

## Case T-61/89

### Dansk Pelsdyravlerforening

v

### Commission of the European Communities

(Competition — Regulation No 26 — Cooperative society —  
No-competition clause — Exclusive supply obligations)

Judgment of the Court of First Instance (Second Chamber), 2 July 1992 ..... II - 1935

#### Summary of the Judgment

1. *Agriculture — Agricultural products — Products listed in Annex II to the Treaty — Concepts — Interpretation — Reference to the Explanatory Notes on the Customs Cooperation Council Nomenclature*  
(EEC Treaty, Art. 38(3) and Annex II)
2. *Agriculture — Competition rules — Regulation No 26 — Scope — Products not listed in Annex II to the Treaty — Furskins — Excluded*  
(EEC Treaty, Art. 42 and Annex II; Council Regulation No 26)
3. *Competition — Community rules — Undertaking — Concept — Cooperative society*  
(EEC Treaty, Arts 85 and 86)
4. *Competition — Agreements, decisions and concerted practices — Effects on competition — Activities of a cooperative society — Criteria*  
(EEC Treaty, Art. 85(1) and (3))

5. *Competition — Agreements, decisions and concerted practices — Prohibition — No-competition clause in the regulations of a cooperative society — Whether permissible — Conditions*  
(EEC Treaty, Art. 85(1))
6. *Competition — Agreements, decisions and concerted practices — Concerted practice — Concept — Coordination and cooperation incompatible with the obligation for each undertaking to determine its conduct on the market independently*  
(EEC Treaty, Art. 85(1))
7. *Competition — Agreements, decisions and concerted practices — Effects on competition — Exclusive agreements in the context of a cooperative — Assessment in the light of the actual economic context — Principle of 'fidelity to the cooperative' — Not relevant*  
(EEC Treaty, Art. 85(1))
8. *Acts of the institutions — Statement of reasons — Obligation — Scope — Decision — Compliance ensured by the Court of its own motion*  
(EEC Treaty, Art. 190)
9. *Competition — Fines — Commission's discretion — View taken by the national authorities — Not relevant*  
(Council Regulation No 17, Art. 15)
10. *Competition — Community rules — Infringements — Intentional commission — Meaning*  
(Council Regulation No 17, Art. 15)

1. Since there are no Community provisions explaining the concepts contained in Annex II to the Treaty and that annex adopts word for word certain headings of the Customs Cooperation Council Nomenclature, it is appropriate to refer to the Explanatory Notes on that Nomenclature in order to interpret the annex.

Annex II to the Treaty. Consequently, that regulation may not be applied to the production of or trade in products, such as furskins, which do not come under Annex II to the Treaty even if they are ancillary to the production of another product which itself comes under that annex.

2. The scope of Regulation No 26 applying certain rules of competition to production of and trade in agricultural products was limited in Article 1 thereof to the production of and trade in the products listed in

3. In the context of Community competition law, the concept of an undertaking

encompasses every entity engaged in economic activity, regardless of its legal status. The fact that the entity is a cooperative organized in accordance with the law of a Member State cannot affect the economic nature of its activity.

on its members obligations to supply to it or to take supplies from it in return for the particular advantages which it grants them, are liable to influence both the economic activity of the cooperative and the free play of competition between its members and vis-à-vis third parties.

4. Whilst the fact that an undertaking is organized in the particular form of a cooperative society does not in itself constitute conduct which restricts competition, such a mode of organization may, regard being had to the context in which the cooperative operates, nevertheless constitute a means capable of influencing the commercial conduct of the cooperative's member undertakings so as to restrict or distort competition on the market in which those undertakings carry out their commercial activities.

Consequently, it cannot be considered that the exercise of an economic activity by a cooperative society is, as a matter of principle, not subject to the provisions of Article 85(1) of the Treaty or that the conditions for the applicability of the Community competition rules, as such, to the cooperative sector are of a different nature from those applying to the other forms in which economic activity is organized. Whilst, in assessing the effects on a given market of the presence of a cooperative, account may be taken of particular features of that form of association of undertakings, that exercise must be carried out *inter alia* in the light of Article 85(3) of the Treaty.

Any cooperative may have an effect on competition in two ways if not more. First, a cooperative society — by reason of the very principles which govern it — may affect the free play of competition as regards the activity constituting its objects as a society, above all when, in the name of cooperative principles, it escapes — to a varying extent depending on the Member State concerned — the application of the rules of national law to which other forms of association by way of firms and companies are subject. Secondly, the obligations imposed on the members of the cooperative, and in particular the obligations associated with the principle of 'fidelity to the cooperative', by virtue of which the cooperative generally imposes

5. In order to determine whether or not a no-competition clause in the regulations of a cooperative society comes within the prohibition in Article 85(1) of the Treaty, it is necessary to examine what would be the state of competition if the clause did not exist. In order to have a beneficial effect on competition, the aim pursued by the introduction of the clause must itself contribute to free competition. In addition, the no-competition clause itself must be necessary and proportionate to the achievement of that aim.

6. The criteria of coordination and cooperation which enable the concept of a concerted practice to be defined must be understood in the light of the concept inherent in the competition provisions of the Treaty according to which each economic operator must determine independently the policy which he intends to adopt on the common market.
7. In order to assess an exclusive agreement in the light of Article 85(1) of the Treaty it is appropriate to consider the actual economic context in which it may produce its effects. Depending on the facts and actual circumstances in which the market in question operates, an exclusive supply obligation may, by guaranteeing to the producer sales of its products and to the distributor security of supply, be such as to intensify competition in terms of the prices and services offered to consumers.
8. The principle that measures must contain a sufficiently precise statement of reasons, enshrined in Article 190 of the Treaty, is one of the fundamental principles of Community law which the Court has to ensure are observed if necessary by raising of its own motion a plea relating to failure to fulfil that obligation.
9. A view taken by the competent national authorities relating to the conditions for the applicability of the competition rules cannot in any way be binding on the Commission when it exercises its power to impose fines.

The reasons for a decision have to appear in the actual body of the decision. The decision cannot be explained for the first time *ex post facto* before the Court, save in exceptional circumstances.

The rule that the scope of an exclusive supply obligation must be assessed in the actual context in which it produces its effects cannot be subject to an exception where the obligation is incorporated in the relationship between a cooperative society and its members, since the desire to comply with the principle of 'fidelity to the cooperative' does not justify disregard of the prohibitions set out Article 85(1) of the Treaty.

10. It is not necessary for an undertaking to have been aware that it was infringing a prohibition laid down by the competition rules of the Treaty for an infringement to be regarded as having been committed intentionally; it is sufficient that it could not have been unaware that the contested conduct had as its object or effect the restriction of competition in the common market.