06.03.A CN code 0603 10)	Plants (Nimexe-code 06.02-54-96-99 : CN-code 0602 30 10, 99 91 99 99)
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IMPORTS

(88)	— into the EEC from third countries :	185 524	21 025
	of which : BLEU	1 106	1 838
	DK	675	551
	D	67 945	4 852
	GR	657	53
	F	6 251	1 771
	IRL	448	0
	I	10 585	1 771
	NL	63 680	9 215
	GB	34 177	994
(89)	— into EEC countries from EEC countries :	807 095 (¹)	423 128
	of which : BLEU	32 689	23 276
	DK	14 832	7 353
	D	572 342	193 739
	GR	150	528
	F	95 369	89 693
	IRL	3 657	1 200
	I	18 073	43 484
	NL	12 931	19 016
	GB	57 052	44 839

EXPORTS

(90)	— from EEC countries to third countries :	211 948	132 039
	of which : BLEU	18	9 217
	DK	1 285	51 645
	D	3 724	9 021
	GR	264	112
	F	6 510	644
	IRL	0	0
	I	24 577	2 687
	NL	174 799	58 496
	GB	771	217
(91)	— from EEC countries to EEC countries :	793 704 (¹)	418 383 (¹)
	of which : BLEU	1 414	73 896
	DK	544	88 079
	D	3 674	10 494
	GR	603	79
	F	12 424	2 181
	IRL	37	403
	I	70 655	3 759
	NL	701 428	238 450
	GB	2 925	1 042

(¹) The difference in the data is due to the different statistics used for imports and exports.

3. The Netherlands market

(a) Trade

(1984 in thousands of ECU — Source: Statistical Office of the European Communities)

	Cut flowers (Common Customs Tariff 06.03 A; CN code 0603 10)	Plants (Nimexe code 06.02-54-96-99; CN code 0602 30 10, 99 91, 99 99)
(92) IMPORTS		
Total	78 110	28 231
EC	12 525	18 858
of which: BLEU	314	11 211
DK	9	2 691
D	3 211	3 700
GR	191	0
F	2 559	349
IRL	0	0
I	4 443	649
GB	1 798	258
Third countries	65 585	9 373
of which: Israel	42 088	Spain 1 685
Thailand	4 169	Japan 1 509
Kenya	3 413	Costa Rica 1 379
Colombia	2 484	USA 1 310
South Africa	2 350	Brazil 651
(93) EXPORTS		
Total	876 227	296 946
EC	700 986	238 450
of which: BLEU	30 384	19 567
DK	13 766	4 805
D	487 482	123 042
GR	123	2 479
F	93 549	37 011
IRL	2 461	749
I	19 893	27 818
GB	53 328	22 979
Third countries	175 241	58 496
of which: USA	66 963	Switzerland 10 778
		Sweden 9 725
		Austria 9 753
		Spain 5 892

(b) Marketing channels

- (94) Approximately 95 % of the Netherlands supply of cut flowers is sold via the ten⁽¹⁾ auction houses organized along cooperative lines and affiliated to the VBN (including indoor plants, the proportion is 80 %; if garden plants are also included, it is 70 %). Some 70 % of imported cut flowers are sold by auction (some 50 % of all imported floricultural products).
- (95) In 1984 Netherlands auctions achieved a total turnover of Fl 3 027 million (1983: Fl 2 740 million). The two largest auctions together

accounted for more than (...) of this turnover (1983 — VBA: Fl (...), Westland Fl (...); 1984 — VBA Fl (...), Westland Fl (...).

- (96) Some 77 % of total supply is exported, the remainder staying in the Netherlands.

L. The current Community rules

1. The basic Regulation and its implementing provisions

⁽¹⁾ On 1 January 1986, the flower department of the Coöperatieve Veilingvereniging Beverwijk was closed. The VBA agreed to take over its operations. The NCB auction at Tilburg likewise closed down on 1 January 1986, its operations being taken over by the Westland auction.

- (97) Council Regulation (EEC) No 234/68 of 27 February 1968 on the establishment of a common organization of the market in live trees and other

plants, bulbs, roots and the like, cut flowers and ornamental foliage⁽¹⁾ established the basis for a common policy for the products falling within Chapter 6 of the Common Customs Tariff (CCT).

Israel, Kenya and Colombia and to roses from Israel and Brazil. Rose bushes and *Asparagus plumosus* are no longer subject to Community surveillance.

(98) The Regulation provides in particular for:

- (a) common quality standards for certain products; such standards have been established for flowering bulbs and cut flowers;
- (b) the liberalization of the intra-Community market;
- (c) harmonization of the provisions for the coordination and unification of the import system applied by each of the Member States with regard to non-member countries; such provisions were laid down by Council Regulation (EEC) No 3279/75⁽²⁾
- (d) recourse to protective measures when the Community market is threatened with serious disturbances by reason of imports from non-member countries. The detailed rules for the application of protective measures in the sector of live trees and other plants, bulbs, roots and the like, cut flowers and ornamental foliage were laid down by Council Regulation (EEC) No 3280/75⁽³⁾.

2. Community surveillance

(99) In view of the fact that there are no protective measures for Community production other than the Common Customs Tariff duties (bound under GATT at 24 % from 1 June to 31 October and at 17 % from 1 November to 31 May, ACP countries benefiting from total exemption), imports from non-member countries of four sensitive products (roses, carnations, rose bushes and *Asparagus plumosus*) have been subject since 1 January 1976 to a Community surveillance system requiring Member States to communicate on a monthly basis to the Commission the quantities imported each month and the quantities for which import documents were applied for in a given month. Imports may not take place without such an import document, which is granted on request and is valid for six weeks. These Community surveillance arrangements were introduced by Commission Regulation (EEC) No 3353/75⁽⁴⁾, as last amended by Regulation (EEC) No 3979/86⁽⁵⁾. Since January 1985 surveillance has extended only to carnations from

II. LEGAL ASSESSMENT

(100) Article 85 (1) of the EEC Treaty prohibits as incompatible with the common market all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market.

A. Restrictive agreements between undertakings

1. Article 5 (10) and (11) of the Auction Rules

(101) Any person on the VBA's premises is subject to the Auction Rules. The agreements arising in general by implication from this form an integral part of the processing room rental agreements between the VBA and the dealers established on its premises (Article 2 (2) of the General Conditions for the Rental of Processing Rooms).

(102) The business activities of the wholesalers established on the VBA's premises are comprehensively governed by Article 5 (10) and (11) of the Auction Rules inasmuch as this forms part of the rental agreements (cf. I. F. above). The following operations are in principle prohibited or require the VBA's consent:

- the purchase of products from sources other than the VBA by VBA tenants in their capacity as buyers (purchasing obligation),
- the resale by VBA tenants of goods not bought through the VBA (limitation of the right of disposal).

(103) These bans, which may be set aside by agreement, are also addressed to VBA tenants' suppliers who are not established on the VBA's premises, the bans taking effect as soon as the suppliers set foot on the VBA's premises.

(104) The effect of Article 5 (10) and (11) of the Auction Rules is that wholesalers established on the VBA's premises are under an obligation towards the VBA to buy floricultural products for resale from the rented processing rooms in principle only from the

⁽¹⁾ OJ No L 55, 2. 3. 1968, p. 1.

⁽²⁾ OJ No L 326, 18. 12. 1975, p. 1.

⁽³⁾ OJ No L 326, 18. 12. 1975, p. 4.

⁽⁴⁾ OJ No L 330, 24. 12. 1975, p. 29.

⁽⁵⁾ OJ No L 370, 30. 12. 1986, p. 20.

VBA. These wholesalers may turn to other sources of supply only with the consent of and on terms laid down by the VBA. Competition between suppliers offering their goods for sale through the VBA and other undertakings for access to wholesalers established on the VBA's premises is thereby restricted.

- (105) The VBA argues that the restrictive effects of Article 5 (10) and (11) of the Auction Rules are cancelled out by the fact that wholesalers established on its premises may carry on all business activities either on the basis of special arrangements (trade agreements; Fl 0,25 levy) or on the basis of the 10 % rule. This argument does not bear closer examination.
- (106) Firstly, the measures concerned are not addressed to the same individuals. The 10 % levy, the trade agreements and the Fl 0,25 levy apply exclusively to dealers established on the VBA's premises, whereas the provisions of the Auction Rules are also designed to deny potential suppliers of those dealers access to the auction complex (cf. the cases enumerated at 51 to 55 above).
- (107) Secondly, the 10 % levy, the trade agreements and the Fl 0,25 levy incontestably form an integral part of the relevant provisions of the Auction Rules. They represent the express conditions under which the prohibition in principle ceases to apply.
- (108) Thirdly, for the competition rules laid down in the EEC Treaty to apply, the formal existence of a restrictive agreement suffices; whether or not it has actually been implemented is immaterial.
- (109) The VBA is also of the opinion that the restrictions placed on its tenants' freedom of action are not restrictions of competition within the meaning of Article 85 (1) of the EEC Treaty because it must allow no competition on its premises.
- (110) The argument to the effect that 'the VBA must allow no competition on its premises' needs clarifying. On the one hand, it may refer directly to the horizontal relationship between the VBA and its competitors. Such prohibitions of competition are covered, however, by the present Decision only in so far as dealers established on the VBA's premises are subject to limitations of their right of disposal. On the other hand, it may refer to the purchasing obligations imposed on such dealers, which are of a vertical nature and which concern the distribution stage downstream of the relevant competitive relationship.
- (111) This argument must likewise be rejected as regards both aspects. It is, of course, recognized that undertakings in certain economic contexts may conclude

agreements which restrict their freedom of action without there being any restriction of competition within the meaning of Article 85 (1) of the EEC Treaty. This holds true in such contexts also for provisions whereby only the goods of certain suppliers may be sold (Ground 21 of the Judgment of the court of Justice of 28 January 1986 in Case 161/84, *Pronuptia*). However, the economic context which exists, e.g., in the case of certain franchising agreements, is not analogous to the one under consideration. Such agreements differ from distribution agreements in that independent traders are given the opportunity, for a consideration, of gaining a foothold on other markets by using the name and adopting the methods of another undertaking. The need for uniformity of the distribution network inherent in franchising agreements does not exist in the present case.

2. 10 % levy

- (112) The 10 % levy notified to the Commission, which, according to the VBA, is the condition under which all business activities which are not the subject of separate rules may be carried on on the VBA's premises, is not only based on Article 5 (10) and (11) of the Auction Rules but has the same restrictive effects.
- (113) Sale through the VBA is as a rule (the sole exception being some of the 'free' suppliers and the suppliers of foreign produce) the first stage in the distribution of the products concerned. The auction costs amount to between approximately 5 % (VBA members) and 10 % ('free' supplier-dealers). As a result of the 10 % levy, purchases from sources of supply other than the VBA are generally subject to the highest VBA selling costs (only 2,5 % of the VBA's total turnover is accounted for by 'free' suppliers, who have to pay the 10 % commission only if they are also dealers).
- (114) The VBA equates distribution by 'free' supplier-dealers through the VBA with the business relationship between other producers who do not offer their goods for sale through the VBA and VBA tenants. It concludes from this that no restriction exists.
- (115) This equation is, however, inadmissible. The 10 % commission payable by 'free' supplier-dealers is the consideration for a service provided by the VBA. The 10 % levy payable by VBA tenants, on the other hand, has as its declared aim the prevention of a certain type of use of the rented property by those tenants.

(116) The proper yardstick for judging whether VBA tenants are subject to anti-competitive agreements is the unrestricted freedom of choice enjoyed by a dealer under perfect competitive conditions. All things being equal, owing to the 10 % levy imposed on tenants, an undertaking which does not offer its goods for sale through the VBA must, if it is to stand any chance of selling to VBA tenants, fix its prices at least 10 % below those quoted by the VBA, this being only because these purchasers are established on the VBA premises. The 10 % levy thus has not only as its object but also as its effect a restriction of competition which, moreover, because of the size of the levy, is appreciable.

(117) The appreciable effect of the 10 % levy is evidenced by the fact that the Commission's attention has not been drawn to a single transaction conducted in due form in accordance with the applicable conditions despite the fact that the VBA has claimed this levy from certain tenants (the customers of Brug Bloemen) at least since September 1982.

(118) In addition, the way in which the levy is administered is anti-competitive. The procedure for the collection of the 10 % levy includes the use of the 'receipt list'. The data contained therein afford the VBA a detailed insight into its tenants' buying behaviour in relation to other sources of supply, in particular as regards quantities, varieties and prices. As its tenants' main source of supply, the VBA is able with the help of this information to steer them towards the products offered for sale through it. The information is also liable not only to influence the VBA's commercial decisions, for example in connection with the conclusion of supply contracts, but also to discourage VBA tenants from entering into business relationships with potential suppliers. Competition between suppliers offering their products for sale through the VBA and the other sources of supply of VBA tenants is at least potentially restricted by this obligation on the part of VBA tenants to furnish information.

3. Trade agreements

(119) The trade agreements concluded between the VBA and some of its tenants lay down the conditions under which the VBA authorizes certain business activities on its premises. There is therefore a direct

link between these trade agreements and Article 5 (10) and (11) of the Auction Rules.

(120) The trade agreements form the contractual basis on which the tenant concerned may display and sell floricultural products on the VBA's premises. In addition, in the trade agreements types A to E the sources of supply of the products to be dealt in are precisely defined, i.e. other VBN auction sales.

(121) For their part, the grade agreements type F specify the goods to be dealt in according to quantities, varieties and sales period. It is also stipulated that the goods must be imported by the tenant himself.

(122) The trade agreements therefore lead to a narrowing of the distribution channels upstream of VBA tenants. Competition between the individual sources of supply of VBA tenants is restricted.

4. Fl 0,25 levy

(123) The provisions concerning the Fl 0,25 levy are the concretization of the requirement laid down in Article 5 (10) of the Auction Rules of the VBA's consent to the receipt of products not bought at the VBA or through the agency thereof. Against payment of the levy, the VBA authorizes its tenants to store on its premises products imported by them for their own account. The VBA nevertheless makes this conditional on the products not being resold to purchasers admitted to it. Through this limitation of its tenants' right of disposal the VBA protects the sales of the suppliers who sell through it. Competition is restricted as a result.

B. Effect on trade between Member States

(124) As a result of the abovementioned restrictions of competition, trade patterns within the Community do not develop in the same way as they would have done had the agreements in question not existed. This state of affairs affects not only Dutch imports of products from other Member States and of goods from third countries which are in free circulation in another Member State, but above all the export of products marketed in the Netherlands.

(125) The restrictions of competition also affect trade to an appreciable extent.

(126) It remains to be seen in this connection whether each individual agreement affects trade to a sufficient extent. At all events, they form part of a body of similar agreements which together have the necessary effect.

- (127) The legal and economic context of the individual restrictive agreements consists of more than one layer.
- (128) On the one hand, Article 5 (10) and (11) of the Auction Rules, the 10 % levy, the trade agreements types A to F and the FI 0,25 levy constitute a whole. These various measures all have (at least as one of their aims) the object, by restricting competition, of promoting and ensuring the sale of floricultural products through the VBA, the provisions of the Auction Rules forming the basis of all the other measures.
- (129) On the other hand, the restrictive measures of the VBA must be assessed in conjunction with corresponding measures of the other VBN auctions. These measures are all based on the decision of the present-day VBN mentioned in VBA circular No 374 of May 1977 (see 52 above).
- (130) The VBA is of the opinion, however, that there is no appreciable effect on trade because, both in the Netherlands and in the common market as a whole, there are a sufficient number of other marketing channels for floricultural products.
- (131) This argument must be rejected. The reference to alternative marketing channels does not cast doubt on the appreciable effect of the restrictions on trade between Member States at issue here. The trade statistics clearly indicate that Dutch wholesalers occupy a leading position in Community trade in floricultural products. Of the 793,7 million ECU worth of cut flowers exported from Community countries to other Community countries, Netherlands firms account for 701,4 million; in the case of plants, Netherlands firms account for 238,4 million ECU out of a total of 418,4 million (1984).
- (132) The fact that
- (...) VBA tenants number among the 23 largest Netherlands exporters who account for 32 % of all Netherlands exports,
 - all VBA tenants are chosen by the VBA on the basis of their sales performance, especially in export markets,
 - all Netherlands flower auctions are subject to the VBN decision reproduced in VBA circular No 374,

makes clear the effect on trade.

- (133) Lastly, regard must be had to the fact that the VBA pursues and expansionary leasing policy, but the current demand for processing rooms already

exceeds the future additional supply. The geographical concentration of important operations and services connected with the flower trade on the VBA's premises clearly has so many economic advantages that, for reasons of competition with one another, exporters, at least, cannot ignore the VBA's offer of a lease.

- (134) The abovementioned restrictions of competition having an appreciable effect on trade between Member States are admissible only if, pursuant to Article 2 of Regulation No 26, Article 85 (1) of the EEC Treaty is not applicable to them (cf. C. below), if they can be exempted under Article 85 (3) of the EEC Treaty from the prohibition laid down in Article 85 (1) (cf. D and E below), or if the application of Article 85 (1) in the present case would conflict with the common constitutional principles of the Member States (cf. F. below).

C. Article 2 of Regulation No 26

- (135) The present proceeding concerns trade in the agricultural products listed in Annex II to the EEC Treaty. These products fall under Articles 1 and 2 of Regulation No 26. Article 1 of that Regulation provides that Articles 85 to 90 of the EEC Treaty apply to agreements and decisions concerning such products, while Article 2 provides for exceptions to the application of Article 85 of the EEC Treaty to agreements and decisions concerning such products. Pursuant to the first sentence of Article 2 (1) of Regulation No 26, Article 85 (1) of the EEC Treaty does not apply to agreements, decisions and practices which 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. Pursuant to the second sentence of Article 2 (1), it does not apply in particular to agreements, decisions and practices of farmers, farmers' associations, or associations of such associations belonging to a single Member State which concern the production or sale of agricultural products or the use of joint facilities for the storage, treatment or processing of agricultural products, and under which there is no obligation to charge identical prices, unless the Commission finds that competition is thereby excluded or that the objectives of Article 39 of the Treaty are jeopardized.

1. Article 5 (10) and (11) of the Auction Rules

(a) National market organization

- (136) These provisions, which have the same effect as exclusive purchasing agreements, do not form an integral part of a national market organization.

Consequently, these provisions are not covered by the first exception provided for in the first sentence of Article 2 (1) of Regulation No 26.

(b) Objectives of Article 39 of the EEC Treaty

(137) Nor are the abovementioned provisions necessary for attainment of the objectives set out in Article 39 of the Treaty. The third recital of Regulation No 26 makes clear that this exception applies only in so far as the application of Article 85 (1) of the EEC Treaty would jeopardize attainment of the objectives of the common agricultural policy in the sector concerned.

(138) To date, in no sector of the common agricultural policy has an exclusive dealing arrangement in favour of producers been regarded as a means of attaining the objectives of Article 39 of the EEC Treaty. Even the Community measures containing detailed provisions on the sale of agricultural products by producer groups (Council Regulation (EEC) No 1035/72 of 18 May 1972 on the common organization of the market in fruit and vegetables⁽¹⁾; Council Regulation (EEC) No 1360/78 of 19 June 1978 on producer groups and associations thereof⁽²⁾) do not provide for any obligations extending to the trading partners of those groups, as other producers would be placed at a disadvantage as a result.

(139) Exclusive dealing arrangements in favour of producer groups are not always beneficial even to members. While it is true that restrictions of competition in this respect are as a rule conducive to the sale of members' products, the binding arrangement in favour of the producer group also restricts the freedom of the individual member to sell his products through the trading partners of the producer group after termination of his membership. In the case of producer groups having — as in the present case — considerable economic influence, a binding arrangement can lead to a situation in which the individual member has no choice but to sell his products through the group because the direct sales channels are blocked.

Membership of the producer group concerned (or some other form of contractual relationship) is thereby indirectly made obligatory. Such 'groups founded on compulsion' do not, however, constitute a means whereby the objectives of Article 39 of the EEC Treaty may legitimately be attained.

(140) In its Decisions of 25 July 1974 (IV/26.602-Fruba; OJ No L 237 of 29 August 1974, pp. 16 *et seq.*) and 2 December 1977 (IV/28.948-Cauliflowers; OJ No L 21 of 26 January 1978, pp. 23 *et seq.*), the first of which was upheld by the European Court of Justice in its Judgment of 15 May 1974 (Case 71/74 (1975) ECR pp. 563 *et seq.*), the Commission likewise refused to apply Article 2 of Regulation No 26 to binding arrangements between agricultural producer groups and dealers.

(141) The VBA contends in response to the objections raised by the Commission that, according to the recitals of Regulation (EEC) No 234/68,

— promoting the rational marketing of production, and

— ensuring stable market conditions

are important objectives of the common agricultural policy in the field of live plants and floricultural products. The system set up by the VBA of the common sale of the floricultural products of its members is therefore necessary for attainment of the objectives set out in Article 39 of the EEC Treaty.

(142) This argument is untenable, at least in so far as it relates to the contractual relations between the VBA and the purchasers admitted to it. The means employed in the floricultural products sector with a view to attaining the objectives of the common agricultural policy pursuant to Article 39 of the EEC Treaty are laid down above all in the provisions of the market organization itself. The scope for private initiative within this framework does not include obligations which extend to the trading partners of certain producers as competition between producers would be distorted as a result.

(143) Lastly, the VBA argues that the restrictions of competition placed on its tenants are indispensable to the running of its auction. Abolition of the relevant provisions would endanger its very existence.

⁽¹⁾ OJ No L 118, 20. 5. 1972, p. 1.

⁽²⁾ OJ No L 166, 23. 6. 1978, p. 1.

- (144) Auction systems have definite advantages from the point of view of the marketing of agricultural products: concentration of supply and demand at a given time and a given place, leading to great transparency of the market and to savings both of time and of transport and selling costs. The VBA possesses these advantages inasmuch as auction by the auction dial system
- guarantees perfect competition both on the supply side and on the demand side,
 - guarantees equal treatment of all suppliers and purchasers,
 - protects the many small producers and small dealers from manipulation by powerful and better informed dealers and trading groups,
 - leads to objective pricing,
 - provides information on price levels also for transactions outside the auction,
 - facilitates the mutual adjustment of supply and demand through the market transparency thus achieved.
- (145) The VBA foresees members leaving and fears that new suppliers will show no interest in becoming members because the auction sale requirement, the cooperative's backbone, would be regarded as discriminatory. The risk of the whole cooperative undertaking would have to be borne by fewer and fewer members and would ultimately become unacceptably high.
- (146) Complete freedom of supply within the auction complex, such as would result from the abrogation of the provisions in question, would also lead to irregularities of supply. Such irregularities of supply will make it more difficult to synchronize supply and demand and hence lead to uneven pricing and to a less than optimum supplying of the market.
- (147) Such a development would undermine confidence in the auction system. That would mean the end of the auctioning of floricultural products by auction dial.
- (148) This argument must be rejected. It is based on the false assumption that the present Decision aims, in any eventuality, at complete freedom of supply to VBA tenants. The Commission is fully aware that VBA tenants are part of a special, fundamentally beneficial distribution system. However, the complete vertical integration of these independent dealers into the system, which, like all other systems must prove its overall economic benefits in competition with others, goes beyond what is legally acceptable.
- (149) The possible incorrectness of the assertion that the exclusive dealing obligations of VBA tenants are indispensable is indicated by the fact that some (...) of the VBA's turnover is accounted for by dealers who are not established on the VBA's premises.
- (c) Preferential treatment enjoyed by cooperatives
- (150) Since the second sentence of Article 2 (1) of Regulation No 26 is a special instance of the application of the exception provided for in the first sentence of that provision, the second sentence cannot be applied if it is established that the agreements between the VBA and the purchasers admitted to it are not necessary for attainment of the objectives of Article 39 of the EEC Treaty and of the organization of the market in live plants and floricultural products based thereon.
- (151) But even if the special circumstances specified in the second sentence were to constitute a separate exception, this additional criterion would still not be satisfied.
- (152) The exception provided for in the second sentence of Article 2 (1) applies only to agreements between farmers and/or their associations. Although the Auction Rules and the Scale of Charges are decisions of a farmers' association, the restriction of competition stems from the fact that wholesalers subject themselves to these provisions by contract and thus individual agreements come into being between a farmers' association and wholesalers.
- 2. Trade agreements and the 'charges for the prevention of irregular use of VBA facilities'*
- (153) The trade agreements and that part of the Scale of Charges which relates to this kind of agreement and the 'charges for the prevention of irregular use of VBA facilities' have their contractual basis in the rules outlined at II.C.1 above. There are no additional reasons why the restrictions of competition resulting from these agreements might be brought within the scope of Article 2 of Regulation No 26.
- D. Regulation (EEC) No 1984/83**
- (154) Although the restrictions of competition mentioned at II.C above have the same effect as exclusive purchasing agreements, they do not correspond, from the formal point of view, to the definition contained in Article 1 of Commission Regulation (EEC) No 1984/83⁽¹⁾.

⁽¹⁾ OJ No L 173, 30. 6. 1983, p. 5.

- (155) Nor would the agreements fall under the block exemption from the substantive point of view because the obligations are of indefinite duration (Article 3 (d) of the Regulation). An analogy with Articles 8 (2) (a) and 12 (2) of the Regulation, which exempt obligations throughout the duration of leases or for the whole period of actual occupation, is out of the question. These exceptions apply to the retail stage of the specific markets dealt with in the Regulation and cannot therefore be compared to the present case.

E. Article 85 (3)

- (156) The provisions of Article 85 (1) of the EEC Treaty cannot be declared inapplicable under Article 85 (3) in the case of the agreements discussed at IIC above as the restrictions of competition notified in accordance with Article 4 (1) of Regulation No 17 do not, in particular, contribute to improving the distribution of goods⁽¹⁾.
- (157) Exclusive purchasing agreements may in certain circumstances lead to an improvement in the distribution of goods. This is especially the case where, for small and medium-sized undertakings, the appointment of several resellers bound by an exclusive purchasing obligation is the only way to penetrate the market and compete with other manufacturers (fifth and sixth recitals of Regulation (EEC) No 1984/83).
- (158) In the present case, the obligations imposed on wholesalers established on the VBA's premises in favour of the VBA, which is both in a strong position on the market and a recognized source of supply for world trade, artificially increasing turnover, leads to a fossilization of marketing channels (see above, IIC.1.b).
- (159) A purchaser admitted to the VBA who has leased a processing room can release himself from his obligations under the restrictive agreements in favour of the VBA only if he simultaneously changes his location. It is therefore from his point of view not simply a matter of choosing his sources of supply; the business decision in question has weighty consequences for the continued existence of the entire undertaking. Integration into the VBA's distribution system is, therefore, of unlimited duration and can therefore not be regarded as a positive contribution to economic development in the Community.

F. Expropriation

- (160) In the VBA's opinion, the application of Article 85 (1) of the EEC Treaty to the agreements concluded between it and the dealers established on its premises would be tantamount to expropriation. As owner, the VBA is entitled to determine to what use its property is put.
- (161) This view does not bear closer examination. The right to property is guaranteed in the Community legal order in accordance with the ideas common to the constitutions of the Member States. In the constitutions of all Member States it is recognized that the exercise of the right to property may be restricted in the general interest and to the extent necessary in that regard (Judgment of the Court of Justice of 13 December 1979, Case 44/79 Hauer v. Land Rheinland-Pfalz (1979) ECR 3727 *et seq.*).
- (162) It is indisputable that, as one of the fundamental principles of Community law, Article 85 of the EEC Treaty serves the general interest. Nor does the application of Article 85 (1) in the present case amount to an excessive and unreasonable interference with an owner's prerogatives such as would impair the essence of the VBA's rights as a property owner.
- (163) It follows from the essence of the rights as property owner that the consideration for the grant of a right of user is the payment of a sum of money. Accessory agreements are, like comparable agreements in other economic fields, subject to the application of the Community competition rules. The VBA will be free in future, in connection with the granting of rights of user and as a substitute for the contested agreements, to enter into agreements in its own economic interest which are not covered by Article 85 (1) or which can be exempted under Article 85 (3). The fact that VBA tenants are part of a special distribution system can be taken fully into account in these future agreements within the framework of the applicable provisions.

G. Establishment of the infringements

- (164) Pursuant to Article 3 of Regulation No 17, the Commission may by decision find that an infringement of Article 85 of the Treaty has occurred.
- (165) The Commission takes the view, having regard to all the circumstances surrounding the present case, that it is necessary to take a decision stating that an infringement occurred, although on 1 May 1988 the rules in question were replaced by new ones.

⁽¹⁾ The improvement of production of goods or the promotion of technical or economic progress has not, as a result of the abovementioned restriction of competition, been taken into consideration.

- (166) On 11 November 1987 the VBA informed the Commission that it decided, in the light of the objections made known to it by the Commission, to amend the rules that it notified on 5 November 1984. With regard to the envisaged new rules, intensive discussions between the Commission and the VBA took place until 8 March 1988. However, on 12 April 1988 the VBA informed the Commission, that it will put into effect rules which are not in accordance with the result which appeared to be established on 8 March 1988. These new rules, which entered into force on 1 May 1988 and which are the subject matter of a new enquiry started by the Commission, are presently being assessed by the Commission on the basis of the competition Regulations.
- (167) In its Judgment of 30 January 1974 in Case No 127/73 'BRI I', the Court of Justice stated⁽¹⁾ that a national court, before which the prohibitions contained in Articles 85 and 86 are invoked in a dispute governed by private law, may if it considers it necessary for reasons of legal certainty stay the proceedings before it, while awaiting the outcome of the Commission's action. In particular, if the Commission has already initiated a procedure in application of Article 3 of Regulation No 17, account should be taken of the necessity to ensure uniform application of Community law.
- (168) It is necessary in the present case to take a decision stating the existence of an infringement not only in order that the current stay in proceedings in the lawsuit between the VBA and Florimex before the Arrondissementsrechtbank Haarlem be ended, thus ensuring, in this way, the uniform application of Community law, but also because of the existence of similar rules applied by other auction houses⁽²⁾,

HAS ADOPTED THIS DECISION:

Article 1

The agreements notified to the Commission which were concluded by the VBA whereby the dealers established on

the VBA's premises and their suppliers were at least until 1 May 1988 required:

- (a) to deal in and/or have delivered on the VBA's premises floricultural products 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 a fee 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, Fl 0,25 levy) as well as the trade agreements concluded between the VBA and these dealers, also constitute, as notified, infringements of that provision.

Article 2

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

Article 3

The VBA shall take no measures having the same purpose or effect as the infringements referred to in Article 1.

Article 4

This Decision is addressed to:

Coöperatieve Vereniging 'De Verenigde Bloemenveilingen Aalsmeer' BA,
Legmeerdijk 313,
NL-1430 BA Aalsmeer.

Done at Brussels, 26 July 1988.

For the Commission

Peter SUTHERLAND

Member of the Commission

⁽¹⁾ (1974) ECR 51 *et seq.*

⁽²⁾ Judgment of the Court of Justice in Case 8/72 Cementhandelaren (1972) ECR 977 *et seq.* and Case 7/82 GVL (1983) ECR 483 *et seq.*; Commission Decisions in Case IV/30.299 Grohe's-distribution system (OJ No L 19, 23. 1. 1985, pp. 17 *et seq.*) and Case IV/30.017 Breeders' rights: roses (OJ No L 369, 31. 12. 1985, pp. 9 *et seq.*).