JUDGMENT OF THE COURT OF FIRST INSTANCE (First Chamber)

13 December 2006 *

In Joined Cases T-217/03 and T-245/03,

Fédération nationale de la coopération bétail and viande (FNCBV), established in Paris (France), represented by R. Collin, M. Ponsard and N. Decker, lawyers,

applicant in Case T-217/03,

Fédération nationale des syndicats d'exploitants agricoles (FNSEA), established in Paris,

Fédération nationale bovine (FNB), established in Paris,

Fédération nationale des producteurs de lait (FNPL), established in Paris,

Jeunes agriculteurs (JA), established in Paris,

represented by B. Neouze and V. Ledoux, lawyers,

applicants in Case T-245/03,

* Language of the case: French.

supported by

French Republic, represented initially by G. de Bergues, F. Million and R. Abraham, and subsequently by M. de Bergues, E. Belliard and S. Ramet, acting as Agents,

intervener,

v

Commission of the European Communities, represented by P. Oliver, A. Bouquet and O. Beynet, acting as Agents,

defendant,

APPLICATIONS, principally, for annulment of Commission Decision 2003/600/EC of 2 April 2003 relating to a proceeding pursuant to Article 81 EC (Case COMP/C.38.279/F3 — French beef) (OJ 2003 L 209, p. 12) and, alternatively, an application for the cancellation or reduction of the fines imposed by that decision,

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

composed of R. García-Valdecasas, President, J.D. Cooke and I. Labucka, Judges,

Registrar: E. Coulon,

having regard to the written procedure and further to the hearing on 17 May 2006,

gives the following

Judgment

Legal context

1 Article 1 of Regulation No 26 of 4 April 1962 applying certain rules of competition to production of and trade in agricultural products (OJ, English Special Edition 1959-1962, p. 129) provides that Articles [81] to [86] EC and provisions made in implementation thereof shall, subject to Article 2 of that regulation, apply to all agreements, decisions and practices referred to in Articles [81](1) and [82] EC which relate to production of or trade in the products listed in Annex [I] to the Treaty, including in particular live animals and meat and edible meat offals.

2 Article 2(1) of that regulation provides as follows:

'Article 81[1] EC shall not apply to such of the agreements, decisions and practices referred to in the preceding Article as form an integral part of a national market organisation or are necessary for attainment of the objectives set out in Article [33 EC]. In particular, it shall not apply 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 [33 EC] are jeopardised.'

Facts

3 The applicant in Case T-217/03, the Fédération nationale de la coopération bétail et viande (FNCBV), comprises 300 cooperative groups of producers in the cattle, pig and sheep-farming sectors and some 30 slaughter and meat-processing groups or undertakings in France.

4 The applicants in Case T-245/03, namely the Fédération nationale des syndicats d'exploitants agricoles (FNSEA), the Fédération nationale bovine (FNB), the Fédération nationale des producteurs de lait (FNPL) and Jeunes agriculteurs (JA), are unions governed by French law. FNSEA is the main French farmers' union. Territorially it consists of local unions grouped together in departmental (département) federations or unions of farmers (FDSEA or UDSEA). In each region federations coordinate the activities of FDSEA and UDSEA. In addition, FNSEA comprises 33 specialised associations representing the interests of each type of producer, including FNB and FNPL. Lastly, JA represents farmers under 35 years of age. To be a member of the local centre of JA, it is necessary to be a member of a local union belonging to FDSEA or UDSEA.

I — *Second 'mad cow' crisis*

5 From October 2000, new cases of bovine spongiform encephalopathy, commonly known as 'mad cow' disease, were discovered in several Member States. At the same time, there was an outbreak of foot-and-mouth disease in sheep in the United Kingdom. This situation caused a loss of confidence on the part of consumers, which had an impact on meat consumption in general in Europe and created a new crisis in the beef sector. There was a sharp drop in beef consumption, particularly in France, and also a substantial reduction in French imports and exports. Likewise producer prices of adult cattle fell very considerably in France, while final consumer prices remained relatively stable.

6 To meet this crisis, the Community institutions adopted a whole series of measures. The scope of the intervention mechanisms for withdrawing certain quantities of cattle from the market so as to stabilise supply in relation to demand was extended and a scheme for the purchase of live animals was set up, together with a purchase scheme based on a tender procedure for carcasses or half-carcasses ('special purchase scheme'). In addition, the Commission authorised several Member States, including France, to grant aid to the beef sector.

7 However, those measures were deemed insufficient by French farmers. In September and October 2001 relations between farmers and slaughterers became particularly tense in France. Groups of farmers stopped lorries illegally in order to check the origin of the meat being transported and blockaded abattoirs. These acts some times led to the destruction of plant and of meat. In return for lifting the blockade of abattoirs, the protesting farmers demanded undertakings from the slaughterers to suspend imports and to apply a so-called 'union' price scale.

II — *Conclusion of the contested agreements and administrative procedure before the Commission*

8 In October 2001 several meetings took place between the federations representing beef farmers (the applicants in Case T-245/03) and those representing the slaughterers (the Fédération nationale de l'industrie et des commerces en gros des viandes (FNICGV) and the applicant in Case T-217/03). Following a meeting on 24 October 2001, organised at the request of the French Minister for Agriculture, an agreement ('Agreement of the federations of stock farmers and slaughterers on the minimum slaughterhouse entry price scale for culled cows') was concluded between the six federations, namely FNSEA, FNB, FNPL, JA, FNCBV and FNICGV.

9 The agreement had two parts. The first was a 'temporary commitment to suspend imports', which made no distinction between types of beef. The second consisted of a 'commitment to apply the slaughterhouse entry price scale to culled cows' (that is to say, cows to be used either for reproduction or milk production), the arrangements for which were set out in the agreement. Consequently it contained a list of prices per kilogram of carcass for certain categories of cows and the method of calculating the price to be applied to other categories, depending inter alia on the special purchase price set by the Community authorities. The agreement was to enter into force on 29 October 2001 and to be applied until the end of November 2001.

10 On 30 October 2001 the Commission sent the French authorities a letter requesting information on the agreement of 24 October 2001.

11 On 31 October 2001 the applicants in Case T-245/03 and FNICGV held a meeting at Rungis (France) on the initiative of the latter. Those federations adopted the following compromise ('the Rungis protocol'):

'"Meat imports" meeting

31 October 2001 – Rungis

The French undertakings specialising in the import and export sector have held a meeting with the producers' federations (FNSEA, FNB, FNPL and [JA]) that signed the national inter-trade agreement of 24 October 2001.

...

They reaffirm the imperative need to bring supply and demand back into balance ...

In the unprecedented crisis situation currently facing producers, the representatives of the farmers urge importers and exporters to be aware of the seriousness of the crisis.

In response, the importers and exporters undertake to demonstrate solidarity.'

12 On 9 November 2001, the French authorities replied to the Commission's request for information of 30 October 2001.

13 Also on 9 November 2001, the Commission wrote to the applicants in Case T-245/03 and to FNICGV requesting information pursuant to Article 11 of Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles [81] and [82] of the Treaty (OJ, English Special Edition 1959-62, p. 87). As the Commission was not at that time aware that the applicant in Case T-217/03 had also signed the agreement of 24 October 2001, the request for information was not sent to it. The five federations in question replied to the requests for information on 15 and 23 November 2001.

14 On 19 November 2001, the president of FNICGV informed the president of FNSEA that he felt obliged to bring forward to that day the final date of application of the agreement, initially scheduled for 30 November 2001.

15 On 26 November 2001, the Commission wrote a letter of formal notice to the six federations which had signed the agreement of 24 October 2001 stating that the facts which had come to its knowledge indicated that the Community competition rules had been infringed and the federations were asked to submit their observations and proposals by 30 November 2001 at the latest. The Commission's letter stated that 'failing satisfactory proposals by that date, [it] envisages initiating a procedure seeking to establish those infringements and to order that they be discontinued if the agreement has been extended, the possibility also arising of the imposition of fines, if appropriate'. The federations replied that the agreement would end on 30 November 2001 and would not be extended.

16 On 17 December 2001, the Commission carried out investigations on the premises of FNSEA and FNB in Paris pursuant to Article 14(3) of Regulation No 17 and on the premises of FNICGV, also in Paris, on the basis of Article 14(2).

17 On 24 June 2002, the Commission adopted a statement of objections addressed to the six federations. They submitted their written observations between 23 September and 4 October 2002. The federations were heard on 31 October 2002.

18 On 10 January 2003, the Commission sent the applicants a request for information within the meaning of Article 11 of Regulation No 17. In particular, it asked them for the total amount, together with a breakdown according to origin, of the income of each federation and their accounting balance sheets for 2001 and 2002, and also the turnover of their direct and/or indirect members for the latest tax year available (overall turnover and turnover connected with the production or slaughter of cattle). The applicants replied by letters of 22, 24, 27 and 30 January 2003.

III — *The contested decision*

19 On 2 April 2003, the Commission adopted decision 2003/600/EC relating to a proceeding pursuant to Article 81 [EC] (Case COMP/C.38.279/F3 — French beef) (OJ 2003 L 209, p. 12, 'the contested decision'), which is addressed to the applicants and to FNICGV.

20 According to the decision, the federations infringed Article 81(1) EC by concluding on 24 October 2001 a written agreement with a view to fixing a minimum purchase price for certain categories of cattle and suspending imports of beef into France, and by concluding, between the end of November and the beginning of December 2001, a verbal agreement having the same object, applicable as from the expiry of the written agreement.

21 At recitals 135 to 149 of the contested decision, the Commission refused to allow in the present case the exemption provided for by Regulation No 26 in favour of certain activities connected with the production of and trade in agricultural products, finding that the agreement was not necessary for attaining the objectives of the common agricultural policy set out in Article 33 EC. Furthermore, the agreement at issue was not one of the means provided for by Council Regulation (EC) No 1254/1999 of 17 May 1999 on the common organisation of the market in beef and veal (OJ 1999 L 160, p. 21) or by the measures implementing it. Lastly, the measures taken were not proportionate to the objectives allegedly sought.

22 According to the contested decision, the infringement began on 24 October 2001 and lasted at least until 11 January 2002, the expiry date of the last local agreement to apply the national agreement of which the Commission was aware.

23 In view of the nature and the geographic extent of the relevant market, the infringement was described as very serious. To determine the degree of responsibility of each federation, the Commission took into account the ratio between the amount of the annual membership fees collected by the main farmers' federation, FNSEA, and that of each of the other federations. As the infringement was of short duration, the Commission did not increase the basic amount.

24 The Commission then found that there were several aggravating circumstances in relation to the applicants:

— it increased the fines on ENSEA, JA and FNB by 30% because their members had used violence to compel the slaughterers' federations to adopt the agreement of 24 October 2001;

— it increased the fines of all the applicants by 20% by reason of the aggravating circumstance that they continued the agreement in secret after the letter of formal notice of 26 November 2001;

— it took into account the preponderant role allegedly played by FNB in the preparation and implementation of the infringement by increasing its fine by 30%.

25 In addition, the Commission took various attenuating circumstances into account:

— in view of the passive or follow-my-leader role played by FNPL, the Commission reduced its fine by 30%;

— with regard to the applicant in Case T-217/03, the Commission took into account, first, the forceful intervention of the French Minister for Agriculture in

favour of the conclusion of the agreement (30% reduction) and, second, the illegal blockading of their members' establishments by farmers (further 30% reduction).

26 In addition, pursuant to Section 5(b) of the Guidelines on the method of setting fines imposed pursuant to Article 15(2) of Regulation No 17 and Article 65(5) of the ECSC Treaty (OJ 1998 C 9, p. 3, 'the Guidelines'), the Commission took account of the specific circumstances of the case in question, particularly the specific economic context marked by the crisis in the industry, and reduced by 60% the fines resulting from the application of the abovementioned increases and reductions.

27 The operative part of the contested decision includes the following provisions:

'*Article 1*

[FNSEA], [FNB], [FNPL], [JA], [FNICGV] and [FNCBV] infringed Article 81(1) [EC] by concluding on 24 October 2001 an agreement which had the object of suspending imports of beef into France and fixing a minimum price for certain categories of cattle, and by concluding verbally an agreement with a similar object at the end of November and beginning of December 2001.

The infringement began on 24 October 2001 and continued to have effect at least until 11 January 2002.

Article 2

The federations named in Article 1 shall immediately bring the infringement to an end, in so far as they have not already done so, and shall henceforward refrain from any restrictive practice that has the same or an equivalent object or effect.

Article 3

The following fines are hereby imposed:

— FNSEA: EUR 12 million,

— FNB: EUR 1.44 million,

— JA: EUR 600 000,

— FNPL: EUR 1.44 million,

— FNICGV: EUR 720 000,

— FNCBV: EUR 480 000.'

Procedure and forms of order sought

28 By applications lodged at the Registry of the Court of First Instance on 19 and 20 June 2003, the applicants brought the present actions.

29 By application lodged on 7 July 2003, FNICGV also brought an action seeking, principally, the cancellation of a fine imposed on it by the contested decision and, alternatively, a reduction in the amount of the fine (Case T-252/03). By order of 9 November 2004, the Court dismissed the action brought by FNICGV as inadmissible.

30 By separate documents received by the Court Registry on 2 and 11 July 2003, the applicants lodged applications for interim measures seeking to secure total or partial dispensation from the obligation to provide bank guarantees, which was imposed as a condition for avoiding the immediate recovery of the amount of the fines imposed by the contested decision.

31 On 7 October 2003, France applied to intervene in each case in support of the forms of order sought by the applicants. By orders of 6 November 2003, the President of the Fifth Chamber of the Court granted leave to intervene. France lodged statements in intervention on 23 December 2003.

32 By orders of the President of the Court of 21 January 2004, a stay was granted of the applicants' obligation (save in the case of FNPL, which had made no application to that effect) to furnish bank guarantees in favour of the Commission in order to avoid the immediate recovery of the fines, for a limited period and subject to certain conditions.

33 By way of measures of organisation, the Court asked the parties on 21 February, 8 and 9 March 2006 to produce certain documents and to reply to certain questions. The parties complied within the time-limits allowed.

34 Upon the report of the Judge-Rapporteur, the Court (First Chamber) decided to open the oral procedure.

35 By order of 3 April 2006, the President of the First Chamber of the Court, after hearing the parties, ordered the joinder of Cases T-217/03 and T-245/03.

36 The parties presented oral argument and replied to questions from the Court at the hearing of 17 May 2006.

37 The applicants claim that the Court should:

— principally, annul the contested decision;

— in the alternative, cancel the fines imposed on them by the contested decision or, in the further alternative, reduce the fines;

— order the Commission to pay the costs.

38 The French Republic, intervening in support of the applicants, claims that the Court should:

— annul the contested decision;

— order the Commission to pay the costs.

39 The Commission contends that the Court should:

— dismiss the applications;

— order the applicants to pay the costs.

40 By letters of 19 and 22 May 2006, the applicants submitted to the Court documents forming part of the Commission's administrative file which had not previously been submitted to the Court in full. By order of 7 July 2006, the Court decided to reopen the oral procedure pursuant to Article 62 of the Rules of Procedure.

41 After hearing the parties, the Court adopted a measure pursuant to Article 64 of the Rules of Procedure, consisting in adding to the file the documents lodged by the applicants on 19 and 22 May 2006. The Commission submitted observations on the said documents by letter of 2 August 2006.

42 The oral procedure was then closed on 2 September 2006.

Merits of the case

43 The applicants seek primarily the annulment of the contested decision. In the alternative, they seek the cancellation or reduction of the fines imposed on them by that decision.

I — *The claims for annulment of the contested decision*

44 The applicants adduce five pleas in law in support of their claims for annulment of the contested decision. The first plea alleges manifest errors of assessment and errors of law in the assessment of the conditions for the application of Article 81(1) EC. The second plea in law alleges manifest errors of assessment and errors of law in establishing the extent and duration of the infringement. The third plea is that the exception provided for by Regulation No 26 was not applied to the disputed agreement. The fourth plea alleges infringement of the rights of the defence. The fifth plea alleges a failure to state reasons.

A — *First plea in law: manifest errors of assessment and errors of law in the assessment of the conditions required for the application of Article 81(1) EC*

45 The applicants do not deny concluding the agreement of 24 October 2001, but do deny that it gives rise to an infringement of Article 81(1) EC. The applicants in Case

T-245/03 criticise the Commission's description of them as associations of undertakings within the meaning of that provision and claim that, in the contested decision, the Commission restricted their exercise of the freedom of association. In addition, the applicant in Case T-217/03 claims that the agreement in question did not appreciably affect trade between the Member States. Lastly, in both cases the applicants submit that the disputed agreement did not entail a restriction of competition.

1. Description of the applicants as associations of undertakings

(a) Arguments of the parties

46 The applicants in Case T-245/03 submit, first, that the Commission manifestly erred in its assessment and infringed Article 81(1) EC in finding that they constituted associations of undertakings. They claim that, even if the two lower levels of their hierarchical organisations in pyramid form are taken into account (namely the department federations and local unions), their members are not undertakings but farmers' unions or federations. Likewise, the members of local unions cannot be treated as undertakings because the criterion for membership of these does not relate to the agricultural undertaking, as membership is not connected with the status of head of the farm in the case of an individual holding (the spouse of an individual farmer may become a member) or with the status of representative of the legal person in the case of farming in the form of a partnership (each partner deciding individually whether to join a local union or not). Second, the applicants consider that, in the contested decision, the Commission did not give a sufficient statement of the reasons for describing them as associations of undertakings. In particular, the Commission failed to reply to the observations put forward on that point by FNSEA during the administrative procedure.

47 The Commission observes, first, that, to determine whether the applicants are associations of undertakings, it is necessary to determine, in short, who their members are. The farmers in the present case are without any doubt undertakings within the meaning of Article 81 EC. Second, the Commission submits that the contested decision sets out in detail the reasons why it found that the applicants are associations of undertakings within the meaning of that provision.

(b) Findings of the Court

48 First of all, it must be observed that the applicant in Case T-217/03 does not dispute that the agreement of 24 October 2001 is, so far as the applicant is concerned, an agreement between associations of undertakings within the meaning of Article 81(1) EC. On the other hand, the applicants in Case T-245/03 maintain that they cannot be described as associations of undertakings within the meaning of that provision. They submit, in substance, that neither their direct members nor their indirect members are undertakings.

49 Article 81(1) EC applies to associations in so far as their own activities or those of the undertakings belonging to them are calculated to produce the results which it aims to suppress (Joined Cases 209/78 to 215/78 and 218/78 *Van Landewyck and Others* v *Commission* [1980] ECR 3125, paragraph 88). Having regard to the purpose of that provision, the concept of an association of undertakings must be understood as being capable of applying to associations which themselves consist of associations of undertakings (see, to that effect, Case T-193/02 *Piau* v *Commission* [2005] ECR II-209, paragraph 69; see also, by analogy, Case T-136/94 *Eurofer* v *Commission* [1999] ECR II-263, paragraph 9).

50 In the present case, the applicants concluded the disputed agreements in the interest and on behalf of, not their direct members, which are actually farmers' federations or unions, but the farmers who are the basic members of the latter. Accordingly the agreement of 24 October 2001, entitled 'Agreement of the federations of stock farmers and slaughterers', was concluded by the 'federations representing stock farmers', 'with the aim of opening prospects for a new relationship in the sector for fair and legitimate remuneration of all those involved, stock farmers and undertakings'. Likewise, the Rungis protocol expressly refers to 'the producers' federations'. Therefore it must be concluded that the Commission was right to take into consideration the indirect or basic members of the applicants in Case T-245/03, namely farmers, in order to determine whether they constituted associations of undertakings within the meaning of Article 81(1) EC.

51 Consequently, it is necessary to ascertain whether the Commission was correct in taking the view that farmers, the basic or indirect members of those applicants, could be regarded as undertakings for the purpose of applying Article 81 EC.

52 It has consistently been held that, in the context of competition law, the concept of an undertaking encompasses every entity engaged in an economic activity, irrespective of its legal status and the way in which it is financed (Case C-55/96 *Job Centre* [1997] ECR I-7119, paragraph 21). Any activity consisting in offering goods and services on a given market is an economic activity (Case T-513/93 *Consiglio Nazionale degli Spedizionieri Doganali* v *Commission* [2000] ECR II-1807, paragraph 36).

53 The activity of farmers, whether arable or stock farmers, is certainly of an economic nature. Their activity is indeed the production of goods which they offer for sale in return for payment. Consequently, farmers constitute undertakings within the meaning of Article 81(1) EC.

54 Therefore the unions which bring them together and represent them, and the federations which bring the unions together, may be described as associations of undertakings for the purpose of applying that provision.

55 This conclusion cannot be undermined by the fact that local unions may also bring together farmers' spouses. First, the spouses of arable or stock farmers who are themselves members of a local farmers' union probably share in the tasks of the family farm. Second, in any case the mere fact that an association of undertakings may also bring together persons or entities that cannot be described as undertakings is not sufficient to affect its status as an association within the meaning of Article 81(1) EC. Likewise, the applicants' argument that, where a farm takes the form of a partnership, it is not the partnership that, through its representative, joins the union, but each of the partners, must be dismissed. As stated above (see paragraph 52), what is important for the purpose of classifying an undertaking is not its legal status or the form of farm in question, but the activity of the farm and those who share in it.

56 Lastly, it is also necessary to dismiss the objection that the obligation to state reasons was not fulfilled on the ground, in substance, that, in the contested decision, the Commission did not reply to the observations submitted by FNSEA during the administrative procedure against its categorisation as an association of undertakings.

57 It must be observed that, although Article 253 EC requires the Commission to state the elements of fact and law which constitute the legal basis of the decision and the considerations which led it to adopt the decision, it is not required to discuss all the issues of fact and law which have been raised by every party during the administrative proceedings (Joined Cases T-305/94 to T-307/94, T-313/94 to T-316/94, T-318/94, T-325/94, T-328/94, T-329/94 and T-335/94 *Limburgse Vinyl Maatschappij and Others* v *Commission* [1999] ECR II-931, paragraph 388).

58 In the present case, the contested decision sets out briefly the argument of FNSEA that it is neither an undertaking nor an association of undertakings but a trade union, and also the arguments of FNPL and JA in that connection (see recital 97, second indent, recital 98 and recital 99, second indent, of the contested decision). Those arguments are dismissed in detail in the contested decision. Accordingly, it is explained that the applicants represent farmers who engage in the activity of producing goods which they offer for sale, that Regulation No 26 would serve no purpose if they were not also undertakings (recital 105 of the contested decision), that the fact that the applicants take the form of trade unions within the meaning of the French Labour Code does not affect their status as associations of undertakings (recitals 110 and 111 of the contested decision), that their trade union activity does not entitle them to disregard the rules of competition and that penalties have been imposed on similar organisations by the French Competition Board (see recitals 112 to 114 of the contested decision). Lastly, the contested decision also refers to previous decisions of the Commission and the relevant case-law (recitals 104 and 106 of the contested decision).

59 In the light of the foregoing, it must be held that the Commission gave sufficient reasons, in the contested decision, for categorising the applicants as associations of undertakings.

60 Consequently, this complaint must be rejected in its entirety.

2. No appreciable effect on trade between Member States

(a) Arguments of the parties

61 The applicant in Case T-217/03 submits that the Commission did not prove that the disputed agreement had an appreciable effect on trade between Member States. The

applicant claims that the part of the agreement relating to the suspension of imports was immediately called into question by the Rungis protocol and that, in any case, the applicant was importing hardly any beef cattle and was therefore not concerned in that aspect. The applicant brings together stock farmers' cooperatives which themselves have slaughtering subsidiaries, the cooperatives collecting and marketing almost exclusively beef produced by their members. Furthermore, the Commission could not base such an effect on trade on no more than an analysis of the potential effects of the agreement, but ought to have examined its real effects. An analysis of trends in the market during the period in question does not show that the agreement produced effects on flows of imports. With regard to minimum selling prices, the applicant observes that the agreement remained in force for nearly one month and submits that its brief duration prevented it from affecting imports into France.

62 The Commission maintains that an agreement with the object of limiting imports is by nature likely to affect trade between Member States. It also claims that the agreement on prices was also likely to affect trade within the Community.

(b) Findings of the Court

63 Article 81(1) EC applies only to agreements which may affect trade between Member States. For an agreement between undertakings to be capable of affecting trade between Member States, it must be possible to foresee with a sufficient degree of probability and on the basis of objective factors of law or fact that it may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States, such as might prejudice the realisation of the aim of a single market between the States (Case C-359/01 P *British Sugar* v *Commission* [2004] ECR I-4933, paragraph 27, and Joined Cases T-213/95 and T-18/96 *SCK and FNK* v *Commission* [1997] ECR II-1739, paragraph 175).

64 In the present case, the agreement of 24 October 2001 contained an undertaking to suspend temporarily imports of beef into France. As the contested decision points out, France is one of the main beef importers in the Community. Most of these imports (approximately 95%) are from other Member States (recital 11 of the contested decision). It follows that the disputed agreement was necessarily capable of affecting trade between Member States.

65 This conclusion cannot be refuted by the applicant's argument that the part of the agreement of 24 October 2001 entitled 'Imports' was dropped only a few days later, on the conclusion of the Rungis protocol of 31 October 2001. Any agreement that fulfils the conditions for the application of Article 81(1) EC falls within the scope of that provision. In any case, as will be found below (see paragraph 136), the Rungis protocol, entitled '"Meat imports" meeting', expressly related to imports and did not entail the complete abandonment of the import suspension measures decided upon by the applicants.

66 The applicant's argument that the 'Imports' part of the agreement was of no concern to it because its members import hardly any beef cattle must also be rejected. According to the figures produced by the applicant, its members' imports represent a percentage of the total beef imports into France which, although small, is not entirely negligible (approximately 1.5% in 2001, that is to say, 3 865 tonnes). At the hearing, the Commission maintained that the applicant's members had imported larger quantities of beef in the past (15 000 tonnes in the year before the beginning of the crisis), which was not denied by the applicant. It must also be observed that, although it is true that the applicant's cooperative members collect and market the beef produced by their members, they may also market, up to a limit of 20% of their annual turnover, the production of farmers who are not members. Lastly, in any

case, as the infringement in which the applicant participated was apt to affect trade between Member States, the Commission was not required to demonstrate that the applicant's individual participation affected intra-Community trade (see, to that effect, Case T-14/89 *Montedipe* v *Commission* [1992] ECR II-1155, paragraph 254).

67 In addition, it must be observed that the part of the disputed agreement relating to the establishment of a minimum price scale was alone capable of affecting intra-Community trade. Practices restricting competition which extend over the whole territory of a Member State have, by their very nature, the effect of reinforcing compartmentalisation of national markets, thereby holding up the economic interpenetration which the Treaty is intended to bring about (*SCK and FNK* v *Commission*, paragraph 179). In this connection, it is necessary to determine the relative extent of the restrictive practice in the relevant market and the economic context of that practice. In the present case, it should be noted that French cattle numbers account for more than 25% of the total cattle population in the Community (recital 10 of the contested decision). Lastly, the Court of Justice has held that, where the market concerned is susceptible to imports, the members of a national price cartel can retain their market share only if they defend themselves against foreign competition (*British Sugar* v *Commission*, paragraph 28).

68 Lastly, contrary to the applicant's assertions, the Commission had no obligation to show that the disputed agreement had an appreciable effect, in practice, on trade between Member States. As indicated in paragraph 63 above, Article 81(1) EC requires only that anti-competitive agreements and concerted practices should be capable of having an effect on trade between Member States (see also *Montedipe* v *Commission*, paragraph 253).

69 Consequently, this complaint must be dismissed.

3. No restriction of competition

(a) Arguments of the parties

70 The applicants submit, in substance, that the disputed agreement did not restrict competition and therefore did not fall within the scope of Article 81(1) EC.

71 The applicants submit that the Commission erred in finding that the agreement in question had an anti-competitive object. They claim that the Commission could not ascribe to them the 'Imports' part of the agreement and ought to have reasoned solely on the basis of the restriction of price competition, if any. However, the disputed scale prices were set on the basis of the intervention prices laid down by the Commission itself in the framework of the common organisation of the market (CMO) in the beef sector, which constitute the market reference and are very low. Furthermore, the agreement had only very limited actual effects, or none at all, for a very brief period, with no repercussions on consumer prices.

72 The applicants also allege that the agreement of 24 October 2001 concerned only a minimum recommended price, to which the applicants could not compel their members to adhere. In the case of a vertical agreement, the fixing of recommended prices is not by nature a restriction of competition. Article 4(a) of Commission Regulation (EC) No 2790/1999 of 22 December 1999 on the application of Article 81(3) [EC] to categories of vertical agreements and concerted practices (OJ 1999 L 336, p. 21), prohibits only the fixing of the resale price to a buyer whereas, in the present case, the slaughterers remain free to determine their prices to large retailers or to wholesalers. Lastly, the applicants draw attention to the specific features of the farming sector, which does not permit the lasting emergence of a spontaneous

balance between supply and demand and which needs regulation by means other than those of the market, as the competition rules do not apply to it automatically. In support of their arguments, the applicants in Case T-245/03 annex to their application a legal opinion dated 2 June 2003.

73 In addition, the applicants observe that, when the Commission examines a restriction of competition, it must take into account the overall legal and economic context in which the disputed agreement was concluded and they add that not every agreement between undertakings which restricts the freedom of action of the parties or of one of them necessarily falls within the prohibition laid down in Article 81(1) EC (Case C-309/99 *Wouters and Others* v *Commission* [2002] ECR I-1577, paragraph 97). An agreement which has an anti-competitive object or effects escapes the prohibition if it enables different objectives to be safeguarded, provided that the restrictive effects are necessary for safeguarding those objectives and that they do not eliminate all competition in a substantial part of the common market. Therefore the Commission ought to have carried out a detailed and concrete analysis of the nature and object of the agreement in question, as well as its effects, which it failed to do.

74 The applicants also submit that the Commission underestimated the situation of extreme crisis in which French farmers of adult cattle found themselves at the material time. The applicants add that the prices of cattle concerned by the disputed agreement fell in 2001, on average, to their lowest level since 1980 and that the prices paid to producers after the deduction of marketing costs fell below the cost of production, even after deduction of the aid received. European consumption of beef fell by nearly 10% in 2001, which directly affected French farmers, who risked disappearing from the market.

75 The applicants also claim that the successive Community measures were found inadequate to meet the crisis. In particular, the special purchase scheme operates

only at the slaughterhouse exit stage, whereas producers' income is affected only at the slaughterhouse entry stage. Therefore the repercussions on producers of the price measures taken by the Community necessarily go through an inter-trade agreement between producers and slaughterers.

76 In that connection the applicants in Case T-245/03 submit that the Commission ought to have examined the agreement of 24 October 2001 as a regulatory document and they observe that the coordinated management between the State and the union federations is traditional in the farming sector in France. The applicants responded to the French Government's express and public request, the aim of which was to avoid an economic disaster for beef producers which could lead to the break-up of the beef sector and which was already causing serious public disorder. The applicants note that the French Minister for Agriculture was the instigator of the agreement and that, in a statement to the French Parliament, he expressed his support for the progress in drawing up the agreement.

77 The Commission observes that, as the parties to the disputed agreement had agreed to wall off the national markets and to set minimum prices, it had to be concluded that the very aim of the agreement was to restrict competition. The Commission submits that, in any case, it took account of the economic and legal context of the agreement in the contested decision. The Commission adds that a number of measures were put into place at Community level to obviate the crisis. Lastly, the Commission submits that the encouragement given by the then French Minister for Agriculture to conclude the agreement does not relate to a regulatory power of any kind.

78 Furthermore, the Commission asks the Court to reject as inadmissible the legal opinion produced as an annex by the applicants in Case T-245/03. Annexes to pleadings have a purely evidential and instrumental purpose (Case T-31/99 *ABB Asea Brown Boveri* v *Commission* [2002] ECR II-1881) and the questions of Community law must be examined by the legal representatives in the procedural documents themselves.

(b) Findings of the Court

79 First of all, the Commission's application for the rejection of the legal opinion produced by the applicants in Case T-245/03 as inadmissible must fail. It must be observed that all the documents lodged with the application are necessarily placed on the file. Whether the applicant may plead certain of those documents or whether the Court may take them into consideration is a different question. It must be observed that the body of the application may be supported and supplemented on specific points by references to extracts from documents annexed to it, provided that the essential submissions in law appear in the application itself (see, to that effect, Case T-87/05 *EDP* v *Commission* [2005] ECR II-3745, paragraph 155, and Case T-209/01 *Honeywell* v *Commission* [2005] ECR II-5527, paragraph 57). In the present case, the Court considers that the applicants sufficiently explained in their pleadings their argument that the disputed agreement should be regarded as a regulatory measure. Therefore the annex in question serves only to support and supplement that argument. Consequently, the applicant was entitled to plead it.

80 With regard to the complaint raised by the applicants, they submit, in substance, that the disputed agreement had neither the object nor the effect of preventing, restricting or distorting competition in the single market within the meaning of Article 81(1) EC.

81 It must be observed straightaway that the agreement concluded by the parties on 24 October 2001 provided, first, for a commitment for the temporary suspension of beef imports into France and, second, for a commitment to apply a minimum slaughterhouse entry price scale to culled cows. Contrary to the applicants' claim, and for the reasons set out in paragraphs 65 and 66 above, an examination of the question whether the disputed agreement was restrictive must take into account not only those of the abovementioned measures relating to prices, but also those aiming at the suspension of imports.

82 Accordingly it must be observed, first, that the commitment in the disputed agreement to suspend imports had, in particular, the object of preventing the entry into France of beef at prices below those of the price scale decided upon by the applicants, in order to ensure the sale of the production of French farmers and the effectiveness of the price scale. It necessarily follows that the object of the disputed agreement was to partition off the French national market and in that way to restrict competition in the single market.

83 Second, with regard to the establishment of a price scale, it must be borne in mind that Article 81(1) EC expressly provides that measures which directly or indirectly fix purchase or selling prices constitute restrictions of competition. It has consistently been held that price fixing is a patent restriction of competition (Case T-148/89 *Tréfilunion* v *Commission* [1995] ECR II-1063, paragraph 109, and Joined Cases T-374/94, T-375/94, T-384/94 and T-388/94 *European Night Services and Others* v *Commission* [1998] ECR II-3141, paragraph 136).

84 In the present case, the applicants agreed on a slaughterhouse entry price scale for certain categories of cattle, which provided for a list of prices per kilogram of carcass for certain categories of cows and the method of calculating the price to be applied to other categories, by reference inter alia to the price fixed by the Community authorities in the framework of the special purchase scheme. Contrary to what the applicants claim, it is clear from the actual wording of the relevant stipulations of the disputed agreement that the prices were not recommended or target prices, but minimum prices to which the signatory federations undertook to secure adherence. The agreement provided that 'the contributions should at least be consistent with this scale.' Likewise, in a message of 8 November 2001 from the applicants in Case T-245/03 to their members, taking stock of the situation with regard to the application of the agreement of 24 October 2001, reference is made to the application of the 'minimum price scale'.

85 By its very nature, an agreement such as that in the present case, concluded by federations representing farmers and federations representing slaughterers and

fixing minimum prices for certain categories of cows, with the aim of making them binding on all traders in the markets in question, has the object of restricting competition in those markets (see, to that effect, Case 123/83 *BNIC* [1985] ECR 391, paragraph 22), inter alia by limiting artificially the commercial negotiating margin of farmers and slaughterers and distorting the formation of prices in the markets in question.

86 This conclusion cannot be undermined by the applicants' argument that the agricultural markets are regulated markets where the competition rules do not automatically apply and where the formation of prices quite often does not answer to the free operation of supply and demand. No doubt the agricultural sector has certain specific features and is the object of very detailed regulation which is frequently rather interventionist. However, it must be observed that the Community competition rules apply to the markets for agricultural products, even if certain exceptions are provided for to take account of the particular situation of those markets, and this will be examined in the context of the third plea.

87 Likewise, the applicants cannot use the argument that the prices of the disputed scale were not restrictive because they were fixed by reference to the prices of the special purchase scheme which were laid down by the Commission itself. The comparative tables produced by the parties at the request of the Court show that, although the prices laid down by the agreement for cows of average or inferior quality were fixed by reference to the prices given in the framework of the special purchase scheme, the prices fixed by the agreement for cows of superior quality (which accounted for 30% of the number slaughtered in 2001) were appreciably higher than the abovementioned intervention prices. In any case, the disputed agreement does not cease to be restrictive merely because the minimum prices are fixed by reference to the government intervention price. Reference to the latter price does not mean that the disputed scale loses its anti-competitive object consisting in fixing directly and artificially a predetermined market price or that it can be treated in the same way as the various government support and intervention schemes in the common organisation of the agricultural markets which have the object of stabilising markets characterised by excess supply by means of withdrawing a part of production.

88 The applicants also allege that, under Article 4(a) of Regulation No 2790/1999, in a vertical agreement only the restriction of the buyer's ability to determine his sale price is prohibited and they claim that the price scale established by the disputed agreement did not limit the slaughterers' ability to determine their prices to their customers. However, this reference to Regulation No 2790/1999 is not relevant in the present case. Article 3 of the regulation excludes from the scope of the exemption by category laid down in favour of vertical agreements cases where the supplier's market share exceeds 30% of the relevant market. The Commission observed, without being contradicted by the applicants, that the production of the members of the stock farmers' federations substantially exceeded the limit of 30% of the French beef market.

89 With regard to the applicants' allegation that they could not compel their members to adhere to the minimum prices decided upon, it must be said that, for an agreement between undertakings to fall within the ambit of Article 81(1) EC, it is not necessary for the associations in question to be able to compel their members to fulfil the obligations imposed on them by the agreement (see, to that effect, Case 71/74 *Frubo* v *Commission* [1975] ECR 563, paragraphs 29 to 31). Furthermore, it must be noted that the reference to the judgment in *Wouters and Others*, is irrelevant here because the factual circumstances and the legal problems raised by that case, which concerned the regulation by a professional association of the practice of the profession of lawyer and its organisation, are not comparable with those of the present case.

90 Furthermore, the applicants cannot justify the disputed agreement by pleading the crisis in the beef sector at the material time, which particularly affected French farmers of adult cattle. This circumstance cannot, on its own, lead to the conclusion that the conditions for applying Article 81(1) EC were not fulfilled (see, to that effect, *Limburgse Vinyl Maatschappij and Others* v *Commission*, paragraph 740). In any case, it must be observed that, in its assessment, the Commission did not

disregard the crisis throughout the sector, as is clear from paragraphs 10 to 15 and 130 of the contested decision. In addition, the Commission took it into account in determining the fines which were reduced by 60%.

91 The applicants must also fail in their argument that the disputed agreement was a national regulatory measure which accorded with the traditional practice in France of management coordinated between the administration and the farmers' federations and which was justified by the ineffectiveness of the measures adopted by the government authorities. In this connection it must be observed that, first, the legal framework within which agreements covered by Article 81 EC are made and the classification given to that framework by the various national legal systems are irrelevant as far as the applicability of the Community rules on competition are concerned (*BNIC*, paragraph 17). Second, it must be borne in mind that, at the hearing, the representatives of the French Republic contended that the disputed agreement could not fall within the scope of joint management by the administration and the farmers' federations because such management takes the form of representation of the latter on national and Community advisory bodies. Third, and lastly, it must be observed that the alleged inadequacy of government measures to deal with the problems of a particular sector cannot justify the private operators concerned in engaging in practices contrary to the competition rules or in claiming to arrogate to themselves rights which are those of public authorities, either national or Community, in order to substitute their own measures for those of the authorities.

92 Likewise, with regard to the role of the French Minister for Agriculture in the conclusion of the agreement of 24 October 2001, suffice it to note that, according to settled case-law, the fact that conduct on the part of undertakings was known, authorised or even encouraged by national authorities has no bearing, in any event, on the applicability of Article 81 EC (Case T-7/92 *Asia Motor France and Others* v *Commission* [1993] ECR II-669, paragraph 71, and *Tréfilunion* v *Commission*, paragraph 118).

93 Lastly, the applicants' argument that the Commission failed to show that the disputed agreement had any effect on imports or on market prices must also be rejected. It has consistently been held that, for the purposes of application of Article 81(1) EC, there is no need to take account of the actual effects of an agreement when it has as its object the prevention, restriction or distortion of competition within the common market. Consequently, it is not necessary to show actual anti-competitive effects where the anti-competitive object of the conduct in question is proved (*Limburgse Vinyl Maatschappij and Others* v *Commission*, paragraph 741, and Case T-62/98 *Volkswagen* v *Commission* [2000] ECR II-2707, paragraph 178). As has just been found, the Commission proved that the disputed agreement had the object of restricting competition in the markets in question (see paragraphs 82 to 85 above). The Commission was therefore not required to examine the actual effects of those measures on competition within the common market, particularly in France.

94 Consequently, this complaint must be dismissed.

4. Classification of trade union activities

(a) Arguments of the parties

95 The applicants in Case T-245/03 submit that the Commission manifestly erred in its assessment in limiting, so far as they are concerned, the freedom of association in trade unions, recognised by Article 12(1) of the Charter of Fundamental Rights of the European Union, proclaimed at Nice on 7 December 2000 (OJ 2000 C 364, p. 1). In particular, the Commission overlooked the specific management functions of French farmers' unions. The Commission was also seriously imprecise when it

demanded that the penalised federations should refrain in future from any agreement, concerted practice or decision which may have an object or effect similar to the infringement alleged against them, whereas a trade union is required to organise concerted action among its members to defend their collective interests.

96 The Commission submits that the fact that the applicants are trade unions does not mean that the competition rules, which are requirements of public policy, do not apply to them.

(b) Findings of the Court

97 Pursuant to Article 3(1)(g) and (j) EC, the activities of the Community include at one and the same time a system ensuring undistorted competition in the internal market and a policy in the social sphere. Article 137(1)(f) EC thus states that the Community is to support and complement the activities of the Member States in the field of the representation and collective defence of the interests of workers and employers, and Article 139(1) EC provides that the dialogue between management and labour at Community level may lead to contractual relations. Article 81(1) EC, for its part, prohibits agreements which have as their object or effect the prevention, restriction or distortion of competition within the common market. That article constitutes a fundamental provision which is essential for the accomplishment of the tasks entrusted to the Community and, in particular, for the functioning of the internal market (Case C-126/97 *Eco Swiss* [1999] ECR I-3055, paragraph 36).

98 The Court of Justice has held that, although certain restrictions of competition are inherent in collective agreements between organisations representing employers and

workers, the social policy objectives pursued by such agreements would be seriously undermined if management and labour were subject to Article 81(1) EC when seeking jointly to adopt measures to improve conditions of work and employment. It therefore follows from an interpretation of the provisions of the Treaty as a whole which is both effective and consistent that agreements concluded in the context of collective negotiations between management and labour in pursuit of such objectives must, by virtue of their nature and purpose, be regarded as falling outside the scope of Article 81(1) EC (Case C-67/96 *Albany* [1999] ECR I-5751, paragraphs 59 and 60). On the other hand, the Court of Justice has ruled that the latter provision was applicable to inter-trade agreements concluded by organisations representing producers, cooperatives, workers and industries within a body governed by public law (*BNIC*, paragraphs 3 and 16 to 20, and Case 136/86 *BNIC* [1987] ECR 4789, paragraphs 3 and 13).

99 In the present case, the Court of First Instance considers that the nature and object of the disputed agreement do not justify its exclusion from the scope of Article 81(1) EC.

100 First, it must be observed that the agreement is not a collective agreement and was not concluded by organisations representing employers and workers. There is no employment relationship at all between farmers and slaughterers because farmers do not work for and under the direction of slaughterers, nor are they incorporated into the slaughterers' undertakings (see, to that effect, Case C-22/98 *Becu and Others* [1999] ECR I-5665, paragraph 26). On the other hand, as the Court has already found, farmers may be deemed to be undertakings for the purpose of Article 81(1) EC (see paragraph 53 above). Consequently, the disputed agreement is an inter-trade agreement between two links of the production chain in the beef sector. Second, the agreement does not relate to measures for improving conditions of work and employment, but to the suspension of beef imports and the fixing of minimum prices for certain categories of cows. The object of those measures, in the present case, is to restrict competition in the single market.

101 It follows that, although the applicants in Case T-245/03 may undoubtedly, as federations of agricultural trade unions, legitimately defend the interests of their members, they cannot in the present case plead the freedom of association in trade unions to justify specific actions which are contrary to Article 81(1) EC.

102 The applicants must also fail in their argument that, by requiring them, in Article 2 of the contested decision, to refrain in the future from any restrictive practice that has the same or an equivalent object or effect, the Commission obstructed them in their mission, as trade unions, of bringing to a successful conclusion concerted action for the defence of their collective interests. By requiring the applicants to refrain from repeating the acts at issue and from adopting any similar measures, the Commission merely indicated the consequences, regarding their future conduct, of the finding of illegality in Article 1 of the contested decision (see, to that effect, Joined Cases T-45/98 and T-47/98 *Krupp Thyssen Stainless and Acciai speciali Terni* v *Commission* [2001] ECR II-3757, paragraph 311). Furthermore, that requirement is sufficiently specific and is based on the factors which led the Commission to find that the acts at issue were illegal, so that it is clear that the requirement does not relate to the applicants' general trade union activities.

103 It follows that this complaint must be rejected.

104 Consequently, this plea is dismissed.

B — *Second plea in law: manifest errors of assessment and errors of law in assessing the extent and duration of the infringement*

105 The applicants dispute the extent and duration of the infringement found by the Commission. First, they submit that the 'Imports' part of the agreement of

24 October 2001 came to an end when the Rungis protocol was signed on 31 October 2001. Second, they deny that the written agreement of 24 October 2001 was extended by a verbal agreement with the same object.

1. Preliminary questions

(a) The taking into account of local agreements

Arguments of the parties

106 The applicants submit that the Commission could not take agreements concluded at local level by individual unions of farmers and slaughterers as its basis for determining the duration of the infringement alleged against the national federations. They observe that the burden of proof of the duration of an agreement rests with the Commission and that, if the Commission has chosen to rely on direct documentary evidence to establish the infringement and participation in it, the Commission cannot presume that a party continued to adhere to the agreement beyond the point at which it was last shown to have participated in an implementing measure (Joined Cases T-25/95, T-26/95, T-30/95 to T-32/95, T-34/95 to T-39/95, T-42/95 to T-46/95, T-48/95, T-50/95 to T-65/95, T-68/95 to T-71/95, T-87/95, T-88/95, T-103/95 and T-104/95 *Cimenteries CBR and Others* v *Commission* [2000] ECR II-491, paragraphs 4281 to 4283).

107 The applicants observe that they are not signatories of the local agreements in question because those agreements were concluded by separate legal entities, namely the department farmers' federations, the department JA or the local unions. The local agreements, particularly those concluded from 30 November 2001, were the exclusive result of action by the latter and depend on their ability to obtain

minimum prices from their buyers. On this point the applicants refer to the handwritten notes made by the director of FNB at the meeting of 29 November 2001 ('negotiate your scales regionally'). The fact that the scale of reference prices was sent by FNB to the department federations which asked for it does not confute this finding because the price scale was sent in the context of local negotiations conducted by those federations, and not in the framework of the national agreement. On 11 December 2001 Mr E. C., one of the directors of FNB, sent the price scale to a department federation, expressly pointing out that it had not been renewed by an agreement. Lastly, the applicants dispute the Commission's argument that the text of the agreements was taken almost word for word from the national agreement.

108 The applicants add that the signatories to those agreements did not take part in the administrative procedure before the Commission. The applicants were unable to reply in their place and stead. Consequently, it is contrary to the rights of the defence and to Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) that those documents were not left out of consideration.

109 The Commission replies that, in assessing the duration of the infringement, it could properly take account of the numerous local agreements concluded after the agreement of 24 October 2001 was signed. The disputed agreement was mainly implemented in the form of the local agreements, particularly after the written agreement expired. Furthermore, all the documents relating to those agreements were seized at the applicants' premises, which shows that the national federations closely monitored the local implementation of their national agreement.

Findings of the Court

110 The applicants submit essentially that, for the purpose of determining the duration of the infringement, the Commission was not entitled to take into consideration

agreements which were not concluded by them themselves, but by department federations or by local farmers' unions on one side and the slaughterers' undertakings on the other.

111 However, it is not disputed that the local federations or farmers' unions in question were members, whether direct or indirect, of the applicants in Case T-245/03.

112 It must be observed that, following the signature of the agreement of 24 October 2001, the national farmers' unions called upon their members to implement the agreement at the local level. Thus, a letter of 25 October 2001 from the applicants in Case T-245/03 to their members, referring to the signature of the agreement on the previous day, states as follows: 'each of us must be very careful from now on to ensure strict application of the agreement throughout the country ... . We ask you also as soon as possible to obtain the signature of undertakings which have not yet signed the agreement. The commitment by undertakings also covers priority given to national supplies'. Likewise, a letter dated 13 December 2001 from the applicants in Case T-245/03 to their members contains the following passage: '... we ask the entire FNSEA network to mobilise ... to check the prices with every slaughterer so that our minimum producer guide prices are adhered to. For that purpose, please kindly arrange to contact every slaughterhouse situated in your department.' Lastly, a letter of 8 November 2001 from the same applicants to their federation members shows that the latter were required to pass to the national federations all the information concerning the measures taken so as to prepare further steps in the union strategy. That information included 'an exact, detailed list of the undertakings which have not yet signed the price scale or which have signed it but are not applying it'.

113 Therefore it is clear from the file that the applicants in Case T-245/03 encouraged their members to carry out specific acts at slaughterers' undertakings operating in

their respective areas and thus to participate in implementing the disputed agreement. Consequently, the acts of the department federations and local unions formed part of a common strategy with the national federations aimed at ensuring that the measures decided upon at national level were effective throughout France. One of the instruments of that strategy was precisely the conclusion of agreements between the local farmers' unions and the slaughterers' undertakings.

114 Thus, a fax sent on 9 November 2001 by the Lower Normandy Fédération régionale des syndicats d'exploitants agricoles (FRSEA) to FNSEA, in response to a questionnaire sent by the latter on 8 November 2001, states as follows: 'Operations and strategies for applying the price scale: ... Formal signature of a regional commitment agreement: observance of the conditions and scale prices by FRSEA (Lower Normandy) and the slaughterers. They have all given a written commitment and have returned the document to us'. Likewise, a fax of 19 November 2001 from the Finistère FDSEA to FNB contains the following passage: 'Regarding the operations concerning the (minimum) price scale ..., verbal agreements have been made with the abattoirs. The written agreement has not yet been returned to us and we have received no complaints from farmers for non-compliance with the price scale.' Lastly, a fax of 13 November 2001 from the Isère FDSEA to FNSEA and to FNB has annexed to it a standard form of local agreement entitled 'Application of the national agreement on the minimum price scale' and contains commitments to adhere to the price scale and to suspend imports temporarily 'until further national negotiation'.

115 However, the fact that those local agreements were signed by the slaughterers and not by their representative organisations at the national level (including FNICGV and the applicant in Case T-217/03) does not justify leaving those agreements out of consideration in the present case. On this point, the Court considers that the existence of a national agreement between the farmers' representatives and those of the slaughterers was a decisive factor in overcoming the resistance of the slaughterers' undertakings to accepting the local agreements submitted to them by the farmers' representatives.

116 Lastly, it is clear from the file that, contrary to the applicants' submissions, the local agreements in question often repeated, in substance, the terms of the national agreement. The local agreements frequently reproduce the national agreement word for word (see, for example, the agreement of 31 October 2001 between the Loire FDSEA and the slaughterers' undertakings of the same department).

117 In the light of the foregoing, the Court considers that those agreements cannot be regarded as the outcome of independent negotiations unconnected with the application of the national agreement. In actual fact, the agreements concluded at the local level were the extension and implementation of the disputed agreement.

118 Therefore, the Court finds that the Commission was right to take the local agreements into consideration for the purpose of assessing the extent and the duration of the infringement attributed to the applicants.

119 In addition, the applicants' argument that taking the local agreements into consideration amounted to a violation of their rights of defence must be rejected. It must be observed that the documents concerning the local agreements upon which the Commission relied in the contested decision and which were found in the course of investigations in the applicants' offices formed part of the administrative file. Therefore, the applicants had an opportunity to formulate observations on those documents during the procedure before the Commission.

(b) Organisation, selection, quotation and interpretation of the documents in the file

Arguments of the parties

120 The applicants submit that, in the contested decision, the Commission misrepresented the handwritten notes found in the office of the director of FNB, on which the Commission to a large extent relied in order to prove the extent and duration of the disputed agreement. Thus, the Commission provided the applicants with only the extracts which it selected itself, it did not arrange them chronologically and did not gather them together, so that they were mixed together with the other documents in the file. Furthermore, there is too much writing on the pages with the abovementioned notes, so that the notes are disordered and often indecipherable.

121 The applicants also dispute the accuracy or the interpretation of a large number of quotations in the contested decision on the grounds that they are incomplete, taken out of context or erroneous, that in reality they contradict the Commission's argument, that they are not dated and that the persons attending the meetings to whom reference is made cannot be identified. Lastly, the applicants submit that, in interpreting the documents in the file, the Commission reversed the burden of proof because it presumed wrongful conduct on the applicants' part and only took into consideration incriminating documents and not exculpatory documents.

122 The Commission observes that in the text of a decision it cannot quote in full all the documents on which it relies and claims that making a selection may be open to criticism only if it misrepresents the documents. The Commission rejects the applicants' further complaints.

Findings of the Court

123 The applicants do not deny that they had access to all the documents forming part of the Commission's administrative file (with the single exception of two letters exchanged between the Commission and the Permanent Representation of France to the European Union). In particular, the Commission observed, without being contradicted by the applicants, that they had access to a complete copy of the abovementioned book of handwritten notes of the director of FNB. It follows that the applicants were in a position to identify and to plead all the exculpatory evidence in exoneration contained in the file. In addition, the applicants do not allege that the Commission removed from, or failed to place in, the administrative file any exculpatory documents identified or provided by them.

124 It must also be observed that, in the contested decision, the Commission, like the applicants, often based its findings on extracts from numerous handwritten notes which were found and copied during the investigations at the applicants' offices. Most of the notes are neither signed nor dated and they are not always very legible. However, it must be observed that the fact that a document is unsigned or undated or is badly written does not impugn its evidentiary value if its origin, probable date and content can be determined with sufficient certainty (see, to that effect, Case T-11/89 *Shell* v *Commission* [1992] ECR II-757, paragraph 86).

125 In the present case, the Commission indicated in the contested decision when a document was not dated and was given an approximate date by reference to its content or context. Likewise, where only the initials of those present at meetings were mentioned, the Commission generally deduced from the context who were the persons in question. Lastly, regarding the applicants' criticism concerning the organisation and classification of the handwritten notes, the Commission explained that the documents in the file were arranged chronologically according to their date

of issue or discovery, in the case of documents found during the investigation, the latter documents having been numbered by following the order of the lists which were drawn up.

126 With regard to the applicants' complaints concerning the use and interpretation of particular items of evidence in the contested decision, they will be examined below in so far as they may call into question the Commission's findings concerning the extent and duration of the infringement.

2. The attribution to the applicants of an agreement relating to imports

(a) Arguments of the parties

127 The applicants claim that the signing of the Rungis protocol on 31 October 2001 led to the part of the national agreement concerning the suspension of imports (which had taken effect on 29 October 2001) coming to an end only two days later, on 31 October 2001. Therefore the 'Imports' part of the agreement had no time to exist and could not be attributed to the applicants.

128 The applicants submit that the Commission misrepresented the facts of the present case and manifestly erred in its assessment in finding that the Rungis protocol comprised an agreement aiming to limit the volume of imports. The undertaking given by importers and exporters in the protocol to show 'solidarity' does not aim at imports and is only a reaffirmation on the part of FNICGV, at the request of the

farmers' federations, that it would continue supplies on the conditions laid down in the price scale. The applicant in Case T-217/03 also observes that, as it was not a signatory of the Rungis protocol, it was in any case not concerned by the undertaking of 'solidarity'. Lastly, the statements by the president of FNICGV on the date of signature of the protocol confirm that the 'Imports' part had been dropped.

129 The applicants likewise submit that, in asserting that there was a necessary connection between the price scale and the suspension of imports, the Commission is confusing what the producers wanted and the true situation after the Rungis protocol. The applicants also note the very critical attitude to the 'Imports' part of the agreement of 24 October 2001, from the beginning, of importing slaughterers and importing wholesalers who were members of FNICGV, and the applicants allege that the acceptance of that part by the federation was only a token gesture and that it could not be maintained.

130 Furthermore, the applicants complain that the Commission did not take into consideration documents which prove that the agreement on imports no longer existed. They refer, first, to a letter of 8 November 2001 from the national farmers' federations to their members, from which it is clear that the agreement of 24 October 2001 related only to the application of the minimum price scale, as there is no allusion at all to any restriction whatever of imports. Second, the applicants mention a handwritten note of 14 November 2001 stating: 'limited agreement; imports continuing today; no retaliation [measures].'

131 The applicants add that the Commission identified only one local agreement concluded after the signature of the Rungis protocol and comprising a provision for the suspension of imports, namely the agreement drawn up in the department of Isère. The documents dated 9 November 2001, originating from the Lower

Normandy FRSEA, and those dated 19 November 2001 from the Finistère FDSEA, are only reports which do not show that the local agreements in question included an undertaking to suspend imports. The other local agreements referred to by the Commission are not subsequent to the Rungis protocol. For example, the agreement concluded in Loire is dated 31 October 2001.

132 Lastly, the applicants claim that examination of the trade volume curves confirms that the suspension of imports did not continue beyond 31 October 2001. They explain that the alleged falls in beef imports in November and December 2001 are due to the constant variation in the monthly quantities imported and that no causal connection can be established between that particular reduction and the existence of an alleged agreement.

133 The Commission submits that the 'Imports' part of the agreement of 24 October 2001 was not cancelled after 31 October 2001 by the Rungis protocol. The Commission claims that the protocol aimed to modify the excessively strict commitment to the total suspension of imports but, by referring to 'solidarity', led to limiting imports at better prices. According to the Commission, the applicants do not explain how a minimum price agreement could succeed if cheaper imports continued at the same time. Lastly, several local agreements concluded on or after the date of the Rungis protocol, pursuant to a national agreement, always included an undertaking to suspend imports.

(b) Findings of the Court

134 First of all, the applicants' argument that, if the 'Imports' part was dropped as a result of the Rungis protocol, that part cannot be attributed to them, must be

rejected. The fact that an infringement was of very short duration does not call into question the existence of an infringement of Article 81(1) EC.

135 Furthermore, the Court considers that, in order to be effective, a minimum price-fixing agreement needed measures for monitoring or limiting imports. In the present case, as beef from other Member States, in particular Germany and the Netherlands, was cheaper than that produced in France and, because of excess supply, the effectiveness of a price scale necessarily depended on supplies from French farmers to slaughterers' undertakings established in France. If that were not the case, not only would the price scale not have been such as to remedy the crisis for French farmers, but it could only have exacerbated it in so far as the slaughterers would have turned to products from other Member States or even non-member countries.

136 In any case, the Court considers that, contrary to the applicants' submissions, the Rungis protocol of 31 October 2001 did not completely eliminate the import suspension measures in the agreement of 24 October 2001, even though it limited them, as the Commission recognised in the contested decision.

137 The applicants' argument that the protocol related to the price scale, but not imports, must be rejected straightaway. The Rungis protocol is entitled '"Meat imports" meeting'. It states that 'the French undertakings specialising in the import and export sector have held a meeting with the producers' federations ... that signed the national inter-trade agreement of 24 October 2001'. The references in the protocol are to importers and exporters and the text does not allude to the price scale. It follows that the Rungis protocol related to the 'Imports' part of the disputed agreement. The message of 31 October 2001 from the president of FNICGV to its members confirms this conclusion.

138 It must be observed that, after some introductory remarks, the protocol contains inter alia the following passage:

'In the unprecedented crisis situation currently facing producers, the representatives of the farmers urge importers and exporters to be aware of the seriousness of the crisis.

In response, the importers and exporters undertake to demonstrate solidarity.'

139 In view of the circumstances of the present case, including the need to monitor imports to ensure the effectiveness of the price scale, which remained fully in force, the Court considers that the commitment to 'solidarity' on the part of importers and exporters must be understood, as the Commission found in the contested decision, as their agreement to limit beef imports in favour of the production of French farmers.

140 This conclusion is not undermined by the abovementioned message of 31 October 2001 from the president of FNICGV to its members, which states: 'we have found a compromise ... enabling the importers to continue their business and to ensure as well as possible the free movement of products reared and marketed by our businesses'. In view of the clear wording of the agreement of 24 October 2001 (namely 'temporary commitment to suspend imports'), to which the president of FNICGV alludes in his message, this passage remains ambiguous. He speaks of a 'compromise' and refers to ensuring the free movement of the products in question 'as well as possible', but not to totally free movement.

141 Therefore the Court considers that the Rungis protocol did not completely nullify the 'Imports' part of the disputed agreement.

142 This conclusion is not contradicted by the two documents relied on by the applicants to show that the 'Imports' part was no longer in force in November 2001.

143 With regard to the letter of 8 November 2001 from the applicants in Case T-245/03 to their members, its purpose was 'to take stock of the implementation of and compliance with the agreement in the departments two weeks after signature and one week after bringing in the minimum price scale.' As the applicants observe, that note refers only to measures for the application of the price scale. However, the mere fact that the letter does not allude to the 'Imports' part is not in itself sufficient to show that that part had been dropped.

144 With regard to the handwritten notes of 14 November 2001, originating from a section head of FNSEA, one of them states: 'limited agreement: imports continuing today; no retaliation [measures]'. However, it must be observed that, as the Commission points out, it is clear from their context that the relevant part of those notes refers to defining the strategy of the applicants in Case T-245/03, in order to prepare their reply to the Commission's request of 9 November 2001 for information (see paragraph 13 above). These are therefore documents which contain only the position of which the applicants wished to inform the Commission. In the text of these handwritten notes there are several references to 'Brussels', to 'BXL' or to the 'DG Competition'. One such reference is as follows: 'DG Competition — a FNSEA text for the end of the morning' and then 'Coordinated, if not joint, reply'. Some of these handwritten passages confirm that the extract relied on by the applicants formed part of the observations to be included in the reply to be sent to the Commission. The following phrases, situated close to the abovementioned extract in

the document in question, should be cited by way of example: 'Main points of defence' or 'defence of producers'. Consequently, it must be found that the extracts relied upon by the applicants lack the objectivity and reliability necessary for cogent evidence.

145 It must be added that several local agreements containing provisions for the suspension of imports were concluded on the same day as the signing of the Rungis protocol or thereafter. For example, a memo by the Loire FDSEA of 31 October 2001 refers to the conclusion on the same day of an agreement between FDSEA, the JA department centre and the 'department beef industry'. The memo states that 'all the undertakings invited ... signed the agreement and undertook to apply it'. However, the annexed agreement reproduces almost word for word the agreement of 24 October 2001 and includes a 'temporary commitment to suspend imports'. Likewise it is clear from the file that, in the department of Isère, at least three local agreements were concluded with slaughterers in November 2001 pursuant to the national agreement and including an obligation to suspend imports temporarily 'until further national negotiation': thus, before 13 November 2001 an agreement with the company Provi, on 13 November with the Bigard group and on 15 November with the companies Carrel and Isère Viandes et Salaisons.

146 The applicants' criticism of the use in the contested decision of documents originating from the Lower Normandy FRSEA dated 9 November 2001, and from the Finistère FDSEA dated 19 November 2001, must also be rejected. The criticism is based on the fact that the documents in question are only reports which do not show that the local agreements concerned included an undertaking to suspend imports. It must be observed, first, that the document of 19 November 2001 was not referred to by the Commission to show the existence of the 'Imports' part, but as an example of the local application of the price scale (see recital 86 of the contested decision and paragraph 114 above). Second, with regard to the document of 9 November 2001, suffice it to observe that the Commission used it only to illustrate the existence of local checks on the origin of meat (see recital 80 of the contested

decision). The document in question actually contains the following extract: 'Oren and Calvados are carrying out checks of lorries carrying imported meat: nothing to report.'

147 The applicants' submissions on the basis of a statistical analysis of the quantities of beef imported into France must also be rejected. It must be observed that, although the Commission found, in the contested decision, that the available statistics showed an appreciable decline in imports in November 2001 compared with October 2001 and in December 2001 compared with November 2001 and that import levels rose sharply in January 2002 (recital 78 of the contested decision), nevertheless the Commission concluded that the reduction in imports could not be attributed with certainty to the agreement (recital 167 of the contested decision). As the Commission did not rely on those statistical data to prove the duration of the 'Imports' part, the applicants' submissions disputing the interpretation of the figures are irrelevant. In any case, the Court considers that the statistics put forward by the applicants do not support the conclusion that the agreement relating to imports did not exist after 31 October 2001.

148 Furthermore, with regard to the argument of the applicant in Case T-217/03 that the undertaking of solidarity given in the Rungis protocol was of no concern to it because it was not a signatory, suffice it to observe that the protocol did not contain a new agreement and merely modified the original provision for the suspension of imports in the agreement of 24 October 2001, of which the applicant in Case T-217/03 was a signatory. In addition, it must be observed that, when questioned by the Court, the applicant in Case T-217/03 admitted that it did not inform its members, either upon signature of the Rungis protocol or subsequently, of the alleged removal of restrictions on beef imports. The reason it gave was that the measures relating to imports were of no concern to its members. However, it should be noted that at least some of its members imported beef cattle into France, although the quantities were relatively small by comparison with overall imports (see paragraph 66 above).

149 In the light of all the foregoing, it must be concluded that there was no error on the Commission's part in finding that, in spite of the Rungis protocol, the 'Imports' part of the agreement of 24 October 2001 was not completely dropped as from 31 October 2001.

3. Attribution to the applicants of a secret verbal agreement after the end of November 2001

(a) Arguments of the parties

150 The applicants submit that the Commission was wrong in finding that the agreement of 24 October 2001 had been extended beyond 30 November 2001 by the parties verbally and in secret.

151 They observe that the extension of an agreement can only result from evidence showing an expression of the consent of all the parties. In the present case, therefore, the Commission had to prove consensus between the producers' and the slaughterers' federations in favour of continuing the agreement. However, the slaughterers' representatives, namely FNICGV and the applicant in Case T-217/03, had every reason for not continuing it beyond the end of November 2001 after the Commission informed them that it considered that the agreement infringed Article 81 EC. Thus, on 30 November 2001, FNICGV informed its members that the agreement would not be renewed.

152 The applicants also observe that the fact that renewal of the agreement was envisaged or discussed is not sufficient to show that it was actually extended. They claim that the Commission could not take as its sole basis evidence from unilateral

statements by the farmers' federations alone, which contained only union claims. As the Commission had the burden of proof, it was required, according to the applicants, to produce documents originating from the slaughterers, confirming their agreement to maintain the price scale at the national level after 30 November 2001.

153 The applicants dispute the conclusions drawn by the Commission from the handwritten notes of the director of FNB concerning the meetings of 29 November and 5 December 2001. In their view, it is clear from those documents that at the meetings the farmers' representatives made it known that, as from December 2001, they would try, by means of union action, to induce the slaughterers to apply on the ground the prices laid down in the scale. The applicants also dispute the Commission's argument that the alleged secret continuation of the agreement also applied to imports and they point out that none of the documents referred to by the Commission relating to the two meetings of 29 November and 5 December 2001 makes the slightest reference to imports.

154 In addition, the applicants assert that the Commission attempts to prove the existence of the verbal agreement with the fact that it was secret. Though the word 'secret' was used in the notebook of FNB's representative, it is contradicted in reality by the publicity given by the farmers' federations to their union claims. The applicants observe that a secret agreement would have been of no advantage in the present context because the presidents of the signatory federations would not have been able to inform all their members of it.

155 With regard to the alleged local agreements subsequent to 30 November 2001, the Commission has identified only one, namely that concluded on 18 December 2001 by FDSEA, the JAs of the department of Sarthe and the Socopa group. That agreement alone formed the basis of the Commission's finding that the infringement continued beyond 30 November 2001. The applicants also assert that the

Commission did not have the text of that agreement, the documents referring to it mentioning only an agreement on the price scale, which therefore differed from the national agreement of 24 October 2001. In addition, the so-called 'renewed' agreements identified by the Commission do not include the date, signatures or the region in question.

156 Moreover, the applicant in Case T-217/03 submits that, as the Commission produced no written document of the slaughterers or involving them, it ought to have proved that the disputed agreement was implemented after 30 November 2001 on the basis of lists of market prices demonstrating that the price scale was adhered to. Although the Commission had tried to prove the existence of the agreement of 24 October 2001 with lists of prices at the national level for the first three weeks during which the agreement was applied, it had not produced any documents with figures relating to the alleged continuation of the agreement.

157 Lastly, the applicants observe that the Commission informed them, by letter of 26 November 2001, that only an extension of the written agreement of 24 October 2001 could give rise to sanctions. They conclude that, by fining them without having proved the existence of the verbal agreement which allegedly renewed the written agreement, the Commission not only manifestly erred in its assessment and erred in law, but failed to abide by its undertakings to the applicants, which amounts to a breach of the principle of the protection of legitimate expectation.

158 The Commission claims that an agreement within the meaning of Article 81(1) EC is not subject to any requirement of form, and an unwritten agreement may perfectly well constitute a prohibited cartel. The Commission observes that, during the second half of November 2001, the applicants still envisaged a written renewal of the agreement and maintains that, after the possibility of a written renewal was discarded, the parties agreed on the secret renewal of the agreement at two meetings on 29 November and 5 December 2001. The Commission adds that numerous

documents show that the agreement was continued after 30 November 2001 and submits that it was therefore unnecessary to prove also that it produced effects. Lastly, the Commission disputes the applicants' interpretation of its letter of 26 November 2001 and claims that, in any case, that question is irrelevant as the agreement was renewed.

(b) Findings of the Court

159 It must be borne in mind that the agreement of 24 October 2001 specified the end of November 2001 as the expiry date. However, it is clear from the contested decision that on 19 November 2001, a few days after receipt of the Commission's request for information, the president of FNICGV informed the president of FNSEA that he felt 'obliged to bring forward to today the final date of application of the agreement' (recital 54 of the contested decision). However, the file does not show that the other signatories actually brought forward the date for the end of the validity of the agreement. Furthermore, the applicants do not dispute the contention that the agreement of 24 October 2001 expired on 30 November 2001, but the fact that the agreement was renewed verbally in secret to beyond the latter date. Therefore, the Court's examination must be limited to this last question.

160 In that connection, it must be observed, as the Commission confirmed at the hearing, that the contested decision characterises the infringement in question as an agreement concluded by federations representing farmers of the one part and federations representing slaughterers of the other. Consequently, as the applicants maintain, in order to prove the existence of the alleged verbal agreement which extended or renewed the agreement of 24 October 2001, the Commission had to show that the representatives of both the farmers and the slaughterers joined in it.

161 On the other hand, the applicants must fail in their argument that the Commission based its reasoning solely on evidence originating from the farmers' representatives and ought also to have produced documents originating from the slaughterers. If other documents in the file were sufficient to show that the latter took part in the agreement, the Commission was not obliged to produce evidence originating directly from the slaughterers' representatives (see, to that effect, *Limburgse Vinyl Maatschappi and Others* v *Commission*, paragraph 512).

162 It must be observed that, for the purpose of proving the extension of the agreement of 24 October 2001 beyond the end of November 2001, in the contested decision the Commission relied on a number of documents: first, documents indicating that the renewal of the agreement was planned, even on a date after its alleged termination by FNICGV, on 19 November 2001 (recitals 46 to 53 of the contested decision); second, documents referring to an agreement of all the parties, together with an undertaking not to disclose it, at two meetings which took place on 29 November and 5 December 2001 (recitals 57 to 70 of the contested decision); third, evidence of the implementation of the agreement after the end of November 2001 (recitals 78 to 95 of the contested decision).

163 Consequently, it will be necessary to examine the evidence referred to by the Commission in the light of the applicants' complaints concerning it.

Preparation for the renewal of the agreement

164 In the contested decision, the Commission observes that during the second half of November 2001 the parties were considering renewing the disputed agreement in writing (recitals 48 to 53 of the contested decision). In particular, the Commission relied upon handwritten notes by the director of FNB and an email dated 28 November 2001 from a representative of the Brittany FRSEA to FNB.

165 First, it must be observed that the abovementioned handwritten notes refer to a working meeting held, according to the Commission, between 22 and 27 November 2001, at which the president of FNICGV, Mr L. S., was present. It appears from those notes that the future of the 'sector agreement' after the end of November 2001 was discussed in relation to the 'Prices' part as well as the 'Imports' part. During those discussions, FNICGV refused to 'continue with [the] written agreement'. The notes also envisage 'discussing legality'. The possibility of 'moving on from the agreement' was, however, examined.

166 Second, it must be observed that the email of 28 November 2001 states as follows: 'continuation of the price scale over the weeks ahead: all the slaughterers encountered said they were willing to maintain the price scale if all the operators also undertook to do so'. However, this passage only shows that certain slaughterers were prepared to maintain the price measures if an agreement to that effect was concluded.

167 It must therefore be concluded that, although the Commission was certainly entitled to use those documents to prove that the applicants had considered and discussed extending the written agreement of 24 October 2001, the documents on their own do not prove that it was actually renewed.

Renewal of the agreement at the meetings of 29 November and 5 December 2001

168 The Commission submits that, after the idea of written renewal was dropped, the parties agreed on the secret renewal of the agreement in the course of two meetings held on 29 November and 5 December 2001.

— Meeting of 29 November 2001

169 With regard to the meeting of 29 November 2001, the Commission, in the contested decision (recitals 57 to 60), begins by examining the handwritten notes of the FNB director. Those notes refer expressly to the 'meeting Thursday 29 November'. As the heading shows, the first part of the notes relates to the preparation of the applicants' reply to the Commission's request for information dated 9 November 2001. The first part includes the following passage: 'imports have continued(.) Not total compliance with the price agreement(.) The agreement, difficulties — negotiate your price scales regionally' and, most importantly, 'OK, we accept non-renewal of the agreement'. Likewise, the following words appear in a box at the top right: 'Outside information? + no more agreement? ... + price agreement'. The Court considers that, in view of their context, these passages are illustrative only of the position that the applicants proposed to adopt vis-à-vis the Commission. Therefore, contrary to the applicants' argument, these extracts do not prove that it was decided to cease applying the contested measures.

170 Later on it is stated: 'cannot be renewed as it stands, given its reprehensible character(.) Pressure should continue to apply the intervention prices (in fact, this means applying the price scale)(.) Avoid any frantic communication with one another'. This passage shows that the farmers' federations wished to continue to demand application of the minimum prices, but this time formally, as a union claim. The following comments are made: 'speak of target price. Regional price scales?' The notes also contain the following extract: 'send letter to FNICGV — FNCBV(.) FNB(:) we take note COM(,) no agreement in future but we continue our union objectives'. Lastly, the following comments are made: 'COMM. Press release(.) Price scale — anti-EEC therefore we stop, but we take action to recommend prices(,) we farmers(,) union objectives'.

171 In addition, these handwritten notes include passages which show that, contrary to the applicants' submissions, the slaughterers' representatives assented to the strategy

of aiming to continue to secure adherence to the minimum prices. Several references are made to 'LS', which is identified by the Commission as alluding to the president of FNICGV, which is not denied by the applicants. For example:

— 'Signed agreement: we cannot continue it (LS)(.) LS = OK to comply with a price set for withdrawal'. Just beneath this is a list of prices for certain categories of beef, encircled with the words 'OK agreement';

— '"Indicative price", "target-related price", "target price"(,) "remunerative price", "farmer target price", "farmer target" LS = I will write nothing/tel.'

172 These extracts likewise mention several times the initials 'FT', which appear to refer to the president of the applicant in Case T-217/03.

173 Lastly, it must be observed that, on the last page of that document ('summary') are the words: 'Good summing-up, unanimous(.) "agreement" (verbal/tel.) on compliance with the "farmer target prices."'

174 In the light of all the foregoing, the Court takes the view, contrary to the applicants, that the handwritten notes concerning the meeting of 29 November 2001 may be interpreted as meaning that the slaughterers' representatives consented to extending the application of the contested measures. Therefore the applicants must fail in their argument that the documents in question show only that the farmers' federations

wished to continue with those measures only within the framework of their union action, in the absence of and outside an agreement with the slaughterers. This argument is in fact contradicted by the contents of the notes themselves.

175 In addition, as observed in the contested decision (see recital 63), several other documents confirm that the applicants agreed verbally at the meeting of 29 November 2001 to continue the disputed agreement.

176 First, in an interview given on 4 December 2001 by the FNB vice-president, Mr G. H., to *Vendée Agricole*, available on the FNSEA internet site, he stated: 'last week, we pointed out the usefulness of this price scale in stopping the downward spiral of prices. The undertakings recognise its impact, but at the same time want to comply with the recommendations issued by Brussels. Henceforth, we will no longer speak of an inter-trade agreement on a price scale, but of a target in terms of floor prices. We still insist on the idea of a union price scale!' The FNB vice-president added: 'There is nothing in writing on this new "agreement". Just words. But extremely important in scope. The representatives of the undertakings at national level have also communicated verbally the content of our discussions.' Finally, referring to several abattoirs in Vendée, he stated: 'we are asking them if they received instructions (on the prices discussed the previous week) identical to ours from their national structures'.

177 Second, the contested decision refers, in recital 64, to a memo from the Vendée federation of 5 December 2001, which states: 'the verbal agreement reached at the end of last week by the beef sector is slow in being applied in practice in the field. ... The whole sector should communicate on this "agreement" at the beginning of the week'. After a reference to discussions between protesters and a slaughterer, the memo continues: 'the persons in charge of the abattoir had talks with (the FNICGV president). He confirmed last week's discussions.'

— Meeting of 5 December 2001

178 With regard to the meeting of 5 December 2001, held on the occasion of national beef day, it is necessary first of all to examine, as the contested decision does in recital 66, an email of 6 December 2001 from a representative of the FRSEA Brittany to the FDSEA presidents of his region. The email, which refers to 'yesterday's meeting', states as follows:

'On this aspect of the minimum prices, the FNICGV and FNCBV national presidents said that they were aware of the need to maintain market prices and to get their members to see this need. Nevertheless we will have no written agreement on this point and the maintenance of prices will depend on our capacity to exert sufficient pressure in the sector. So I suggest that as from the end of this week you should enter into contact ... with the slaughterers in your department so as to check up on their commitment to maintain prices on the existing and updated basis and to alert them to the union action which we will be able to implement as from next week in the event of any failure to comply with this commitment.'

179 The contested decision goes on to consider, in recital 67, an information bulletin issued by FNPL and sent by fax on 10 December 2001, also referring to national beef day, which 'confirmed the continuation of the price scale.' The bulletin reports that 'the representatives of the slaughterers (FT and LS) took note of the unwritten renewal of the price scale'.

180 Lastly, the contested decision refers, in recitals 68 and 69, to other passages in the handwritten notes of the FNB director, entitled 'Beef day — 5 December 2001.' Those notes contain the following extracts: 'we're to stop saying "against imports", and go to restaurants and catering','a mistake = to have stated suspension of imports in writing, but we have been rapped over the knuckles by Brussels and others in the COPA. Without putting it in writing, let us continue with "target prices" or prices below which we don't want prices [to fall]'. Likewise, just after the comments

attributed to the presidents of the applicant in Case T-217/03 and of FNICGV, the note reads: 'we can no longer put in writing, but continue'. The president of FNICGV then stated: 'we will maintain (our commitment) on PAS (special purchase price)' and 'message passed to our undertakings ... informally, the price scale will continue.' Lastly, the president of the applicant in Case T-217/03 stated in that connection: 'yes OK but it must be applied by everyone'. With regard to this last statement, contrary to the submissions of the applicant in Case T-217/03, the words 'applied by everyone' do not mean that it is impossible to apply the price scale and do not deprive the statement in question of evidential value.

Implementation of the agreement after the end of November 2001

181 In addition, the contested decision contains references to several actions at local level which confirm that the agreement continued to be applied after 30 November 2001 (recitals 92 to 94 of the contested decision).

182 In particular, a memo from the Vendée FDSEA dated 18 December 2001 states that a slaughterer (the Socopa group) agreed, after a blockade of its premises, to apply the minimum price scale for cows until 11 January 2002.

183 The file also contains two copies of a document entitled 'Agreement of 25 October 2001 (renewed)' which includes the following words: 'Signed and deemed applicable by FNSEA, FNB, FNICGV and FNCBV/SICA'. As the applicants point out, these documents are not dated. However, in recital 94 of the contested decision the Commission identified them respectively as a fax of 'FDSEA 79' of 13 December 2001 and as a document sent on the same day by the Deux-Sèvres FDSEA to a slaughterer.

184 Lastly, a fax sent by a representative of FDSEA Maine-et-Loire to the director of FNB on 11 December 2001, entitled 'Checks at Maine-et-Loire abattoirs', states: 'no abnormality found — price scale applied — no imports.'

Findings

185 In view of what has been said above, it must be found that, in the contested decision, the Commission proved to the requisite legal standard that the applicants continued to apply the disputed agreement, verbally and in secret, beyond the end of November 2001, in spite of the Commission's letters of 26 November 2001 informing them that the agreement revealed an infringement of Community competition rules.

186 This finding cannot be undermined by the applicants' arguments that the secret continuation of the agreement would render it totally ineffective. It must be observed that the file contains several references to the applicants' wish not to publicise the existence of an undertaking given by the farmers' representatives and those of the slaughterers after the expiry of the written agreement. However, the Court considers that secrecy did not render the agreement entirely ineffective, particularly as the farmers' federations continued to call in public for the price scales, but this time in the ostensible form of a union claim, and continued to inform their members of them. Likewise, the file suggests that the slaughterers' representatives also informed several slaughterers' undertakings of them verbally (see paragraph 177 above).

187 Furthermore, the Court considers that the continuation of the agreement cannot be denied solely on the basis of FNICGV's memo of 30 November 2001 stating that 'the minimum purchase price scale for culled cows concluded on 24 October 2001 has

not been and will not be renewed' and that 'this is the conclusion reached at the meeting held (yesterday) in Paris in the presence of the signatories of the agreement'. The Court considers that this statement formed part of FNICGV's public relations strategy, particularly after that federation had been warned by the Commission of the possibility of sanctions by reason of the disputed agreements. In any case, as stated above, documents subsequent to that date show that the president of FNICGV took part in the renewal of the agreement.

188 Lastly, as the Commission proved on the basis of documentary evidence that the agreement was continued, it was not necessary, contrary to the applicants' claim, to prove its continuation by examining the effects of the agreement on prices during the relevant period.

189 Therefore, the Court finds that the Commission was right to find, in the contested decision, that the duration of the infringement was from 24 October 2001 to 11 January 2002.

190 Consequently, this plea must be dismissed in its entirety.

C — *Third plea in law: non-application of the exception provided for by Regulation No 26*

1. Arguments of the parties

191 The applicants submit that the Commission infringed Regulation No 26 and that there were manifest errors of assessment and errors of law on its part in refusing to

grant the disputed agreement derogation from the application of Article 81(1) EC, as provided for by Article 2 of Regulation No 26 in favour of certain activities connected with the production and marketing of agricultural products. They maintain that the agreement in question was necessary for achieving the aims of the common agricultural policy.

192 Thus, the applicants claim that, as recognised by the contested decision, the disputed agreement had the objective of ensuring a fair standard of living for beef farmers. They add that the objective of stabilising markets was also achieved because the agreement set up a price mechanism which contributed to ending the existing disruption and enabled farmers to sell their products at profitable prices and consequently to confront the crisis without disappearing from the market. The agreement did not, however, jeopardise the objectives of increasing productivity and ensuring that supplies reach consumers at reasonable prices, in relation to which the agreement was neutral.

193 The applicants consider that in the present case the Commission ought to have tried to reconcile the various objectives (Case 5/73 *Balkan-Import-Export* [1973] ECR 1091, paragraph 24, and Joined Cases 197/80 to 200/80, 243/80, 245/80 and 247/80 *Ludwigshafener Walzmühle and Others* v *Council and Commission* [1981] ECR 3211, paragraph 41). Especially because of the exceptional crisis in the beef sector, the Commission ought to have given priority to the objectives of stabilising markets and ensuring a fair standard of living for the agricultural community. Therefore the Commission ought to have found that, to bring all the objectives listed by Article 33(1) EC into balance, it was justified to apply the derogation provided for by Regulation No 26.

194 The applicants in Case T-245/03 criticise the Commission's argument in recitals 146 and 147 of the contested decision that the fact that the measures adopted were not provided for by Regulation No 1254/1999 was sufficient to preclude application of

the derogation provided for by Article 2 of Regulation No 26. The applicant in Case T-217/03, for its part, claims that the Commission manifestly erred in its assessment and also erred in law in finding that the agreement did not fall within the scope of the objectives laid down by the CMO. The applicant submits inter alia that the agreement complied with the objectives stated in recitals 2 and 31 of Regulation No 1254/1999 and with Article 38(1) thereof.

195 Lastly, the applicants claim that the Commission manifestly erred in its assessment and also erred in law in finding that the disputed agreement was disproportionate. In addition, the Commission stated no reasons for that finding and did not explain what measures other than those provided for by the disputed agreement would have stopped the collapse in prices.

196 The Commission submits that the exception provided for by Article 2 of Regulation No 26 must be interpreted and applied restrictively. In the present case, the disputed agreement may appear appropriate, at best, for attaining only one of the five objectives specified by Article 33 EC (ensuring a fair standard of living for the agricultural community) and it has no connection with the other four. In addition, it goes beyond the framework of the CMO in the beef sector and, in any case, appears disproportionate for attaining the desired objectives. In the final analysis, the agreement does not fall within the scope of the derogation in question.

2. Findings of the Court

197 First of all, it must be observed that the maintenance of effective competition in the markets for agricultural products is one of the objectives of the common agricultural policy. Whilst Article 36 EC has conferred on the Council responsibility for determining the extent to which the Community competition rules are applicable to

the production of and trade in agricultural products, in order to take account of the particular position of the markets for those products, that provision nevertheless established the principle that the Community competition rules are applicable in the agricultural sector (Case C-137/00 *Milk Marque and National Farmers' Union* [2003] ECR I-7975, paragraphs 57 and 58).

198 By virtue of Article 1 of Regulation No 26, Article 81(1) EC applies to all agreements, decisions and practices referred to in that provision which relate to production of or trade in the agricultural products listed in Annex I to the EC Treaty, including in particular live animals, edible meat and offals, subject to the provisions of Article 2 of the same regulation. The latter provides that Article 81(1) EC does not apply to agreements, decisions and practices which are necessary for the attainment of the objectives of the common agricultural policy set out in Article 33 EC.

199 Constituting as it does a derogation from the general rule in Article 81(1) EC, Article 2 of Regulation No 26 must be interpreted strictly (Case C-399/93 *Oude Luttikhuis and Others* [1995] ECR I-4515, paragraph 23, Joined Cases T-70/92 and T-71/92 *Florimex and VGB* v *Commission* [1997] ECR II-693, paragraph 152). Furthermore, it has consistently been held that the first sentence of Article 2(1) of Regulation No 26, which provides for the exception claimed, applies only if the agreement in question is conducive to attainment of all the objectives of Article 33 (*Oude Luttikhuis and Others*, paragraph 25; *Florimex and VGB* v *Commission*, paragraph 153; see also, to that effect, *Frubo* v *Commission*, paragraphs 25 to 27). However, the Court has stated that in the event of a conflict between those sometimes divergent objectives, the Commission may try to reconcile them (*Florimex and VGB* v *Commission*, paragraph 153). Lastly, as is clear from the very wording of the first sentence of Article 2(1) of Regulation No 26, the agreement in question must be 'necessary' for the attainment of those objectives (*Oude Luttikhuis and Others*, paragraph 25; see also, to that effect, *Florimex and VGB* v *Commission*, paragraphs 171 and 185).

200 In accordance with Article 33(1) EC, the objectives of the common agricultural policy are:

'(a) to increase agricultural productivity by promoting technical progress and by ensuring the rational development of agricultural production and the optimum utilisation of the factors of production, in particular labour;

(b) thus to ensure a fair standard of living for the agricultural community, in particular by increasing the individual earnings of persons engaged in agriculture;

(c) to stabilise markets;

(d) to ensure the availability of supplies;

(e) to ensure that supplies reach consumers at reasonable prices.'

201 The applicants submit, essentially, that the disputed agreement was necessary for the attainment of two of those objectives, namely to ensure a fair standard of living for the agricultural community and to stabilise markets, and that it was neutral in relation to the remaining three, which therefore it did not adversely affect.

202 As the applicants point out, the main object of the disputed agreement was to assist beef farmers in France in the crisis situation in the beef sector at the material time. Therefore it may be regarded as having the objective of ensuring a fair standard of living for the agricultural community for the purposes of Article 33(1)(b) EC.

203 On the other hand, the Court considers that the agreement of 24 October 2001 did not aim to stabilise markets, as envisaged by Article 33(1)(c) EC; nor could it be deemed necessary for that purpose. As the contested decision states, the crisis in the beef sector in 2000 and 2001 was due to the massive imbalance between supply and demand caused primarily by the sharp drop in consumption owing to the crisis of confidence resulting from the discovery of new cases of 'mad cow' disease and foot-and-mouth disease (see recitals 12, 13 and 142 of the contested decision). Consequently, stabilisation of the markets in question required above all measures to reduce the volume of supply, of which there was a considerable surplus, and to promote the consumption of beef, which had fallen considerably.

204 The disputed agreement did not provide for measures in that respect. Furthermore, not only were the minimum prices which it laid down unlikely to help to stabilise the markets, but could even run counter to that objective to the extent that they might entail an increase in prices likely to reduce consumption even more and thus widen the gap between supply and demand. The introduction of a price scale also represented an artificial fixing of prices, contrary to their natural formation in the market and to the government support and intervention arrangements. In addition, the disputed agreement could only be a purely short-tem measure incapable of producing medium or long-term effects. The limitation of beef imports into France inevitably gave rise to a risk of distortion in intra-Community trade in beef and of adverse effects on the stability of the markets in question in a number of Member States.

205 Moreover, an agreement limiting imports of cheaper products and fixing minimum prices cannot be regarded as neutral in relation to the objective of ensuring that supplies reach consumers at reasonable prices, as envisaged in Article 33(1)(e) EC. As the Commission points out in recital 144 of the contested decision, without being contradicted by the applicants, especially in the case of consumption via restaurant and catering services, which are major users of imported meat, the suspension of imports would probably have the effect of raising prices. Furthermore, even if the scale prices were fixed at the slaughterhouse entry stage, they would also be likely to be passed on to consumers.

206 In the light of the foregoing, it must be found that the disputed agreement can be regarded as necessary only in relation to the objective of ensuring a fair standard of living for the agricultural community. On the other hand, the agreement is likely at least to jeopardise the setting of reasonable prices for supplies to consumers. Lastly, the agreement had no connection with, and was therefore all the more unnecessary for, the stabilisation of markets, ensuring the availability of supplies and increasing agricultural productivity. Therefore, in view of the case-law referred to in paragraph 199 above, the Court considers that the Commission did not err in finding that bringing those different objectives into balance did not justify the conclusion that the derogation provided for by the first sentence of Article 2(1) of Regulation No 26 was applicable in the present case.

207 Furthermore, the objections to the finding, in recitals 146 and 147 of the contested decision, that the disputed agreement is not among the means provided for by the CMO rules in the beef sector, including in particular Regulation No 1254/1999, must be rejected. Contrary to the submission of the applicants in Case T-245/03, the Commission did not find that circumstance sufficient on its own to rule out the applicability of the derogation based on Regulation No 26, but merely took that factor into account — rightly — in support of its finding that the agreement in question was not necessary for the attainment of the objectives of the common agricultural policy (see, to that effect, *Florimex and VGB* v *Commission*, paragraphs 148 to 151). Likewise, the applicant in Case T-217/03 must fail in its argument that the agreement complied with the objectives of that regulation. In particular, the

provisions listed by the applicant (namely, recitals 2 and 31 of the preamble to and Article 38(1) of that regulation) merely provide for the right of the Community institutions to take measures in the event of disturbance in the market (see Article 43 of that regulation) and in no way justify a private agreement limiting imports and fixing minimum prices.

208 Lastly, regarding the arguments concerning the proportionality of the contested measures, the complaint alleging failure to state reasons must be rejected. In recital 148 of the contested decision the Commission stated reasons to the requisite legal standard for its finding that the fixing of prices and suspension of imports were serious restrictions of competition and could not be regarded as proportionate to the aims of the agreement. Contrary to the applicants' submissions, the Commission was not required to state what measures the applicants could have taken to make their agreement comply with Article 2 of Regulation No 26. The complaint that, in examining the applicability of the derogation provided for by that provision, the Commission erred in taking into consideration the disproportionate nature of the measures laid down by the agreement, cannot be upheld either. It has consistently been held that, for the purpose of applying that derogation, measures cannot be regarded as necessary for the attainment of the objectives of the common agricultural policy unless they are proportionate (see, to that effect, *Florimex and VGB* v *Commission*, paragraph 177). In the present case, even bearing in mind the special nature of the agricultural markets and the crisis in the beef sector during the relevant period, the restriction of imports and the fixing of prices cannot be regarded as measures proportionate to the objectives pursued as they were serious infringements of competition law.

209 It follows that this plea must be dismissed.

D — *Fourth plea: infringement of the rights of the defence*

1. Arguments of the parties

210 The applicants submit that the statement of objections, which constitutes an application of the fundamental principle of observance of the rights of the defence, must be couched in terms that, albeit succinct, are sufficiently clear to enable the parties concerned properly to identify the conduct complained of, so as to enable them properly to defend themselves before the Commission adopts a final decision (Case T-352/94 *Mo och Domsjö* v *Commission* [1998] ECR II-1989, paragraph 63).

211 In the present case, first, the applicants complain that in the statement of objections the Commission did not mention that, in order to determine the amount of the fine of the federations other than FNSEA, it would take into account the annual fees paid by their members. Second, the applicants submit that in the statement of objections the Commission did not indicate in any way that it would calculate the fines by reference to the turnover of the members directly or indirectly belonging to them. The Commission thus failed to inform the applicants of the matters of fact and of law on which the contested decision was based, including the main factors for calculating the fine, and therefore the applicants were unable to submit their observations on the point.

212 The applicants observe that the Court of Justice has held that a statement of objections which merely identifies as the perpetrator of an infringement a collective entity does not make the companies forming that entity sufficiently aware that fines will be imposed on them individually if the infringement is made out and is not

sufficient to warn the companies concerned that the amount of the fines imposed will be fixed in accordance with an assessment of the participation of each company in the conduct constituting the alleged infringement (Joined Cases C-395/96 P and C-396/96 P *Compagnie Maritime Belge Transports and Others* v *Commission* [2000] ECR I-1365, paragraphs 144 to 146).

213 Lastly, the applicants claim that the Commission's letter of 10 January 2003 asking them for financial information was not sufficient to ensure observance of the rights of the defence. As the letter was subsequent to the submission of the applicants' observations and to the date when they were heard, they were not in a position to defend themselves in relation to the matters in issue. Furthermore, the letter gave no indication of the Commission's intentions.

214 The Commission observes that it has consistently been held that, in the statement of objections, it is only required to state that it will consider whether it is appropriate to impose fines on the undertakings concerned and to indicate the main factual and legal criteria capable of attracting a fine (Joined Cases 100/80 to 103/80 *Musique diffusion française and Others* v *Commission* [1983] ECR 1825, paragraph 21).

215 According to the Commission, the applicants must have been aware that their members' fees would be taken into account and they had every opportunity to submit their observations on sight of the statement of objections. It was also open to them to make their views known on the question of their members' turnover because on 10 January 2003 the Commission sent them a request for information on that point (see, to that effect, *Musique diffusion française and Others* v *Commission*, paragraph 23).

216 Lastly, the Commission disputes the relevance of the judgment in *Compagnie Maritime Belge Transports and Others* v *Commission*, relied on by the applicants.

The statement of objections in the present case made it very clear that the Commission was contemplating imposing fines on the applicants, the addressees of the statement, and not therefore on the intermediate federations or on individual farmers. In view of the case-law which takes the members of federations into consideration, the applicants could easily have realised the risk and could have defended themselves on that point in the administrative procedure.

2. Findings of the Court

217 Observance of the rights of the defence is, in all proceedings in which sanctions, in particular fines, may be imposed, a fundamental principle of Community law which must be respected even if the proceedings in question are administrative proceedings (Case T-308/94 *Cascades* v *Commission* [1998] ECR II-925, paragraph 39). In accordance with that principle, the statement of objections is an essential procedural safeguard which must set forth clearly all the essential facts upon which the Commission is relying at that stage of the procedure (*Compagnie Maritime Belge Transports and Others* v *Commission*, paragraph 142).

218 It is settled case-law that, where the Commission expressly states in its statement of objections that it will consider whether it is appropriate to impose fines on the undertakings and it indicates the main factual and legal criteria capable of giving rise to a fine, such as the gravity and the duration of the alleged infringement and whether that infringement was committed intentionally or negligently, it fulfils its obligation to respect the undertakings' right to be heard. In doing so, it provides them with the necessary means to defend themselves not only against the finding of an infringement but also against the imposition of fines (*Musique diffusion française and Others* v *Commission*, paragraph 21, and *ABB Asea Brown Boveri* v *Commission*, paragraph 78).

219 The applicants submit that the Commission ought to have mentioned in the statement of objections that it would take account of their annual fees to determine the amount of the fine imposed on the federations other than FNSEA and that it would calculate the fines according to the turnover of the applicants' members.

220 On this point it must be observed, first, that the Commission calculated the basic amount of the fines by reference to the membership fees collected by the applicants (recitals 169 and 170 of the contested decision). After establishing that the basic amount of the fine on the main farmers' federation (FNSEA) should be EUR 20 million, taking account of the gravity of the infringement, the Commission used the ratio between the amount of the annual membership fees collected by each of the other federations and that collected by FNSEA as an objective criterion of the relative size of the different farmers' federations and, consequently, of their individual degree of responsibility for the infringement. Those amounts were thus set at one-fifth (FNPL), one-tenth (FNB and FNCBV) and one-twentieth (JA) of the amount set for FNSEA.

221 Second, it must be observed that the Commission, as it acknowledged before the Court, took into account the turnover of the applicants' basic members for the purpose of verifying adherence to the 10% maximum laid down by Article 15(2) of Regulation No 17.

222 The Court of Justice has held that to give indications in the statement of objections as regards the level of the fines envisaged, before the undertaking has been invited to submit its observations on the allegations against it, would be to anticipate the Commission's decision and would thus be inappropriate (*Musique diffusion française and Others* v *Commission*, paragraph 21, and *ABB Asea Brown Boveri* v *Commission*, paragraph 66). All the more so, to raise in the statement of objections the question whether the fine which may be imposed by the final decision will

adhere to the 10% maximum would also anticipate the decision and would thus be inappropriate.

223 Furthermore, contrary to the applicants' submissions, the judgment in *Compagnie Maritime Belge Transports and Others* v *Commission* is not relevant to the present case. In paragraphs 143 to 146 of that judgment, the Court of Justice held that the Commission was required to specify unequivocally, in the statement of objections, the persons on whom fines may be imposed and held that a statement of objections which merely identifies as the perpetrator of an infringement a collective entity does not make the companies forming that entity sufficiently aware that fines will be imposed on them individually and is not sufficient to warn the companies concerned that the amount of the fines will be fixed in accordance with an assessment of the participation of each company in the conduct constituting the alleged infringement. In the present cases, the Commission did not impose sanctions on the applicants' members, whether direct or indirect, but on the applicants themselves because of their own degree of responsibility for the infringement (recital 169 and Articles 1 and 3 of the contested decision), as the Commission had announced in the statement of objections. The fact that the turnover of the members of an association of undertakings which has committed an infringement is taken into account in no way means that a fine has been imposed on them (Joined Cases T-39/92 and T-40/92 *CB and Europay* v *Commission* [1994] ECR II-49, paragraph 139).

224 In the light of the foregoing, the Court finds that the Commission did not infringe the applicants' rights of defence for having failed to indicate, in the statement of objections, that it proposed to take into account the annual fees collected by the applicants and their members' turnover for the respective purposes of calculating the basic amount of the fines and verifying the 10% upper limit laid down by Article 15(2) of Regulation No 17.

225 Consequently, this plea must be dismissed.

E — *Fifth plea in law: failure to state reasons*

1. Arguments of the parties

226 The applicants point out that the statement of the reasons on which a decision adversely affecting a person is based must be such as to enable the Community judicature to exercise its power of review as to the legality of the decision and to enable the person concerned to ascertain the matters justifying the measure adopted, so that he can defend his rights and verify whether the decision is well founded (Case T-310/94 *Gruber + Weber* v *Commission* [1998] ECR II-1043, paragraph 40).

227 The applicants submit that the contested decision makes no reference to the turnover figures which the Commission is said to have taken into account to calculate the fines, nor to verification of adherence to the 10% upper limit laid down by Article 15(2) of Regulation No 17. Thus the Commission did not mention that it had decided to calculate the upper limit on the basis of the aggregate turnover of the applicants' members, nor did it state which members were involved. However, a very detailed statement of reasons was called for in the present case, because this was the first time that the Commission had dealt with a case concerning farmers' unions and because it intended to derogate from the restrictive conditions relating to taking into account the turnover of an association's members. The Commission's request for information of 10 January 2003 could not in any case compensate for the lack of a statement of reasons. Lastly, the failure to state reasons means, according to the applicant in Case T-217/03, that the entire contested decision must be annulled, and not only the part relating to fines.

228 The French Republic observes that the contested decision does not meet the obligation to state reasons pursuant to Article 253 EC. Explanations which the Commission attempts to put forward for the first time in its statement in defence cannot rectify this situation (see, to that effect, Case T-323/99 *INMA and Itainvest* v *Commission* [2002] ECR II-545, paragraph 76).

229 The Commission contends first that this plea cannot justify the annulment of the contested decision in its entirety, but only the annulment of Article 3, as the alleged lack of a statement of reasons concerns the level of fines and does not affect the actual facts or their legal assessment. In any case, the Commission completely fulfilled the obligation to state reasons in the present case.

230 The Commission submits that that obligation is satisfied where it states the factors which it took into account to measure the gravity and the duration of the infringement for the purpose of calculating the fine (Case C-282/98 P *Enso Española* v *Commission* [2000] ECR I-9817, paragraphs 40 and 41; Case C-297/98 P *SCA Holding* v *Commission* [2000] ECR I-10101, paragraphs 56 to 65; and Case T-220/00 *Cheil Jedang* v *Commission* [2003] ECR II-2473, paragraph 218). Therefore the Commission is not required to state in its decision the turnover taken into account or what percentage thereof is levied in the form of a fine, since the question whether the 10% maximum is attained does not form part of the statement of reasons for the decision. The figure of 10% is the legal maximum limit of the fine which may be imposed and does not form part of the reasons for the measure adopted.

231 The Commission also submits that the obligation to state reasons must be assessed in its context and observes that it clearly indicated that it was proceeding on the basis of the Guidelines, Section 5(c) of which permits it to impose on an association a fine equivalent to the total of the individual fines which might have been imposed on each of its members. The applicants cannot be unaware of the principles governing the calculation of the fine, including the fact that the Commission takes into account their members' turnover in order to ensure that the 10% maximum is not exceeded. It is clear from the contested decision as a whole that the infringement was committed by the applicants not for themselves, but for the benefit of their members.

232 The Commission also observes that, on 10 January 2003, it asked each of the applicants for their members' turnover figures. The applicant in Case T-217/03 sent

the Commission the information by letter of 27 January 2003. The figures supplied by that federation showed that the 10% maximum was very far from being attained. The applicants in Case T-245/03, on the other hand, stated that they were unable to provide the information. In view of this refusal, the Commission could have adopted a decision ordering the production of the figures on the basis of Article 11(5) of Regulation No 17 accompanied, if necessary, by penalties or fines, but it simply took the view, given the available information, that there was not the slightest likelihood that the 10% maximum of the turnover of the applicants' members would be attained.

2. Findings of the Court

233 It has consistently been held that that the statement of reasons required by Article 253 EC must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted the measure in such a way as to enable the persons concerned to ascertain the reasons for the measure and to enable the competent Community Court to exercise its power of review. The requirements to be satisfied by the statement of reasons depend on the circumstances of each case, in particular the content of the measure in question, the nature of the reasons given and the interest which the addressees of the measure, or other parties to whom it is of direct and individual concern, may have in obtaining explanations. It is not necessary for the reasoning to go into all the relevant facts and points of law, since the question whether the statement of reasons meets the requirements of Article 253 EC must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question (*Cheil Jedang* v *Commission*, paragraph 216; Case T-38/02 *Groupe Danone* v *Commission* [2005] ECR II-4407, paragraph 96).

234 In the present case, the applicants complain that, in the contested decision, the Commission did not state expressly that the fines imposed did not exceed the 10%

maximum of their turnover, as laid down in Article 15(2) of Regulation No 17, and failed to state the reasons why it could take account of their members' turnover for the purpose of verifying that the maximum was not exceeded.

235 It must be observed that indeed none of the recitals of the contested decision deals with question of adherence to the maximum 10% of turnover to which fines are subject. The Commission likewise omitted to indicate that, to ensure that the 10% limit was not exceeded, it was necessary in the present case to take account of the turnover of the applicants' basic members; nor did it provide any reason for such a possibility.

236 The Commission nevertheless considers that adherence to the maximum 10% of turnover is only the legal maximum limit of the fine and does not form part of the statement of reasons of the decision.

237 It must be observed that the maximum 10% turnover referred to in Article 15(2) of Regulation No 17 refers to the turnover of the undertaking or association which committed the infringement and which, being the addressee of the decision, is thereby in a position to ensure that the limit is not exceeded. In those circumstances, no specific reasons are required with regard to the observance of the limit. However, where the Commission departs from its usual approach and, for the purpose of imposing the fine, takes into account a turnover different from that of the addressee of the decision sanctioning the infringement, such as the turnover of the members of the sanctioned association, the Commission must necessarily give a specific reason for its decision in that respect, so as to enable the addressee of the decision to ensure that the 10% limit was adhered to in the calculation of the fine.

238 Thus, where the Commission imposes a fine on an individual undertaking which is the perpetrator of an infringement, it is not necessarily required, in the absence of specific circumstances, to state express reasons for adhering to the maximum 10% of the turnover of the undertaking in question. The latter must be aware of the existence of that legal limit and the specific amount of its turnover and can then ascertain, even without any reasons in the decision in question, whether or not the 10% maximum was exceeded by the fine imposed on that undertaking.

239 On the other hand, where the Commission sanctions an association of undertakings and ensures that the legal limit of 10% of the turnover on the basis of the aggregate turnover of all or some of the members of the association is not exceeded, it must state this expressly in its decision and must set out the reasons which justify taking the members' turnover into account. If reasons are not given, the persons concerned will not know the justification for the decision and will not be able to ensure properly that the legal limit was adhered to in the particular case.

240 This conclusion is not undermined by the case-law relied on by the Commission in paragraph 230 above, according to which it is sufficient, with regard to the scope of the obligation to state reasons concerning the calculation of a fine for infringement of the Community competition rules, for the Commission to set out in its decision the factors which it has taken into account pursuant to the Guidelines and which have enabled it to measure the gravity and duration of the infringement. That case-law relates only to the question of determining the amount of the fine and not that of ensuring that the ultimate fine does not exceed the maximum 10% of the turnover of the undertaking or association sanctioned.

241 It must therefore be concluded that, in the present case, the Commission ought to have indicated in the contested decision that it had used the turnover of the

applicants' basic members, specifying whether it was the turnover of all their members or of particular categories of them, for the purpose of verifying that the fines did not exceed the legal maximum of 10%. Likewise, the Commission ought to have set out the circumstances that enabled it to take account of the aggregate turnover of the applicants' members for that purpose.

242 Nor can the Commission plead the fact that, in recital 164 of the contested decision, it indicated that it would proceed on the basis of the Guidelines. That generic reference appears in the section concerning the determination of the amount of the fines and has the sole object of drawing attention to the criteria governing the assessment of the gravity of the infringement. In addition, it must be observed that in the contested decision the Commission made no reference to Section 5(c) of the Guidelines concerning the possibility of taking into account the turnover of the members of an association.

243 Likewise, the Commission cannot rely on its letters to the applicants of 10 January 2003 requesting the turnover figures of their members. Even if it were assumed that, in the light of those requests, the applicants understood that the contested decision had taken account of their members' turnover for the purpose of calculating the 10% maximum, nevertheless the requests cannot compensate for the lack of a statement of reasons on that point in the contested decision, particularly the complete absence of any indication of the reasons why such figures could be used for verifying that the limit was not exceeded.

244 Lastly, with regard to the fact that the applicants in Case T-245/03 did not provide the Commission with their members' turnover figures, this likewise does not excuse the Commission from setting out in the body of the decision the reasons why it considered it appropriate to take account of the members' turnover and the reasons why it considered that the 10% limit had not been exceeded in the present case.

245 In the light of all the foregoing, the conclusion must be that the Commission failed to fulfil its obligation to state reasons as required by Article 253 EC.

II — *Submissions on the cancellation or reduction of the fine*

246 The applicants rely on six pleas in law in support of their application for the cancellation or reduction of the fines imposed on them by the contested decision. The first plea is that the Guidelines are unlawful. The second plea alleges infringement of the principle of proportionality, a manifest error of assessment and an error of law in determining the gravity of the infringement. The third plea alleges errors of assessment and of law and infringement of the principle of proportionality in taking account of aggravating and attenuating circumstances. The fourth plea alleges infringement of Article 15(2) of Regulation No 17 in setting the amount of the fines. The fifth plea alleges infringement of the rule against cumulation of penalties. The sixth plea alleges infringement of the principle of proportionality and a manifest error of assessment in taking account of the circumstances provided for by Section 5(b) of the Guidelines.

A — *First plea: unlawfulness of the Guidelines*

1. Arguments of the parties

247 The applicants in Case T-245/03 submit, first, that the Guidelines are contrary to the principle of proportionality. They observe that the assessment of the effect of agreements or practices on the functioning of the market is an essential factor for determining the degree of gravity of an infringement. However, in describing an

infringement as very serious, the Commission does not take its effects into consideration at all, but only its nature and the extent of the relevant geographic market. Furthermore, where an infringement is classified as very serious in accordance with Section 1A of the Guidelines, it is liable to a fine of a minimum starting amount of EUR 20 million, which is discretionary and arbitrary. That minimum amount also prevents the Commission from taking account of the importance, the size and the nature of the entity concerned or its profits from the infringement.

248 Second, the applicants submit that the Guidelines are contrary to Article 15(2) of Regulation No 17. They observe, first, that Section 1A of the Guidelines permits the Commission to set the basic amount of a fine at a figure of more than EUR 1 million or 10% of the turnover of the undertaking being sanctioned. However, according to the applicants, Article 15(2) of Regulation No 17, in providing that the Commission must take account of the gravity and the duration of the infringement at the stage of determining the basic amount of the fine, does not permit the basic amount — or the ultimate fine — to exceed the abovementioned limits. The applicants maintain, second, that Section 1B of the Guidelines takes account of the criterion of the duration of the infringement only in order to increase the fine, which leads the Commission to regard in the same way an infringement which lasted a few days and one which lasted almost one year.

249 The Commission observes, first, that the only criteria expressly mentioned by Article 15 of Regulation No 17 are the gravity and the duration of the infringement, and Article 15 lays down no limits or reservations regarding the Commission's discretion in setting fines, other than adherence to the maximum relating to the turnover of each undertaking. In addition, as very serious infringements are practices the very object of which is manifestly contrary to the principles of the internal market and in order to ensure that fines have a deterrent effect, it appears in no way disproportionate to take EUR 20 million as the starting point. In any case,

contrary to the applicants' assertion, it is possible to go below EUR 20 million within the category of very serious infringements. Second, the Commission submits that the setting of a limit to the fine must be done in relation to its final amount, before leniency is granted, and the fact that short duration is not a factor which reduces the fine, but merely neutral, is not contrary to Article 15(2) of Regulation No 17.

2. Findings of the Court

250 It must be observed as a preliminary point that, although the Guidelines are not the legal basis of the contested decision, that being inter alia Regulation No 17, they determine, in a general and abstract manner, the method by which the Commission has bound itself in setting the amount of fines. In the present case, therefore, there is a direct link between the contested individual decision and the general measure represented by the Guidelines. Since the applicants were not in a position to ask that the Guidelines be declared void, they may form the subject-matter of an objection of illegality (Case T-23/99 *LR AF 1998* v *Commission* [2002] ECR II-1705, paragraphs 274 and 276, and Case T-64/02 *Heubach* v *Commission* [2005] ECR II-5137, paragraph 35).

251 The applicants submit, first, that the Guidelines are contrary to the principle of proportionality because they do not take account of the effects of the agreements or practices in question in the determination of whether an infringement is very serious.

252 On this point, it must be observed that Section 1A of the Guidelines states that very serious infringements include 'horizontal restrictions such as price cartels and market-sharing quotas, or other practices which jeopardise the proper functioning of the single market, such as the partitioning of national markets'. It has consistently

been held that cartels relating to prices or the partitioning of markets are by nature very serious infringements (Case T-65/99 *Strintzis Lines Shipping* v *Commission* [2003] ECR II-5433, paragraph 168; Case T-66/99 *Minoan Lines* v *Commission* [2003] ECR II-5515, paragraph 280; and Joined Cases T-49/02 to T-51/02 *Brasserie nationale* v *Commission* [2003] ECR II-3033, paragraphs 173 and 174). Therefore the Court considers that the Commission did not infringe the principle of proportionality by stating in its Guidelines that those kinds of infringements are to be regarded as very serious. In any case, the first paragraph of Section 1A of the Guidelines states that, in assessing the gravity of the infringement, account must be taken of its actual impact on the market, where this can be measured. It follows that, in certain specific circumstances, the Commission must take into account the effects of the infringement in question for the purpose of classifying it as very serious or not.

253 Next, regarding the allegedly discretionary and arbitrary nature of the sum of EUR 20 million laid down for very serious infringements, it must be pointed out first that, in accordance with settled case-law, Regulation No 17 allows the Commission a margin of discretion when fixing fines, in order that it may direct the conduct of undertakings towards compliance with the competition rules (*Cheil Jedang*, paragraph 76). It must also be noted that, as the basic amounts provided for in the Guidelines are merely 'likely', the Commission is entirely free to set a starting amount below EUR 20 million. The flat-rate amounts provided for by the Guidelines are merely indicative and therefore cannot in themselves give rise to an infringement of the principle of proportionality (*Heubach* v *Commission*, paragraphs 40 and 44).

254 Second, the applicants submit that the method laid down by Section 1A of the Guidelines for calculating fines is contrary to Article 15(2) of Regulation No 17 in that it envisages the possibility of setting a basic fine amount of more than EUR 1 million or 10% of the turnover of the undertaking concerned.

255 However, this argument must fail. Article 15(2) of Regulation No 17, in providing that the Commission may impose fines of up to 10% of turnover during the preceding business year for each undertaking which participated in the infringement, requires only that the fine eventually imposed on an undertaking be reduced if it should exceed 10% of its turnover, irrespective of the intermediate stages in the calculation intended to take account of the gravity and duration of the infringement. Consequently, Article 15(2) of Regulation No 17 does not prohibit the Commission from referring, during its calculation, to an intermediate amount exceeding 10% of the turnover of the undertaking concerned, provided that the amount of the fine eventually imposed on the undertaking does not exceed that maximum limit (*LR AF 1998* v *Commission*, paragraphs 287 and 288). This consideration also applies to the maximum amount of EUR 1 million.

256 The applicants also claim that Section 1B of the Guidelines violates Article 15(2) of Regulation No 17 as it takes account of the criterion of the duration of the infringement only to increase the fine.

257 It must be observed that Article 15(2) lays down that, to determine the amount of the fine, it is necessary to take into account the duration of the infringement as well as its gravity. In that connection, Section 1B of the Guidelines provides that the duration of the infringement may entail a possible increase in the amount of the fine established on the basis of gravity. The Guidelines thus distinguish between infringements of short duration (in general, less than one year), for which there is no increase, infringements of medium duration (in general, one to five years), for which there is an increase of up to 50% in the amount determined for gravity, and, lastly, infringements of long duration (in general, more than five years), for which there is an increase of up to 10% per year in the amount determined for gravity. The Guidelines therefore take no account of the very brief duration of an infringement for the purpose of reducing the amount initially determined.

258 The fact that the duration of the infringement was short does not in the least affect its gravity, which arises from its nature. The Commission was therefore right to find, in accordance with the first indent of the first paragraph of section 1B of the Guidelines, that the very short duration of the infringement, less than one year, meant merely that no additional amount should be imposed on the amount calculated by reference to the gravity of the infringement (Case T-213/00 *CMA CGM and Others* v *Commission* [2003] ECR II-913, paragraph 283).

259 Furthermore, it must be observed that, in accordance with settled case-law, the Guidelines do not go beyond the legal framework for fines set out in Article 15(2) of Regulation No 17. The general method for setting fines described in the Guidelines is based on the two criteria referred to in Article 15(2) of Regulation No 17, namely the gravity of the infringement and its duration, and observes the upper limit determined by reference to the turnover of each undertaking, as laid down in that provision (*LR AF 1998* v *Commission*, paragraphs 231 and 232; Joined Cases T-236/01, T-239/01, T-244/01 to T-246/01, T-251/01 and T-252/01 *Tokai Carbon and Others* v *Commission* [2004] ECR II-1181, paragraphs 189 and 190, and *Heubach* v *Commission*, paragraph 37).

260 In the light of all the foregoing, this plea must be rejected.

B — *Second plea: infringement of the principle of proportionality, manifest error of assessment and error of law in determining the gravity of the infringement*

1. Arguments of the parties

261 The applicants submit that the Commission should not have classified the infringement as 'very serious', but as 'serious'. They repeat that the Commission

was not justified in attributing to them the 'Imports' part of the agreement and they dispute the duration of the 'Prices' part. In addition, they complain that the Commission took no account of the slight impact of the disputed measures on the functioning of the market. In actual fact, the acts imputed to them caused no damage to the beef sector as the agreement had no effect on prices or on imports. Thus the slaughterers never claimed to have suffered loss by reason of the agreement on the price scale which, furthermore, did not affect consumer prices. However, the Commission did not examine the importance of the economic sector in question or the actual impact of the agreement. According to the applicants, the Commission was not entitled merely to plead that it was impossible to quantify sufficiently accurately the true effects attributable to the agreement. The applicants also claim that the Commission did not take account of the whole legal and economic context of the case as a whole, particularly the crisis in the sector and the ineffectiveness of the Community measures in overcoming it. Lastly, they claim that the infringement was the outcome of a vertical agreement and not a horizontal agreement.

262 The Commission submits that, in view of the nature of the infringement and the geographic extent of the market in question, the infringement was undoubtedly very serious.

2. Findings of the Court

263 It must be observed, first, that it has been held that the Commission was correct with regard to the determination of the duration and extent of the disputed agreement. Therefore the criticism relating to the classification of the gravity of the agreement based on an incorrect weighting of the duration and extent of the infringement must be rejected.

264 Next, it must be noted that the infringements in question, namely the suspension or limitation of beef imports and the fixing of a minimum price scale, are particularly serious. As the Commission rightly points out in the third indent of Section 1A of

the Guidelines, practices aiming at the partitioning of national markets are, in principle, very serious infringements. Likewise, the price-fixing measures were, in the present case, a very serious infringement. The object of that part of the disputed agreement was to fix minimum prices for certain categories of cows, with the aim of making them compulsory for all traders in the markets in question (see paragraph 85 above). This finding is not undermined by the applicants' argument that the disputed agreement constituted a vertical agreement. It must be borne in mind that the agreement was set up by federations representing a very large proportion of both the farmers and slaughterers in France, two links of the production chain in the beef sector (see paragraph 88 above). Furthermore, the infringements at issue affected the main beef market in Europe, extending beyond national territory because of the limitation of imports. It is moreover not disputed that the federations which signed the agreement of 24 October 2001 were the main associations in the sector of beef farming and slaughtering in France.

265 With regard to taking account of the effects of the agreement, the Court considers that, in the present case, the Commission correctly assessed Section 1A of the Guidelines which, for the purpose of assessing the gravity of the infringement, mentions taking account of the actual impact of the infringement on the market only where the impact can be measured. On this point, it must be observed that, in the contested decision, the Commission examined the trend in beef imports into France and in average prices for different categories of beef as a result of the disputed agreement, but found that it was not able to quantify the actual effects of the agreement on intra-Community trade and on prices (recitals 78, 81 and 167 of the contested decision). Lastly, regarding the submissions concerning the economic context of the present case, it must be noted that the Commission took that into account in the contested decision, inter alia for the purposes of application of Section 5(b) of the Guidelines (see paragraphs 350 to 361 below). In any case, this question will be discussed in greater detail below.

266 In the light of the foregoing, the Court considers that, in the present case, the classification of the infringement as 'very serious' was justified.

267 This plea must therefore be rejected.

C — *Third plea: errors of assessment and of law and infringement of the principle of proportionality in taking account of aggravating and attenuating circumstances*

268 The applicants dispute the increase in the fines on the basis of some of the aggravating circumstances found by the Commission, namely the continuation of the agreement in secret and the use of violence. In addition, the applicant in Case T-217/03 claims that a number of attenuating circumstances should be taken into account. The applicants submit that, by taking those aggravating and attenuating circumstances into account, the Commission made errors of assessment and of law and infringed the principle of proportionality.

1. Aggravating circumstances: continuation of the agreement in secret

(a) Arguments of the parties

269 The applicants deny that the agreement of 24 October 2001 was continued in secret and therefore dispute the 20% increase in the fines on that basis.

270 The Commission maintains that the agreement was continued, in secret and without being in writing, beyond the expiry date of the written agreement of 24 October 2001.

(b) Findings of the Court

271 It must be observed that on 26 November 2001 the Commission sent a letter of warning to the applicants, informing them that the facts which had come to its knowledge, including the conclusion of the agreement of 24 October 2001, indicated that the Community competition rules had been infringed and the applicants must put an end to this. The applicants replied to the Commission that the agreement would end on 30 November 2001 and that it would not be extended (see paragraph 15 above). However, the Court has found that, contrary to the applicants' claim, they continued their agreement after 30 November 2001 secretly, in spite of the Commission's warning and in breach of the assurances they had given the Commission (see paragraph 185 above). In such circumstances, the Court considers that the Commission was entitled to regard the continuation of the infringement as an aggravating circumstance (see, to that effect, *LR AF 1998* v *Commission*, paragraph 324) and consequently to increase the fines by 20%.

272 This complaint must therefore be rejected.

2. Aggravating circumstances: the use of violence

(a) Arguments of the parties

273 The applicants in Case T-245/03 dispute the 30% increase in the fines imposed on FNSEA, FNB and JA by reason of the alleged use of violence by their members to obtain the slaughterers' signature to the agreement of 24 October 2001 and to verify its subsequent implementation.

274 The applicants observe that, before 24 October 2001, the main aim of local actions was to persuade the French Government to put into effect a certain number of measures and to make public opinion aware that the farmers alone were suffering the consequences of the crisis. One of those actions had given rise to extremely serious acts of violence on 15 October 2001 in a context of despair. However, FNSEA did not call for blockades of abattoirs and even less for acts of violence.

275 Those acts became much more serious, particularly on 23 October 2001 in the west of France. In this context of extreme tension, the French Minister for Agriculture took the initiative in calling a meeting of the applicants and the slaughterers' federations. The applicants infer from this that violence was not used by the national farmers' federations to persuade the slaughterers to sign the agreement of 24 October 2001, but that it was thanks to the signing of that agreement that the violence came to an end on the ground. After the agreement of 24 October 2001 was signed, the situation was different, depending on the region, as the conduct of the representatives of the numerous local or department unions was not the same. In any case, the actions which took place in certain departments were within the framework of the union action organised by the local or department unions and therefore could not be attributed to the applicants.

276 Lastly, the applicants submit that the Commission must observe the principle that penalties are personal (Case C-279/98 P *Cascades* v *Commission* [2000] ECR I-9693, paragraphs 78 and 79) and that therefore it could regard the violent acts as an aggravating circumstance only if it adduced specific proof that each of the three federations in question had actually incited its members to engage in such acts.

277 The Commission observes that the applicants do not deny that acts of violence took place, or that they were carried out by their indirect members. Those acts could be attributed to the applicants, which had advocated union mobilisation and had often

been informed of the result of operations organised and perpetrated to ensure the implementation of the national agreement and which were sometimes called for by the applicants. Therefore the Commission was entitled to find that those acts constituted an aggravating circumstance against the applicants.

(b) Findings of the Court

278 The contested decision finds, in recital 173, that the farmers who were members of the applicants in Case T-245/03 used violence in order to compel the slaughterers' federations to adopt the agreement of 24 October 2001 and that they used physical force to set up means of verifying that the agreement was being applied, such as illegal inspections to establish the place of origin of meat.

279 It is clear from the file that numerous actions were carried out in France by groups of farmers, inter alia at the premises of slaughterers, in order to compel observance of the minimum purchase prices of beef and to prevent beef imports. The file also shows that, in the course of some of those actions, acts of violence took place, including the blockading of abattoirs, destruction of meat, ransacking of undertakings and illegal inspections.

280 The applicants in Case T-245/03 admit that such acts took place. However, they deny that they can be imputed to them because they were not committed by their direct members but by members of local or department unions. They also assert that they never called for such acts of violence.

281 In that connection, it must be observed, first, that the applicants in Case T-245/03, in particular FNSEA, FNB and JA, played a decisive role in laying down and organising the union action aiming to compel adherence to the minimum prices for certain categories of cows and the suspension of beef imports into France. That action was taken by numerous farmers' unions and federations, direct or indirect members of the applicants, and also by groups of farmers who are not denied in many cases to have been members of those farmers' unions.

282 Thus the minutes of a coordination meeting of the representatives of FNSEA, FNB, JA and FNPL held on 16 October 2001 indicate that FNB proposed 'a producer price scale for the different categories of cull cows'. The minutes also indicate that the union strategy proposed for succeeding in imposing the price scale required, in particular, 'checking the origin of meat, particularly in (the restaurant and catering sector)' and the 'mobilisation of all producers according to that objective, that is to say, refuse to sell below the price and/or report those who buy below the price'. Lastly, the minutes refer to the need to 'mobilise the network according to this new strategy'. Likewise, a memorandum of 19 October 2001 from FNB to the beef sections calls for 'continuing and intensifying the mobilisation of the beef sections according to the aims set out by the FNB bureau for obtaining a minimum price scale for cull cows'. It is stated that 'strong union mobilisation (was) imperative in accordance with this objective' and that its aim should be 'to persuade undertakings to stick to that principle', adding that 'united and coordinated action by all producers (was) essential'.

283 Following the signing of the agreement of 24 October 2001, a memorandum of 25 October 2001 from the applicants in Case T-245/03 to their members states: 'each of us must now be very careful to ensure strict application of the agreement throughout the country'. In addition, another memorandum of 13 December 2001 asks: 'all (members) of the FNSEA network to mobilise ... to verify the prices paid by every slaughterer' and, for that purpose, 'to organise contacts with every abattoir situated in (their) department'.

284 The foregoing leads to the conclusion that the actions of local unions on the ground formed part of a strategy organised by the applicants. Several documents in the file show that some of the acts of violence at issue took place in the course of those actions.

285 For example, a press article of 17 October 2001 reports the destruction of refrigerators in an abattoir at Fougères, during which the farmers attacked the refrigerators with iron bars and burnt beef carcasses. The article notes that 'the angry farmers (had) responded to a national call relayed by FNSEA and (JA).' Similarly, the article states as follows:

'The president of the FDSEA Mayenne is condemning imports of foreign meat. Behind him, carcasses and piles of cardboard boxes are being put on a giant brazier. "We found what we were looking for. The meat stored here was slaughtered in Holland, Austria, Germany or Italy".'

286 In the same vein, a press report of 25 October 2001 refers to blockades of beef-processing factories, abattoirs and central purchasing agencies by French farmers' unions on previous days. After observing that union officials had asserted that, in spite of lifting the blockades, 'their troops remain mobilised, planning "inspections" of sites to verify whether the undertakings are observing the embargo', the report reproduces the following statements by the FNSEA president outside a press conference: 'We are going to meet them. If they do not understand, we have means of persuasion'. The report adds that 'the French farmers (had) called upon ... the French to boycott foreign beef, threatening reprisals against undertakings buying it after 29 October'.

287 Lastly, in an interview on 4 December 2001, the vice-president of FNB stated that, in order to be applied, the price scale required the mobilisation of farmers on the ground', asserting that, if the prices offered by slaughterers did not conform with the agreed prices, the farmers would blockade the abattoirs in question.

288 Furthermore, the applicants must fail in their argument that the acts of violence were not used by the national farmers' federations to persuade the slaughterers to sign the agreement of 24 October 2001, as the signing of that agreement rather enabled the violence to cease on the ground. First, the agreement expressly provides that the federations representing the slaughterers concluded the agreement 'in return for the lifting of the blockade of abattoirs'. Second, as those acts often took place within the framework of the union action launched by the applicants in Case T-245/03, they cannot justify the conclusion of such an agreement by the need to restore public order which was disturbed by that action.

289 In those circumstances, the Court considers that the Commission was entitled to regard the use of violence as an aggravating circumstance, attributable against FNSEA, FNB and JA, and to increase by 30% the fines imposed on them.

290 It follows that this complaint must be rejected.

3. Failure to take account of attenuating circumstances

(a) Arguments of the parties

291 The applicant in Case T-217/03 submits that the Commission did not take account of all the attenuating circumstances provided for by the Guidelines. It states inter

alia that the agreement had no effect on the market and that the infringement came to an end as soon as the Commission intervened. It also pleads its entirely passive role in the infringement, despite the statements by its representatives. Those factors should have led the Commission to exempt it from any fine.

292 The Commission replies that the applicant's arguments are unfounded in fact and in law.

(b) Findings of the Court

293 First, it must be observed that the argument that the applicant put an end to the infringement as soon as the Commission intervened has no factual basis. It has been found that, contrary to what the applicants claim, they continued their agreement after 30 November 2001, in spite of the Commission's warning of 26 November 2001 and contrary to the assurances they gave the Commission (see paragraph 271 above).

294 Secondly, it must be observed that the statements by the president of the applicant in Case T-217/03 contradict the applicant's argument that it played an entirely passive role in the infringement. In a letter of 9 November 2001 to the president of FNSEA, the president of the applicant in Case T-217/03 makes the following statement: 'The [applicant in Case T-217/03] played an active role in the negotiations of 24 October which led to the agreement on a minimum price scale for cows. Although the discussion was difficult ... it made rapid progress on the principle of a minimum price scale and I think, with my federation, greatly contributed towards it.' In any case, the Commission reduced the applicant's fine by

60%, taking account of two attenuating circumstances relating to the backing of the French Minister for Agriculture in favour of the conclusion of an agreement and the illegal blockading of establishments of the applicant's members. To a certain extent, those attenuating circumstances are justified by the fact that the applicant did not play a leading or very active role in the infringement, its participation being explained, at least in part, by the particular circumstances of the case.

295 Thirdly and lastly, the Commission cannot be criticised for having failed to find an attenuating circumstance based on the alleged lack of effects of the disputed agreement on the markets. Contrary to what the applicant claims, the Court considers that the file does not show that the agreement caused no effects on the markets in question. In particular, the fact that the Commission was not able to quantify the actual effects of the agreement on prices and intra-Community trade (recital 167 of the contested decision) does not mean that it produced no effect at all. In any case, it must be observed that the appraisal of the effects of an infringement must be carried out, where appropriate, in the context of evaluating its impact on the market for the purpose of assessing its gravity, and not in relation to an appraisal of the individual conduct of each undertaking in order to assess any aggravating or attenuating circumstances (*Cheil Jedang* v *Commission*, paragraph 189).

296 It follows that, in the present case, the Commission was entitled to find that there were no attenuating circumstances in favour of the applicant in Case T-217/03.

297 This complaint must therefore be rejected.

298 Consequently, this plea must be dismissed in its entirety.

D — *Fourth plea: infringement of Article 15(2) of Regulation No 17 in setting the amount of the fines*

1. Arguments of the parties

299 The applicants in Case T-245/03 begin with the submission that it is clear from Article 15(2) of Regulation No 17 that the Commission cannot impose a fine of more than EUR 1 million on an association of undertakings which has no turnover. That provision should be interpreted restrictively, in view of the seemingly punitive nature of the sanctions for which it provides.

300 The applicant in Case T-217/03 claims, for its part, that the upper limit of 10% of turnover applies to a fine of any amount, even if it is less than EUR 1 million. To allow a fine above that limit would be contrary to the principles of equal treatment and proportionality and would systematically penalise small undertakings.

301 The applicants submit that the fines imposed by the contested decision exceed the limit of 10% of their turnover. Thus, since the income of the applicant in Case T-217/03 totalled EUR 1 726 864 in 2002, the fine of EUR 480 000 represents more than 25% of its turnover. With regard to the applicants in Case T-245/03, their fines represent 200% of the annual membership fees of FNSEA, 240% of those of FNB, 80% of those of FNPL and 200% of those of JA.

302 In that connection, the applicants submit that the calculation for the purpose of ensuring that the limit was not exceeded should not have been made by taking into consideration the turnover of their respective members, whether direct or indirect.

303 It is clear from the case-law that the turnover of the members of associations of undertakings can be taken into account for the purpose of calculating the upper limit of 10% only if the association in question is able, by virtue of its internal rules, to bind its members (Case C-298/98 P *Finnboard* v *Commission* [2000] ECR I-10157, paragraph 66; *CB and Europay* v *Commission*, paragraph 136; Case T-29/92 *SPO and Others* v *Commission* [1995] ECR II-289, paragraph 385; *SCK and FNK* v *Commission*, paragraph 252; and Case T-338/94 *Finnboard* v *Commission* [1998] ECR II-1617, paragraph 270). Therefore the members' turnover must be taken into account only if the disputed practice formed part of the object of the statutes of the association in question or if the statutes permit the members to be bound (see, to that effect, order in Case T-18/96 R *SCK and FNK* v *Commission* [1996] ECR II-407, paragraphs 33 and 34).

304 The applicants maintain that they cannot bind their respective members. The applicant in Case T-217/03 claims that it is empowered merely to unite and defend the trade interests of its members and to represent them vis-à-vis public authorities and trade organisations and that it is not an association responsible for its members' commercial interests or for concluding agreements on their behalf. Likewise, the applicants in Case T-245/03 assert there is no legal provision and no stipulation in their respective rules which empowers them to undertake commitments on behalf of their members, much less bind the 'members of the members affiliated to their members', that is to say, the natural persons, farmers, who are members of local unions.

305 Lastly, the applicants in Case T-245/03 submit that, even if they were empowered under their internal rules to bind their members, the Commission could not in any

case use the method of aggregating the members' turnover to calculate the fines in the present case. The applicants are not autonomous federations, but have common members. Therefore it would have been necessary to take into account, for each federation, only the aggregate income of the farmers who are members of that federation only.

306 The Commission contends, first, that the argument that it cannot impose a fine of more than EUR 1 million on an association of undertakings which has no turnover is based on an incorrect reading of Article 15(2) of Regulation No 17.

307 It adds that, under that provision, it is required to examine adherence to the upper limit of 10% of turnover only where it imposes a fine exceeding EUR 1 million (*Musique diffusion française and Others* v *Commission*, paragraph 119). However, as the applicant in Case T-217/03 was fined EUR 480 000, the Commission could not have disregarded the upper limit in question so far as the applicant was concerned.

308 The Commission points out that Section 5(c) of the Guidelines provides that, in cases involving associations of undertakings, where it is found to be impossible to impose individual fines on member undertakings, an overall fine should be imposed on the association, equivalent to the total of individual fines which might have been imposed on each of the members of the association. To refer only to the budget of a federation would take no account at all of the actual weight of the parties to an agreement.

309 The Commission disputes the applicants' interpretation of the case-law referred to in paragraph 303 above. It observes that, according to that case-law, the upper limit of 10% may be calculated by reference to the turnover of the members of an association of undertakings 'at least where, by virtue of its internal rules, the association can bind its members'. The Commission submits that the words 'at least where' are not synonymous with 'provided that', but rather with 'at least' or 'in any case'. That case-law does not rule out the possibility that other specific circumstances may justify taking account of the turnover of the members of an association. The Commission adds that in the present cases the agreement was concluded by the national federations for the benefit of their members. The applicants have no economic activity and therefore a purely commercial agreement would be of economic interest only to their members. The interests of the federations merge completely with those of their members, the applicants having no interest of their own in concluding the agreement.

310 The Commission argues that, in any event, the applicants in the present case were able to bind their members as contemplated in the abovementioned case-law. The Commission observes that the rules of an association need not necessarily mention that ability, as it may arise from a combination of various provisions. Likewise, the requirement to bind members does not imply power to bind them legally. However that may be, it is clear from examination of the applicants' rules that they can bind their respective members.

311 According to the Commission, if the turnover of the applicants' basic members is taken as the basis for calculation, the fines imposed in the present case did not exceed the 10% limit. First, with regard to the applicant in Case T-217/03, according to the estimates in its letter of 27 January 2003, the fine appears completely marginal in relation to its members' turnover. Second, regarding the applicants in Case T-245/03, the Commission points out that, taking account of the number of members of FNSEA declared by it, apportioning the total fines over the number of

farmer members would give EUR 48.68 per member. Consequently, an average annual turnover of EUR 500 per member would be sufficient to avoid reaching the limit. Similarly, as the beef sector generated a turnover of some EUR 4.4 billion in 2002 and FNSEA stated that it represented 70% of French farmers, its members' turnover should represent approximately EUR 3 billion. However, the total fines would reach the limit of 10% of the turnover of FNSEA beef farmers only if they generated turnover of less than EUR 160 million, which would represent 3.5% of the beef sector. Lastly, even taking account of the fact that farmers belong to more than one association, the calculation would not change. Accordingly, apportioning FNSEA's fine over its 270 000 members who are not members of JA would give a figure of EUR 44.44 per farmer.

2. Findings of the Court

312 Article 15(2) of Regulation No 17 provides that the Commission may impose on undertakings or associations of undertakings fines from EUR 1 000 to EUR 1 000 000, or a sum in excess thereof but not exceeding 10% of the turnover in the preceding business year of each of the undertakings participating in the infringement.

313 Contrary to the argument of the applicants in Case T-245/03, this provision does not prevent the Commission from imposing fines of more than EUR 1 000 000 on associations which allegedly have no turnover. According to settled case-law, the use of the general term 'infringement' in Article 15(2) of Regulation No 17, inasmuch as it covers without distinction agreements, concerted practices and decisions of associations of undertakings, indicates that the upper limits laid down in that

provision apply in the same way to agreements and concerted practices as to decisions of associations of undertakings (Case T-338/94 *Finnboard* v *Commission*, paragraph 270, and case-law cited). As will be shown below, where an association of undertakings has no economic activity of its own or where its turnover does not reveal the influence it may have on the market, the Commission may, under certain conditions, take into consideration the turnover of its members for the purpose of calculating the maximum fine which may be imposed on it.

314 On the question whether the threshold of 10% of turnover applies only to fines exceeding EUR 1 million, it must be observed, as did the Court of Justice in the case of *Musique diffusion française and Others* v *Commission*, that the only express reference to the turnover of the undertaking in Article 15(2) of Regulation No 17 concerns the upper limit of a fine exceeding EUR 1 000 000 (paragraph 119). However, it must be observed that Section 5(a) of the Guidelines states that the final amount calculated according to the method laid down in Sections 1 to 3 may not 'in any case' exceed 10% of the worldwide turnover of the undertakings, as laid down by Article 15(2) of Regulation No 17. As the Commission must comply with the Guidelines, the conclusion must be that the limit of 10% of turnover should have been observed in the present case even with regard to the setting of fines of less than EUR 1 million, like those imposed on the applicant in Case T-217/03 and on JA (see, to that effect, Joined Cases T-71/03, T-74/03, T-87/03 and T-91/03 *Tokai Carbon and Others* v *Commission*, not published in the ECR, paragraph 388).

315 It is common ground that, in the present case, the fines imposed on the applicants exceed 10% of their respective turnover, if 'turnover' is understood to mean the overall amount of their income, including the fees paid by their members and the aid they have received. However, the question arises as to whether, as the Commission submits, observance of that limit could nevertheless have been calculated in the present case by reference to the turnover of the applicants' members.

316 It must be borne in mind that Section 5(c) of the Guidelines provides that, in cases involving associations of undertakings, decisions should, in so far as possible, be addressed to and fines imposed on the individual undertakings belonging to the association. However, where that is not possible (for example, where there are several thousand affiliated undertakings), an overall fine should be imposed on the association, equivalent to the total of individual fines which might have been imposed on each of the members of the association.

317 According to settled case-law, the upper limit of 10% of the turnover must be calculated by reference to the turnover achieved by each of the undertakings that are parties to the agreements and concerted practices or by all the members of the associations of undertakings, at least where the internal rules of the association empower it to bind its members. The possibility of taking into account for that purpose the turnover of all the undertakings that are members of an association is justified by the fact that, in determining the amount of the fines, account may be taken inter alia of such influence as the undertaking may have been able to exercise in the market, in particular by reason of its size and economic power, of which its turnover may give an indication, and the deterrent effect that fines must have. The influence which an association of undertakings may have had on the market depends not on its own turnover, which reveals neither its size nor its economic power, but rather on the turnover of its members which gives an indication of its size and economic power (*CB and Europay* v *Commission*, paragraphs 136 and 137; *SPO and Others* v *Commission*, paragraph 385; and Case T-338/94 *Finnboard* v *Commission*, paragraph 270).

318 However, that case-law does not rule out the possibility that, in certain cases, the turnover of the members of an association could also be taken into account even if the association does not possess formal power to bind its members, there being no internal rules enabling it to do so. The Commission's option of imposing fines of an amount appropriate to the infringements at issue could otherwise be jeopardised, as associations with a very small turnover but bringing together a large number of undertakings which could not be formally bound but which together have a substantial turnover could be sanctioned only by very small fines, even if the

infringements for which they were responsible could have a considerable influence on the markets in question. Furthermore, this eventuality would run counter to the need to ensure that sanctions for infringements of the Community competition rules have a deterrent effect.

319 Therefore, the Court considers that other specific circumstances, beyond the existence of internal rules enabling the association to bind its members, may justify taking account of the aggregate turnover of the members of the association in question. This applies in particular to cases where an infringement on the part of an association involves its members' activities and where the anti-competitive practices at issue are engaged in by the association directly for the benefit of its members and in cooperation with them, the association having no objective interests independent of those of its members. Although, in some of those situations, the Commission could impose individual fines on each of the member undertakings in addition to sanctioning the association in question, this could be particularly difficult or impossible where the number of members is very large.

320 In the present case, it must be noted, first, that the primary task of the applicant federations is to defend and to represent the interests of their basic members, namely farmers, cooperative associations and slaughterers. As far as the applicants in Case T-245/03 are concerned, the object of FNSEA is to represent and defend the interests of the farming profession and, for that purpose, it organises, coordinates and harmonises all the trade interests of farmers who are members of the basic unions (Article 8 of its statutes); FNB's object is the organisation, representation and defence of the common interests of all producers of beef cattle (Article 7 of its statutes); FNPL's task is the coordination, organisation, representation and defence

of the interests of all producers of milk and dairy products (Article 6 of its statutes); lastly, JAs have the task of representing young farmers and defending their interests (Article 6 of its statutes). With regard to the applicant in Case T-217/03, under Article 2(1) of its statutes, it has the task of uniting and defending the trade interests of its members, including associations of cattle producers and their branches operating abattoirs.

321 Second, the disputed agreement did not relate to the activity of the applicants themselves but to that of their basic members. The applicants do not sell, buy, or import beef. Consequently, the undertaking to suspend imports and the establishment of a minimum price scale are not of direct concern to them. The measures laid down in the disputed agreement affected only the applicants' basic members who were, furthermore, the ones who had to put them into practice.

322 Third, it must be observed that the disputed agreement was concluded directly for the benefit of the applicants' basic members. With regard, first, to the farmers' federations, the object of the agreement was to enable their members who are cattle farmers to sell their production and to obtain profitable prices so as to deal with the crisis in the sector at the material time. Second, with regard to the slaughterers' federations, it must be noted that, although the measures adopted, that is to say, the fixing of minimum prices and the suspension or limitation of imports, may appear potentially contrary to the interests of slaughterers in so far as they could have entailed an increase in their operating costs, nevertheless the conclusion of the disputed agreement had the aim, in the context of the tensions in the present case, of enabling the slaughterers to carry on their business and to reduce to some extent the threats to it. Accordingly the disputed agreement expressly provides that the federations representing slaughterers concluded the agreement 'in consideration for lifting the blockade of abattoirs'.

323 Fourth, it must be observed that, as already stated, the disputed agreement was put into effect by the conclusion of local agreements between department federations and local farmers' unions, that is to say, the members of the applicants in Case T-245/03, and the slaughterers (see paragraphs 112 to 115 above). In addition, specific actions on the part of groups of farmers monitored the implementation of the stipulations of the agreement.

324 In those circumstances, the Court considers that, in the present case, it was justified in taking into account the turnover of the applicants' basic members for the purpose of calculating the 10% upper limit referred to in Article 15(2) of Regulation No 17. In particular, those turnover figures alone gave an adequate indication in the present case of the applicants' economic strength and, therefore, of the influence which they were able to exert on the markets in question.

325 The option of taking into account the turnover of the applicants' basic members must however be confined in the present case to those of their members who operated in the markets affected by the infringements sanctioned in the contested decision, namely the beef farmers, slaughterers and meat-processing undertakings. It must be borne in mind that, with the exception of FNB and, to a smaller extent, FNPL, only a small number of the applicants' direct and indirect members had interests in the stock-farming sector, in the case of the applicants in Case T-245/03, and in cattle-slaughtering in the case of the applicant in Case T-217/03. In actual fact, the agreement did not relate to the activity of the applicants' members who did not operate in the cattle markets, it was not concluded for their benefit and those members probably did not take part in implementing the contested measures. Consequently, their turnover figures cannot be used in the present case for calculating the 10% upper limit.

326 It is in the light of the foregoing considerations that it must be considered whether the fines imposed in the applicants in the contested decision exceeded the limit of 10% of turnover laid down by Article 15(2) of Regulation No 17.

327 Thus, so far as the applicant in Case T-217/03 is concerned, the estimates it gave in its letter of 27 January 2003 to the Commission show that its fine represented between 0.05 and 0.2% of the 2002 turnover of the cooperative slaughtering and processing undertakings which are its members, depending on whether or not those which are at the same time members of the applicant and of the Syndicat national de l'industrie des viandes (SNIV), the specialised union which brings together the large industrial undertakings in the sector, are taken into account.

328 For the applicants in Case T-245/03, the Court has no exact figures relating to the turnover of stock farmers who are its members. At first during the administrative procedure, at the request of the Commission, and subsequently in the present action, at the request of the Court, the applicants claimed that they could not produce even approximate figures for the turnover of their farmer members. The applicants were likewise unable to inform the Court of the number of stock farmers who are basic members of FNSEA and of JA respectively and the applicants claimed that FNB and FNPL, strictly speaking, have no basic members.

329 However, the applicants in Case T-245/03 stated that in 2002 the turnover in France from production in the sector of adult cattle was EUR 4 552 billion and that the turnover from the slaughter of adult cattle was EUR 3 430 billion. Taking account of the smaller of those two figures, it must be concluded that the applicants' fines do not exceed the upper limit of 10% of the turnover of their stock farmer members if they accounted for at least 3.5% in the case of FNSEA, 0.42% in the case of FNB, 0.18% in the case of JA and 0.42% in the case of FNPL of the abovementioned overall turnover. None of the applicants denies that its members account for a significant proportion of the turnover from the slaughter of adult cattle in France. In that

connection the Court points out that, in reply to a question put by the President of the Court of First Instance, the applicants in Case T-245/03 admitted that the members of FNSEA could represent approximately 50% of the 240 000 farmers with more than five adult cattle in France (order in Case T-245/03 R *FNSEA and Others* v *Commission* [2004] ECR II-271, paragraph 89).

330 The Court considers that, in those circumstances, it has been sufficiently established that the fines imposed on the applicants in Case T-245/03 do not exceed the upper limit of 10% of the turnover of their respective members.

331 This finding cannot be undermined by the applicants' argument that, as they have common members, the Commission ought to have taken into account, for each federation, only the aggregate income of the farmers who are members of that federation alone. In actual fact, as the applicants point out, all the farmers who are direct or indirect members of FNB, FNPL or JA are at the same time indirect members of FNSEA. However, for the purpose of verifying observance of the upper limit of 10% of turnover, it is sufficient in the present case if the aggregate total of the fines imposed on the four applicants in Case T-245/03 is below 10% of the turnover of the farmers who are basic members of FNSEA, the federation which brings together the three other applicant federations. For that limit not to be exceeded in the present case, it is sufficient if the turnover of the farmers who are basic members of FNSEA represents at least 4.52% of the turnover from the slaughter of adult cattle in France. For the reasons given above, the Court considers that that is the case here.

332 Lastly, the applicants in Case T-245/03 cannot plead that FNB and FNPL have, strictly speaking, no members in so far as no farmer joins them, whether directly or indirectly. It must be observed that those federations receive membership fees from the department federations (by reference to the total number of cattle in the department and the litres of milk produced there). The department federations bring together the local unions to which the farmers belong. Therefore, the beef farmers may, for the purpose of calculating the 10% limit of turnover, be regarded as basic members of FNB and FNPL, in the same way as they are deemed to be basic members of FNSEA.

333 In the light of all the foregoing, the Court finds that the fines imposed on the applicants in the contested decision do not exceed the upper limit of 10% of the turnover of their respective members.

334 Therefore, this plea must be dismissed.

E — *Fifth plea: infringement of the rule against cumulation of penalties*

1. Arguments of the parties

335 The applicants point out that the rule against cumulation of penalties or the principle *ne bis in idem* prevents a person from being penalised more than once for

the same offence. That principle, which is laid down in Article 4 of Protocol No 7 to the ECHR, is consistently applied in Community competition law (Case 7/72 *Boehringer Mannheim* v *Commission* [1972] ECR 1281, paragraph 3) and is a fundamental principle of Community law (Joined Cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P and C-254/99 P *Limburgse Vinyl Maatschappij and Others* v *Commission* [2002] ECR I-8375, paragraph 59).

336 The applicants submit that the contested decision penalised the same persons more than once for the same infringement in so far as FNB, JA and FNPL are members of FNSEA. The natural persons (beef farmers) who belong to local unions could indirectly belong to FNSEA and to FNB, as well as to FNPL (if they have dairy cows) and to JA (if they are under 35 years of age). Likewise, certain members of the applicant in Case T-217/03 are also members of FNSEA. Consequently, a number of fines have been imposed on those persons, although the Commission has only been able to find — indirectly — a single infringement. The applicants dispute the Commission's argument that the principle of *ne bis in idem* does not apply in the present case because there is only one procedure. The parallel procedures initiated by the Commission against the applicants led to the repetition of the penalties imposed on them. In addition, the application of that principle cannot be limited to situations where proceedings are brought against undertakings for the same infringement by more than one competition authority.

337 Furthermore, the applicants in Case T-245/03 state that, in setting the basic amount of the fines, the Commission proceeded on the basis of the ratio between the total annual fees received by FNSEA and those received by each of the other relevant federations. The ratios used are inaccurate however, in that FNB and FNPL repay to FNSEA a portion of the annual fees received by them (namely, in 2001, approximately 10%, corresponding to EUR 60 979, in the case of FNB, and 15%, representing EUR 181 670, in the case of FNPL). The ratios used should therefore be reduced accordingly.

338 The French Government observes that it cannot be disputed that, in the present case, natural persons are members of different federations, even if only by reason of the affiliation of certain federations to FNSEA and therefore those persons have been fined twice for one and the same infringement of competition law. That amounts to imposing an excessive fine on them and is contrary to the principle of proportionality.

339 The Commission observes that, in Community case-law, the principle *ne bis in idem* applies in cases where an undertaking which has borne (or may bear) a penalty imposed at Community level for infringements of the competition rules has also borne (or may bear) a penalty in other proceedings in a non-member country or in a Member State (see, to that effect, Case 14/68 *Wilhelm and Others* [1969] ECR 1, and *Boehringer Mannheim* v *Commission*, cited above). According to the Commission, the mere fact that the actions complained of are identical is not sufficient to justify the application of that principle, because it is also necessary for the parties to be identical. In the present case, proceedings were initiated against each federation for its own participation in the infringement, each federation being necessary, by virtue of its own influence on the market, for the agreement to be effective. The fact that certain persons are members of more than one of the federations does not diminish the fact that each of the applicants took part in the agreement. Lastly, the proportionality of the fines imposed on several federations with common members is ensured by the 10% limit of turnover, but cannot mean that those members must be exempt.

2. Findings of the Court

340 It is clear from the case-law that the principle *ne bis in idem* is a general principle of Community law which is upheld by the Community Courts. In the field of Community competition law, the principle precludes an undertaking from being sanctioned by the Commission or made the defendant to proceedings brought by the Commission a second time in respect of anti-competitive conduct for which it has already been penalised or of which it has been exonerated by a previous decision

of the Commission that is not amenable to challenge (Case T-224/00 *Archer Daniels Midland and Archer Daniels Midland Ingredients* v *Commission* [2003] ECR II-2597, paragraphs 85 and 86, and *Tokai Carbon and Others* v *Commission*, paragraphs 130 and 131). The application of the principle *ne bis in idem* is subject to the threefold condition of identity of the facts, unity of offender and unity of the legal interest protected. Under that principle, therefore, the same person cannot be sanctioned more than once for a single unlawful course of conduct designed to protect the same legal asset (Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P *Aalborg Portland and Others* v *Commission* [2004] ECR I-123, paragraph 338).

341 In the present case, the Commission fined the applicant federations by reason of the participation and the degree of responsibility of each one of them in the infringement (see recital 169 and Articles 1 and 3 of the contested decision). In actual fact, all the applicants took part, albeit with different degrees of involvement and with different consequences, in the infringements penalised by the contested decision. In particular, all the applicant federations signed the agreement of 24 October 2001. Therefore, the Commission was entitled to fine each federation which took part in the disputed agreement on the basis of the individual role played by each one in the signature and implementation of the agreement and of the attenuating and aggravating circumstances relevant to each of them.

342 Contrary to the submissions of the applicants in Case T-245/03, this finding cannot be undermined by the fact that FNB, FNPL and JA are members of FNSEA. The fact is that those federations have independent legal personality and separate budgets and their objects do not always coincide. They thus carry out their respective union activities in defence of their own specific interests (see paragraph 320 above). The fact that those federations to a large extent coordinated their actions and those of their respective members in the present case in the pursuit of common aims does not diminish the respective responsibility of each federation for the infringement.

343 Furthermore, contrary to what the applicants appear to argue, the contested decision did not impose penalties on their basic members, whether direct or indirect. Taking into account the turnover of the members of an association of undertakings in determining the 10% limit does not mean that a fine has been imposed on them or even that the association in question has an obligation to recover the amount of the fine from its members (*CB and Europay* v *Commission*, paragraph 139). As the individual farmers who are indirect members of the applicant federations in Case T-245/03 were not penalised in the contested decision, it cannot be concluded that the fact that the basic members of FNB, FNPL and JA are also members of FNSEA prevented the Commission from penalising each of those federations individually. It is all the more irrelevant that some of the members of the applicant in Case T-217/03 are also members of FNSEA.

344 It follows that the offenders in the present case are not identical, as the contested decision does not penalise the same entities more than once or the same persons for the same acts. Therefore, it must be concluded that the principle *ne bis in idem* was not infringed. Likewise, as the applicants' members, whether direct or indirect, were not fined twice for one and the same infringement, contrary to the French Government's argument, nor was the principle of proportionality infringed.

345 Moreover, the applicants in Case T-245/03 must fail in their argument that, when setting the basic amount of the fines, the Commission wrongly calculated the ratio between the annual membership fees received by FNSEA and the fees paid to FNB and FNPL. In particular, contrary to the applicants' argument, the Commission was not required to adjust the FNB and FNPL figures by subtracting from them the fees paid by those federations to FNSEA. As the fees were taken into account as an

objective indication of the relative size of each federation, the Commission was right to take the view that the relevant figures were their respective overall fees, which reflect the degree of representativeness of each applicant.

346 Consequently, this plea must be dismissed.

F — *Sixth plea: manifest error of assessment in taking account of the circumstances provided for by Section 5(b) of the Guidelines*

1. Arguments of the parties

347 The applicant in Case T-217/03 asserts that the 60% reduction made by the Commission pursuant to Section 5(b) of the Guidelines to take account of the particular context of the beef crisis should have been applied to the basic amount of the fine and not to the figure resulting after the increases in and deductions from the basic amount for aggravating and attenuating circumstances respectively. There is no justification for derogating from the principle for determining fines, set out in Section 2 of the Guidelines, consisting in calculating a basic amount and increasing or reducing it by a percentage. In the alternative, the applicant claims that the Commission ought to have taken the economic context into account as an attenuating circumstance, as it has done in other cases.

348 The applicants in Case T-245/03 submit, for their part, that the Commission, in applying Section 5(b) of the Guidelines, did not draw the appropriate conclusions from the following circumstances, set out in the contested decision (see recitals 181 and 184): first, it is not the applicants' object to make a profit; second, the specific characteristics of the agricultural product in question; third, the fact that the

Commission penalised for the first time an agreement concluded entirely between federations and which relates to a basic agricultural product and involves two links in the production chain; fourth, the specific context of exceptional crisis. The applicants observe in that connection that, in a decision of 3 February 2003, the United Kingdom competition authorities did not fine a Northern Ireland beef producers' association which concluded a price agreement, in view of the context in which the agreement was made, marked also by the 'mad-cow' crisis and the foot-and-mouth epidemic. The applicants note that, in the present case, such factors did not cause the Commission to make an adequate adjustment to the fines, as a result of which the ultimate amounts remain exorbitant.

349 The Commission contends that the argument of the applicant in Case T-217/03 concerning the method of calculating the reduction relating to the circumstances provided for in Section 5(b) of the Guidelines disregards both the letter and the spirit of the Guidelines. The complaint that the economic context ought to have been taken into account as an attenuating circumstance is a new plea and is therefore inadmissible. As for the submissions of the applicants in Case T-245/03, the Commission observes that the 60% reduction in the fine allowed in the present case has no equivalent in its past decisions.

2. Findings of the Court

350 Section 5(b) of the Guidelines reads as follows:

'Depending on the circumstances, account should be taken, once the above calculations have been made, of certain objective factors such as a specific economic context, any economic or financial benefit derived by the offenders ..., the specific characteristics of the undertakings in question and their real ability to pay in a specific social context, and the fines should be adapted accordingly.'

351 In the present case, the Commission took account of the specific economic context, marked in particular by the serious crisis in the beef sector, and reduced by 60% the amount resulting from an increase or a reduction in the basic amount of the fines by reason of the aggravating or attenuating circumstances taken into consideration.

352 First, the argument of the applicant in Case T-217/03 that the abovementioned 60% reduction ought to have been applied to the basic amount of the fine and not the amount as already increased and reduced by reason of aggravating and attenuating circumstances must be dismissed. The Guidelines deal with aggravating and attenuating circumstances in Sections 2 and 3 respectively, which state that 'the basic amount will be increased' and 'the basic amount will be reduced'. Section 5(b), by contrast, provides that other circumstances are to be taken into consideration 'once the above calculations have been made' and provides that 'the fines should be adjusted accordingly'. It must therefore be concluded that the calculation method used by the Commission complied with the provisions of the Guidelines.

353 Second, with regard to the alternative submission of the applicant in Case T-217/03, to the effect that the economic context ought to have been taken into account as an attenuating circumstance, it must be pointed out that this was not raised at the reply stage and is therefore a new plea which must be dismissed pursuant to Article 48(2) of the Rules of Procedure. In any case, it must be observed that Section 5(b) of the Guidelines refers expressly to taking account of the specific economic context of a case; that criterion is not, however, expressly mentioned in Section 3 of the Guidelines, which deals with attenuating circumstances. Consequently, it must be found that the Commission did not err in taking into consideration the specific economic context pursuant to Section 5(b) of the Guidelines and not by way of attenuating circumstances, as the applicant wished.

354 Third, regarding the reference to the decision of United Kingdom competition authorities of 3 February 2003, suffice it is to note that, in assessing the circumstances of the present case, the Commission is not bound by decisions of national authorities in other, somewhat similar cases.

355 Fourth and lastly, it is necessary to reply to the applicants' arguments that the Commission did not draw all the appropriate inferences from the circumstances of the present case and ought to have made an even greater reduction in the fines pursuant to Section 5(b) of the Guidelines.

356 It must be observed that, in the contested decision, the Commission, in applying the abovementioned provision, took into account the fact that the contested decision was the first to penalise an agreement concluded entirely between union federations relating to a basic agricultural product and involving two links in the production chain, as well as the specific economic context of the case, which went beyond a mere fall in prices or the presence of a well-known disease. The economic context was characterised by the following factors: first, the drop in the consumption of beef as a result of the 'mad-cow' crisis, which affected a sector already in a difficult situation; second, intervention measures taken by the Community and national authorities aimed at restoring balance in the beef market; third, the loss of consumer confidence, linked to the fear of 'mad cow' disease; fourth, the situation of farmers who, despite Community adjustment measures applied by France, were faced with slaughterhouse entry prices for cows which were falling again, while consumer prices remained stable (recitals 181 to 185 of the contested decision).

357 Having regard to all those circumstances, the Commission decided, pursuant to Section 5(b) of the Guidelines, to allow the applicants a 60% reduction in the fines.

358 It must be borne in mind that, while the Commission has discretion in setting the amount of fines, the Court has, by virtue of Article 17 of Regulation No 17, unlimited jurisdiction within the meaning of Article 229 EC to review decisions whereby the Commission has fixed a fine and may, consequently, cancel, reduce or increase the fine imposed.

359 In the present case, the Court considers that the different consequences identified and taken into account by the Commission in the contested decision pursuant to section 5(b) of the Guidelines are very exceptional. Their exceptional nature arises from the particular characteristics of the applicants, their functions and their respective spheres of activity, as well as from the circumstances inherent in the economic context of this particular case.

360 The Court considers that the 60% reduction in the fines decided upon by the Commission pursuant to Section 5(b) of the Guidelines, although substantial, does not take sufficient account of all those exceptional circumstances.

361 Therefore, to take full and proper account of all the circumstances identified by the Commission in the contested decision and in consideration of the fact that this is the first time that the Commission has sanctioned this type of anti-competitive conduct, the Court, asserting its unlimited jurisdiction, considers it appropriate to set at 70% the reduction to be allowed in the applicants' fines pursuant to Section 5(b) of the Guidelines.

III — *Method of calculation and final amount of fine*

362 In paragraphs 241 and 245 above, the Court has found that, in the contested decision, the Commission failed to state reasons in that it did not state that it had used the turnover of the applicants' basic members for the purpose of ensuring that the fines did not exceed the upper limit of 10% provided for by Article 15(2) of Regulation No 17; nor did it set out the circumstances which enabled it to take account of those aggregate turnover figures. However, it must be observed that, in paragraphs 324 and 325 above, the Court has found that, in the present case, the Commission was entitled to take into account the turnover of the applicants' basic members for the purpose of calculating the upper limit, provided that they operated in the markets affected by the infringements sanctioned in the contested decision.

363 The Court considers that, in those circumstances, the failure to state reasons should not entail the annulment of the contested decision as that could only lead to the adoption of another decision identical in substance to the decision annulled (see, to that effect, Case T-16/02 *Audi* v *OHIM (TDI)* [2003] ECR II-5167, paragraph 97), or any alteration in the amount of the fines.

364 However, as appears from paragraph 361 above, the fines imposed on the applicants should be reduced by 70% pursuant to Section 5(b) of the Guidelines, instead of the 60% reduction applied by the Commission. Accordingly, the amounts of the fines are set at:

— EUR 360 000 for the applicant in Case T-217/03;

— EUR 9 000 000 for FNSEA;

— EUR 1 080 000 for FNB;

— EUR 450 000 for JA;

— EUR 1 080 000 for FNPL.

Costs

365 Under Article 87(3) of the Rules of Procedure, where each party succeeds on some and fails on other heads, the Court may order that the costs be shared or that each party bear its own costs. In the present case, it is appropriate to order the applicants to bear their own costs in the main proceedings and to pay three-quarters of the

costs incurred by the Commission in those proceedings. The Commission is to bear one-quarter of its own costs in the main proceedings and all costs in the proceedings for interim measures.

366 Under Article 87(4) of the Rules of Procedure, the French Republic, which intervened in the proceedings, is to bear its own costs.

On those grounds,

THE COURT OF FIRST INSTANCE (First Chamber)

hereby:

1. **Sets the amount of the fine imposed on the Fédération nationale de la coopération bétail et viande, the applicant in Case T-217/03, at EUR 360 000;**

2. **Sets the amount of the fines imposed on the applicants in Case T-245/03 as follows: EUR 9 000 000 for the Fédération nationale des syndicats d'exploitants agricoles, EUR 1 080 000 for the Fédération nationale bovine, EUR 1 080 000 for the Fédération nationale des producteurs de lait and EUR 450 000 for Jeunes agriculteurs;**

3. **Dismisses the remainder of the application;**

4. **Orders the applicants to bear their own costs in the main proceedings and to pay three-quarters of those of the Commission in the main proceedings;**

5. **Orders the Commission to bear one-quarter of its costs in the main proceedings and to pay all the costs in the proceedings for interim measures;**

6. **Orders the French Republic to bear its own costs.**

García-Valdecasas Cooke Labucka

Delivered in open court in Luxembourg on 13 December 2006.

E. Coulon J.D. Cooke

Registrar President

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