JUDGMENT OF THE COURT OF FIRST INSTANCE (Fourth Chamber)

31 January 2001 *

In Joined Cases T-197/97 and T-198/97,

Weyl Beef Products BV, established at Enschede (Netherlands), represented by E.H. Pijnacker Hordijk and S.B. Noë, lawyers,

applicant in Case T-197/97,

Exportslachterij Chris Hogeslag BV, established at Holten (Netherlands), represented by A.P.J.M. de Bruyn, lawyer,

Groninger Vleeshandel BV, established at Groningen (Netherlands), in liquidation, represented by J.J. van der Molen, liquidator appointed by the courts, represented initially by A.P.J.M. de Bruyn, and subsequently by P.E. Mazel, lawyers,

with an address for service in Luxembourg,

applicants in Case T-198/97,

* Language of the case: Dutch.

Commission of the European Communities, represented by W. Wils, acting as Agent, and G. van der Wal, lawyer, with an address for service in Luxembourg,

defendant,

supported by

Produktschap voor Vee en Vlees

and

Stichting Saneringsfonds Runderslachterijen,

both established at Rijswijk (Netherlands),

represented by I.W. VerLoren van Themaat, lawyer, with an address for service in Luxembourg,

interveners,

APPLICATION, in Case T-197/97, for annulment of the Commission's decision of 23 April 1997 (case No IV/35.591/F-3 — Weyl/PVV+SSR) rejecting an application made by the applicant on 14 June 1995 and, in Case T-198/97, for annulment of the Commission's decision of 23 April 1997 (case No IV/35.634/F-3 — Hogeslag-Groninger/PVV+SSR) rejecting an application made by the applicants on 30 June 1995,

THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES (Fourth Chamber),

composed of: V. Tiili, President, R.M. Moura Ramos and P. Mengozzi, Judges,

Registrar: G. Herzig, Administrator,

having regard to the written procedure and further to the hearing on 25 February 2000,

gives the following

Judgment

Facts and legal background

1 The Produktschap voor Vee en Vlees (the Livestock and Meat Board; 'the PVV') is a public-law body which was set up under Article 66 of the Wet op de Bedrijfsorganisatie (Netherlands law on the organisation of commerce). On the basis of Article 66, both marketing boards ('produktschappen') and central marketing boards ('hoofdproduktschappen') may be established. These bodies, which are governed by public law and comprise two or more groups of undertakings, play various roles in commercial life in relation to certain products or groups of products.

2 The PVV was set up in 1954 to promote the common interest of all undertakings engaged in the raising of cattle and the handling and processing of beef and veal. Its members are appointed by the various unions and employers' associations in that sector.

3 The PVV may impose financial levies on the undertakings concerned. It does so by means of regulations which, upon approval by the Minister responsible, become legally binding.

4 With a view to devising a restructuring policy for the beef and veal sector under which the overall excess capacity of Dutch slaughterhouses would be reduced, the PVV opened consultations in 1992 with representatives of the sector, at the end of which it was agreed that certain slaughterhouses should be repurchased with a view to withdrawing them from operation. To that end, the PVV adopted two regulations on 14 July 1993, one setting up a fund for the cattle slaughtering sector (PVV Verordening — Fonds runderslachtsector) and one making provision for the financing of that fund (PVV Heffingsverordening — Fonds runderslachtsector) ('the PVV regulations').

5 The purpose of the PVV regulation setting up a fund for the cattle slaughtering sector was to make provision for the financing of measures designed to improve the structure of that sector in the Netherlands. The fund forms part of the assets of the PVV and is administered by it. The resources to be used to meet the fund's agenda are allocated by the executive board, subject to a ceiling fixed by the latter.

6 The regulation concerning the levy introduced by the PVV in connection with the above fund makes provision for the collection of monies to be paid into the fund.

7 Both regulations were approved by the Netherlands Minister for Agriculture, Nature Management and Fisheries.

8 On the basis of those two regulations, the costs of restructuring are financed by means of a levy. This is fixed at NLG 150 000 per percentage point of the undertaking's share of total slaughtering capacity in the Netherlands and currently corresponds to NLG 15 per carcass. Pursuant to Article 2(4) of the Heffingsverordening, the levy must not be passed on to the suppliers of beef cattle.

9 In December 1993 and July 1995 the Commission authorised the aid provided for by those regulations ('the restructuring aid'; see OJ 1994 C 109, p. 4, and OJ 1996 C 67, p. 3, respectively). In those two decisions ('the aid decisions'), the Commission noted the assurances given by the Netherlands authorities to the effect that under no circumstances would any of the monies involved be granted on the basis of beneficiaries' past or current trading difficulties and that in determining the payments to beneficiaries account would be taken only of the impact of the imposed capacity reductions on the beneficiaries in terms of net earnings foregone and/or social costs involved and/or loss of capital value.

10 On 7 November 1994, 13 slaughterhouses set up a foundation for improving the structure of the cattle slaughterhouse system (the Stichting Saneringsfonds Runderslachterijen; 'the SSR'). The SSR is administered by representatives of the participant slaughterhouses who together account for the majority of slaughtering operations carried out in the Netherlands.

11 The SSR primarily endeavours to strengthen the structure of the sector by repurchasing slaughtering capacity and then withdrawing it permanently from operation. These repurchasing operations are financed by the PVV.

12 On 28 February 1995 the SSR notified its constitutional rules to the Commission. In answer to a written question from the Court of First Instance, the Commission stated that pending the outcome of the present proceedings it had not yet adopted a formal position with regard to that notification.

13 During the first six months of 1995, the SSR repurchased a number of slaughterhouses. All the undertakings concerned had the opportunity to make their views known and to apply for a redemption premium.

14 Under the repurchasing agreements, the repurchased slaughterhouses undertake for 30 years not to carry out any cattle slaughtering operation within a radius of 1 500 km of their undertaking and must not arrange for such operations to be carried out elsewhere. The SSR actively monitors compliance with those agreements and may where appropriate initiate judicial proceedings against defaulting parties.

15 Weyl Beef Products BV ('Weyl Beef') — the applicant in Case T-197/97 — is the largest slaughterhouse undertaking in the Netherlands and is not a member of the SSR. Each year it carries out between 125 000 and 130 000 slaughtering operations. Each year, for five years, it must contribute NLG 2.2 million to the restructuring operations.

16 Exportslachterij Chris Hogeslag BV ('Hogeslag') and Groninger Vleeshandel BV ('Groninger Vleeshandel'; currently in liquidation) — the applicants in Case T-198/97 — are two medium-sized slaughterhouse undertakings.

17 On 14 June 1995 and 30 June 1995 respectively, Weyl Beef and Groninger Vleeshandel made applications pursuant to Article 3(2) of Council Regulation No 17 of 6 February 1962: First Regulation implementing Articles 85 and 86 of the Treaty (OJ, English Special Edition 1959-1962, p. 87). They sought a finding from the Commission that, first, the provisions and agreements relating to the restructuring of the cattle slaughtering sector in the Netherlands infringed Article 85(1) of the EC Treaty (now Article 81(1) EC) and, secondly, that the introduction by the PVV of a levy to finance the restructuring of that sector was an infringement of Article 3(g) of the EC Treaty (now, after amendment, Article 3(g) EC), Article 3a of the EC Treaty (now Article 4 EC), Article 5 of the EC Treaty (now Article 10 EC), Articles 85 and 92 of the EC Treaty (now, after amendment, Article 87 EC) and Article 93 of the EC Treaty (now Article 88 EC), and also of Articles 1(2)(e), 3 and 53 of the Agreement on the European Economic Area (EEA).

18 At the hearing provided for by Article 19 of Regulation No 17, the applicants added that, in so far as those provisions and agreements, taken as a whole, did not fall directly within the scope of Article 85(1) of the Treaty, they were in any event incompatible with the second paragraph of Article 5 of the Treaty, read in conjunction with Articles 3(g) and 85 thereof.

19 On 6 November 1995 the Commission sent communications to the applicants pursuant to Article 6 of Regulation No 99/63/EEC of the Commission of 25 July 1963 on the hearings provided for in Article 19(1) and (2) of Council Regulation No 17 (OJ, English Special Edition 1963-1964, p. 47), informing them that on the basis of the information in its possession there were insufficient grounds for granting their applications.

20 The applicants replied to those communications from the Commission by letters of 5 January 1996. On 20 June 1996 a second hearing was held.

21 On 23 April 1997 the Commission adopted two decisions ('the contested decisions') confirming that it did not intend to take any further action with regard to the above applications. It stated, first, that the objections raised by the applicants in respect of the PVV regulations could not be considered since those measures were legally binding. Secondly, on the subject of the SSR's constitutional rules, even if these were indeed agreements between undertakings, they did not entail any obligation or recommendation concerning the commercial conduct of members, since implementing measures had yet to be adopted concerning the SSR's purpose and the means of attaining it. Article 85(1) of the Treaty could not be applied until such measures were adopted. Thirdly, the Commission classified the redemption premiums as aid introduced by the Netherlands authorities. Accordingly, the applications made in respect of those measures fell outside the scope of Article 3 of Regulation No 17. Lastly, the Commission concluded that the repurchasing agreements had no appreciable effect on competition.

Procedure

22 By application lodged at the Registry of the Court of First Instance on 30 June 1997, Weyl Beef brought an action which was registered as Case T-197/97.

23 By application lodged at the Registry of the Court of First Instance on the same day, Hogeslag and Groninger Vleeshandel brought an action which was registered as Case T-198/97.

24 By applications lodged at the Registry of the Court of First Instance on 10 November 1997, the PVV and the SSR sought leave to intervene in support of the forms of order sought by the Commission in both cases.

25 By orders of the President of the First Chamber of 17 February 1998, the PVV and the SSR were granted leave to intervene.

26 The written procedure in Case T-197/97 was closed on 12 May 1998.

27 The written procedure in Case T-198/97 was closed on 20 May 1998.

28 Upon hearing the report of the Judge-Rapporteur, the Court of First Instance (Fourth Chamber) decided to open the oral procedure and, by way of measures of organisation of procedure under Article 64 of the Rules of Procedure, asked the parties to reply to a number of written questions. The parties complied with that request within the time allowed.

29 At the hearings held on 10 February 2000, the parties presented oral argument and their replies to the oral questions put by the Court of First Instance.

30 After hearing the parties, the Court of First Instance (Fourth Chamber) considers it appropriate to join the present cases for the purposes of the final judgment, in accordance with Article 50 of the Rules of Procedure.

Forms of order sought

31 In Case T-197/97 the applicant claims that the Court should:

— annul the Commission's decision of 23 April 1997 (Case No IV/35.591/F-3 — Weyl/PVV+SSR);

— declare that the provisions and agreements relating to the restructuring of the Netherlands cattle slaughtering sector infringe Article 85(1) of the Treaty;

— order such other measures as are required;

— order the Commission to pay the costs.

32 In Case T-198/97 the applicants claim that the Court should:

— annul the Commission's decision of 23 April 1997 (Case No IV/35.634/F-3 — Hogeslag-Groninger/PVV+SSR);

— declare that the provisions and agreements relating to the restructuring of the Netherlands cattle slaughtering sector infringe Article 85(1) of the Treaty;

— order such other measures as are required;

— order the Commission to pay the costs.

33 In both cases, the Commission, supported by the PVV and the SSR, claims that the Court should:

— declare that the action is inadmissible in so far as it is based on Articles 3(g), 3a, 5, 85, 92 and 93 of the Treaty, and on Articles 3 and 53 of the EEA Agreement;

— declare that, for the rest, the action is unfounded;

— order the applicant/s to pay the costs.

Law

Admissibility

Arguments of the parties

34 According to the Commission, both actions seek a declaration that the arrangements made for the restructuring of the cattle slaughtering sector in the

Netherlands, together with the related agreements, infringe Article 85(1) of the Treaty; that the parafiscal charges levied by the PVV in order to finance that restructuring infringe Articles 3(g), 3a, 5, and 85 of the Treaty, read together, and Article 1(2)(e) of the EEA Agreement read together with Articles 3 and 53 thereof; and that the creation of the PVV fund and the grant of monies allocated to that fund (through the SSR) to restructured undertakings infringe Articles 92 and 93 of the Treaty.

35 On the basis of that interpretation, the Commission, while not formally raising a preliminary plea of inadmissibility, puts forward two pleas in law in support of its contention that the actions should be dismissed as inadmissible.

36 First, the Commission contends that the actions are inadmissible in so far as they are based on Articles 92 and 93 of the Treaty and contest the PVV regulations. It points out that, following notification of those regulations by the Netherlands, the Commission decided not to initiate the procedure provided for by Article 93(2) of the Treaty nor to raise any objection on the basis of Article 92 thereof, whether against the regulations, or against the allocation of the parafiscal charges or against the fund. It had been open to the applicants, as parties concerned, to submit a complaint to the Commission in respect of the aid and subsequently to bring judicial proceedings contesting the decisions (Case 323/82 *Intermills* v *Commission* [1984] ECR 3809 and Case C-198/91 *Cook* v *Commission* [1993] ECR I-2487).

37 Nor, according to the Commission, can the applicants rely on a plea of illegality under Article 184 of the EC Treaty (now Article 241 EC) in order to contest the lawfulness of the aid decisions. That plea is provided for by way of exception and cannot be raised by a party which has a right of action, with respect to the same measures, under the fourth paragraph of Article 173 of the EC Treaty (now, after amendment, the fourth paragraph of Article 230 EC).

38 Lastly, the Commission maintains that in the contested decisions it had already expressed its view that the applications concerning the PVV regulations, made pursuant to Article 3(2) of Regulation No 17, could not be considered because those regulations were legally binding and, in consequence, outside the scope of that provision.

39 Secondly, the Commission contends that the actions are inadmissible in so far as they are based on Articles 3(g), 5 and 85 of the Treaty, and on Articles 1(2), 3 and 53 of the EEA Agreement, and in so far as they contest the PVV regulations. It points out that in this respect the actions are directed against the PVV as a public body and, consequently, applications made to the Commission can go no further than to request initiation of the infringement procedure under Article 169 of the EC Treaty (now Article 226 EC) with respect to the Netherlands for failure to fulfil its obligations under the above provisions. It is settled law that where the Commission refuses to initiate with respect to a Member State the infringement procedure under Article 169 of the Treaty read in conjunction with Articles 3(g), 5 and 85 thereof, an action contesting that refusal is inadmissible.

40 In response, Weyl Beef (Case T-197/97) and Hogeslag (Case T-198/97) argue that their actions concern solely the rejection of their complaints alleging infringement of Article 85(1) of the Treaty. While they acknowledge that the payments from the PVV fund were authorised by the Commission in accordance with Article 92 of the Treaty, they maintain that the Commission is not thereby released from its obligation to carry out an independent appraisal of the agreements between undertakings, to which the aid at issue is linked, in the light of Article 85 of the Treaty.

41 Lastly, they point out that the Court of Justice has held that where certain agreements between undertakings are contrary to Article 85, the fact that a Member State makes them generally binding or extends their application to undertakings which do not belong to the cartel does not mean that Article 85(1) of the Treaty has not been infringed by the undertakings (see, to that effect, Case 123/83 *Clair* [1985] ECR 391, paragraph 23). Moreover, there is nothing to preclude an undertaking which makes an application pursuant to Article 3(2) of

Regulation No 17 from asking the Commission also to find that Articles 3, 5 and 85 of the Treaty have been infringed and to take the appropriate steps under Article 169 of the Treaty.

42 It does not follow from the Commission's statement that the PVV regulations are legally binding and that the applications made in respect of those measures on the basis of Article 3(2) of Regulation No 17 cannot therefore be given consideration (paragraph 32 of the contested decisions) that the Commission cannot take action under Regulation No 17 against the restructuring arrangements as a whole.

43 Groninger Vleeshandel accepts that its action is essentially based on Article 85 of the Treaty. It maintains, however, that the action is also based on Articles 92 and 93 of the Treaty and accordingly admissible in so far as so little information was published in the *Official Journal of the European Communities* concerning the aid decisions that the company was unable to gauge its interest in bringing proceedings. Groninger Vleeshandel was therefore still entitled to contest the aid decisions in the present proceedings before the Court of First Instance and cannot properly be said to have submitted its complaint too late.

Findings of the Court

44 The first point to note is that the applicants have applied to the Court for a ruling solely on the question whether the provisions and agreements relating to the restructuring of the Dutch cattle slaughtering sector are in infringement of Article 85(1) of the Treaty. This is clear not only from the forms of order sought, but also from the arguments in support of the applicants' pleas in law, which seek to demonstrate, first, that the contested decisions are private — not public — measures, and therefore fall within the scope of Article 85(1) and, second, that they have anti-competitive effects and therefore manifestly infringe Article 85 of the Treaty.

45 Although the applications which were made to the Commission on the basis of Article 3(2) of Regulation No 17 and out of which the dispute arose were more comprehensive in purpose, the actions before the Court, by contrast, concern only the question whether the measures at issue are compatible with Article 85 of the Treaty, and all references to other Treaty provisions are made solely for the purpose of showing that that provision has been infringed.

46 Furthermore, in answer to a written question from the Court, Weyl Beef and Hogeslag confirmed that their actions concerned solely the alleged infringement of Article 85(1) of the Treaty.

47 It follows from the foregoing that the pleas in law put forward by the Commission in order to show that the actions are inadmissible are to no effect.

48 On the other hand, the Court must reject Groninger Vleeshandel's argument that since its action is based on Articles 92 and 93 of the Treaty, it is admissible in so far as so little information was published in the Official Journal concerning the authorisation of the restructuring aid that it was unable to gauge its interest in bringing proceedings. It is settled law that the undertaking or undertakings in receipt of aid are not the only parties concerned by it; other parties concerned are the persons, undertakings or associations whose interests may be affected by the grant of the aid, in particular trade organisations and rival undertakings. In other words, there is an indeterminate group of persons to whom notice must be given (*Intermills* v *Commission*, cited above, paragraph 16).

49 It follows that, as in the case of notices published for the purposes of Article 93(2) of the Treaty, the sole purpose of the requirement that aid authorisation under Article 93(3) be notified is to oblige the Commission to take steps to ensure that all persons who may be concerned are alerted. Consequently, the publication of an authorisation notice in the Official Journal is an adequate means of informing

all the parties concerned that certain State aid has been authorised by the Commission on the basis of Article 93(3) (see, by analogy, *Intermills* v *Commission*, cited above, paragraph 17).

50 In the present case, the details given in the notice referred to, which concerned the authorisation of 'aid to improve the structures of slaughterhouses [*sic*] in the beef and veal sector and parafiscal charges for the benefit of the livestock and meat Produktschap' were sufficiently precise to enable the applicant — which, at the time, was perfectly aware of the restructuring operations in the sector — to realise that, without a shadow of a doubt, it was concerned by the measure. In so far as the action brought by Groninger Vleeshandel may be regarded as based also on Articles 92 and 93 of the Treaty, it must therefore be held to be inadmissible.

Substance

Arguments of the parties

51 The applicants maintain that the Commission infringed Article 85(1) of the Treaty in a number of respects. They do not accept that the Commission refused to initiate an investigation under the competition rules because of the lack of a Community interest. Rather, it was clear from the conduct of the procedure following their complaints that the Commission had indeed proceeded to investigate their allegations that Article 85(1) had been infringed.

52 Furthermore, the contested decisions do not mention lack of Community interest as a ground for rejecting the applications. That is a justification introduced *ex*

post facto which is not borne out by the contested decisions and cannot therefore be relied upon in the present proceedings.

53 Moreover, the Commission's argument that the restructuring arrangements do not fall within the scope of Article 85(1) of the Treaty rests upon a misappraisal of the facts and an error of law.

54 According to the applicants, the Commission cannot rely on the aid decisions except in so far as concerns the redemption premiums since the only reference in those decisions to the various forms in which the aid was forthcoming concerned the premiums, not the PVV regulations or the repurchasing agreements.

55 Also, the Court of Justice has consistently held that approval of State aid under Articles 92 and 93 of the Treaty cannot have the effect of removing the measures under investigation from the scope of Article 85 of the Treaty (see, to that effect, Case C-225/91 *Matra* v *Commission* [1993] ECR I-3203, paragraph 44, and Case T-17/93 *Matra Hachette* v *Commission* [1994] ECR II-595, paragraph 44 et seq.). In the first place, the question whether aid is compatible with the common market is quite different from the question whether an agreement between undertakings has as its purpose or effect the restriction of competition; secondly, the fact that in the context of a procedure concerning State aid, the Commission authorises measures which have major repercussions on the various markets does not mean that a horizontal agreement along the same lines is compatible with Article 85 of the Treaty.

56 At the time when the Commission adopted the aid decisions, it did not take into account the agreements between undertakings on which the PVV regulations were based. As a general rule, the information requested from a State in connection with a procedure for the notification of aid does not concern agreements between undertakings. Also, at the time of adopting the aid decisions,

the Commission was not aware of the agreements at issue in the present proceedings, and the features of them relevant for the purposes of Article 85 of the Treaty. No account was taken of the applicants' complaints in the first aid decision because it predated them; nor in the second decision, which was adopted on 5 July 1995, three weeks after the applications were made.

57 The applicants conclude from all the foregoing considerations that the provisions and agreements relating to the restructuring of the Netherlands cattle slaughtering sector fall within the scope of Article 85 of the Treaty. A number of factors indicate that their purpose and effect is to restrict or distort competition: the sector's overall capacity *vis-à-vis* production of carcasses was artificially reduced; the only slaughterhouse undertakings to benefit from restructuring were those which had previously suffered from overcapacity, whereas the others suffered only the disadvantage of having to pay the levy; and the structure of the cattle slaughtering sector had not been improved since the measures had led to the closure of modern slaughterhouses to the benefit of the older slaughterhouses where there was overcapacity. Moreover, the repurchased slaughterhouses remained active on the important downstream market in the production of beef and veal (boning and preparation of carcasses) and, thanks to the repurchasing agreements, had been able to write off the initial costs of their premises and stock. In consequence, the 'restructured' undertakings artificially improved their competitive position on the downstream market to the detriment of their competitors and, since the cattle slaughterhouses had agreed that the charge could not be passed on to the cattle suppliers, they had thus entered into an agreement which is indisputably contrary to Article 85 of the Treaty.

58 The Commission contends, first, that in the context of an application made pursuant to Article 3 of Regulation No 17, it is not for the Commission to give a definitive ruling on the applicability of Article 85(1) of the Treaty; it need only evaluate the nature and importance of the case with a view to determining whether it involves a measure of Community interest sufficient to take up the complaint (Case T-77/95 *SFEI and Others* v *Commission* [1997] ECR II-1, paragraphs 29 and 46). Its decisions, adopted within that framework, are

therefore based on a comparative assessment: the nature and seriousness of the restriction allegedly placed on competition are balanced against the Community interest at stake. Even if that analysis is not set out in so many words in the body of the contested decisions, it is reflected in their findings.

59 The Commission further maintains that it cannot, on the basis of Article 85(1) of the Treaty, refuse to authorise a restructuring contract (repurchasing agreement) by reason of the effects, on the downstream market in the production of beef and veal, of a State aid policy which has been authorised (the PVV regulations).

60 On that point, the Commission notes that the essential elements of the restructuring arrangements are to be found in the PVV regulation setting up a fund for slaughterhouses in the beef and veal sector and in the PVV regulation introducing a parafiscal charge to finance that fund.

61 By letter of 31 December 1993, the Commission informed the Netherlands that it had no objections to the restructuring aid investigated under Articles 92 and 93 of the Treaty. Consequently, neither the restructuring arrangements as such nor their funding could be prohibited under Article 85(1) of the Treaty, unless the implementation of those arrangements by the SSR subjected the member undertakings and/or restructured undertakings to restrictions which did not already stem from the arrangements themselves (see, to that effect, Case 74/76 *Iannelli and Volpi* [1977] ECR 557). The assessment for the purposes of Article 85(1) of the Treaty had therefore to be limited to restrictions on competition which went beyond those brought about by the restructuring arrangements imposed or agreed by the SSR, and which did not coincide with or were not incidental to the effects of the aid.

62 The Commission points out that the Netherlands authorities have introduced aid for restructuring the cattle slaughtering sector which, at the private-law level, is

based on repurchasing agreements between the SSR and the restructured slaughterhouse undertakings. The Commission emphasises that it examined the financial aspects of the restructuring arrangements (the grant of an amount from the fund and the levying of a charge to finance the fund), the consequences of payment of the redemption premium and the obligations under the PVV regulations (such as the obligation not to pass on the charge to third parties) at the time when it evaluated the PVV regulations for the purposes of Articles 92 and 93 of the Treaty and that it did not raise any objection. Among the consequences of the aid, the Commission noted the effects on the downstream market, that is to say, the market in beef and veal production. Those effects stemmed directly from the PVV's payment of State aid out of the restructuring fund for closure of slaughterhouses or of those parts of undertakings which specialise in slaughtering. The Commission points out that this led it to conclude, in the various decisions concerning the present case, that the effects on the cattle slaughtering market and on the downstream market were compatible with Article 92(1) of the Treaty, and even with Article 85(1) thereof. The case-law of the Court of Justice to which the applicants refer (*Matra* v *Commission*, cited above, paragraph 44, and *Matra Hachette* v *Commission*, cited above, paragraph 44 et seq.) bears out that finding in that the substantive assessment to be made under the provisions governing State aid and the assessment under Articles 85 and 86 of the Treaty are complementary.

63 Lastly, the Commission contends that it is not correct to say that when it adopted the second aid decision it was unaware of the related agreements or of the aspects of the case relevant for the purposes of Article 85. The PVV and the SSR had notified the regulations in question on 28 February 1995.

Findings of the Court

64 The first point to note is that the applicants' allegations are based on an interpretation of the contested decisions which the Commission disputes. Whereas, according to the applicants, the Commission rejected their applications on grounds relating to Article 85(1) of the Treaty, concerning competition, the Commission itself maintains that its sole ground for refusing the applications was the lack of a sufficient Community interest in the case.

65 The first matter to be settled, therefore, is the ground on which the contested decisions rejected the applications.

66 As the applicants have rightly pointed out, the contested decisions make no mention whatsoever of the Community interest. It must therefore be established whether, despite the absence of any express reference to the Community interest, the applications were rejected solely because the case did not involve a sufficient Community interest.

67 In the contested decisions, the Commission states that, although restructuring was initiated by the private sector, the restructuring programme must be regarded as having been established by decision of the public authorities, since the participation of undertakings in the drafting of the decisions relating to those matters was simply a preparatory step in the adoption of public measures. In that context, the Commission does not accept that a complaint may be brought against the PVV regulations on the basis of competition law, since those measures are legally binding. In the same way, according to the Commission, the redemption premiums provided for in the event of the closure of slaughterhouses are to be classified as State aid authorised by the Commission.

68 As regards the constitutional rules of the SSR, it is stated in the contested decisions that these were, by contrast, agreements between undertakings. However, they do not entail obligations or recommendations relating to the commercial conduct of SSR members. The objective of restructuring the sector and the means envisaged for attaining this — namely the large-scale purchasing of cattle slaughtering capacity in order subsequently to withdraw it permanently from operation — required implementing measures. Only the latter measures could be a proper subject of investigation under Article 85(1) of the Treaty.

69 Lastly, according to the contested decisions, the repurchasing agreements that the SSR concluded with the slaughterhouse undertakings are subject to Article 85 of

the Treaty, notwithstanding the fact that they constitute one of the fundamental steps towards attaining the objective pursued by the public restructuring programme. However, the Commission states in its decisions that by virtue of that fact, those agreements had no separate purpose, that is to say, they were not intended to restrict competition.

70 Nor, according to the contested decisions, do those agreements have the effect of appreciably restricting competition. First, the Commission defines the geographical markets concerned, at least in so far as concerns the wholesale trade, as encompassing at the very least the EEA. Secondly, it establishes that the number of slaughtering operations and, therefore, the production of beef and veal, had not decreased as a result of the restructuring measures. On the basis of the information in its possession, the Commission finds that the effects of the repurchasing agreements on the beef cattle market have been positive since certain slaughterhouses have been able to increase the number of slaughtering operations and thus raise their income. This creates downward pressure on beef cattle prices in the Netherlands.

71 Again, according to the contested decisions, the effects on the markets in cattle carcasses and in beef and veal are negligible, or at least positive. Given the overcapacity in the cattle slaughtering sector, the Commission likewise does not find any effect on the market in slaughtering services. Lastly, taking into consideration the fact that the markets in beef cattle, carcasses and slaughtering services are upstream of the market in beef and veal, the Commission also considers the effects on the latter market and concludes that they are not appreciable.

72 In the light of the foregoing, the Court finds that, not only is there no reference in the contested decisions to the Community interest, but also that manifestly it is not the ground of rejection on which those decisions are based. On the contrary, the factors taken into account in the contested decisions are characteristic of a legal assessment pursuant to Article 85 of the Treaty. The same may be said of the Commission's investigation of the practical effects of the repurchasing agreements on the downstream market in beef and veal, which it describes as not appreciable.

The conclusion drawn from that by the Commission is not that there is no Community interest in considering the application further, but that Article 85 of the Treaty does not apply in so far as it comes into operation only if the anti-competitive effects of the agreements under consideration have an appreciable impact on the market.

73 The Court must therefore reject the Commission's contention that its rejection was based exclusively on the lack of Community interest and must conclude that, since the substantive grounds for rejecting the applications are duly stated in the contested decisions, the Commission's legal analysis of the facts must be reviewed.

74 In that connection, it is settled law that, where the Commission has decided to proceed no further with an application and not to carry out an investigation, the review of legality which the Court of First Instance must undertake focuses on the question whether or not the contested decision is based on materially incorrect facts or is vitiated by an error of law, a manifest error of appraisal or misuse of powers (see, in particular, Case T-24/90 *Automec* v *Commission* [1992] ECR II-2223, paragraph 80).

75 The Court of Justice has ruled that it is clear from the general scheme of the Treaty that the procedure provided for in Articles 92 and 93 must never produce a result which is contrary to the specific provisions of the Treaty (see, to that effect, Case 73/79 *Commission* v *Italy* [1980] ECR 1533, paragraph 11, and *Matra* v *Commission*, cited above, paragraph 41). The Commission's obligation to ensure that Articles 92 and 93 are applied consistently with other provisions of the Treaty is all the more necessary where those other provisions also pursue, as in the present case, the objective of undistorted competition in the common market. When adopting a decision on the compatibility of aid with the common market, the Commission must be aware of the risk of individual traders undermining competition in the common market (*Matra* v *Commission*, cited above, paragraphs 42 and 43).

76 However, the Court has also held that those aspects of aid which contravene specific provisions of the Treaty, other than Articles 92 and 93 thereof, may be so indissolubly linked to the object of the aid that it is impossible to evaluate them separately (*Matra* v *Commission*, cited above, paragraph 41).

77 Specifically, the Court has held that, where this is so, the effects of those aspects on the compatibility or incompatibility of the aid as a whole must be assessed by means of the procedure under Article 93 of the Treaty. The position is different, however, if it is possible when an aid programme is being analysed to separate those conditions or factors which, even though they form part of the programme, may be regarded as not being necessary for the attainment of its object or for its proper functioning (*Iannelli and Volpi*, cited above, paragraph 14).

78 It is therefore necessary first to determine whether the restructuring measures are aspects or elements of aid authorised by the Commission and, if so, whether they entail restrictive effects which go beyond what is necessary if the aid is to attain the objectives permissible under the Treaty.

79 By way of a preliminary point, it should be noted that the parties do not agree on the nature of the measures at issue. While the Commission considers that the restructuring arrangements as a whole flow from the PVV regulations and that, consequently, the agreements entered into by the SSR are a fundamental step towards attainment of the objective pursued by the public authorities, the applicants maintain that the restructuring arrangements are the result of private agreements and that only the measures for financing those arrangements are of a public nature. In essence, while the Commission maintains that the restructuring arrangements are the result of a public initiative, the applicants maintain that it is the result of private concertation, which subsequently procured public funding.

80 That issue has no bearing on the assessment of the link between the measures and the purpose of the aid: whether or not, in point of fact, the restructuring initiative came from undertakings or from the public authorities (the PVV), it is common ground that the measures were intended to reduce capacity in the sector with financial assistance from the State. Furthermore, the applicants themselves stated in their applications that 'the introduction of the levy and the decision to transfer the monies raised thereby to the SSR are indissolubly linked to the restructuring programme. Without the levy, there would have been no restructuring and without restructuring, there would have been no levy'.

81 Furthermore, it is settled law that, in applying Article 92 of the Treaty, regard must be had primarily to the effects of the aid on the recipient undertakings or producers, not the status of the institutions entrusted with distribution and administration of the aid (Case 78/76 *Steinike & Weinlig* [1977] ECR 595, paragraph 21). In consequence, since the effects of the aid are brought about by the restructuring arrangements as a whole — including the SSR's selection of the beneficiaries — the scheme must be regarded as the rules implementing the aid. A measure adopted by a public authority and favouring certain undertakings or products does not lose the character of a gratuitous advantage, and thus aid, on account of the fact that it is wholly or partially financed by contributions imposed by the public authority and levied on the undertakings concerned (*Steinike & Weinlig*, cited above, paragraph 22).

82 For that reason, the distinction drawn by the applicants between the various measures which go to make up the aid package is artificial. In their applications, although they accept that the payments granted from the PVV fund were approved by the Commission under Article 92 of the Treaty, they add 'but that approval does not extend to the levies designed to finance the restructuring measures'. Thus they appear to distinguish between the charges levied to finance restructuring and the use to which the funds thereby raised are directed, whereas the two operations are indissolubly linked and were intended together as a means of meeting the objective of reducing structural overcapacity.

83 It must therefore be concluded that, even if it is accepted that some of the measures for restructuring the cattle slaughtering sector may fall within the scope of Article 85 of the Treaty (such as the agreements on the constitution of the SSR and the redemption agreements), they are so indissolubly linked to the purpose of the aid that they cannot be separately evaluated.

84 However, it remains to be determined whether those measures entail restrictive effects which go beyond what is necessary if the aid is to attain the objectives permissible under the Treaty. The applicants make no useful contribution on this point since all their observations focus on the anti-competitive effects of the capacity reduction brought about by the restructuring arrangements and on the discrimination generated by the compulsory nature of the levy *vis-à-vis* operators in the sector. Those effects are inherent in the objectives of the aid.

85 In particular, the applicants state that the restructuring arrangements restrict competition by reason of the fact that they benefit only those slaughterhouses where there was overcapacity, which is an inevitable consequence of the aid. Moreover, even though the applicants mention that capacity reduction could have been organised independently by each individual undertaking — without the need to set up a body to evaluate applications for aid on a coordinated basis — they base their arguments, not on the fact that this action was coordinated, but on the fact that the measures in question favoured only slaughterhouses where there had been overcapacity. However, had the restructuring been uncoordinated, the effect would have been the same, and derives therefore from the aid itself, not from its coordination.

86 It must therefore be concluded that the anti-competitive effects of the scheme alleged by the applicants are all attributable to the aid at issue and are to be regarded as necessary to implement it and to achieve its purpose.

87 However, the applicants object that the only measures classified as aid by the Commission in the contested decisions are those concerning the redemption premiums. All the other measures are defined as deriving simply from legislation and therefore as strictly linked to public measures. They conclude that the Commission cannot now argue that all the measures are covered by the rules on State aid.

88 Even though, in the contested decisions, the Commission classifies only the redemption premiums as State aid, it states in those decisions that the restructuring measures form part of a public enterprise the financial aspects of which are covered by the rules on State aid. Specifically, the Netherlands authorities have introduced aid for the restructuring of the cattle slaughtering sector which, at the private-law level, is implemented on the basis of repurchasing agreements between the SSR and the restructured slaughterhouse undertakings (agreements subject to Article 85 of the Treaty).

89 Accordingly, when appraising the PVV regulations in the light of Articles 92 and 93 of the Treaty, the Commission also examined the financial aspect of the restructuring, the effects of the redemption premiums and the obligations arising under the PVV regulations, and raised no objection. Among the consequences of the aid, the Commission noted the effects on the downstream market in the production of beef and veal. Those effects derive directly from the PVV's payment, through the restructuring fund, of the redemption premiums. The Commission concludes that neither the restructuring arrangements as such nor the method of financing them can be prohibited under Article 85 of the Treaty.

90 Furthermore, the Commission expressly states in paragraphs 36 and 37 of the contested decisions that in assessing the repurchasing agreements — which, being private-law measures, are subject to Article 85 of the Treaty — account must be taken of the practical circumstances in which undertakings conduct their

business. It goes on to point out that, in the present case, those circumstances are encapsulated in the statutory restructuring arrangements for the sector ('the arrangements are, however, a fundamental factor in the attainment of the objective pursued by the statute'; see paragraph 39 of the contested decisions) and that the agreements therefore have no independent purpose.

91 Clearly, therefore, the line of reasoning indicated in the preceding paragraphs underpins all the content of the contested decisions. It should be noted that in the Commission's account of the facts in those decisions, it always refers to the restructuring arrangements as if to a single package to be assessed under the rules on State aid. Similarly, throughout the decisions, the Commission uses the same legal arguments to demonstrate that the arrangements — the financing of which is a crucial aspect — entail measures of a public nature.

92 It must be concluded that the Commission was correct in the view that it could not, on the basis of Article 85 of the Treaty, prohibit the private measures forming part of the arrangements at issue by reason of the effects of aid which had been approved. Clearly, also, its decisions were entirely based on that ground of rejection.

93 Lastly, so far as concerns the applicants' statement that, when adopting the aid decisions, the Commission failed to take into account the agreements between undertakings on which the PVV regulations are based, it has been established in the course of the oral procedure that the Commission was at that time aware of the constitutional rules of the SSR, Article 3 of which expressly refers to the restructuring measures, including the repurchasing agreements. On the other hand, since the Commission did not know how the restructuring agreements were to be applied in practice, it assessed the arrangements as such and did not evaluate the anti-competitive effects that might flow from the special repurchasing agreements.

94 In the light of the foregoing, it must be concluded that the contested decisions are not based on materially incorrect facts; nor are they vitiated by an error of law or a manifest error of assessment. Moreover, the Commission acted properly in deciding that the arrangements for restructuring the cattle slaughtering sector did not give rise to appreciable anti-competitive effects — so far as the Commission knew at the time when the contested decisions were adopted — above and beyond the effects inherent in that scheme which had been evaluated for the purposes of Articles 92 and 93 of the Treaty.

95 It follows that the actions must be dismissed in their entirety.

Costs

96 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings.

97 Since the applicants have been unsuccessful and the Commission has applied for costs, the applicants must be ordered to pay the costs.

98 Under Article 87(4) of the Rules of Procedure, the Court of First Instance may order an intervener to bear its own costs. The interveners must bear their own costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Fourth Chamber)

hereby:

1. Dismisses the actions;

2. Orders the applicants to bear their own costs as well as those incurred by the Commission;

3. Orders the interveners to bear their own costs.

Tiili Moura Ramos Mengozzi

Delivered in open court in Luxembourg on 31 January 2001.

H. Jung
Registrar

P. Mengozzi
President