

## **Joined Cases T-217/03 and T-245/03**

### **Fédération nationale de la coopération bétail et viande (FNCBV) and Others**

**v**

### **Commission of the European Communities**

(Competition — Article 81(1) EC — Beef — Suspension of imports — Fixing of a union price scale — Regulation No 26 — Associations of undertakings — Restriction of competition — Trade union action — Effect on trade between Member States — Obligation to state reasons — Guidelines on the method of setting fines — Principle of proportionality — Gravity and duration of the infringement — Aggravating and attenuating circumstances — Prohibition of multiple sanctions — Rights of the defence)

Judgment of the Court of First Instance (First Chamber), 13 December 2006 II - 5000

#### **Summary of the Judgment**

- 1. Competition — Community rules — Associations of undertakings — Definition (Art. 81(1) EC)*

2. *Competition — Community rules — Associations of undertakings — Definition*  
(Art. 81(1), EC)
3. *Competition — Agreements, decisions and concerted practices — Effect on trade between Member States*  
(Art. 81(1) EC)
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(Art. 81 EC)
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(Arts 33 EC, 36 EC and 81(1) EC; Council Regulation No 26, Art. 2(1))
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12. *Competition — Fines — Amount — Determination — Maximum amount*  
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(Art. 81(1) EC; Commission Notice 98/C 9/03)
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(Council Regulation No 17, Art. 15(2))
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16. *Competition — Fines — Commission decision finding an infringement adopted after a Commission decision not amenable to review penalising or exonerating the same undertaking*  
(Council Regulation No 17, Art. 15)
17. *Competition — Fines — Amount — Discretion of the Commission — Judicial review — Unlimited jurisdiction*

1. 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. Having regard to the purpose of that provision, the concept of an association of undertakings must be understood as capable of applying to associations which themselves consist of associations of undertakings.

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 paras 49, 89)

For an agreement between undertakings to fall within the ambit of that provision,

2. 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. Any activity consisting in offering goods and services on a given market is an economic activity.

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.

described as undertakings is not sufficient to affect its status as an association within the meaning of Article 81(1) EC. Likewise, the 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. 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.

(see paras 52-55)

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.

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

3. 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 Member States.

Where the infringement in which an undertaking or association of undertakings participated is apt to affect trade between Member States, the Commission is not required to demonstrate that the individual participation of that undertaking or association of undertakings has affected 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. Lastly, 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.

(see paras 63, 66, 67)

4. Article 81(1) EC expressly provides that measures which directly or indirectly fix purchase or selling prices constitute

restrictions of competition. Price fixing is a patent restriction of competition.

An agreement 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, inter alia by limiting artificially the commercial negotiating margin of farmers and slaughterers and distorting the formation of prices in the markets in question.

This conclusion cannot be undermined by the 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, 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.

Moreover, the agreement in question does not cease to be restrictive merely because the minimum prices are fixed by reference to the government intervention price. Reference to that price does not mean that the minimum price 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 organisations of the agricultural markets which have the object of stabilising markets characterised by excess supply by means of withdrawing a part of production.

(see paras 83, 85-87)

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.

Likewise, 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. Furthermore, the crisis in a sector cannot, on its own, preclude Article 81(1) EC from applying.

(see paras 90-92)

5. The legal framework within which agreements between undertakings prohibited 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. Moreover, the alleged inadequacy of government measures to deal with the problems of a particular sector cannot justify
6. Agreements concluded in the context of collective negotiations between management and labour in pursuit of measures to improve conditions of work and employment must, by virtue of their nature and purpose, be regarded as falling outside the scope of Article 81(1) EC. However, an agreement concluded by federations representing farm-

ers and federations representing slaughterers aimed at fixing minimum prices for the purchase of cows by slaughterers and suspending beef imports must be held to come within the scope of the prohibitions laid down in Article 81 EC.

(see paras 98-100)

in question is conducive to attainment of all the objectives of Article 33 EC, it being understood that, given that those objectives are sometimes divergent, the Commission may try to reconcile them. Lastly, 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 paras 197-199, 208)

7. 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.

8. 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. 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.

Constituting as it does a derogation, Article 2(1) of Regulation No 26, which 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, must be interpreted strictly. Furthermore, that provision applies only if the agreement

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.

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.

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. 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.

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.

(see paras 217, 218, 222)

(see paras 238, 239)

9. Where the Commission imposes a fine on an individual undertaking which is the perpetrator of an infringement, it is
10. Although 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 are not the legal basis of the decision imposing a fine on a trader, that decision being based on 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. Therefore, there is a direct link between that decision and the Guidelines, with the result that they may form the subject-matter of an objection of illegality.

In any event, 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.

(see paras 252, 253)

(see para. 250)

11. Cartels relating to prices or the partitioning of markets are by nature very serious infringements. Therefore the Commission did not infringe the principle of proportionality by stating in Section 1A 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 that those kinds of infringements are to be regarded as very serious, for which a starting amount of EUR 20 million is provided.

12. 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. This consideration also

applies to the maximum amount of EUR 1 million.

(see para. 255)

ations of undertakings to put an end to that agreement, and the use of violence in order to compel a party to adopt an agreement or to ensure that the agreement is being applied, are among the aggravating circumstances which the Commission may take into account in increasing the amount of a fine imposed pursuant to Article 81 EC.

13. In the light of Section 1B 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, which provides that the duration of the infringement may entail a possible increase in the amount of the fine established on the basis of gravity, it seems that the very short duration of the infringement, less than one year, means merely that no additional amount should be imposed on the amount calculated by reference to the gravity of the infringement. In any event, 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.

(see paras 134, 257, 258)

(see paras 271, 278-289)

15. Article 15(2) of Regulation No 17 does not prevent the Commission from imposing fines of more than EUR 1 000 000 on associations which allegedly have no turnover. 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. 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.

14. Secret continuation of an agreement after the Commission has ordered the participating undertakings or associ-

Although in that provision the only express reference to the turnover of the undertaking concerns the upper limit of a fine exceeding EUR 1 000 000, Section 5(a) 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, by which the Commission has bound itself, states that the final amount of fine calculated 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. The limit of 10% of turnover must accordingly be observed, even with regard to the setting of fines of less than EUR 1 million.

Moreover, 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.

However, the possibility must not be ruled out 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.

Therefore, 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.

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.

(see paras 313, 314, 317-319, 325, 343)

In those cases, in any event, the option of taking into account the turnover of the basic members of the associations of undertakings must, however, be confined, in principle, to those of their members who operated in the markets affected by the infringements sanctioned in the contested decision.

Furthermore, taking into account the turnover of the members of an association of undertakings in determining the

16. 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. 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. However, it does not prohibit the

sanctioning of a number of different associations of undertakings which participated in a single infringement by reason of the participation and the degree of responsibility of each one of them in the infringement, even if some of them are members of the others.

(see paras 340-344)

17. While the Commission has discretion in setting the amount of fines imposed for infringements of the Community competition rules, the Court has, by virtue of Article 17 of Regulation No 17, unlim-

ited 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. Under that unlimited jurisdiction, the Court may, *inter alia*, adjust the amount of the reduction in the fine granted by the Commission to an undertaking or an association of undertakings as one of the circumstances provided for in 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.

(see paras 352, 355-361)