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II

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COMMISSION

COMMISSION DECISION

of 13 November 2002

(concerning the cash advance granted by France to Bull)

(notified under document number C(2002) 4366)

(Only the French text is authentic)

(Text with EEA relevance)

(2003/599/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community, and in particular the first subparagraph of Article 88(2) thereof,

Having regard to the Agreement on the European Economic Area, and in particular Article 62(1)(a) thereof,

Having called on interested parties to submit their comments pursuant to these provisions⁽¹⁾,

Whereas:

requested by the Commission would be sent as soon as possible. When it failed to receive the information, the Commission sent France a reminder by letter No D/50581 of 11 February, stating that a decision requiring the information to be provided would be taken under Article 10(3) of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty⁽²⁾ if it failed to received the information within ten working days.

- (2) France replied by fax of 4 March 2002, registered on 5 March under No A1/31700, asking for an extension of twenty working days in which to reply. By letter No D/50983 of 7 March, the Commission informed France that it had registered the case as non-notified aid (NN 23/2002) and extended the deadline for providing the information requested to 18 March 2002.

I. PROCEDURE

- (1) On 20 November 2001 the Commission learned from several sources that France was planning to grant a repayable advance of EUR 100 million to Bull. It accordingly sent a request for information to France by letter No D/54828 of 22 November 2001 and a reminder (D/55337) on 21 December 2001. By letter dated 19 December, the French Minister for the Economy informed the Commission about the aid plan in question. By fax dated 7 January 2002, registered as received on 8 January under No A/30093, the Commission received a provisional reply from the French authorities which stated that a cash advance of EUR 100 million had been paid and that the information

- (3) By fax dated 14 March 2002, registered under No A/32004 on 15 March, France notified the aid measures in question. By fax dated 20 March, registered on 22 March under No A/322021, the French authorities sent the Commission a memo on Bull's audited annual accounts. By letter of 20 March, registered by the Commission on 2 April under No A/32431, the French authorities submitted Bull's annual report for 2000.

⁽¹⁾ OJ C 128, 30.5.2002, p. 8.

⁽²⁾ OJ L 83, 27.3.1999, p. 1.

- (4) On 9 April 2002 the Commission decided to initiate the procedure in Article 88(2) of the Treaty and to require France to supply it with certain information concerning the measure in question. The decision was communicated to France by letter No SG/2002/229344/D of 12 April. Publication of the letter in the *Official Journal of the European Communities*⁽³⁾ did not give rise to any comments from third parties.
- (5) By letter of 3 May 2002, registered on the same date under No A/332709, France informed the Commission of the confidential information to be removed from the decision before publication. By letter registered on the same day under No A/33300, it also applied for a further month to provide the information requested when the procedure had been initiated. The Commission agreed to the request by letter No D/52321 of 13 May. By letter of 5 June, registered under No A/34118 on 6 June, France sent its comments on the initiation of the procedure and some of the information requested.
- (6) On 10 June 2002 a meeting took place between the Commission and the managing director of Bull. On 4 July, by letter No D/53522, the Commission sent France a reminder asking it to send the restructuring plan required in point 23(d) of the Community guidelines on rescue and restructuring aid for firms in difficulty⁽⁴⁾ (hereinafter referred to as the guidelines) as soon as possible. France sent the plan to the Commission by letter of 17 July 2002, registered on 18 July under No A/35380.
- (7) By letter No D/54766 of 26 August 2002, the Commission sent further questions to France, which replied by letter of 23 September, registered under No A/36914 on 24 September. The annexes to the letter arrived on 2 October, registered on the same date under No A/37167.

II. DESCRIPTION OF THE RECIPIENT

1. Earlier Commission decisions concerning Bull

- (8) Bull has been the subject of several Commission decisions. In 1992 the Commission decided that the capital injections from state resources amounting to

FRF 4 billion (EUR 609 million) contained elements of aid but that the aid was compatible with the common market⁽⁵⁾. In the same decision, it concluded that aid of FRF 2,68 billion (EUR 408 million) for research and development was also compatible with the common market.

- (9) In 1993 and 1994 France granted further aid to Bull. The Commission decided that the aid contained in the advance of FRF 2,5 billion (EUR 381 million) granted in February 1993 and the public contribution of FRF 8,6 billion (EUR 1 311 million) in 1993 and 1994 were compatible with the common market⁽⁶⁾ provided, however, that the conditions of the restructuring plan were complied with, that the company was privatised and that no further aid not complying with Community law would be granted to the Bull group.

2. The recipient and its development since 1994

- (10) The shareholders of the French computer group Bull are the French State with 16,3 % and France Télécom, Motorola and NEC with 16,9 % each. The other shareholders are institutions with 14 %, individuals and employees with 7 % each and Dai Nippon Printing (DNP)⁽⁷⁾ with 5 %. Bull is a limited company under French law.
- (11) Bull is an international computer group based in Europe, with businesses in over 100 countries. It operates chiefly in two areas:

— *Top of-the-range professional servers*

- (12) Bull designs and supplies a range of large professional servers based on the proprietary operating system GCOS. It also markets servers using IBM and NEC technology. In addition, Bull provides its customers with maintenance services directly linked to the servers. The French authorities reported that Bull's share of the European market in this sector is estimated at 3 %. Its main competitors are IBM (46,6 % of the market), Fujitsu (11,75 %) and Sun (11,07 %).

⁽³⁾ OJ C 128, 30.5.2002, p. 8.

⁽⁴⁾ OJ C 288, 9.10.1999, p. 2.

⁽⁵⁾ OJ C 244, 23.9.1992, p. 2.

⁽⁶⁾ Commission Decision 94/1073/EC of 12 October 1994 (OJ L 386, 31.12.1994, p. 1).

⁽⁷⁾ DNP is a Japanese group.

— *Specialised computer engineering services*

TABLE 1

Bull: assets sold in the last two years⁽⁹⁾

(in EUR million)

Date	Business	Amount
December 1999	29,7 % holding in Ingenico	104,4
February 2000	Automated teller machines	70
July 2000	Electronic subcontracting	50-100
February 2001	Smart cards (CP8)	341
February 2001	Irish service subsidiaries (CARA)	31
End 2001	European services	Various financial tools including acquisition of 13,4 % stake in Steria
2002	Louveciennes headquarters	50
2002	Lottomatica	11
2002	SOFOM	5
2002	Sale on the market of the first tranche of Steria shares ⁽¹⁰⁾	29

(13) Bull's activities in the computer engineering sector (development and integration of different applications, engineering of software architectures, etc.) are housed in Integris. Here its main competitors are Xerox, Compaq, IBM, Hewlett Packard, Oracle and SAP. Bull's share of the European market amounts to some 2 %, according to the French authorities.

(14) In 2001 Bull's turnover, broken down by activity, was as follows:

- 44 % in systems integration and information management services,
- 17 % in proprietary servers,
- 20 % in standard servers,
- 19 % in various infrastructure products and services.

(15) Bull's customer breakdown is as follows: 40 % in the public sector, 20 % in telecommunications, 8 % in energy and transport, 20 % in banking and insurance, and the remainder in various sectors.

(16) In 1994 Bull implemented the measures advocated in Decision 94/1073/EC. Following that restructuring, Bull again became profitable in 1995 and employed 21 400 persons in 85 countries in 1996, with a turnover of FRF 24 billion. In addition, as recommended by the independent expert appointed by the Commission, France launched Bull's privatisation by opening up its capital to DNP, France Télécom, Motorola and NEC in 1995-1996. In 1997 the company was listed on the stock exchange.

(17) In 1999, however, Bull again showed a loss, chiefly owing the depreciation of certain financial assets. In 2000 the operating result was still negative. Bull was therefore compelled to sell some assets (see Table 1) and to lay off staff under a social plan. By 2001 Bull employed only some 9 500 persons throughout Europe⁽⁸⁾.

(18) Bull acquired the Italian activities⁽¹¹⁾ of Integris Europe from Steria on 19 December 2001 in exchange for a reduction in the debt taken over by Steria of EUR 11 million (instead of the expected EUR 21 million)⁽¹²⁾.

⁽⁹⁾ According to *Les Echos*, 20 November 2001.

⁽¹⁰⁾ The first package of shares had been received in payment for the transfer to Steria of Bull's service business in Europe (excluding its information management activities in the United Kingdom) and its Scandinavian and Swiss subsidiaries.

⁽¹¹⁾ It should be noted that Bull's Italian service activities are in deficit.

⁽¹²⁾ See 'Bull va racheter tout de suite sa division italienne à Steria', *La Tribune*, 28 December 2001.

⁽⁸⁾ Of these employees, 1 026 work in Italy, 498 in the United Kingdom, 316 in Germany, 234 in the Netherlands, 441 in Spain and Portugal, and the others (nearly 6 800) in France.

- (19) According to the information in the possession of the Commission, a recovery and development plan for 2001-2003 (known as the 'strategic plan') was adopted in November 2000⁽¹³⁾ and was implemented at the beginning of 2001. It provided for a strategic recentering on its services and mainframes and the conversion of the two businesses into subsidiaries. It also provided for disinvestment, the sale of non-strategic assets, a reduction in costs and workforce adjustments.
- (20) In 2001, according to the French authorities, Bull experienced several setbacks. First, the strategic plan failed. It had been aimed partly at selling the loss-making French service businesses. Negotiations were under way with a consortium of French investors, and it was planned to list Integris on the stock exchange. However, the crisis in the technology stock market scuppered this plan. In addition, the sharp fall in technology shares in March 2000 affected the financing of Internet technology activities in which Bull had invested heavily, focussing its commercial offer on the concepts of 'e-services' and 'net-infrastructure'.
- (21) A fresh restructuring phase began in December 2001 with the appointment on 2 December of a new CEO who was given the task of analysing the financial situation and assessing Bull's prospects. The analysis resulted in a three-stage recovery strategy which was adopted in principle by Bull's board of directors on 14 March 2002. The recovery strategy was presented to the Commission in July 2002 (see Section V).
- (22) Bull also planned to sell other assets: its second tranche of Steria shares received in exchange for the transfer of its United Kingdom service business and the proceeds from the sale of Louveciennes and from the transaction with Steria. The sale of other property was also planned, as was the outsourcing of spare parts and the termination of the pension plan at Bull HN Information Systems Inc.
- (23) The 2001 financial report showed losses for 2001 totalling EUR 253 million (compared with EUR 243 million in 2000), whereas the subscribed capital was EUR 340 million and there was a negative net worth of EUR 158 million (compared with EUR 86 million in 2000). Consolidated net losses amounted to EUR 544 million (compared with EUR 292 million in 2000).
- (24) As regards the firm's most recent figures, the accounts for the first half of 2002 show the loss of 2 160 jobs, of which 1 240 in France. According to the French authorities, the redundancy plan was fully financed from the sale of assets⁽¹⁴⁾. The plan of 14 March 2002 also provided for a reduction in administrative costs and overheads. According to the results presented on 25 July 2002, total distribution and administration costs were reduced to 18 % of turnover in the second half of 2002, compared with 25 % in 2001. The report also showed a turnover of EUR 780 million⁽¹⁵⁾, a gross margin of EUR 170 million and a negative net result of EUR 524,2 million⁽¹⁶⁾. The losses before tax and interest payments amount to EUR 151 million. Business nevertheless continued at the same pace in the first half of 2002 and the group received orders worth EUR 713 million⁽¹⁷⁾.
- ### III. DESCRIPTION OF THE AID
- (25) The French Government granted aid totalling EUR 450 million to Bull. This figure covers a first instalment of EUR 100 million at the end of 2001 which was not notified and a second instalment of EUR 350 million in the first half of 2002. The aid was subject to several conditions that were listed in the notification:
- the aid was a loan in the form of repayable shareholder's advance,
 - the loan carried an annual interest rate of 5,23 %, equivalent to the Commission reference rate applicable on the date of the first payment of the cash advance,
 - the loan was to be reimbursed no later than 12 months after the final payment,
 - the aid would be paid over a maximum period of six months,
 - France undertook to submit a restructuring plan to the Commission by 30 June 2002,
- (13) By the end of 2000 Bull was already discussing selling assets so as to reduce its debts.
- (14) The total cost of the redundancy plan amounts to EUR 210 million, which corresponds to the total revenue from assets sold or asset sales decided on in September 2002.
- (15) Compared with the target for March 2002 of EUR 700 million, turnover in the previous having been EUR 1,27 billion.
- (16) The loss is due, among other things, to provisions for restructuring of EUR 225 million.
- (17) C. Jay 'Bull a assaini son bilan mais doit encore faire ses preuves'. *La Tribune*, 29 July 2002.

— the maximum amount of the loan was EUR 450 million. The cash advance of EUR 450 million was justified by the French authorities on the basis of the liquidity plan shown in Table 2⁽¹⁸⁾ and a margin of EUR 7 million granted in view of the fact that the firm's liquidity requirements might exceed EUR 443 million by June 2002⁽¹⁹⁾. The liquidity prospects for the period 31 December 2001-30 June 2002 were presented as follows by the French authorities:

TABLE 2

Liquidity plan

(in EUR million)

Available liquidity	Position at start of period	Operating liquidity generated (cash consumption)	Increase (decrease) in available resources	Position at end of period
January 2002	103 ⁽²⁰⁾	- 84	- 12	7
February 2002	7 ⁽²¹⁾	- 43	- 30	- 66
March 2002	- 66	- 79	- 116	- 261
April 2002	- 261	- 28	- 42	- 331
May 2002	- 331	- 10	- 2	- 343
June 2002	- 343	8	- 4	- 339

IV. REASONS WHY THE ARTICLE 88(2) PROCEDURE WAS INITIATED

(26) The Commission decided to initiate proceedings under Article 88(2) of the Treaty for five main reasons based on its review of the compatibility of the aid with the guidelines.

⁽¹⁸⁾ The cash advance is in two parts: a first advance of EUR 100 million at the end of 2001 and a further advance of EUR 350 million on 14 March 2002.

⁽¹⁹⁾ The French authorities explained that, for example, the firm's self-financing capacity could deteriorate more rapidly than expected.

⁽²⁰⁾ This figure includes the EUR 100 million already paid by the State at the end of 2001.

⁽²¹⁾ Situation as at 31 December 2001 after payment of the cash advance by the State.

(27) First, the Commission questioned the one-off nature of the aid in question which, according to paragraph 25 of the guidelines, must be designed to keep a company in business for a limited period, during which its future can be assessed. In the present case, it seemed at this stage that the firm was committed to a long-term restructuring process.

(28) Second, the Commission was not certain about the exact date on which the first tranche of EUR 100 million had been granted. The importance of knowing the exact date is due to the fact that the guidelines provide that the Member State must, not later than six months after the rescue aid measure has been authorised, communicate a restructuring plan or a liquidation plan or proof that the loan has been reimbursed in full.

(29) Third, the duration of the aid did not seem clear. According to the guidelines, the aid must cover a maximum period of six months. However, according to the notification, there was a risk that the aid granted would last more than six months.

(30) Fourth, the Commission doubted that the aid would have no 'spillover' effect, as claimed by France, as Bull had businesses in other Member States⁽²²⁾.

(31) Fifth, the Commission had doubts as to the source of the cash requirements. As the firm had started restructuring some years earlier, as stated in Section II, the aid could be intended more to finance the current restructuring. As Bull had already received restructuring aid in 1993-1994, fresh restructuring aid would have come up against the principle of 'one time, last time' aid provided for in Section 3.2.3 of the guidelines.

V. COMMENTS FROM FRANCE

(32) Following the initiation of the procedure, the French authorities provided the following details:

⁽²²⁾ See Section II.2.

- (33) The French authorities pointed out that, as regards the one-off nature of the aid and the firm's long-term restructuring, Bull was undergoing continuing adjustment, in step with developments on the IT market, like the other firms present ⁽²³⁾. This adjustment process had led Bull to expand in the services market, regarded as less capital-intensive. These adjustment efforts ⁽²⁴⁾, contained in the strategic plan covering end-2000 and 2001, were self-financed by the firm. However, the development of the services sector was not carried out under favourable conditions owing to the lack of financing for certain products, leading to a deterioration in the position of the firm. The French authorities stated that external factors such as the very difficult position on the IT market and the collapse in the stock market value of IT firms had led to the failure of Bull's strategic plan in 2001. They stressed the fact that the price for Bull's European service activities had been amended downwards several times between May and November. The strategic plan having failed, the firm found itself in difficulties once again and encountered problems in finding short-term credit. That was why Bull applied to the French Government for rescue aid at the end of December 2001.
- (34) Regarding the exact date on which the first instalment of EUR 100 million was granted, the French authorities indicated that it had been granted on 31 December 2001. The cash advance had been granted under Article 24 of the amending Finance Law for 2001 ⁽²⁵⁾. In accordance with the Decree of 5 December 1870 on the promulgation of laws and decrees, this Law became applicable only one clear day after its publication in the French Official Gazette, i.e. on 31 December 2001. The EUR 100 million was actually paid to Bull on 2 January 2002.
- (35) As regards the total duration of the aid, the French authorities stated that, following the first tranche of EUR 100 million on 31 December 2001, a second tranche of EUR 150 million had been granted on 2 May 2002 and a third of EUR 200 million on 17 June 2002. They confirmed that the aid had indeed been paid over a maximum period of six months from the date on which it was granted, in accordance with Section 3.1 of the guidelines.
- (36) As regards the question of spillover of the rescue aid granted to Bull, France stated that Bull had only a very small share of the market for services and servers ⁽²⁶⁾ and that it lagged far behind its competitors. It concluded that the effect of the aid on intra-Community trade and competition was minimal. It also stated that the disappearance of Bull would help to weaken competition in Europe as Bull offered its customers a freedom of choice that would not otherwise exist. France also pointed out that Bull was a recognised specialist in heterogeneous and open environments and thus facilitated the free interplay of competition.
- (37) As regards the source of the liquidity requirements and the doubt expressed by the Commission when it initiated the procedure concerning the possible use of the aid to finance the successive restructuring plans, France provided a detailed statement on the use of the cash advance of EUR 450 million:
- EUR 134 million was allocated to financing the operating losses incurred since 1 January 2002. The French authorities stressed that the requirements were set to disappear in the second quarter owing to the reduction in management costs,
 - EUR 106 million was used to reimburse short-term credit lines. According to the French authorities, most of the banks had withdrawn their credit lines from Bull, which had been unable to find fresh credit,
 - EUR 91 million was allocated to repayment of a debenture loan,
 - EUR 37 million was allocated to repayment of yen bonds involving a private placement. The repayment had been contractually obligatory owing to Bull's inadequate capital and reserves as at 31 December 2001,
 - EUR 85 million was used to repay a bank loan secured with claims which the lender decided at short notice to terminate, although it has so far agreed to extend the arrangements on a month-by-month basis. The French authorities pointed out that Bull must have sufficient resources to allow it repay the loan at any time.

⁽²³⁾ This was true of other European mainframe manufacturers such as ICL, Siemens, Nixdorf, Olivetti and Philips, which had to shut down or sell their businesses in this sector.

⁽²⁴⁾ Involving changes in the portfolio of activities and staff cutbacks or retraining.

⁽²⁵⁾ Law No 2001-1276 of 28 December 2001 (*Journal Officiel de la République Française*, No 302, 29.12.2001).

⁽²⁶⁾ France stated that, as regards top-of-the-range servers, Bull held less than 3 % of the European market and its share of the market for IT services was less than 2 %.

- (38) The French authorities concluded that the advance from the State allowed Bull to remain in business in the first half of 2002 although the firm had a negative cash flow of EUR 134 million and had to repay EUR 319 million in bank or debenture loans rapidly.
- (39) As regards the financing of the restructuring costs, France stated that the cost of the restructuring plan in the first half of 2002 was EUR 55 million and was financed by selling assets: sale of the Louveciennes headquarters (EUR 50 million), sale of Lottomatica (EUR 11 million) and Sofom (EUR 5 million), and sale on the market of the first tranche of Steria stock received in exchange for the transfer to Steria of Bull's service businesses in Europe, as well as its Scandinavian and Swiss subsidiaries (EUR 29 million). The sale of these assets provided Bull with a total of EUR 95 million, giving it a surplus of EUR 40 million over the costs of the redundancy plan in the first half of 2002. The surplus, coupled with the sale of assets decided by the board of directors but not yet carried out⁽²⁷⁾ and involving an amount of [...] (*)⁽²⁸⁾, will make it possible to finance the rest of the restructuring plan.
- (40) The French authorities also submitted a restructuring plan that can be summarised as follows:

Rescue phase — 1.1.2002-30.6.2002

- The aim is to achieve operational equilibrium.
- Workforce cut by some 1 500 persons, of whom 1 200 in France.
- Reduction in overheads (from 25 % in 2001 to 18 % in 2002) ⁽²⁸⁾.
- Consolidation of positive results achieved by Bull in proprietary servers and their maintenance, reversal of negative results in the other fields.
- Financing of the redundancy plan through the sale of Bull's assets: sale of land and buildings, sale of Steria stock, transfer to IBM of maintenance parts management business and the corresponding stocks.

Lasting recovery strategy — 2002-2005

- The purpose of this phase is to combine all the strengths of the group so that together they provide their customers with applications development and information management services, together with advice on computer architecture systems and help with putting it into practice in order to optimise the corresponding physical infrastructures.
- As regards servers, reduction in the supply of servers, concentration on servers using the new Intel Itanium 2 components. These will essentially be top-of-the-range servers. Bull plans to withdraw from the development and marketing of [...] *.
- As regards infrastructure services, Bull's aim is to increase the added value of services supplied. To that end, a small number of services will be promoted using specific Bull products in the field of systems security and administration, open-source solutions or the tools provided by a small number of first-rank partners. Synergy between the different teams will be established in order to enhance productivity.
- In the field of applications services and security products, Bull's aim is to restore the profitability of the systems integration activities through professional management and a gradual increase in skills on the basis of the experience already acquired in the telecommunications sector, the public sector and the energy sector. Bull is also planning to expand in the defence sector in view of the possibilities for cooperation offered by the development of new scientific sectors. Bull is already offering competitive services, especially in the field of electronic messaging services, 24-hour call management, portals for mobiles and invoicing of telephone calls. It also plans to improve tools and skills in the area of the security of information systems. The skills will be available [...] *.
- In figures, Bull's aim is to have [...] * departments and [...] * products by 2005. The products would consist of proprietary servers, large open servers and security products.

(*) Square brackets with an asterisk denote confidential information which has been deleted from the text.

⁽²⁷⁾ [...] *.

⁽²⁸⁾ Bull's budget was based on overheads reduced to some 17,5 %, excluding the cost of the redundancy plan.

Recapitalisation of the group — September 2002 to 30 June 2003

- On the basis of the activities described above, Bull should reach equilibrium by the second half of 2002 and return to profit by 2003. Even if Bull returns to profit, it will not be able to reimburse the cash advance of EUR 450 million from its own resources by 17 June 2003.
- That is why Bull will need to be recapitalised. It plans to achieve this either through one or several large private-sector shareholders wishing to participate in a capital increase or through other private investors interested in acquiring a stake in Bull.
- The search for capital will start on [...]*, once Bull has shown it can return to operational equilibrium.

VI. ASSESSMENT OF THE AID

1. Existence of aid

- (41) Article 87(1) of the Treaty states that 'any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, insofar as it affects trade between Member States, be incompatible with the common market'.
- (42) In the present case, the shareholder's advance was granted by the French State under Article 24 of the amending Finance Law for 2001. The aid consists in a repayable cash advance from the French State, a Bull shareholder. The advance is for a specific firm, Bull. It does not comply with the principle of a private investor in a market economy since the other Bull shareholders have not stated that they intend to grant an advance to Bull and as Bull, in view of its financial situation, was not able to obtain the advance on the market. Furthermore, the aid strengthens the position of the firm by enabling it cover its normal operating costs and distorts or threatens to distort competition since Bull is an international company and its products are the subject of international trade. Furthermore, Bull has foreign competitors such as IBM, Fujitsu and Sun.

- (43) It can be concluded therefore that the shareholder's advance granted by the French State to Bull constitutes aid within the meaning of Article 87(1) of the Treaty.

2. Obligation to notify

- (44) Article 88(3) of the Treaty requires Member States to notify any plans to grant or alter aid. The Member State concerned may not put its proposed measures into effect until the procedure has resulted in a final decision.
- (45) It is clear that, in the present case, the aid was granted and paid both before France officially notified the aid and before the Commission could ascertain whether it was compatible with the common market, the aid having been granted on 31 December 2001 and paid on 2 January 2002, with the formal notification reaching the Commission only on 14 March 2002.
- (46) The Commission concludes that, in failing to notify, France unlawfully implemented the aid in question and was thus in breach of its obligations under Article 88(3) of the Treaty.

3. Compatibility of the aid with the common market

- (47) The aid cannot be exempted under Article 87(2) of the Treaty as it is not aid of a social character, granted to individual consumers, or aid to make good the damage caused by natural disasters or to compensate for the economic disadvantages caused by the division of Germany.
- (48) Nor can the aid be exempted under Article 87(3)(a), (b) and (d) of the Treaty as it is not intended to promote economic development in certain regions, to promote the execution of an important project of common European interest or to promote culture and heritage conservation.
- (49) It is therefore necessary to determine whether the aid qualifies for exemption under Article 87(3)(c) of the Treaty as aid to facilitate the development of certain activities where it does not adversely affect trading conditions to an extent contrary to the common interest.

- (50) This is the Treaty provision that prompted the Commission to adopt the guidelines it applies to assess measures in the field of rescue and restructuring aid. And rescue aid is precisely the exemption claimed by the French authorities.

4. Assessment of the aid under the guidelines

- (51) According to the figures supplied by the French authorities and given in Section II.2, Bull can be regarded as a firm in difficulty within the meaning of the guidelines.

- (52) In view of its status as a limited company, Bull can thus be regarded as a firm in difficulty under point 5(a) of the guidelines 'where more than half of its registered capital has disappeared and more than one quarter of that capital has been lost over the preceding 12 months'. In the present case, the losses in 2001 amounted to EUR 253 million (against EUR 243 million in 2000), the capital subscribed to that date amounting to EUR 340 million. Bull had a negative net worth of EUR 158 million (compared with EUR 86 million in 2000), which is less than half the equity. Furthermore, over a quarter of the capital has disappeared in the last twelve months.

- (53) An analysis of these figures shows that Bull is indeed in the position of a firm in difficulty within the meaning of the guidelines, a fact also confirmed by the mounting losses and the necessary disposal of a large number of assets.

- (54) A review of the aid under Section 3.1 of the guidelines produces the following assessment:

- (55) In accordance with point 23(a) of the guidelines, the aid consists of liquidity support granted at an interest rate corresponding to the reference rate adopted by the Commission. In case in question, the rate is 5,23 %, which was the reference rate on the date on which the first tranche of aid was granted, i.e. 31 December 2001.

- (56) Point 23(b) of the guidelines stipulates that the aid must be linked to loans that are to be reimbursed over a period of not more than twelve months after disbursement of the last instalment to the firm. In the present case, the last instalment having been granted on 17 June 2002, reimbursement must be completed by 17 June 2003. The Commission notes that, according to France, Bull will not be able to repay that sum from its own resources

and is planning a recapitalisation operation. It proposes to verify this condition at a later date and insists that the reimbursement take place as soon as possible, and no later than 17 June 2003.

- (57) Point 23(c) of the guidelines states that the aid must be warranted on the grounds of serious social difficulties and have no unduly adverse spillover effects on other Member States. This condition had caused doubts when the procedure was initiated owing to the fact that Bull operated in other Member States. However, France has provided sufficient information for the Commission to conclude that the aid has no negative spillover effect, thereby dispelling the latter's doubts. Bull has only a small market share and, in addition, it is selling most of its businesses outside France, which limits the adverse effect of the aid in other Member States.

- (58) Point 23(d) of the guidelines requires France to communicate, not later than six months after the rescue aid has been authorised, a restructuring plan or a liquidation plan or proof that the loan has been reimbursed in full and/or that the guarantee has been terminated. When the procedure was initiated, this point posed difficulties as the Commission did not know the exact date on which the first aid instalment had been granted. France stated that it had been granted on 31 December 2001. As a result, it was required to submit a restructuring plan by 30 June 2002, an undertaking it gave at the time of the notification. It communicated the restructuring plan with a slight delay six and a half months after payment of the first aid instalment. The Commission regrets that France failed to communicate the restructuring plan by the deadline set but concludes that the submission of the plan satisfies the requirements of the guidelines.

- (59) Point 23(e) of the guidelines states that rescue aid must be restricted to the amount needed to keep the firm in business. The Commission had doubts concerning this point when it initiated the procedure as Bull had been restructuring for several years and it was possible that the aid would be used to finance the restructuring. Bull had received restructuring aid in 1993-1994, so that further restructuring aid would have come up against the principle of 'one time, last time' aid referred to in Section 3.2.3 of the guidelines. The Commission considers that the details supplied by France when the procedure was initiated are sufficient to enable it to conclude that the cash advance was used solely to reimburse the credit lines, debenture loans and bank

loans and to finance operating losses. France also presented data confirming that the restructuring costs, notably the redundancy plan, had been financed in full by the sale of assets (Section V). The Commission accordingly concludes that the aid was used in accordance with point 23(e) of the guidelines since it was limited to the amount needed to keep the firm in business for the six months during which the rescue aid was authorised.

(60) The Commission points out, however, that France will have to comply strictly with the principle of 'one time, last time' aid and must not grant restructuring aid to Bull before 31 December 2004. Any recapitalisation of Bull will thus have to conform to the private investor principle.

(61) Point 24 of the guidelines requires rescue aid to cover a maximum period of six months. The situation as regards this requirement was not clear when the procedure was initiated as the Commission did not know when the first aid instalment was paid or what the total duration of the aid was. The Commission concludes from the explanations provided by France that the aid granted complies with that requirement since the first instalment was granted on 31 December 2001⁽²⁹⁾ and the last instalment on 17 June 2002, a period of less than six months. The Commission's doubts concerning this aspect were thus removed.

(62) Under point 25 of the guidelines, rescue aid must be a one-off operation designed to keep a company in business for a limited period, during which its future can be assessed. The situation regarding this requirement gave rise to questions when the procedure was initiated as the company had been engaged in a long-term restructuring process and the cash advance could have served to cover the costs of restructuring. According to the information communicated by France, the rescue aid allowed the company to take stock and to develop a recovery strategy which was implemented in early 2002. France also supplied evidence that the cash advance had been allocated to cover liquidity requirements and that restructuring costs had been financed from the sale of assets. The Commission's doubts were accordingly dispelled.

(63) However, the Commission stresses that no further rescue aid may be granted as such aid must be a one-off operation.

VII. CONCLUSION

(64) The cash advance granted by France to Bull constitutes aid within the meaning of Article 87(1) of the Treaty.

(65) The aid granted by France in breach of its obligations under Article 88(2) of the Treaty constitutes unlawful aid.

(66) The exemption in Article 87(3) of the Treaty is applicable in so far as the cash advance satisfies the criteria spelt out in the guidelines. The Commission has accordingly assessed the aid in the light of the guidelines.

(67) The Commission concludes, having regard to the information communicated by the French authorities, that the cash advance was granted to a firm in difficulty, that it consists in liquidity support subject to the Commission reference rate, that it is linked to a loan to be reimbursed over a period of not more than 12 months after disbursement of the last instalment and that the aid will not have any adverse spillover effects on other Member States.

(68) The Commission must, however, ensure that the reimbursement obligation is satisfied not more than twelve months after payment of the last instalment, i.e. by 17 June 2003. France will accordingly be required to submit evidence to the Commission that Bull has repaid in full the cash advance and interest as soon as possible and by 17 June 2003 at the latest.

(69) The Commission must also ensure that rescue aid is a one-off operation. Accordingly, France may not grant any further rescue aid to Bull in the future in order to safeguard the one-off nature of the aid.

(70) In order to comply with the 'one time, last time' condition, the Commission points out that no restructuring aid may be granted by France to Bull within ten years of payment of the last restructuring aid, i.e. until 31 December 2004,

⁽²⁹⁾ See Section V.

HAS ADOPTED THIS DECISION:

Article 3

France shall inform the Commission, within two months of notification of this Decision, of the measures taken to comply with it.

Article 1

The aid granted by France to Bull in the form of a cash advance of EUR 450 million is compatible with the common market, subject to the conditions set out in Article 2.

Article 4

This Decision is addressed to the French Republic.

Done at Brussels, 13 November 2002.

Article 2

France shall submit evidence of the reimbursement by Bull, no later than 17 June 2003, of the cash advance of EUR 450 million, including interest.

For the Commission

Mario MONTI

Member of the Commission

COMMISSION DECISION**of 2 April 2003****relating to a proceeding pursuant to Article 81 of the EC Treaty****(Case COMP/C.38.279/F3 — French beef)***(notified under document number C(2003) 1065)***(Only the French text is authentic)***(2003/600/EC)*

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

1. THE FACTS

Having regard to the Treaty establishing the European Community,

Having regard to Council Regulation No 17 of 6 February 1962, first Regulation implementing Articles 85 and 86 of the Treaty ⁽¹⁾, as last amended by Regulation (EC) No 1/2003 ⁽²⁾, and in particular Article 15(2) thereof,

Having regard to Council Regulation No 26 of 4 April 1962 applying certain rules of competition to production of and trade in agricultural products ⁽³⁾, as amended by Regulation No 49 ⁽⁴⁾, and in particular Article 2 thereof,

Having regard to the Commission decision of 24 June 2002 to initiate proceedings in this case,

Having given the undertakings concerned the opportunity of being heard on the matters to which the Commission has taken objection, in accordance with Article 19(1) of Regulation No 17 and Article 2 of Commission Regulation (EC) No 2842/98 of 22 December 1998 on the hearing of parties in certain proceedings under Articles 85 and 86 of the EC Treaty ⁽⁵⁾,

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

Having regard to the final report of the Hearing Officer in this case ⁽⁶⁾,

Whereas:

1.1. Subject of the case and procedure

- (1) This Decision relates to a written agreement, dated 24 October 2001, concluded between six French federations in order to set a minimum purchase price for certain categories of cattle and suspend imports of beef into France. Four of the federations which signed the agreement represent cattle farmers: the Fédération nationale des syndicats d'exploitants agricoles (FNSEA), the Fédération nationale bovine (FNB), the Fédération nationale des producteurs de lait (FNPL) and the Jeunes agriculteurs (JA, formerly the Centre national des jeunes agriculteurs or CNJA). The two other federations which signed the agreement represent cattle slaughterers: the Fédération nationale de l'industrie et des commerces en gros des viandes (FNICGV) and the Fédération nationale de la coopération bétail et viande (FNCBV). This Decision also relates to the verbal agreement concluded at the end of November and beginning of December 2001 between the same parties and having the same object, applicable following the expiry of the agreement concluded on 24 October 2001.

- (2) On 30 October 2001, having learned of the signature of the agreement of 24 October 2001, the Commission wrote to the French Permanent Representative to the European Union requesting further information on the agreement and on the involvement of the French State. A reply was received by letter dated 9 November 2001.

⁽¹⁾ OJ L 13, 21.2.1962, p. 204/62.

⁽²⁾ OJ L 1, 4.1.2003, p. 1.

⁽³⁾ OJ 30, 20.4.1962, p. 993/62.

⁽⁴⁾ OJ 53, 1.7.1962, p. 1571/62.

⁽⁵⁾ OJ L 354, 30.12.1998, p. 18.

⁽⁶⁾ OJ C 195, 19.8.2003.

- (3) On 9 November 2001, the Commission wrote to five of the federations which had signed the agreement requesting information pursuant to Article 11 of Regulation No 17; since the Commission was not at that time aware that the FNCBV had also signed the agreement, the request for information was not addressed to that federation. The five federations in question replied accordingly to the requests for information on 15 and 23 November 2001.
- (4) On 26 November 2001, in the light of the information thus obtained, the Commission sent the six federations a letter of formal notice stating that the facts which had come to its knowledge indicated, at first sight, that the Community competition rules had been infringed. The addressees were asked to submit their comments by 28 November. Each of them replied that the agreement would end on 30 November 2001 and that it would not be extended.
- (5) On 17 December 2001, having information indicating that the agreement was in fact continuing, the Commission carried out investigations on the premises of the FNSEA and the FNB in Paris pursuant to Article 14(3) of Regulation No 17, and on the premises of the FNICGV, also in Paris, on the basis of Article 14(2) of Regulation No 17.
- (6) On 24 June 2002, the Commission adopted a statement of objections addressed to the six federations. The parties submitted their written comments between 23 September and 4 October 2002. They also made known their views at the hearing held on 31 October 2002.
- (9) The FNSEA, which is the main French farmers' union, has various branches. The basic level is the local farmers' union (*syndicat d'exploitants agricoles*); the local farmers' unions are grouped together at department (*département*) level. The grouping is called the *Fédération départementale des syndicats d'exploitants agricoles* (FDSEA) or *Union départementale des syndicats d'exploitants agricoles* (UDSEA), and these are members of the FNSEA. Regional federations coordinate the activities of the FDSEAs or UDSEAs in each region. The FNSEA also comprises 38 specialised associations representing the interests of each type of producer. These specialised associations include the FNB and the FNPL, both of which signed the agreement of 24 October 2001. Lastly, the FNSEA also comprises four social affairs sections, which are not covered by this proceeding. Young farmers (under 35 years of age) have their own representative body, the JA. To be a member of the local young farmers' centre, one must also be a member of the local FDSEA/UDSEA trade union. The FNSEA, the JA, the FNB and the FNPL are trade unions governed by French law.

1.3. The beef sector in France and the October 2000 crisis

- 1.2. The Parties
- (7) The FNICGV is the trade organisation representing undertakings of all sizes and types of activity operating in the meat industry and meat wholesaling (beef and veal, pigmeat, mutton and lamb, horsemeat and offal). The FNICGV is a union (*syndicat*) established under French law and, on 1 January 2000, had more than 400 members throughout France. Its members account for more than 75 % of turnover in the sector. In its comments on the statement of objections, the FNICGV stated that its share 'as regards slaughter' (*en matière d'abattage*) is 80 %, or 60 % if the cooperatives, which are ordinary rather than permanent, members are not included.
- (8) The FNCBV is the federation representing the cooperative movement. It comprises 300 cooperative groups of producers in the cattle, pig and sheep farming sectors and some 30 slaughter and meat-processing groups or undertakings.
- (10) The cattle population in the Community numbers some 81 million head. French cattle numbers account for more than 25 % of this total. Every year, slaughtered adult cattle in France represent approximately 1,3 million tonnes of carcase weight equivalent (1,361 million in 1999, 1,277 million in 2000 and 1,315 million in 2001). Slaughtered dairy cattle (i.e. cows intended for milk production) or suckler cows (i.e. cows for the rearing of calves) represent approximately 50 % of this total (620 000, 624 000 and 600 000 tonnes of carcase weight equivalent in 1999, 2000 and 2001 respectively) (7). In a report drawn up by the French body OFIVAL (Office national interprofessionnel des viandes, de l'élevage et de l'aviculture) in October 2002 on 'the beef sector in France' (8), one of the tables is headed 'operators'. Against the heading 'production', the table indicates '240 000 farms with more than five' adult cattle, with turnover estimated at EUR 4,4 billion. Against the heading 'slaughter', the table cites '443 slaughter and cutting enterprises with more than 20 employees'; turnover in 'butcher's meat' is estimated at EUR 14 billion, including EUR 6,2 billion for 'beef and veal'.

(7) Document 38.279/107. See also the statistics available on the website of the Office national interprofessionnel des viandes, de l'élevage et de l'aviculture (OFIVAL), www.ofival.fr.

(8) 'La filière bovine en France', report available on the OFIVAL website, www.ofival.fr/doctech/sial/bov02-t.pdf.

- (11) Total imports into France (live adult cattle, fresh and frozen meat) from other Member States amounted to 342 000 tonnes of carcase weight equivalent in 1999, 331 000 tonnes in 2000 and 262 000 tonnes in 2001. Such imports account for virtually all French imports of beef and veal (only 5 % of French imports of such products come from non-Community countries). France is one of the main meat importers in the Community, just as it is one of the main exporters to the other Member States. In 2001, French imports were worth EUR 1 354 million and French exports EUR 744 million⁽⁹⁾. Most of the trade is in fresh or frozen meat, not live animals. It should be borne in mind that at that time France was unlawfully banning the import of beef originating in the United Kingdom. That France thereby failed to fulfil its obligations has been confirmed by the Court of Justice of the European Communities⁽¹⁰⁾.
- (12) In October 2000, a new case of bovine spongiform encephalopathy (BSE or mad cow disease) was discovered. It involved an animal from a herd from which, in the meantime, 11 other animals had been slaughtered and their meat put up for sale in a supermarket chain. Other cases of BSE were subsequently discovered in other Member States. At the same time, sheep in the United Kingdom were badly hit by an outbreak of foot-and-mouth disease, which had an impact on meat consumption in general in other Member States as well as the United Kingdom.
- (13) This situation, which was widely reported in the media, created a new crisis in the beef sector. As from October 2000, there was a sharp drop in consumption in a number of Member States, including France, but also a substantial reduction in French imports and exports; for example, the last two months of 2000 saw a 50 % drop in French imports compared with the same months in 1999. However, as from the middle of 2001, consumption in France recovered considerably, so that the decline for 2001 as a whole compared to 2000 was ultimately on a much smaller scale than anticipated (a decline of between 4 % and 5 %). Similarly, though it did not return to its original level, trade recovered substantially.
- (14) The trend of beef production prices was as follows. Following the October 2000 crisis, prices fell significantly. Even though average slaughterhouse entry prices for cows rose again during the first half of 2001, they remained below the average prices for the first half of 1999 or 2000. As from the second half of 2001 in particular, prices started to fall again. Between September/October 2000 and September/October 2001, the decline may be put at about 20 % on the slaughterhouse entry prices for culled cows, i.e. cows for slaughter⁽¹¹⁾. At the beginning of October 2001, following four months of decline, slaughterhouse entry prices had fallen back to the level they had reached at the end of November 2000, at the height of the new beef crisis⁽¹²⁾. However, it should be noted that, because of the reform of the common agricultural policy under 'Agenda 2000', intervention prices had been reduced by 13,4 %, in return for an increase in direct aid for stock farmers. As from the 43rd week of 2001 (the week from 22 to 28 October 2001), the statistics produced by the federations in response to the request for information show a recovery in prices. For example, the slaughterhouse entry price for U3 cows⁽¹³⁾ rose, per 100 kg carcase, from FRF (French francs) 1 941 to FRF 1 956, then to FRF 2 025 and finally to FRF 2 034 respectively for weeks 42 (the week before the agreement was signed), 43, 44 and 45 of 2001⁽¹⁴⁾.
- (15) By contrast, final consumer prices remained stable or increased slightly throughout 2001. This is partly due to the additional costs imposed by BSE, which, in France at any rate, are borne by intermediaries and passed on to the final consumer, or to the loss of income on certain parts of the animal no longer sold to the consumer⁽¹⁵⁾. It is also possible that the decrease in volume sold was offset by an increase in the margins of the various operators involved up to the point of sale to the final consumer.

⁽¹¹⁾ See document 38.279/162 and 163.

⁽¹²⁾ All the weekly price figures from January 1999 to mid-November 2001 are set out in document 38.279/109 to 111.

⁽¹³⁾ The Community rules have established a grading scale for adult cattle carcasses based on the combined use of two criteria. The first (conformation) is divided into six categories represented by the letters SEUROP (the letter S stands for 'superior', E for 'excellent' and so on to letter P, which stands for 'poor'). The second criterion is the degree of fat cover; it is subdivided into five categories, from 1 (low) to 5 (very high). A third-level subdivision (identified by the signs '+', '-' and '=') is also possible (see Council Regulation (EEC) No 1208/81 of 28 April 1981 determining the Community scale for the classification of carcasses of adult bovine animals (OJ L 123, 7.5.1981, p. 3), as last amended by Council Regulation (EEC) No 1026/91 (OJ L 106, 26.4.1991, p. 2)).

⁽¹⁴⁾ Document 38.279/109.

⁽¹⁵⁾ An FNSEA memo of 30 August 2001 states that 'the additional cost imposed by the new BSE crisis on the production and sale of 1 kilo of minced steak' (le surcoût lié à la nouvelle crise ESB sur la fabrication et la vente d'un kilo de steak haché) may be put at '14 % of the industrial selling price to large retailers' (14 %, prix de vente industriel à la grande distribution) (document 38.279/534).

⁽⁹⁾ Information available on the OFIVAL website, citing as its source 'French customs (2001)'.

⁽¹⁰⁾ Case C-1/00 *Commission v France* [2001] ECR I-9989.

1.4. The common organisation of the market in beef and veal and the measures adopted to deal with the crisis

1.4.1. Common organisation of the market: general rules

(16) The common organisation of the market in beef and veal (the CMO), as applicable at the time of the events involved in this case, is based on Council Regulation (EC) No 1254/1999 (OJ L 160, 26.6.1999, p. 21) (the basic Regulation).

(17) As the second recital to the basic Regulation states, 'the aim of the common agricultural policy is to attain the objectives set out in Article 33 of the Treaty'. It goes on to state that 'in the beef and veal sector, in order to stabilise markets and to ensure a fair standard of living for the agricultural community, provision should be made for internal market measures comprising, in particular, direct payments to beef producers, private storage aid and a public storage scheme'. The CMO is thus based on a comprehensive scheme of direct payments to farmers. A series of premiums is provided for by the Regulation, such as the suckler cow premium (Article 6 et seq. of the basic Regulation) and the slaughter premium (Article 11 of the basic Regulation).

(18) On the other hand, the mechanisms for public intervention, which were deemed to be 'no longer indispensable to balance the market', were to be phased out gradually (see recital 20 to the basic Regulation). Accordingly, until 30 June 2002, the national intervention agencies were able to buy in products, under tender procedures, 'to prevent or mitigate a substantial fall in prices' (Article 47 of the basic Regulation). The tender procedures could be opened whenever the following two conditions were both met for a period of two consecutive weeks:

- the average Community market price recorded on the basis of the Community grading scale⁽¹⁶⁾ for the carcasses of adult bovine animals is less than 84 % of the intervention price,
- the average market price recorded on the basis of the said scale in the Member State or States or regions of a Member State is less than 80 % of the intervention price (Article 47(3) of the basic Regulation).

Article 47(3) sets the intervention price at gradually decreasing levels from 1 January 2000 to 30 June 2002.

Under Article 47(2) of the basic Regulation, intervention buying-in may not cover more than 350 000 tonnes per year for the Community as a whole.

(19) From 1 July 2002, Articles 26 and 27 of the basic Regulation introduced new mechanisms (namely, private storage aid and an intervention system known as the 'safety net'). However, these mechanisms are not relevant here, given the period to which the facts involved in this case apply.

(20) The detailed rules for the application of the basic Regulation as regards the public intervention buying-in provided for in Articles 27 and 47 were laid down by Commission Regulation (EC) No 562/2000⁽¹⁷⁾.

(21) Lastly, the basic Regulation provides that 'when a substantial rise or fall in prices is recorded on the Community market and this situation is likely to continue, thereby disturbing or threatening to disturb the market, the necessary measures may be taken' (Article 38 of the basic Regulation).

1.4.2. Measures adopted to deal with the crisis

(22) The Community institutions adopted various measures to deal with the crisis that had been affecting the beef sector since October 2000.

(23) Acting on a proposal from the Commission, the Council amended the basic Regulation⁽¹⁸⁾. Noting that the market had been 'seriously disrupted because consumers (...) have lost confidence', it took the view that 'a number of measures that seek to regulate the market by reducing future production should accordingly be adopted' (first recital to the Regulation). In particular, it raised the ceiling for intervention buying-in for 2001, increasing it from 350 000 tonnes to 500 000 tonnes.

(24) The Commission for its part implemented the instruments provided for in the basic Regulation. Use was made of the intervention mechanisms that allow certain quantities of cattle to be withdrawn from the market, so as to stabilise supply in relation to demand. The relevant rules were also amended so as to broaden their scope of application. For example, by way of derogation,

⁽¹⁷⁾ OJ L 68, 16.3.2000, p. 22.

⁽¹⁸⁾ Council Regulation (EC) No 1512/2001 amending the basic Regulation (OJ L 201, 26.7.2001, p. 1).

⁽¹⁶⁾ See footnote 13.

intervention was extended to include products which had not hitherto been included and carcasses of a weight greater than that hitherto authorised⁽¹⁹⁾. These derogation measures were extended throughout 2001 and into the beginning of 2002⁽²⁰⁾.

(25) The Commission also adopted special new instruments under Article 38 of the basic Regulation (see recital 21 of this Decision).

(26) Firstly, on 18 December 2000, the Commission adopted Regulation (EC) No 2777/2000 adopting exceptional support measures for the beef market⁽²¹⁾, applicable for the first half of 2001. The first recital in the Regulation states that 'the Community beef market is currently going through a deep crisis due to a lack of consumer confidence in beef, with a fall in consumption and a substantial reduction in prices. The Regulation accordingly introduced an exceptional measure, pursuant to Article 38 of the basic Regulation. A purchase scheme was established, under certain conditions, for live animals that were to be subsequently slaughtered and destroyed, so as to prevent surpluses from developing on the market. Regulation (EC) No 2777/2000 specified that the purchase scheme would be co-financed by the Community at the rate of 70 %.

(27) Secondly, on 3 April 2001, the Commission adopted Regulation (EC) No 690/2001 on special market support measures in the beef sector⁽²²⁾. The Regulation introduces a purchase scheme, based on a tender procedure, for carcasses or half carcasses. Under the scheme, where certain price conditions are met, tendering is opened in the Member States. The meat purchased by the competent authorities in the Member States following the tender procedure (the purchase price is 70 % financed by the Community) is either destroyed or stored, for example for use in providing humanitarian aid. The Regulation, which was scheduled to expire at the end of December 2001, was extended until March 2002⁽²³⁾, 'in order to avoid a further collapse of the market' (recital 2).

(28) All in all, during the year following the start of the second mad-cow crisis, more than 750 000 tonnes of meat were thus withdrawn from the market, equivalent to more than 10 % of annual consumption in Europe⁽²⁴⁾.

(29) Lastly, under the Community rules governing State aid, the Commission authorised a number of Member States to grant aid to the beef sector. On 25 July 2001, the Commission declared French State aid of EUR 267 million granted to stock farmers hit by the BSE crisis compatible with Article 87(2)(b) of the Treaty⁽²⁵⁾. On 3 April 2002, the Commission declared a further grant of French state aid, amounting to EUR 75,5 million, to stock farmers hit by the crisis compatible with Article 87(2)(b) of the Treaty⁽²⁶⁾. France was the largest provider of direct state aid to farmers to help them deal with the October 2000 crisis.

1.5. The situation prior to the agreement of 24 October 2001

(30) Despite these measures to stabilise the market, deemed insufficient by the farmers, who blamed the different degrees of strictness in applying the measures from one Member State to another, relations between farmers and slaughterers in France became tense in September and October 2001. At that time, throughout most of France, groups of farmers illegally stopped lorries in order to check the origin of the meat being transported. In the documents drawn up by the farmers' unions, these illegal interceptions are generally described as 'inspections' (contrôles). In addition, slaughterhouses were blockaded by farmers, who prevented any vehicles from entering or leaving the slaughterhouse and/or checked the geographical origin of the meat. These protests and their consequences were widely reported in the press⁽²⁷⁾. In most cases, the protest action resulted in the loss of meat which had gone bad after several days of being held up in a blockade, or in meat of non-French origin being burned. Occasionally, the protests resulted in material damage, sometimes on a very substantial scale. For example, on 15 October 2001, farmers ransacked two premises in the department of Ille et Vilaine and destroyed several tonnes of meat⁽²⁸⁾.

⁽¹⁹⁾ Commission Regulation (EC) No 1209/2001 of 20 June 2001 derogating from Regulation (EC) No 562/2000 laying down detailed rules for the application of Council Regulation (EC) No 1254/1999 as regards the buying-in of beef (OJ L 165, 21.6.2001, p. 15). The maximum weight allowed for intervention was raised once again by Commission Regulation (EC) No 1496/2001 (OJ L 197, 21.7.2001, p. 3).

⁽²⁰⁾ Most recently by Commission Regulation (EC) No 2579/2001 (OJ L 344, 28.12.2001, p. 68).

⁽²¹⁾ OJ L 321, 19.12.2000, p. 47.

⁽²²⁾ OJ L 95, 5.4.2001, p. 8.

⁽²³⁾ Commission Regulation (EC) No 2595/2001 (OJ L 345, 29.12.2001, p. 33).

⁽²⁴⁾ Document 38.279/631.

⁽²⁵⁾ OJ C 247, 5.9.2001, p. 10. The full text of the Decision can be found on the Commission's Internet site, in French, at the following address (aid measure No NN 46/01): http://www.europa.eu.int/comm/secretariat_general/sgb/state_aids/agriculture_2001.htm.

⁽²⁶⁾ OJ C 110, 7.5.2002, p. 7.

⁽²⁷⁾ See, for example, the press review attached to the FNICGV's reply of 23 November 2001 to the Commission's request for information (document 38.279/187 to 304).

⁽²⁸⁾ Ibid. See also document 38.279/719 and 720.

- (31) These protests and blockades of slaughterhouses were particularly frequent in mid-October 2001, affecting establishments throughout France. In return for lifting blockades, the protesters made the slaughterers undertake to suspend imports and to apply what they called the union price scale. It appears that, in mid-October 2001, in order to prevent the decline in prices, the FNB decided to introduce a slaughterhouse-entry-price scale applicable to culled cows 'because of the importance of this category' ⁽²⁹⁾. The application of the price scale entailed the coordination of a number of measures, including measures against imports, particularly in the restaurant and catering industry ⁽³⁰⁾, staff restaurants and canteens being large consumers of imported meat, which is cheaper ⁽³¹⁾. A few days after the price scale was adopted at national level, the FNB called on the unions to mobilise in order to ensure that it was applied. This meant not only press coverage ⁽³²⁾, but also meetings with the slaughterers 'in order to get the price scale adopted' ⁽³³⁾. A number of major slaughterers in the Pays de Loire region agreed to apply the price scale as from 22 October 2001, following a blockade that had lasted several days ⁽³⁴⁾. When signing one of the agreements, the FNB Vice-President described it as 'historic', in that 'beef prices have always been set on the basis of supply and demand' and 'for the first time, a minimum price scale will determine market prices' ⁽³⁵⁾. The press reported on such local agreements, noting that they also included a clause suspending imports up to 31 December 2001 ⁽³⁶⁾.
- (32) Documents in the file show that, on a proposal from the FNB, the introduction of a price scale was discussed by the FNB, the FNSEA, the FNPL and the CNJA on 16 October 2001 ⁽³⁷⁾. The four federations agreed to do so ⁽³⁸⁾. On that date, the price scale was also discussed with the 'federations in the sector', but without reaching an agreement ⁽³⁹⁾. A further meeting took place on 23 October 2001 in order to ensure 'the application of the price scale set by the FNB Bureau', but no agreement was reached ⁽⁴⁰⁾. In a notebook containing handwritten notes by the FNB's director, it is noted that the FNCBV's President and the FNICGV's representative stated that they did not have any mandate to negotiate a price scale; the following is also noted against their names: 'the problem is the supply/demand surplus' and 'we cannot operate on an artificial market' ⁽⁴¹⁾.
- (33) A further meeting took place on 24 October 2001, at the request of the Minister for Agriculture. The Minister did not conceal his backing for the discussions that were taking place between the six federations, and some of the discussions were held on the Ministry's premises. On 24 October 2001, the Minister told the lower house of the French parliament: 'I arranged for a cross-industry meeting to be held this morning at eight thirty in order to get everyone to face their responsibilities. People are now negotiating with the help of the Ministry, which is trying to iron out any difficulties. I would like to get downstream undertakings to agree to stop purchasing abroad for a few weeks, or indeed a few months. Of course, I have no means of obliging them to do so, the State cannot force them to do so. However (...) if such undertakings were to stop importing for two, three or six months, until stocks had run down, it would be an act of good citizenship'. The Minister went on to state: 'I would like to get all parties to agree to a fair purchasing price scale' ⁽⁴²⁾.
- (34) In the FNB director's handwritten notes on this meeting, under the heading 'Ministry nego.', the following is noted at the outset: 'Minister: — stopping imports: — there must be a price scale; — I will provide money if necessary' ⁽⁴³⁾.
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- ⁽²⁹⁾ Document 38.279/613 and 614. See also document 38.279/615, confirming the existence of the scale. The file also shows that discussions on such a price scale had already taken place in the weeks leading up to this, for example, at a meeting held on 2 October 2001 (document 38.279/950 and 951).
- ⁽³⁰⁾ Document 38.279/614. This sector (restauration hors domicile) covers hotels and restaurants, but especially staff restaurants, hospitals, military bodies and canteens.
- ⁽³¹⁾ See in particular document 38.279/612.
- ⁽³²⁾ A press article published on 25 October 2001 reported on discussions on a planned price scale for weanlings and stated that 'last week, the FNB distributed a minimum slaughterhouse entry price scale for cull cows to cattle markets and processing firms' (la semaine dernière, la FNB a diffusé une grille de prix minimum des vaches de réforme entrée abattoir, auprès des marchés aux bestiaux et des entreprises de transformation) (document 38.279/201).
- ⁽³³⁾ Document 38.279/615. See also document 38.279/614.
- ⁽³⁴⁾ Document 38.279/615.
- ⁽³⁵⁾ Document 38.279/200.
- ⁽³⁶⁾ For example, with regard to an agreement signed by a slaughterhouse in the Vendée region following a blockade by farmers, the General Secretary of the local FDSEA stated: 'the operators have solemnly undertaken to stop importing foreign meat until 1 January and to apply the union price scale' (les opérateurs se sont engagés solennellement à stopper les importations de viande d'origine étrangère jusqu'au 1^{er} janvier et à appliquer la grille des prix syndicale) (reported in *Le Maine Libre* on 19 October 2001, document 38.279/221). See also extracts from the daily newspaper *Ouest France* published on 19 October 2001 (document 38.279/223 and 224).
- ⁽³⁷⁾ See the record of the coordination meeting, document 38.279/620.
- ⁽³⁸⁾ Document 38.279/1159. See also document 38.279/981.
- ⁽³⁹⁾ Document 38.279/1159.
- ⁽⁴⁰⁾ Document 38.279/1156.
- ⁽⁴¹⁾ Document 38.279/1011.
- ⁽⁴²⁾ Document 38.279/309 and 310.
- ⁽⁴³⁾ Document 38.279/889.

- (35) A number of statements by the FNCBV President indicate that he actively supported the conclusion of the agreement. In an article published by the newspaper *Ouest France* on 31 October 2001, the FNCBV President states: 'we have played a key role in getting the principle of a price scale accepted' ⁽⁴⁴⁾. Similarly, in a memo sent by the FNCBV President to the FNSEA President on 9 November 2001, it is stated that 'the FNCBV played an active role in the negotiations of 24 October which resulted in the agreement on a minimum price scale for cows'; the President makes the point: 'I think that, with my federation, I made a major contribution to this' ⁽⁴⁵⁾.

1.6. The provisions of the agreement of 24 October 2001

- (36) The meeting held on 24 October 2001 culminated in an agreement between the FNSEA, the FNB, the FNPL, the CNJA, the FNICGV and the FNCBV.

1.6.1. Substance of the agreement

- (37) The agreement concluded between the six federations on 24 October 2001 (but formally signed the next day ⁽⁴⁶⁾) covers two aspects.
- (38) The first is a 'temporary commitment to suspend imports' (engagement provisoire de suspension des importations). This commitment does not contain any specification as to the type of beef to which it applies. It therefore covers all types of beef imports, as is borne out by a number of documents found by the Commission during the investigations. For example, the FNB director's handwritten notes state, with regard to the FNSEA President's press conference on 25 October 2001: 'suspension of all imports' ⁽⁴⁷⁾. They also state, with regard to a draft reply to the Commission's request for information: 'types of meat covered by the agreement: — price scales: carcasses of culled cows; — commitment to temporarily suspend imports: all beef products' ⁽⁴⁸⁾. The documents in the file, notably press articles, referring to 'inspections' (contrôles) carried out by farmers as to the geographical origin of meat do not show that any distinction was made as to type of beef.
- (39) The second aspect covered by the agreement relates to prices. This is a 'commitment to apply the slaughterhouse entry purchase price scale to culled cows' (engage-

ment d'application de la grille de prix d'achat entrée-abattoir en vaches de réforme) in accordance with the arrangements set out in the agreement. There then follows a list of prices per kilogram for certain categories of cow (mainly U and R category cows); in the case of other categories, the agreement stipulates how the price to be charged should be calculated, on the basis of the price deriving from the special purchase ⁽⁴⁹⁾. Since the special purchase price was set every fortnight, the prices in the price scale were accordingly adjusted as from mid-November 2001 ⁽⁵⁰⁾.

- (40) Broadly speaking, the prices thus set were some 10 % to 15 % higher than the prices the previous week ⁽⁵¹⁾.

1.6.2. Duration of the agreement

- (41) The agreement was to enter into force on 29 October 2001 and remain in force until 30 November. Although the agreement does not make any provision for its continued application, it is in fact clear that the parties envisaged extending it beyond 1 December. The French Minister for Agriculture had, moreover, clearly stated in the lower house of parliament, during the first sitting on 24 October 2001, i.e. when the agreement was still being discussed, that the suspension of imports should cover 'two, three or six months', and that he 'would like to get the downstream undertakings to agree to stop purchasing abroad for a few weeks, or indeed a few months' ⁽⁵²⁾. A number of documents show that this was indeed the intention of the parties, or at least of some of them. These documents include the following:

- handwritten notes by the FNB's director at a press conference given by the FNSEA President on 25 October 2001 state the following: 'effect Monday (...) and until 30 November. Meeting already planned for then, for the follow-up' ⁽⁵³⁾,
- in those handwritten notes, on a page which is undated, but was probably written between 9 and 12 November 2001, given the context, it is stated, under the heading 'imports': 'not to be extended in the new December agreement' ⁽⁵⁴⁾,

⁽⁴⁴⁾ Document 38.279/195.

⁽⁴⁵⁾ Document 38.279/410.

⁽⁴⁶⁾ Document 38.279/1121.

⁽⁴⁷⁾ Document 38.279/893.

⁽⁴⁸⁾ Document 38.279/1025. See also document 38.279/1038: 'scope imports: only cows? definition vague, because crisis agreement!' (portée imports: que sur les vaches? définition floue, car accord dans la crise!).

⁽⁴⁹⁾ An FNB document dated 26 October 2001 gives a number of additional explanations on price calculation methods (document 38.279/618). Document 38.279/631 (FNSEA memo preparatory to the meeting with the French Prime Minister on 8 November 2001) states: 'for O and P cows, prices have been calculated in such a way as to be able to maintain special purchase for these categories' (pour les vaches O et P les prix ont été établis de façon à pouvoir maintenir l'achat spécial sur ces catégories).

⁽⁵⁰⁾ See document 38.279/802 and 38.279/803.

⁽⁵¹⁾ Document 38.279/109 and document 38.279/198.

⁽⁵²⁾ Document 38.279/310, full report on parliamentary debates, first sitting of Wednesday, 24 October 2001, *Journal officiel de la République française*.

⁽⁵³⁾ Document 38.279/893.

⁽⁵⁴⁾ Document 38.279/1023.

- an FNSEA memo of 7 November 2001 states: 'a meeting with the undertakings is planned (evening of 20 November?) to discuss the agreement and prepare its renewal beyond 30 November' ⁽⁵⁵⁾,
- in a joint memo dated 8 November 2001 from the four agricultural federations to the local and sectoral union organisations, it is explicitly stated: 'in order to prepare the ground for the extension of the price scale after 30 November 2001, we believe it is essential that we should have all the information concerning the actions carried out, the difficulties encountered and the results achieved in the departments so as to allow proper application of the price scale' ⁽⁵⁶⁾,
- in a memo found in the office of the FNSEA President, undated but written after 9 November 2001, since it refers to the Commission's request for information, it is stated, on the subject of the price scale, that 'its renewal will be discussed on 27 November' ⁽⁵⁷⁾,
- an FNB memo dated 30 October 2001 bears undated handwritten notes referring to an FNPL proposal that should be taken into account 'when the price scale is renewed' ⁽⁵⁸⁾,
- at the meeting of the FNPL's National Council held on 26 November 2001, the FNPL's General Secretary stated that 'pursuing the agreement on the minimum price scale beyond 31 November 2001 is an important requirement' ⁽⁵⁹⁾.

1.6.3. Reactions to the conclusion of the agreement and the 'Rungis protocol' of 31 October 2001

- (42) In a press release issued by the Ministry of Agriculture on 24 October 2001, it is stated that the Minister for Agriculture 'warmly welcomes the agreement signed (...) which he had wished for, instigated and encouraged' and 'congratulates the signatories on their keen sense of responsibility' ⁽⁶⁰⁾.
- (43) In a message sent to members on 24 October 2001, the FNICGV President stated: 'the Minister for Agriculture,

who brought us together for the meeting this morning, wanted us to reach an agreement with the farmers after a long and difficult day of negotiation' ⁽⁶¹⁾. The FNICGV President made the following remarks, reported in the newspaper *Ouest France* on 30 October 2001: 'the Minister himself gave a commitment along these lines, indicating that he would ensure that the authorities did not challenge an agreement which the DGCCRF would otherwise have attacked' ⁽⁶²⁾.

- (44) There were numerous reactions from private parties following the signature of the agreement. Some members of the FNICGV, part of whose business was directly linked to imports, were highly critical of the part of the agreement relating to the suspension of imports ⁽⁶³⁾. A memo sent by the FNICGV President to members on 31 October 2001 refers to a meeting to be held that same day with 'a delegation of representatives from Dutch and German firms' ⁽⁶⁴⁾. Similarly, Belgian, British, Dutch, German and Spanish farmers' federations criticised this aspect of the agreement, which they denounced. For example, at a meeting between the Vice-President and Director of the FNB and a delegation of Dutch and German agricultural undertakings and federations, probably held on 31 October 2001 ⁽⁶⁵⁾, the delegation demanded that the suspension of imports be lifted ⁽⁶⁶⁾. A Dutch-Belgian importer/exporter stated at the meeting that, by way of retaliation, a boycott might be imposed on French products ⁽⁶⁷⁾. A number of farmers' federations also complained in writing to the French representatives ⁽⁶⁸⁾. At a meeting held by the

⁽⁶¹⁾ Document 38.279/88.

⁽⁶²⁾ Document 38.279/195. The initials DGCCRF refer to the Directorate-General for Competition, Consumption and Fraud Prevention (Direction générale de la concurrence, de la consommation et de la répression des fraudes).

⁽⁶³⁾ Document 38.279/1200 (individual firm, document of 26 October 2001) and document 38.279/1201 (Rungis meat dealers and wholesalers union, which is a member of the FNICGV, document of 26 October).

⁽⁶⁴⁾ Document 38.279/94.

⁽⁶⁵⁾ This was probably the same delegation as that met by the FNICGV President, referred to in footnote 64.

⁽⁶⁶⁾ Document 38.279/914 to 917.

⁽⁶⁷⁾ Document 38.279/917.

⁽⁶⁸⁾ See, for German farmers, the letter sent by the Deutscher Bauernverband President to the FNSEA President on 30 October 2001 (document 38.279/387); for British farmers, the letter sent by the NFU President to the FNSEA President on 13 November 2001 (document 38.279/391); for Belgian farmers, the letter sent by the Boerenbond President to the FNSEA President on 19 November 2001 (document 38.279/394); for Dutch farmers, the LTO memo of 15 November 2001 (document 38.279/683); for Spanish farmers, the letter sent by the President of the l'Asociación española de criadores de vacuno de carne to the FNB President on 7 November 2001 (document 38.279/1125). In a memo drawn up by the FNSEA in preparation for a meeting with the French Prime Minister to be held on 8 November 2001, it is stated that 'the undertakings have agreed to temporarily suspend imports, which will inevitably create problems with our German and Dutch partners' (les entreprises se sont engagées à suspendre provisoirement les importations, ce qui ne va pas sans poser de problèmes avec nos partenaires allemands et néerlandais) (document 38.279/632).

⁽⁵⁵⁾ Document 38.279/423.

⁽⁵⁶⁾ Document 38.279/1146. Reference may also be made to an article in No 566, the November 2001 edition, of the *Revue Jeunes Agriculteurs*, which states: 'this price scale, which entered into force on 29 October, will be revised on 1 December' (mise en application le 29 octobre, cette grille sera révisée le 1^{er} décembre).

⁽⁵⁷⁾ Document 38.279/424. See also document 38.279/428.

⁽⁵⁸⁾ Document 38.279/873.

⁽⁵⁹⁾ Document 38.279/519. The date should of course be read as 30 November.

⁽⁶⁰⁾ Document 38.279/203.

Committee of Agricultural Organisations in the European Union (COPA) on 20 November 2001, a number of federations from other Member States again expressed their dissatisfaction, pointing out in particular that closing borders would not solve the beef crisis⁽⁶⁹⁾. Lastly, the federations representing downstream operators were highly critical of the agreement as regards both its price and import components⁽⁷⁰⁾. The European Livestock and Meat Trading Union also wrote to the Competition DG on 16 January 2002 to denounce the agreement and the damage caused by the blockades of some of its members' abattoirs.

- (45) A further meeting between the parties that had signed the agreement took place on 31 October 2001 at Rungis, at the instigation of the FNICGV⁽⁷¹⁾, which was concerned at its members' difficulties in complying with the requirement that imports be temporarily suspended. The federations which had signed the agreement of 24 October 2001 came up with a new compromise (the Rungis protocol), which was formulated as follows: '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'⁽⁷²⁾.

1.7. The renewal of the agreement after the end of November

1.7.1. *Preparing the way for renewing the agreement*

- (46) As already noted, the agreement of 24 October 2001 was initially concluded for a period ending on 30 November 2001. It was, however, clear that the agreement was to be renewed (see recital 41 of this Decision).
- (47) The documents in the Commission's possession show that the follow-up to the agreement was being discussed as from mid-November.

- (48) Thus, the FNB director's handwritten notes, found by the Commission during the investigation carried out on the FNB's premises, state, under the heading 'future of the agreement'⁽⁷³⁾: 'imports: impossible to re-sign. What instructions for action to be taken (...). What "official line"? Should reference be made publicly to Com. interest in the case? Yes. We hope conduct will be "civic" and "careful of consumer information", "advantages of local contacts"'. Following a subheading 'prices', it is stated: 'difficult to re-sign documents. Reach agreement (?). How to organise pressure? (...) JB-PDL experience: recommendations! FNB recommendation: we continue to take the view following termination of the agreement that it is legitimate for farmers to obtain price scale prices'⁽⁷⁴⁾.

- (49) With regard to a discussion which took place on 20 November 2001 (it is not evident from the document who the participants were), the FNB director notes in particular: 'create permanent harassment: continuous presence. Without media coverage. Continue on imports (...). Imports: don't say it, and certainly don't write it'⁽⁷⁵⁾.

- (50) The FNB director's handwritten notes also refer to discussions for which no date is indicated, but which, given the context, must have taken place between 22 and 27 November 2001. Under the general heading "sector agreement": what prospects after end November?', it is stated: 'course of action 1: continuing with written agreement: refusal FNICGV, pb Commission. Course of action 2: moving on from the agreement'⁽⁷⁶⁾.

- (51) A number of documents show that, up until very late November, consideration was being given to renewal of the agreement.

- (52) An e-mail sent by a representative of the FRSEA Brittany to the FNB and the presidents of local federations in his region on 28 November 2001 states: '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'⁽⁷⁷⁾.

⁽⁶⁹⁾ Document 38.279/1059 and 1060.

⁽⁷⁰⁾ See, for example, the letter sent by the General Secretary of the European Livestock and Meat Trading Union to Mr Fischler, the Member of the Commission responsible for agriculture, as early as 29 October 2001 (document 38.279/1253 and 1254). See also the reaction of the President of the Fédération des marchés de bétail vif (FMBV) and the President of the Fédération française des commerçants en bestiaux (FFCB) as reported in the press (document 38.279/197 and document 38.279/201).

⁽⁷¹⁾ Document 38.279/103.

⁽⁷²⁾ Document 38.279/105.

⁽⁷³⁾ The notes are not dated, but, given their context, they must have been written between 18 and 20 November 2001.

⁽⁷⁴⁾ Documents 38.279/1054 and 1055. The initials 'JB-PDL' refer to two persons belonging to the FNSEA.

⁽⁷⁵⁾ Document 38.279/1065.

⁽⁷⁶⁾ Document 38.279/1075. The letters 'pb' probably stand for 'problem'.

⁽⁷⁷⁾ Document 38.279/1106.

- (53) Another e-mail sent to the FNB on 26 November 2001 from the department of Côtes-d'Armor states that the price scale is being 'correctly applied' in three abattoirs visited and that 'these abattoirs have undertaken to continue applying the price scale if the national cross-industry commitment to apply the price scale is renewed. We hope that the negotiations tomorrow will succeed and that we can come back to ask them to give a commitment that they will apply it' ⁽⁷⁸⁾.

1.7.2. *Announcement that the agreement would not be renewed*

- (54) On 19 November 2001, i.e. a few days after having received the Commission's request for information (see recital 3 of this Decision), the FNICGV President, realising the risk of fines being imposed on the federation's members for infringing the competition rules, informed the FNSEA President that he felt 'obliged to bring forward to today the final date of application of the agreement, initially scheduled for 30 November 2001' ⁽⁷⁹⁾.
- (55) In response to the Commission's letter of formal notice of 26 November 2001 (see recital 4 of this Decision), all the federations stated that the agreement of 24 October 2001 would not be extended beyond 30 November, each of them stressing that the agreement had already been terminated a few days before by one of the parties.
- (56) A document entitled 'info flash' issued by the FNICGV on 30 November 2001 refers to a meeting held on 29 November 2001. It states: 'The minimum purchase price scale for culled cows concluded on 24 October 2001 has not been and will not be renewed. This is the conclusion reached at the meeting held yesterday in Paris in the presence of the signatories of the agreement' ⁽⁸⁰⁾.

1.7.3. *The meeting held on 29 November 2001*

- (57) The FNB director's handwritten notes, found during the investigation carried out at the FNB's headquarters, contain a number of passages relating to the meeting held on 29 November 2001. On a page bearing in the top right-hand corner the boxed heading 'meeting Thursday 29 November 8.00' (given the context, the notes were probably taken during preparations for the meeting held on 29 November), it is stated: 'negotiate your price scales regionally. Reply to the Commission. OK, we accept non-renewal of the agreement. Rec-

ommendation price scale: should we put it in writing? In the union newspaper: yes (in the form of recommendations) (...). Speak of indicative prices' ⁽⁸¹⁾. With regard to the price scale: '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' ⁽⁸²⁾.

- (58) The handwritten notes then contain comments on a page headed in the top right-hand corner 'discussion 29 November 2001' followed by a series of initials (the Commission is not able to identify all the participants, but some of the initials are clearly those of two of the Vice-Presidents, the Director and the General Secretary of the FNB, the FNPL Director who signed the Rungis protocol on behalf of the FNPL, the FNCBV President and the FNICGV President. Two other sets of initials are probably those of the CNJA representatives ⁽⁸³⁾). It is stated on several occasions that it is necessary to 'continue' ⁽⁸⁴⁾. Then, alongside the initials of the FNICGV President, it is stated: 'signed agreement: we cannot continue it. OK to comply with a price set for withdrawal'. There follows a series of figures with the underlined phrase in the margin: 'OK agreement' ⁽⁸⁵⁾.
- (59) The following handwritten page comprises a series of expressions: 'indicative price, remunerative price, target-related price, farmer-target price, target price, farmer target'. This is followed by the initials of the FNICGV President and the phrase: 'I will write nothing/tel.'. Then, under a subheading 'Press release', it is stated 'price scale = anti-EEC therefore we stop, but we take action to recommend prices, we farmers, union objectives' ⁽⁸⁶⁾.

⁽⁷⁸⁾ Document 38.279/1098.

⁽⁷⁹⁾ Document 38.279/164.

⁽⁸⁰⁾ Document 38.279/360.

⁽⁸¹⁾ Document 38.279/736.

⁽⁸²⁾ Document 38.279/737.

⁽⁸³⁾ These could be the JA representative at a coordination meeting on the beef crisis (see document 38.279/620) and one of the JA representatives at the round table discussion on beef held on 5 December 2001 (document 38.279/580).

⁽⁸⁴⁾ 'The price scale has been of great value: return hope and industrial peace ⇒ continue what has been started, with proper information' (document 38.279/738); 'the market naturally follows the price scale, let us continue' (ibid.).

⁽⁸⁵⁾ Document 38.279/738.

⁽⁸⁶⁾ Document 38.279/739 (underlining removed).

- (60) Lastly, under the heading 'summary', it is stated: "agreement" (verbal/tel.) on compliance with the "farmer-target prices", followed by a number of prices for certain types of meat. 'How: through union action, recommendations' ⁽⁸⁷⁾. Another handwritten page states 'by general agreement, we will no longer communicate in writing' ⁽⁸⁸⁾. Another handwritten document, undated (but written after 27 November 2001) states, following an indication that caution is required: 'careful about putting things in writing → restrictive agreement' ⁽⁸⁹⁾.
- (61) A number of handwritten pages reflect local representatives' difficulties in understanding the arrangements ⁽⁹⁰⁾. The FNB organised a telephone conference on 4 December 2001 with its regional representatives in order to explain "the target price" approach on beef ⁽⁹¹⁾.
- (62) Other handwritten notes state the following: "Agreement [→ other binding terms] on abiding by the union target price" (...). Praise the good citizenship of the abattoirs in the press (cite the good ones). "Agreement to make the market more ethical". Union recommendations' ⁽⁹²⁾.
- (63) In an interview given by the FNB Vice-President on 4 December 2001, available on the FNSEA website, the FNB Vice-President states: '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 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'. In reply to the question 'Have all the undertakings received a message asking them to maintain the prices thus discussed?', the FNB Vice-President replies: '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'. Lastly, on the implementing arrangements, the Vice-President states: 'As regards prices, they must be in line with those discussed last week. If this were not to be the case, we will blockade the offending abattoirs. Furthermore, on Tuesday, four delegations once again requested accounts from the four

Vendée abattoirs. We are asking them if they received instructions identical to ours from their national structures. We will see what is the weight of words, after the impact of the written document' ⁽⁹³⁾.

- (64) Similarly, a document dated 5 December 2001, accessible on the FDSEA Vendée website and reproduced on the FNSEA website, 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. Like a month ago. The recalcitrant slaughterers are still the same ones. Of course, there is no longer any reference to a cross-industry agreement. "OK", explains the FDSEA, "But we are converting the price scale signed a month ago into a real union price scale by means of a requirement that these floor prices be applied throughout the country". The whole sector should communicate on this "agreement" at the beginning of the week'. After having noted that, during a visit to an abattoir, the person in charge had said that he 'has received nothing from his national superiors', the document continues: 'as to the immediate and total application of this price scale throughout the country, the slaughterers can trust the FDSEA. "On Monday, if there is no solution, we will blockade once again". The FNSEA urges all the departments to do the same'. After a reference to discussions between the protesters and a slaughterer, the document states: 'the persons in charge of the abattoir had talks with (the FNICGV President). He confirmed last week's discussions'. Lastly, quoting one of the leaders of the FDSEA Vendée, the memo continues: "All slaughtered animals in the department which are not in line with our scale of floor prices must be notified by fax to the FDSEA. On the basis of such information, we will decide whether or not to blockade the offending undertakings". The Vendée leaders forcefully repeated this message to all the FDSEA people meeting in Paris until Thursday. The price scale therefore still exists. Although it is not a cross-industry scale, it remains a union scale. Until the very end' ⁽⁹⁴⁾.

1.7.4. The meeting held on 5 December 2001

- (65) On 5 December 2001, a 'national beef day' (journée nationale viande bovine) organised by the FNSEA was held ⁽⁹⁵⁾. The afternoon was given over to a round table discussion ⁽⁹⁶⁾, attended by representatives of the various parties which had signed the agreement of 24 October 2001.

⁽⁸⁷⁾ Document 38.279/740.

⁽⁸⁸⁾ Document 38.279/750.

⁽⁸⁹⁾ Document 38.279/1150.

⁽⁹⁰⁾ For example, document 38.279/748: 'how does it work? At what price?' (comment ça marche? À quel prix?).

⁽⁹¹⁾ Document 38.279/1118.

⁽⁹²⁾ Document 38.279/750.

⁽⁹³⁾ Document 38.279/368.

⁽⁹⁴⁾ Document 38.279/366.

⁽⁹⁵⁾ Document 38.279/474.

⁽⁹⁶⁾ Document 38.279/401a.

- (66) An e-mail sent on 6 December 2001 by an FRSEA Brittany representative to the FDSEA presidents of his region, which was found by the Commission during its investigation at the FNSEA, reads as follows: 'following yesterday's meeting, three priorities emerged from the discussions: ensuring minimum price levels for females, freeing markets, reflecting on control. On the first point, while there is no longer any agreement on the official price for the reasons set out in my last message, everybody agreed on the need to maintain through union pressure the prices for females at the existing price scale level by updating it on the basis of the prices determined at special purchase (...). On this aspect of the minimum prices, the FNICGV and FNCBV national presidents said 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 (either by telephone or by delegation) 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' ⁽⁹⁷⁾.
- (67) In a weekly information memo issued by the FNPL, the 'national beef day' is summarised as follows: 'a union day which has avoided a milk-meat war, confirmed the continuation of the price scale and enabled a lot of participants to express themselves. Most of the morning was given over to presentation of the establishment and application of the various price scales (weanlings, young cattle in the Loire region and cows). All in all, maintenance of the price scale is necessary and involves union pressure, even if there are problems of application. The price scale is, however, an intermediate stage, the target is to bring production into line with the market (...). The afternoon was given over to the round table discussion. The representatives of the slaughterers (the FNCBV and FNICGV Presidents) took note of the unwritten renewal of the price scale'. Under the heading 'problem application of the price scale calves for slaughtering', it is stated: 'one abattoir (in the department of Saône-et-Loire) is not applying the price scale, considers the producers' claims unacceptable and, in the event of union action, is threatening to alert the authorities and the European Commission. The message (of the FNICGV President) does not seem clear or firm!' ⁽⁹⁸⁾.
- (68) In the FNB director's handwritten notes, copied by the Commission during the investigation carried out on the FNB's premises, six pages are given over to the national beef day held on 5 December 2001 ⁽⁹⁹⁾. As regards imports, it is stated 'we're to stop saying "against imports", and go to restaurants and catering' ⁽¹⁰⁰⁾. After the initials of the FNSEA President, it is stated: 'a mistake: to have stated suspension of imports in writing, but we have been rapped over the knuckles by Brussels and others in COPA. Without putting it in writing, let us continue with "target prices" or prices below which we don't want prices (to fall). We are sure that sector partners commit to price policy'. It is also stated: 'writing prohibited' ⁽¹⁰¹⁾.
- (69) On the round table discussion held on 5 December 2001, it is stated under the heading 'the agreement of 25 October', after the initials of the FNB general secretary: 'union objective: continue'. There follow comments from the FNCBV and FNICGV Presidents. Under the first, it is stated: 'we can no longer put in writing, but continue'. Under the second: 'we will maintain commitment on special purchase price. Message passed to our undertakings. Therefore + 30 to + 40 cts. Informally, the price scale will continue'. Then the FNCBV President once again: 'yes OK. But it must be applied by everyone' ⁽¹⁰²⁾. Lastly, by way of conclusion, under the initials of the FNSEA President, it is stated: 'the price scale does not stop. But not in writing, in practice. We will go to speak with those who do not comply' ⁽¹⁰³⁾.
- (70) Similarly, in a memo dated 14 December 2001, published on the FDSEA Marne website, the President of the FDB in the department of Marne states: 'Since the signed agreement has run foul of European regulations, we will apply it without signature (...). Anyone who deviates from the chosen path must be put back on track' ⁽¹⁰⁴⁾.

⁽⁹⁸⁾ Document 38.279/489.

⁽⁹⁹⁾ Document 38.279/751 to 756.

⁽¹⁰⁰⁾ RHD stands for 'restauration hors domicile', or restaurants and catering. This sector is the main consumer of imported beef (document 38.279/751).

⁽¹⁰¹⁾ Document 38.279/751 (underlining removed).

⁽¹⁰²⁾ Document 38.279/754.

⁽¹⁰³⁾ Document 38.279/756.

⁽¹⁰⁴⁾ Document 38.279/1221.

⁽⁹⁷⁾ Document 38.279/487.

1.8. Implementation of the agreement

1.8.1. General

(71) To quote the terms used in the document itself, the document concluded between the six federations on 24 October 2001 was an 'agreement' (accord) comprising 'commitments' (engagements) entered into on behalf of the federations. The fact that the federations considered themselves bound by this commitment is moreover evident from the announcements they made immediately after the conclusion of the agreement. For example, on 25 October 2001, the four agricultural federations sent a memo to the representatives of all the local and sectoral federations in which reference is made to 'the agreement' (l'accord) obtained and in which it is stated: 'each of us must now be very careful to ensure strict application of the agreement throughout the country, starting next Monday' ⁽¹⁰⁵⁾. Similarly, the fax sent by the FNICGV President to members on 24 October 2001 leaves no doubt as to the existence of an agreement which had to be implemented ⁽¹⁰⁶⁾. This is, moreover, how operators understood the agreement. A formal report drawn up by a bailiff on 24 October 2001 at the request of a slaughterer in Saône-et-Loire states that the FDSEA representative wanted to conclude a local agreement with the slaughterer; the slaughterer 'stated that there was no point in doing so since the national agreements applied throughout the country' ⁽¹⁰⁷⁾. Similarly, an FNICGV member, replying to the above-mentioned fax from the FNICGV president, stated that he had taken note of the agreement (though he did not like it) and that he was 'taking every step to comply with it immediately' ⁽¹⁰⁸⁾.

(72) The agricultural federations immediately called on their members to disseminate as far as possible the price scale adopted, to ensure that it was applied ⁽¹⁰⁹⁾ and to report immediately any failure to apply the price scale ⁽¹¹⁰⁾. The FDSEA Vendée President stated in an interview published in the newspaper *La Vendée agricole* on 2 November 2001: 'the time for discussion is past. National federations signed the agreement with the FNSEA and its specialised associations on 25 October at 9.00. The price scale now applies throughout the country and to all undertakings' ⁽¹¹¹⁾.

(73) Numerous local agreements were also concluded in order to 'ratify' the national agreement at local level ⁽¹¹²⁾. These were agreements concluded between the local farmers' federations (generally at department level) with one or more individual slaughterers. The conclusion of these agreements, in return for lifting the blockade on the abattoirs, took place immediately after the national agreement had been signed, but also throughout the month of November. Sometimes there were only verbal agreements to abide by the national agreement ⁽¹¹³⁾.

(74) Generally speaking, the documents in the file show that the local agreements were carbon copies of the national agreement concluded on 24 October 2001 ⁽¹¹⁴⁾. Where local agreements were not concluded, slaughterers ran the risk of blockades of their plants until they agreed to sign ⁽¹¹⁵⁾. In some cases, slaughterers did not give in and obtained expulsion orders from the French judicial authorities ⁽¹¹⁶⁾.

⁽¹⁰⁵⁾ Document 38.279/1121.

⁽¹⁰⁶⁾ Document 38.279/88 and 89.

⁽¹⁰⁷⁾ Document 38.279/181.

⁽¹⁰⁸⁾ Document 38.279/1204.

⁽¹⁰⁹⁾ See, for example, documents 38.279/584, 617 and 1152.

⁽¹¹⁰⁾ Many documents provide evidence of this: for example, documents 38.279/187 and 237.

⁽¹¹¹⁾ Document 38.279/237.

⁽¹¹²⁾ Document 38.279/204 (Charolles agreement), document 38.279/279 (Moselle agreement), document 38.279/280 (Vendée agreements) or document 38.279/822 (Loire-et-Cher agreements). See also the agreement between the FRSEA Lower Normandy and slaughterers in that region concluded at the beginning of November 2001 (document 38.279/823).

⁽¹¹³⁾ For example, document 38.279/1123.

⁽¹¹⁴⁾ See, for instance, document 38.279/826 and 827 (department of Loire); document 38.279/834 (department of Oise); document 38.279/837 and 839 (two agreements in the department of Corrèze); document 38.279/841 and 845 (department of Allier). A number of documents also refer to verbal commitments to comply with the price scale (document 38.279/852, 19 November 2001). See also the FNB director's handwritten notes, document 38.279/911. See also the FRSEA Brittany's fax reviewing the agreements obtained from slaughterers, by department in that region, as at 29 October 2001.

⁽¹¹⁵⁾ See, for example, document 38.279/882 and 883, document 38.279/420: 'the price scale is on the whole being complied with, even if occasionally union action proves necessary' (cette grille est dans l'ensemble respectée, même si parfois l'action syndicale se révèle nécessaire).

⁽¹¹⁶⁾ See the case of the Tour du Pin abattoir, which refused to conclude the local agreement (document 38.279/1272), and was blockaded from 20 to 23 November 2001 (document 38.279/868 to 871 and document 38.279/1268 et seq.), before obtaining an order from the Bourgoin Jallieux court of first instance (document 38.279/1255 to 1267).

(75) However, in some instances, these agreements went beyond what had been provided for. In particular, although the part of the agreement of 24 October 2001 concerning the suspension of imports had been reformulated by the Rungis protocol of 31 October 2001, it is evident from the file that local agreements concluded in November none the less continued to include explicitly a ban on imports⁽¹¹⁷⁾. In one instance of which the Commission has knowledge, the local agreement was concluded by other operators in the sector, such as the local livestock dealers' union⁽¹¹⁸⁾.

(76) The involvement of the downstream sectors seems to have been discussed immediately after the national agreement was signed. In particular, it was planned to involve the large-scale distribution and restaurant and catering sectors. However, the documents in the file provide no evidence that these sectors were involved in the adoption or application of the price scale⁽¹¹⁹⁾. In their replies to the Commission's requests for information of 9 November 2001, the federations confirmed that they did not possess any documents exchanged with distributors on the disputed agreement.

1.8.2. Imports

(77) As noted above, the agreement concluded on 24 October 2001 included a commitment on the 'suspension of imports', applicable to all beef products. On 31 October 2001, the Rungis protocol moderated the terms of this commitment, referring only to 'solidarity'.

(78) The statistics available to the Commission show that, in the week following the signature of the agreement, the percentage of beef of non-French origin sold at the Rungis market decreased, though not significantly. Its level thus remained above that which had existed two weeks previously⁽¹²⁰⁾. The FNICGV also produced, as an annex to its reply to the letter of formal notice (see recital 4 of this Decision), tables setting out the volumes

of imports marketed at Rungis in the period from 1 October to 26 October 2001 and in the period from 1 November to 27 November 2001; the figures show that the volume of imports passing through Rungis not only did not decrease in November compared with October, but actually increased⁽¹²¹⁾. However, it should be noted that, in Annexes 5 and 6 to its reply to the statement of objections, the FNICGV produced two new tables, one entitled 'table showing imports of beef on to the French market' (tableau d'importations des viandes bovines sur le marché français), the other entitled 'table showing imports of fresh meat on to the French market' (tableau d'importations des viandes fraîches sur le marché français). The tables show an appreciable decline in imports in November 2001 compared with October 2001, and in December 2001 compared with November 2001. In January 2002, however, the level of imports rose sharply. Thus, between October and December 2001, imports from Germany and the Netherlands, the main exporters to France, fell respectively by more than 25 % and more than 14 %, but rose 24 % and 29 % in January 2002. At the hearing, the FNICGV representative explained that this might be due to cyclical phenomena which were normal at this time of year⁽¹²²⁾ and that these fluctuations were due to factors other than the agreement.

(79) It should be noted that the local agreements signed after the agreement of 24 October included a provision on the suspension of imports. However, there is nothing to indicate that the Rungis protocol affected the previous local agreements. In addition, in spite of the protocol, the local agreements concluded after 31 October 2001 continued to contain a provision on the suspension of imports; they continued to refer to the 'commitment to temporarily suspend imports (including European imports) pending further national negotiations'⁽¹²³⁾.

(80) The day the agreement was signed on 24 October 2001, the FNB and FNSEA called for a boycott of non-French meat and threatened those who did not apply the boycott with reprisals⁽¹²⁴⁾. As from 30 October, protests by farmers took place, with meat originating in other Member States being destroyed⁽¹²⁵⁾. Various documents (e-mail, memo, message on the FDSEA website) bear

⁽¹¹⁷⁾ Thus, the standard agreement drawn up by the FDSEA and the CDJA in Isère on 13 November 2001 still contained a commitment on the suspension of imports (document 38.279/885); even so, this type of agreement was signed on that date by a number of slaughterers (document 38.279/882). See also document 38.279/1287.

⁽¹¹⁸⁾ Document 38.279/825 to 827, in the department of Loire.

⁽¹¹⁹⁾ On the contrary, see the letter sent by the FNCBV President to the FNSEA President on 9 November 2001 (document 38.279/410). Document 38.279/617 refers to contacts entered into by the FNB with the federation representing hypermarkets and supermarkets, but makes no mention of any result achieved.

⁽¹²⁰⁾ Document 38.279/08.

⁽¹²¹⁾ Document 38.279/356 to 359. The figures for the last five days in October were not supplied.

⁽¹²²⁾ The figures, also produced in the table, for the period October 2000 to December 2000 are not representative in this respect, given the crisis which began in October 2000. The figures for the period from October 1999 to December 1999, which appear stable, do not confirm the cyclical explanation.

⁽¹²³⁾ See, for example, documents 38.279/882, 885 and 1285.

⁽¹²⁴⁾ Document 38.279/318.

⁽¹²⁵⁾ Document 38.279/322.

witness to 'inspections' of the origin of meat being carried out by local agricultural federations in various departments during the months of November and December. In a fax sent by the FRSEA Basse-Normandie to the FNB director on 9 November 2001, it is stated: 'Orne and Calvados are carrying out inspections of lorries carrying imported meat: nothing to report' ⁽¹²⁶⁾. An e-mail sent to the FNB on 13 November 2001 under the heading 'inspection of beef imports Loire-et-Cher' states: 'we carried out measures this morning to inspect the origin of beef. We have found meat from Holland, Germany and Poland' ⁽¹²⁷⁾. In a fax sent by an FDSEA Maine-et-Loire representative to the FNB director on 11 December 2001, under the heading 'inspection in abattoirs in Maine-et-Loire', it is stated: 'no anomaly found — scale applied — no imports' ⁽¹²⁸⁾.

1.8.3. Prices

- (81) The tables showing average prices per week for various categories of meat, produced by the federations in their reply to the request for information (see recital 3 of this Decision), show that, for each of the categories, the price started to rise as from week 43 (the week in which the agreement of 24 October 2001 was signed) following some 20 weeks of decline ⁽¹²⁹⁾ (see recital 14 of this Decision).
- (82) The implementation and the effects of the price scale of 24 October 2001 are borne out by documentary evidence.
- (83) Firstly, numerous documents reflect the dissemination of the price scale to members through the press or by mail ⁽¹³⁰⁾.
- (84) Secondly, in a document entitled 'Application and supervision of the union price scale', accessible on the FNSEA's website and dated 14 November 2001, the FNB Vice-President states: 'despite the initial fits and starts, the first fortnight suggests that the price scale is being

applied in the four abattoirs in the department [Vendée]', a statement based on checks carried out in the abattoirs. The document notes that 'checks are being carried out at a steady pace' ⁽¹³¹⁾.

- (85) Thirdly, in an FNSEA memo dated 7 November 2001 and entitled 'Beef: current situation', it is stated: 'it appears today that the price scale is being relatively well applied in the O and P categories. It is apparently being a little less well applied in the beef breeds, particularly R cows, where the price difference seems to be too great' ⁽¹³²⁾. In a memo drafted by the FNSEA on 15 November 2001, it is stated, with regard to the price scale, under the heading 'sectoral files — 1. beef': 'the price scale is, on the whole, being complied with by operators; even if occasionally union action proves necessary' ⁽¹³³⁾. A third memo, undated, but written between 9 and 15 November ⁽¹³⁴⁾, states that 'appreciable effects have been recorded for U and R cows and less appreciable effects for O and P cows. Problem of downgrading in the application of the price scale'.
- (86) Fourthly, in a letter dated 20 November 2001, the FDB Aude President states that 'it has been confirmed to us that the application of the agreement is not always complied with or is complied with only under certain conditions set by the purchaser' ⁽¹³⁵⁾. In a fax sent by the FDSEA Finistère to the FNB on 19 November 2001, the following handwritten comment has been added: 'we have not received any complaints from farmers for non-compliance with the price scale' ⁽¹³⁶⁾. In a fax sent by the FDSEA Pas-de-Calais to the FNB on 29 November 2001, under the heading 'compliance with the price scale', it is stated: 'generally speaking, the price scale has been complied with as from the first week. Prices have been slightly higher in S₂ and S₃ before being limited S₄ and S₅. The presence of an FDSEA representative noting all the prices on the market seems to have worried the slaughterers, who abided by the price scale' ⁽¹³⁷⁾.

⁽¹²⁶⁾ Document 38.279/823.

⁽¹²⁷⁾ Document 38.279/822.

⁽¹²⁸⁾ Document 38.279/849. See also document 38.279/1228.

⁽¹²⁹⁾ Document 38.279/117.

⁽¹³⁰⁾ See the press review attached as an annex to the FNICGV's reply to the Commission's request for information. See also, for example, document 38.279/584.

⁽¹³¹⁾ Document 38.279/277.

⁽¹³²⁾ Document 38.279/422. The letters stand for meat categories under EC regulations (see footnote 13).

⁽¹³³⁾ Document 38.279/420.

⁽¹³⁴⁾ Document 38.279/424: the memo mentions the Commission's request for information of 9 November 2001 and the draft reply thereto (the final reply was drawn up on 15 November 2001).

⁽¹³⁵⁾ Document 38.279/851.

⁽¹³⁶⁾ Document 38.279/852.

⁽¹³⁷⁾ Document 38.279/856.

- (87) Fifthly, an e-mail sent to the FNB on 26 November 2001 from the department of Côtes-d'Armor states: 'this morning 150 farmers went to three abattoirs (...). They found that the minimum price scale is being properly applied' ⁽¹³⁸⁾. Another e-mail sent by the FRSEA Brittany President to, amongst others, the FNB on 28 November 2001 also reports that the price scale was being complied with by the abattoirs inspected, such compliance being variously described as 'total' or 'comprehensive' ⁽¹³⁹⁾.
- (88) Sixthly, in the FNB director's handwritten notes, similar comments appear. Thus, with regard to an FNB Council meeting ⁽¹⁴⁰⁾, it is stated, with regard to the department of Aveyron: 'pb on reform → inconsistent applic. price scale', and with regard to the department of Cantal: 'price scale: pb on the R' ⁽¹⁴¹⁾. A few pages further on, under the title "sector agreement": what prospects after end November?', it is stated: 'assessment. "Price scale" aspect: an increase in prices of the order of 0,75 F/kg has been observed for R and U cows during the week (...) and a rise of a few cts/kg for P and O cows. Apart from Angers, the regional slaughterhouse entry prices have not been aligned on the price scale' ⁽¹⁴²⁾. Lastly, handwritten notes made at a region meeting in Clermont-Ferrand on 3 December 2001 refer to the price scale and state 'it's working: we are winning. The situation is turning round' ⁽¹⁴³⁾.
- (89) The implementation of the price scale established by the farmers' unions and endorsed by the slaughterers' federations at the end of November/beginning of December 2001 is also borne out by a number of documents.
- (90) In the first place, the price scale was reported in the press, the term used being 'union recommendations' ⁽¹⁴⁴⁾.
- (91) Then again, the day after the meeting held on 5 December 2001, the FNSEA President wrote to all the presidents of local and specialised federations asking them 'to mobilise [their] network so as to check, as from Monday 10 December among operators in the sector, the prices charged for the purchase of cattle' ⁽¹⁴⁵⁾.
- (92) A fax sent by the FDSEA Maine-et-Loire to the FNB on 11 December 2001 comprises the results of a 'check' carried out by farmers amongst abattoirs in the department. The fax states: 'price scale applied', even though the author is surprised that it is being fully applied and wonders whether the farmers have not been 'duped' ⁽¹⁴⁶⁾.
- (93) Several news reports published on FDSEA websites refer to new blockades of abattoirs in mid-December 2001. For example, from 17 to 19 December, the abattoirs of a slaughter group, 'the only one in France opposed to the application of the price scale' according to one of these news reports, were blockaded. The group finally agreed to apply the price scale until 11 January 2002 ⁽¹⁴⁷⁾.
- (94) During the investigation carried out on the premises of the FNB, a copy was taken of a one-page document headed 'fax received from FDSEA 79, 13/12/01, 17:31'. The document is entitled 'agreement of 25 October 2001 (renewed) signed and deemed applicable by the FNSEA, the FNB, the FNICGV and the FNCBV/SICA' and comprises a table 'union "minimum price" scale'. At the foot of the page, it is stated: 'all the groups which are co-signatories of this agreement have asked the agricultural and trade union organisations to take steps to ensure that this price scale is complied with, through any action which in their eyes may justify intervention with each operator in the sector' ⁽¹⁴⁸⁾. It should be noted that an identical document was sent by the FDSEA Deux-Sèvres to a slaughterer on 13 December 2001 ⁽¹⁴⁹⁾.

⁽¹³⁸⁾ Document 38.279/1098.

⁽¹³⁹⁾ Document 38.279/1106.

⁽¹⁴⁰⁾ The date of the meeting does not appear in the handwritten notes. Given the context, it must be the meeting held on 21 November 2001, the invitation to which is contained in document 38.279/716.

⁽¹⁴¹⁾ Document 38.279/1069.

⁽¹⁴²⁾ Document 38.279/1075.

⁽¹⁴³⁾ Document 38.279/746.

⁽¹⁴⁴⁾ See the article published in *Union Paysanne* on 14 December 2001 (document 38.279/1178). The article reports that, 'after a few price adjustments, the price scale must be taken today as a union recommendation, a recommended selling price for farmers' (après quelques ajustements de prix, la grille est aujourd'hui à prendre comme une recommandation syndicale, un prix de vente conseillé aux éleveurs).

⁽¹⁴⁵⁾ Document 38.279/492. See also the memo issued by the FNB, documents 38.279/509 and 510, and the joint memo issued by the four agricultural federations, document 38.279/522, calling for mobilisation.

⁽¹⁴⁶⁾ Document 38.279/849.

⁽¹⁴⁷⁾ Documents 38.279/1222 to 1229.

⁽¹⁴⁸⁾ Document 38.279/812.

⁽¹⁴⁹⁾ Document 38.279/1198.

(95) It should be noted, lastly, that a number of documents stress the link between checks on imports and checks on prices. For example, on 24 October 2001, the day on which the price scale was discussed amongst the six federations, the Fédération française des commerçants en bestiaux sent a letter to the French Minister for Agriculture stating: 'in a market economy, there cannot be any authoritarian setting of market prices without, at the same time, setting up a whole arsenal of protective measures at frontiers against foreign competition' ⁽¹⁵⁰⁾. Furthermore, as early as 11 October 2001, when it was discussing the establishment of a minimum price scale, the FNB was aware that a number of actions would be necessary in order to achieve this result. The first of such actions listed by the FNB in a memo providing 'information to the beef sections' related precisely to imports, in particular in the restaurant and catering sector ⁽¹⁵¹⁾. Furthermore, the public documents in the Commission's possession, whether press articles or news reports published on the FNSEA and FDSEA website, show that the 'inspections' carried out by the farmers' federations in the abattoirs from October to December related almost systematically to the price charged and to whether or not there was any imported meat.

2. MAIN COMMENTS OF THE PARTIES

(96) In their written replies to the statement of objections and at the hearing, the various federations put forward the following arguments.

(97) The FNSEA argued essentially that:

- the agreement cannot be seen in isolation from the background against which it was signed, namely, an unprecedented crisis in the beef sector which began in October 2000. The crisis resulted in a considerable drop in prices, with no prospect of a return to normal in the medium term. The Community measures taken to deal with the crisis, which were not properly applied by some Member States, proved insufficient. Over and above the crisis in the sector, a human crisis developed, with farmers facing hardship and resorting to sometimes violent protest action. This situation eventually led to breakdowns in law and order. The agreement

concluded on 24 October 2001, which was essentially a media exercise, 'was the only means of restoring hope and industrial peace' ⁽¹⁵²⁾,

- the FNSEA is neither an undertaking nor an association of undertakings. It is a trade union which does not have any means of compelling its members. It maintains that the agreement was not anticompetitive, but fitted 'into the union framework of defending the interests of the trade' of livestock farmers, which constitutes a 'task of general interest' ⁽¹⁵³⁾. The FNSEA also argued that the FNCBV is an association of cooperatives and that there cannot be any such thing as an agreement between a cooperative and its members,
- the agreement of 24 October 2001 was not renewed. However, decisions are not passed on immediately at local level and, at all events, non-renewal does not prevent the continuation of union action,
- the part of the agreement that related to imports 'was by its nature contestable' ⁽¹⁵⁴⁾. However, it was a response to an exceptional situation, was of short duration since it 'ceased at the end of November 2001' ⁽¹⁵⁵⁾ and had no effect,
- the price agreement does not constitute an illegal agreement. It is at all events covered by the second exception in Article 2 of Regulation No 26. This is because the agreement is 'necessary' for attainment of the objectives of the common agricultural policy set out in Article 33(1)(b) and (c) of the Treaty and is not 'contrary to the achievement of the other objectives of Article 33' ⁽¹⁵⁶⁾,
- the Minister for Agriculture publicly urged signing of the agreement,
- as far as imports are concerned, the infringement ended very rapidly. The incidents known to the Commission after 1 December are too isolated to prolong its duration beyond that date,
- at all events, given the general context in which the agreement of 24 October 2001 was concluded, the short duration of the 'imports' aspects and the lack of impact, no fine should be imposed.

⁽¹⁵⁰⁾ Document 38.279/829.

⁽¹⁵¹⁾ Document 38.279/620.

⁽¹⁵²⁾ Comments in reply to the statement of objections, p. 24.

⁽¹⁵³⁾ Comments in reply to the statement of objections, p. 24.

⁽¹⁵⁴⁾ Comments in reply to the statement of objections, p. 26.

⁽¹⁵⁵⁾ Comments in reply to the statement of objections, p. 26.

⁽¹⁵⁶⁾ Comments in reply to the statement of objections, p. 29.

(98) The FNB and the FNPL sent comments to the FNSEA. The FNPL also pointed out that it was a union, belonging to the FNSEA.

(99) The JA essentially made the following points:

- the crisis affecting the beef sector since October 2000 was unprecedented. It entailed substantial losses of income for stock farmers, with no prospect of improvement. It created a deep-seated malaise in the sector. At the hearing, the JA stressed more particularly that the purpose of the agreement was to send a message of hope to farmers affected by a serious psychological crisis,
- the JA is a union of persons, and not an association of undertakings,
- the agreement on the suspension of imports was symbolic and was of very short duration.

(100) The FNCBV essentially argued that the agreement of 24 October 2001 was not renewed. Its non-renewal did not, however, prevent its continued application in the following weeks. In actual fact, the effects of the national agreement gradually faded and had ended by Christmas 2001.

(101) The FNICGV argued as follows:

- in the autumn of 2001, the crisis affecting the beef sector reached its climax, resulting in numerous breakdowns in law and order. The 'objective' goal of the agreement was simply to uphold law and order,
- the FNICGV terminated the initial agreement as early as 19 November 2001. It did not participate in any secret renewal of the agreement. The documents used as evidence originate only from the farmers' unions. They reveal nothing more than the existence of a unilateral price scale adopted by the farmers' unions,
- the agreement was concluded under the threat of violence on the part of the farmers, which in French law constitutes a ground for nullity of contracts (Articles 1111 and 1112 of the French Civil Code). Moreover, it was not in the slaughterers' interest to conclude such an agreement,
- the agreement relates only to a very limited quantity of animals,
- the FNICGV has no means of imposing anything on its members. Indeed, some refused to carry out

the agreement concluded at national level. Nor did the agreement provide for any retaliatory measures,

- with regard more particularly to the provisions relating to imports, the agreement did not produce any effect,
- the Minister for Agriculture 'strongly urged farmers and slaughterers to reach an agreement'. Consequently, he 'imposed anticompetitive conduct on the undertakings' ⁽¹⁵⁷⁾,
- with regard to fines, the facts of the case justify a moderate assessment.

3. LEGAL ASSESSMENT

3.1. Infringement of Article 81(1) of the EC Treaty

(102) Article 81(1) of the EC Treaty states that 'The following shall be prohibited as incompatible with the common market: all agreements between undertakings (...) which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market'.

3.1.1. Undertakings and associations of undertakings

(103) It has to be considered whether the members of the federations involved are 'undertakings' within the meaning of Article 81, and then whether the federations themselves are 'associations of undertakings' within the meaning of that provision.

3.1.1.1. Undertakings

(104) It is settled case-law that 'the concept of an undertaking covers any entity engaged in an economic activity, regardless of its legal status and the way in which it is financed' ⁽¹⁵⁸⁾. Even a natural person may constitute an 'undertaking' if that person engages in an economic activity ⁽¹⁵⁹⁾. 'Any activity consisting in offering goods and services on a given market is an economic activity' ⁽¹⁶⁰⁾.

⁽¹⁵⁷⁾ Comments in reply to the statement of objections, p. 7.

⁽¹⁵⁸⁾ See for example Court of First Instance in Case T-513/93 *Consiglio Nazionale degli Spedizionieri Doganali v Commission* (2000) ECR II-1807, paragraph 36, with further references.

⁽¹⁵⁹⁾ Commission Decision 76/29/EEC of 2 December 1975 relating to a proceeding under Article 85 of the EEC Treaty (IV/26.949 — AOIP/Beyard) (OJ L 6, 13.1.1976, p. 8), point II(2).

⁽¹⁶⁰⁾ See for example the judgment cited in footnote 158.

(105) Four of the federations involved here represent farmers. There is no doubt that farmers engage in an economic activity, that of producing goods and offering them for sale. Even though they may be natural persons, therefore, farmers are 'undertakings' within the meaning of Article 81 of the Treaty. Indeed if they did not engage in an economic activity Regulation No 26 would serve no purpose, as the competition rules would not apply in agriculture in any event.

(106) Slaughterers perform for gain the service of slaughtering animals, and offer the products of their work for sale. They too are 'undertakings'.

(107) It is true that some slaughterers are organised in the form of cooperatives; the FNCBV itself is a federation of cooperatives. But in a case involving a cooperative society in Denmark it was held that the fact that a body was a cooperative organised in accordance with the law of a Member State did not affect the economic nature of its activity⁽¹⁶¹⁾. In reply to the argument put forward by the FNSEA (see recital 97 of this Decision, at the end of the second indent), it will be enough to point out that the agreement which is the subject of this Decision is not a matter of the relations between a cooperative and its members, but an agreement between six distinct entities, namely the federations to which the Decision is addressed.

(108) It has to be concluded, therefore, that the members of the federations involved are 'undertakings' within the meaning of Article 81 of the Treaty.

3.1.1.2. Associations of undertakings

(109) The federations in the case, which bring together 'undertakings' within the meaning of Article 81 of the Treaty, are consequently associations of undertakings, or associations of associations of undertakings.

(110) The FNSEA and the JA have argued that they are organised in the form of trade unions (*syndicats professionnels*) under Title IV of the French Labour Code, and consequently do not constitute associations of undertakings. But the Court of Justice has held that the legal framework within which agreements are made, and

the classification given to that framework by the various national legal systems, are irrelevant as far as the applicability of Article 81 of the Treaty is concerned⁽¹⁶²⁾.

(111) Article 81 applies to non-profit-making associations in so far as their own activities or the activities of undertakings affiliated to them are calculated to produce the effects which it aims to suppress⁽¹⁶³⁾.

(112) The Commission recognises the importance of trade union freedom, which as the FNSEA points out is referred to in particular in Article 12(1) of the Charter of Fundamental Rights of the European Union⁽¹⁶⁴⁾. The Commission does not in any way underestimate the work of information, advice and protection of their members' interests performed by organisations representing particular occupations or professions. But such organisations step outside those terms of reference when they assist in the conclusion and implementation of agreements that are in breach of rules of public policy such as the competition rules. The conclusion of an agreement such as the one at issue here, an agreement between agricultural organisations and organisations of downstream operators which is aimed at suspending imports and setting a minimum purchase price, exceeds the limits of legitimate trade union action.

(113) In a wide variety of industries, including agriculture, the French Competition Board has frequently taken decisions holding that the rules of competition have been infringed by professional or trade associations that

⁽¹⁶¹⁾ Court of First Instance in Case T-61/89 *Dansk Pelsdyravlæforening v Commission* (1992) ECR II-1931, paragraph 50.

⁽¹⁶²⁾ Case C-35/96 *Commission v Italy* (1998) ECR I-3851, paragraph 40, and Case 123/83 *Clair* (1985) ECR 391, paragraph 17.

⁽¹⁶³⁾ Court of Justice in Case 71/74 *Frubo v Commission* (1975) ECR 563, paragraph 30; Joined Cases 209 to 215 and 218/78 *van Landewyck and Others v Commission* (1980) ECR 3125, paragraph 88; and Joined Cases 96 to 102, 104, 105, 108 and 110/82 *IAZ and Others v Commission* (1983) ECR 3369, paragraph 20.

⁽¹⁶⁴⁾ OJ C 364, 18.12.2000, p. 1. Article 12(1) of the Charter states that 'Everyone has the right to (...) freedom of association at all levels, in particular in political, trade union and civic matters'.

have gone beyond their legitimate role, and has imposed fines on them ⁽¹⁶⁵⁾.

(114) In reality, while it is essential that trade unions be free to represent their members' interests, that does not entitle such associations to engage in unlawful conduct. Quite the reverse, their role ought to be to seek to prevent such conduct.

(115) From the documents in the case it is clear that even when they signed the agreement the parties were aware, or could not have been unaware, that it was incompatible with the Community rules. In handwritten notes by one of the directors of the FNB, dated 25 October and concerning the press conference on the agreement, there is the indication 'against the law' ⁽¹⁶⁶⁾, and more explicit again, after the name of the President of the FNCBV, 'a bit against the law, but can't be helped' ⁽¹⁶⁷⁾. With regard to the meeting on 29 October, the same notes remark 'DGCCRF + Competition Board!!!' ⁽¹⁶⁸⁾. In fact these notes make it clear that discussions on a possible scale of prices took place as early as the beginning of October 2001. At a meeting on 2 October 2001, after the initials of the President of the FNSEA, there are the words 'it's anticompetitive, but commitment' (c'est anticoncurrentiel, mais engagement, document 38.279/950). After the name of the President of the FNCBV are the words 'Can we close ranks? without being caught out by the DGCCRF?' (peut-on se serrer les coudes? sans se faire prendre en faute par la DGCCRF? document 38.279/951). Immediately after the signature of the agreement, outside parties complained to the President of the FNSEA that it was illegal (see recital 44 of this Decision). The statements that the President of the FNCBV made to the press regarding the DGCCRF also

show that the parties were perfectly aware that the agreement between them was illegal (see recital 43 of this Decision) ⁽¹⁶⁹⁾.

(116) It should be recalled, in any event, that the decisions of the Commission and the judgments of the Court of First Instance and Court of Justice of the European Communities offer numerous examples of associations which were perfectly legitimate in themselves but which nevertheless provided a framework for infringements of the competition rules ⁽¹⁷⁰⁾.

(117) The six federations that are party to the agreement therefore constitute associations of undertakings (or associations of associations of undertakings) within the meaning of Article 81 of the Treaty.

3.1.2. Agreement

(118) It is undisputed that for there to be an 'agreement' within the meaning of Article 81 of the Treaty it is not necessary that the parties should consider it legally binding. An 'agreement' may exist where the parties reach a consensus on a plan which limits or is likely to limit their commercial freedom by determining the lines of their mutual action or abstention from action in the market. No enforcement procedures such as might be foreseen in case of a civil law contract are required. Nor is it necessary for such an agreement to be made in writing.

(119) An agreement such as the one concluded on 24 October 2001 therefore constitutes an 'agreement' between associations of undertakings within the meaning of Article 81 of the Treaty ⁽¹⁷¹⁾.

(120) In addition, the discussions that took place at the meetings on 29 November and 5 December 2001 attest the existence of a similar agreement between the same parties that carried on from the earlier one. The form had changed from that of the agreement of 24 October, since no formal written document survives. But, as has been shown in the account of the facts, the discussions

⁽¹⁶⁵⁾ Since the setting up of the Competition Board (Conseil de la concurrence), every one of its annual reports has given examples of the application of the competition rules to trade unions or federations (see in particular the reports for 1987 and 1997). For examples of formal decisions concerning farmers' unions see the following Competition Board decisions:

- Decision No 00-D-01 of 22 February 2000 on practices in the fruit and vegetables trade (this decision was annulled on 17 October 2000 by the Paris Court of Appeal on separate grounds to do with an error in the identification of the addressee of the decision);
- Decision No 96-D-60 of 15 October 1996 on competition in seed potatoes;
- Decision No 96-D-59 of 8 October 1996 on practices observed in the Champagne wine trade;
- Decision No 95-D-77 of 5 December 1995 on competition on the market in honey;
- Decision No 94-D-61 of 29 November 1994 on practices observed in the production and marketing of veal;
- Decision No 94-D-23 of 5 April 1994 on practices observed in the olive oil trade.

⁽¹⁶⁶⁾ Document 38.279/892.

⁽¹⁶⁷⁾ Document 38.279/893.

⁽¹⁶⁸⁾ Document 38.279/901.

⁽¹⁶⁹⁾ It may also be worth referring to an article that appeared in the magazine *Les Marchés* on 26 October 2001, the day after the formal signature of the agreement, which states that 'According to the FNSEA, the Ministry of Agriculture has made no objection to the agreement, but some sources already suspect that it does not comply with the rules on competition' (selon la FNSEA, le ministère de l'agriculture n'aurait pas émis de réserve sur cet accord, que certains soupçonnent cependant déjà de ne pas être conforme à la réglementation sur la concurrence, document 38.279/198).

⁽¹⁷⁰⁾ Of those already cited, see the judgment of the Court of First Instance in *Consiglio Nazionale degli Spedizionieri Doganali v Commission* (see footnote 158), or the judgment of the Court of Justice in *Clair* (see footnote 162).

⁽¹⁷¹⁾ See for example Court of Justice in *Frubo* (see footnote 163) and *Clair* (see footnote 162), paragraph 20.

reflect a meeting of minds between the federations that had signed the initial agreement. This is quite explicit in the notes taken by the director of the FNB at the meetings of 29 November and 5 December 2001: the notes refer several times to the 'agreement' between the parties (see in particular recitals 58, 60 and 69 of this Decision). Indeed the facts already set out reveal that the parties had agreed to keep the new agreement secret (see in particular recital 60); the documents in the case contain numerous references to the need for the parties 'to put nothing in writing from now on' (*ne plus rien écrire*, see in particular recitals 59, 60, 68, 69 and 70), and to confine themselves to a 'verbal agreement' (see in particular recitals 59, 60, 63 and 64). Without repeating these documents in full, it may be worth pointing out that the director of the FNB wrote in his handwritten notes that 'by general agreement, we will no longer communicate in writing'. The vice-president of the FNB said, 'there is nothing in writing on this new "agreement". Just words (...) we will see what is the weight of words, after the impact of the written document'.

(121) The FNICGV has argued that the farmers had threatened violence, and that the agreement was concluded under that threat, which in French law is a ground of nullity. But for a commitment to be considered an 'agreement' within the meaning of Article 81 it is not necessary that it should constitute a valid and binding contract under national law⁽¹⁷²⁾. And the courts have consistently held that an undertaking or association of undertakings party to an agreement within the meaning of Article 81 of the Treaty cannot rely on the argument that it was compelled to take part by the other participants. It could instead have reported the pressure being brought to bear on it to the appropriate authorities, and lodged a complaint with the Commission under Article 3 of Regulation No 17⁽¹⁷³⁾.

(122) Moreover, if an agreement vitiated by a ground of nullity were to escape Article 81, as the FNICGV contends when it invokes the threat of violence, no agreement would ever be caught by Article 81(1) of the Treaty: the fact that an agreement restricts competition is itself a ground of nullity under Article 81(2) of the Treaty. But the fact

that the agreement was concluded under compulsion may be taken into account when the victim's participation in the infringement has to be assessed for purposes of the setting of fines.

(123) Lastly, contrary to the parties' claims, the fact that the agreement itself made no provision for penalties to be imposed on parties who failed to comply with it does not prevent it from being an 'agreement' within the meaning of Article 81(1) of the Treaty⁽¹⁷⁴⁾.

3.1.3. *Restriction of competition*

(124) Article 81(1)(a) of the Treaty cites by way of example of restriction of competition forms of conduct which 'directly or indirectly fix purchase or selling prices'. As further examples Article 81(1)(b) and (c) refer to forms of conduct which 'limit or control production [or] markets' or 'share markets or sources of supply'.

(125) An agreement such as the one under consideration here, which was concluded between farmers' and slaughterers' representatives and is aimed at setting minimum prices for the purchase of culled cows in France, consequently constitutes a restriction of competition within the meaning of Article 81(1) of the Treaty.

(126) In addition, an agreement by which the parties promise not to import products originating in the other Member States, among other places, leads to a partitioning of the market which is incompatible with Article 81(1) of the Treaty. It is true that the section of the agreement of 24 October 2001 requiring the 'suspension' of imports of beef in general was moderated by the Rungis protocol of 31 October 2001. But the 'solidarity' which importers and exporters promised to display has to be understood in the context as a call, at the very least, to limit imports as far as possible, since total suspension of imports had proved impossible in practice. Furthermore, it is undisputed that local agreements were concluded in the last week of October and in November, that is to say after the conclusion of the Rungis protocol (see recitals 73 to 75 and 79 of this Decision). But those agreements, which continued and implemented the national agreement, contained a suspension of imports clause valid 'pending

⁽¹⁷²⁾ Court of First Instance in Case T-41/96 *Bayer v Commission* (2000) ECR II-3383, paragraph 68, and Court of Justice in Case C-277/87 *Sandoz v Commission* (1990) ECR I-45, paragraph 13.

⁽¹⁷³⁾ Court of First Instance in Case T-149/89 *Sotralentz v Commission* (1995) ECR II-1127, paragraph 53, and Case T-308/94 *Cascades v Commission* (1998) ECR II-925, paragraph 122.

⁽¹⁷⁴⁾ See in particular Court of First Instance in Case T-317/94 *Moritz J. Weig v Commission* (1998) ECR II-1235, paragraph 134.

further national negotiations' (see recitals 75 and 79). The facts also show that in November and December, likewise after the signature of the Rungis protocol, farmers carried out 'inspections' of the origin of meat, and in some cases destroyed meat that was not of French origin (see recital 80). Several times in those two months local organisations informed the FNB of the results of inspections relating specifically to the origin of meat. For example, it may be recalled that a local union representative wrote to the FNB on 11 December 2001 regarding an 'inspection' in the slaughterhouses of the region: 'no anomaly found — scale applied — no imports' (same recital). The handwritten notes by the director of the FNB include the observation 'continue on imports', but 'don't say it, and certainly don't write it' (see recital 49, concerning a conversation on 20 November 2001). Regarding the meeting on 5 December, the same notes observe 'we're to stop saying "against imports", and go to restaurants and catering' (see recital 68).

- (127) It is well established that for the purpose of applying Article 81(1) of the Treaty there is no need to take account of the actual effects of an agreement once it appears that its aim is to prevent, restrict or distort competition within the common market⁽¹⁷⁵⁾. The agreement at issue here did have the restriction of competition as its object, and there is consequently no need to examine its effects. With regard to the provisions in the agreement concerning prices, however, it may be pointed out that prices did indeed begin to rise as soon as the agreement of 24 October 2001 had been concluded (see recitals 14 and 81 of this Decision), and that several documents show that farmers' representatives felt that the price scale was having the desired effect, at least in part (see recitals 85, 86 and 88). With regard to the provisions in the agreements concerning imports, the facts show that goods were 'inspected' to establish their origin, and that imported products were destroyed (see in particular recital 80). The figures produced by the FNICGV in response to the statement of objections show that the volume of imports from France's main commercial partners in the beef industry fell substantially in November and December 2001 by comparison with October 2001, before rising again in January 2002 (see recital 78). But the Commission is not in a position to say that this was the result of the infringement.

- (128) The FNICGV has contended that the agreement concerned only a limited quantity of animals. This is not true of imports. That part of the agreement concerned all beef (see recital 38 of this Decision). It was not confined to cows, as opposed to other kinds of cattle, or to animals on the hoof for slaughter, as opposed to imported fresh or frozen meat. The agreement on prices did apply only to certain categories of cow intended for slaughter, but this does not mean that its scope was narrow.

- (129) First, it is a particular feature of the French market that consumption is largely oriented towards the meat of cows⁽¹⁷⁶⁾. Second, it is clear from the price scale drawn up by the FNB in mid-October 2001 (see recital 31 of this Decision) that the scale was confined to culled cows 'because of the importance of this category'⁽¹⁷⁷⁾. Moreover, it would seem contradictory to claim that the agreement was concluded mainly to send a message of hope to farmers, to put an end to the strong pressure being exerted by the farmers and the public authorities, and to avoid breakdowns of law and order, and at the same time to claim that the agreement related only to very small volumes.

- (130) It is indisputable that the beef industry was undergoing a serious crisis at the time the agreement was concluded (see section 1.3 of this Decision), a crisis which affected all markets in the Community. The Commission recognised the situation, and precisely for that reason it took special measures (see section 1.4.2). But as the Court of Justice has recently had occasion to point out, 'the existence of a crisis in the market cannot in itself preclude the anti-competitive nature of an agreement'⁽¹⁷⁸⁾. The existence of a crisis might have been relied upon in order to seek an exemption under Article 81(3) of the Treaty⁽¹⁷⁹⁾. None of the parties to the agreement submitted any such application. But even if this agreement had been notified, it most likely would not have qualified for exemption. It is well established that exemption can be granted only when the four tests of Article 81(3) of the Treaty are all satisfied⁽¹⁸⁰⁾. In this

⁽¹⁷⁵⁾ See for example Court of First Instance in Case T-305/94 etc. *LVM and Others v Commission* (1999) ECR II-931, paragraph 741.

⁽¹⁷⁶⁾ See French Ministry of Agriculture memo of 17 October 2001 (document 38.279/621).

⁽¹⁷⁷⁾ Documents 38.279/614 and 615 in particular.

⁽¹⁷⁸⁾ Court of Justice in 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 *LVM and Others v Commission*, 16 October 2002, not yet reported, paragraph 487.

⁽¹⁷⁹⁾ *Ibid.*, paragraph 488.

⁽¹⁸⁰⁾ See for example Court of First Instance in Case T-86/95 *Compagnie générale maritime and Others v Commission* (2002) ECR II-1011, paragraph 349.

case it will be enough to point out that the first two tests are not satisfied. The agreement does not in any way contribute to improving the production or distribution of goods or to promoting technical or economic progress. Nor does it allow consumers a fair share of the resulting benefit.

3.1.4. *Appreciable effect on trade between Member States*

(131) The courts have consistently held that in order that an agreement between undertakings may affect trade between Member States it must be possible to foresee with a sufficient degree of probability on the basis of a set 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 in all the Member States ⁽¹⁸¹⁾.

(132) The first part of the agreement provided for nothing less than a suspension of imports. Although the terms of the agreement of 24 October 2001 were moderated by the Rungis protocol, the wording of the protocol and the facts of the case make it clear that control of imports of beef, including imports from other Member States, continued to be a vital component of the agreement (see recital 80 of this Decision). This is confirmed by the written protests of agricultural organisations in other Member States (see recital 44).

(133) On the minimum prices for culled cows, it should be pointed out first that an agreement, decision or concerted practice extending over the whole of the territory of a Member State has, by its very nature, the effect of reinforcing the partitioning of markets on a national basis, thereby holding up the economic interpenetration which the Treaty is designed to bring about ⁽¹⁸²⁾. And on a market that is open to imports a minimum price agreement can function only if it is backed up by

measures to control imports ⁽¹⁸³⁾. Otherwise, in a sector such as that of beef in France, where the producer price is already far higher than those in the neighbouring countries, and notably in Germany, fixing an even higher minimum price would necessarily lead to an increase in cheaper imports. The facts set out in this Decision (see recital 95) show that the link between minimum price and control of imports was indeed made. In particular, in the price scale that it adopted even before the agreement of 24 October 2001, the FNB listed the trade union measures that would have to be taken to ensure the application of the scale: the first such measure listed was control of imports (same recital). The 'inspections' carried out by farmers in October to December 2001 were concerned both with prices and with the place of origin of the meat.

(134) The volumes of trade between France and the other Member State are substantial (see recital 11). In fact the bulk of trade in beef is inside the Community. The potential effects of an agreement of the kind at issue here, whether direct — suspending or limiting imports — or indirect — keeping up prices — have to be regarded as appreciable.

3.2. **Council Regulation No 26**

(135) Regulation No 26 provides that Article 81 is to apply to all agreements, decisions and practices which relate to production of or trade in the products listed in Annex II to the Treaty, now Annex I, which include beef.

(136) By way of exception it provides that Article 81 is not to apply to restrictive practices of three kinds:

- (a) those which 'form an integral part of a national market organisation';
- (b) those which 'are necessary for attainment of the objectives set out in Article 33 of the Treaty';

⁽¹⁸¹⁾ See for example Court of Justice in Case 42/84 *Remia and Others v Commission* (1985) ECR 2545, paragraph 22.

⁽¹⁸²⁾ Court of Justice in Case C-309/99 *Wouters*, 19 February 2002, not yet reported, paragraph 95. In a judgment delivered on the same day in Case C-35/99 *Arduino*, not yet reported, the Court held that a tariff fixing minimum and maximum fees for members of a profession that 'extends to the whole of the territory of a Member State (...) may affect trade between Member States' (paragraph 33).

⁽¹⁸³⁾ Court of Justice in Case 246/86 *Belasco v Commission* (1989) ECR 2117, paragraph 34: 'since 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.'

- (c) restrictive 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 (...) 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 of the Treaty are jeopardized.'
- (137) As the parties have indeed accepted, the exceptions set out at (a) and (c) cannot apply here. The organisation of the market in beef is a common one, so that the exception at (a) is excluded. The exception at (c) is excluded twice over: the agreement involves parties other than farmers, namely the slaughterers' federations; and it does indeed impose an obligation to charge identical prices.
- (138) The exception at (b) cannot apply either. In line with the Commission's practice in its decisions and with the case-law, Article 2 of Regulation No 26, being an exception to the general rule, must be interpreted strictly⁽¹⁸⁴⁾. The third recital to Regulation No 26 states that Article 81 of the Treaty is to apply to agricultural products in so far as its application 'does not impede the functioning of national organisations of agricultural markets or jeopardize attainment of the objectives of the common agricultural policy'.
- (139) According to the court judgments the exemption in (b) applies only if the agreement facilitates the attainment of all the objectives of Article 33(1) of the Treaty⁽¹⁸⁵⁾, or, if those objectives should prove divergent, if the Commission is able to reconcile them so as to enable the derogating provision to apply⁽¹⁸⁶⁾.
- (140) The agreement at issue here does not in any way help 'to increase agricultural productivity'. That objective, listed at Article 33(1)(a) of the Treaty, is quite outside the scope of the agreement.
- (141) The agreement was intended to fix a minimum price, which would be higher than the market price, and it might therefore be thought that it would help 'to ensure a fair standard of living for the agricultural community, in particular by increasing the individual earnings of persons engaged in agriculture'. Article 33(1)(b) lists that objective, but links it to the achievement of the first objective, the improvement of productivity, as can be seen from the fact that it begins with the word 'thus'. The agreement at issue here clearly does not pursue the first objective.
- (142) In addition, contrary to what has been argued by the FNSEA, the agreement cannot be considered necessary 'to stabilise markets' (Article 33(1)(c) of the Treaty). The crisis in the beef sector was due primarily to a massive imbalance between supply and demand. Fixing a minimum purchase price does nothing to remedy such a situation. It does not affect the volume of supply, of which there was a large surplus; an increase in minimum prices might even cause demand to fall, thus widening the gap between supply and demand. The view that fixing a minimum price would not solve anything had indeed been put forward by the President of the FNCBV and the FNICGV representative at the meeting on 23 October 2001 (see recital 32 of this Decision). Numerous documents in the file show that everyone was aware that the only real way to end the crisis was to bring supply and demand into balance⁽¹⁸⁷⁾.
- (143) The agreement is not necessary 'to assure the availability of supplies' (Article 33(1)(d) of the Treaty). The market in beef is not suffering from any shortage of supply.

⁽¹⁸⁴⁾ Court of Justice in Case C-399/93 *Oude Luttikhuis and Others* (1995) ECR I-4515, paragraph 23, and Court of First Instance in Joined Cases T-70/92 and T-71/92 *Florimex and VGB v Commission* (1997) ECR II-693, paragraph 152. See also e.g. Commission Decision 1999/6/EC of 14 December 1998 relating to a proceeding under Article 85 of the Treaty (IV/35.280 — Sicasov) (OJ L 4, 8.1.1999, p. 27), recital 68.

⁽¹⁸⁵⁾ *Frubo*, paragraphs 22 to 27 (see footnote 163); *Oude Luttikhuis*, paragraph 25 (see footnote 184); Court of Justice in Case C-265/97 *P VBA and Others v Commission* (2000) ECR I-2061, paragraph 94.

⁽¹⁸⁶⁾ *VBA*, paragraph 94 (see footnote 185).

⁽¹⁸⁷⁾ For example, an FNSEA memo dated 6 November 2001 on the adoption of the agricultural budget by the lower house of the French parliament says 'the Minister pointed out that it was not enough to write cheques for livestock farmers, supply and demand had also to be brought into line' (le ministre a rappelé que faire des chèques aux éleveurs ne suffirait pas, il faudra aussi équilibrer l'offre et la demande, document 38.279/400). See also an interview with the President of the FNSEA in the newspaper *Le Figaro Économie*, 17 October 2001 (document 38.279/312), or a memo from the FDSEA of Loire, dated 31 October 2001, according to which 'everyone agreed that the only lasting solution was for consumption to increase again, and that a sustainable future for the trade depended on it' (tout le monde a convenu que la seule planche de salut durable était une remontée de la consommation, et que ceci conditionnait l'avenir durable de la filière, document 38.279/825).

- (144) Lastly, contrary to what the FNSEA has argued, the agreement is not likely 'to ensure that supplies reach consumers at reasonable prices' (Article 33(1)(e) of the Treaty). Especially in the case of consumption via restaurant and catering services, which are a major user of cheaper, imported meat, the suspension of imports could only have the effect of increasing prices.
- (145) Thus the agreement is not necessary in order to achieve at least four of the five objectives of the common agricultural policy. Even if the view were to be taken that it did indeed fall within the scope of the objective in Article 33(1)(b) of the Treaty, nevertheless, when that objective is weighed against the other four objectives listed in Article 33(1), which it would not help to achieve, it has to be concluded that the derogation in Regulation No 26 does not apply here.
- (146) In addition, as has already been said, beef is the subject of a common organisation of the market. By definition such an organisation is established 'in order to attain the objectives set out in Article 33' of the Treaty, as is expressly stated in Article 34. The same point is made in the recital 2 to Regulation (EC) No 1254/1999 (see recital 17 of this Decision).
- (147) But there is no way in which it can be maintained that the agreement at issue is among the means indicated by the Regulation or the legislation implementing it ⁽¹⁸⁸⁾.
- (148) Lastly, even if it were to be supposed that the measures taken by the parties did contribute to the attainment of the objectives in Article 33(1) of the Treaty — which they did not — the word 'necessary' in Article 2 of Regulation No 26 requires that the measures be proportionate, that is to say that no other less restrictive measures would allow the objectives pursued to be attained. The agreement at issue aimed to fix prices and suspend imports, both of which are restrictions of competition expressly named in Article 81(1) of the Treaty and which constitute manifest infringements for which penalties have frequently been imposed.
- (149) It follows that the agreement cannot be regarded as 'necessary' as required by the first sentence of Article 2(1) of Regulation No 26. Consequently, it is not excepted from the application of Article 81(1) of the Treaty.
- ### 3.3. Intervention by the French State
- (150) It has to be considered whether, as some of the parties contend, the part that may have been played by the French authorities in the conclusion of the agreement of 24 October 2001 is such as to prevent the application of Article 81 to the conduct of the six federations.
- (151) It appears from the facts that the French State, through its Minister for Agriculture, was indeed implicated in the conclusion of the agreement of 24 October 2001. He strongly encouraged the conclusion of an agreement whose content was necessarily going to be in violation of the competition rules. This was expressly stated by the Minister before the lower house of parliament when the agreement was under discussion (see recital 33 of this Decision), and in the press release that the Minister issued after the agreement was concluded (see recital 42). But the Minister himself acknowledged that he could not 'oblige' or 'force' the parties to conclude an agreement (see recital 33). The agreement continues to be an agreement between private parties.
- (152) From the case-law it is clear that if anticompetitive conduct is required of undertakings by national legislation, or if the latter creates a legal framework which itself eliminates any possibility of competitive activity on their part, Article 81 does not apply. In such a situation, the restriction on competition is not attributable to the autonomous conduct of the undertakings ⁽¹⁸⁹⁾.
- (153) That is not the case here. However the French State may have been implicated in the discussions that led to the conclusion of the agreement of 24 October 2001, there was no question of a legal framework that left the undertakings no margin for autonomous conduct.

⁽¹⁸⁸⁾ Court of First Instance in Joined Cases T-70/92 and T-71/92 *Florimex and VGB v Commission* (1997) ECR II-693, paragraphs 148 and 149, and opinion of Advocate-General Tesaro in *Oude Luttikhuis* (see footnote 184) (1997) ECR 4471, paragraph 14. For examples of recent practice in Commission decisions see *Sicasov* (see footnote 184), paragraph 68, and Decision 1999/210/EC of 14 October 1998 relating to a proceeding pursuant to Article 85 of the EC Treaty (British Sugar plc, Tate & Lyle plc, Napier Brown & Company Ltd and James Budgett Sugars Ltd) (OJ L 76, 22.3.1999, p. 1), recital 187.

⁽¹⁸⁹⁾ See for example Court of Justice in Joined Cases C-359/95 P and C-379/95 P *Commission and France v Ladbroke Racing* (1997) ECR I-6265, paragraph 33, and Court of First Instance in *Consiglio Nazionale degli Spedizionieri Doganali v Commission* (see footnote 158), paragraphs 58 and 59.

(154) In their replies to the statement of objections the parties did not contest this conclusion. The FNSEA and the FNICGV stressed that the Minister had been implicated, but they confirmed that while he may have been deeply involved his role was merely one of encouragement⁽¹⁹⁰⁾.

(155) In addition, it cannot be overlooked that the intervention on the part of the Minister was itself provoked by weeks of farmers' demonstrations, sometimes violent, in September and October 2001. In its observations in reply to the statement of objections, the FNSEA pointed out that 'law and order was threatened' and that these demonstrations 'were paralysing economic activity in the whole agri-food sector'⁽¹⁹¹⁾; the FNSEA added that the Minister felt obliged to intervene 'to try to put an end to the crisis and the disturbance of law and order'⁽¹⁹²⁾.

(156) Thus the conduct of the six French federations does not fall outside the scope of Article 81 of the Treaty.

3.4. Duration of the infringement

(157) The infringement which is the subject of this Decision originated with the agreement of 24 October 2001. The agreement of 24 October 2001 expired on 30 November 2001, but the agreement continued beyond that date. The Commission has evidence that the agreement concluded at countrywide level continued to have effect at least until 11 January 2002, the date of expiry of the last local agreement to apply the national commitment of which the Commission is aware (see recital 93 of this Decision). Thus the infringement began on 24 October 2001 and lasted at least until 11 January 2002.

⁽¹⁹⁰⁾ Comments of FNICGV, p. 7, last paragraph ('The Minister for Agriculture strongly encouraged farmers and slaughterers to reach agreement' (le Ministre de l'agriculture a fortement incité les éleveurs et les abatteurs à s'entendre)), and comments of FNSEA, p. 23, penultimate paragraph ('The Minister for Agriculture himself publicly encouraged the conclusion of an agreement which he considered indispensable' (le Ministre de l'agriculture lui-même a incité publiquement à la signature d'un accord jugé comme indispensable)).

⁽¹⁹¹⁾ Comments in reply to the statement of objections, p. 15, last line.

⁽¹⁹²⁾ Comments in reply to the statement of objections, p. 23, penultimate paragraph.

3.5. Persons to whom this Decision should be addressed

(158) This Decision should be addressed to the six federations directly implicated in the infringement, that is to say those who were party to the agreement of 24 October 2001 and who continued to apply it, though in a different form, beyond 30 November 2001.

3.6. Article 3(1) of Regulation No 17

(159) Article 3(1) of Regulation No 17 states that where the Commission finds that there is infringement of Article 81 of the Treaty it may by decision require the undertakings concerned to bring such infringement to an end. According to the information available to the Commission the agreement of 24 October 2001 was extended in another form beyond 30 November 2001.

(160) In view of the statements made by the parties it is probable that the infringement has ceased to have effect, but that cannot be asserted with absolute certainty.

(161) The Commission should therefore require the federations to which the present Decision is addressed to bring the infringement to an end, if they have not already done so, and henceforth to refrain from any agreement, concerted practice or decision which might have the same or a similar object or effect.

3.7. Article 15(2) of Regulation No 17

(162) Article 15(2) of Regulation No 17 empowers the Commission to impose on undertakings or associations of undertakings fines of from EUR 1 000 to EUR 1 000 000, or a sum in excess thereof but not exceeding 10 % of turnover, where either intentionally or negligently they infringe Article 81(1) of the Treaty.

3.7.1. The amount of the fine

(163) In fixing the amount of the fine, the Commission is to have regard to all relevant circumstances, and in particular to the gravity and duration of the infringement.

- (164) 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⁽¹⁹³⁾ state that 'In assessing the gravity of the infringement, account must be taken of its nature, its actual impact on the market, where this can be measured, and the size of the relevant geographic market'.
- (165) The infringement at issue consists of a minimum price agreement and a commitment to suspend or at least to limit imports, and by its nature, therefore, the infringement is a particularly serious one. This is especially so because measures had been taken by the Community institutions to resolve the crisis and authorise the granting of aid to the farmers affected.
- (166) Turning to the size of the relevant geographic market, the French market is one of the main agricultural markets in the Community, and the French beef herd alone amounts to more than 25 % of the Community herd. In addition, one aspect of the agreement was concerned with imports, so that the scope of the infringement went beyond France itself.
- (167) It has already been said (see recital 127) that the Commission is not able to quantify the real effects on prices and on intra-Community trade that can be attributed to the agreement. The slaughterhouse entry price did rise in the three weeks following the conclusion of the agreement (see recital 14); the statistics in the Commission's possession show that the increase did not last long, and that the prices reached remained lower than those of October and November 1999, before the second 'mad cow' crisis⁽¹⁹⁴⁾. As regards the volume of trade between Member States, the reduction in imports shown in the figures supplied by the FNICGV at the hearing (see recital 78) cannot be said with certainty to be a result of the agreement.
- (168) In view of the nature of the infringement and the geographic extent of the relevant market, it is clear that the infringement is very serious.
- (169) Each of the federations should be fined, because, as is clear from the facts and their legal assessment, each of them played an individual part in the infringement. The parties should be distinguished in such a way as to reflect each one's relative strength and thus its degree of responsibility for the infringement. Market shares do not provide an appropriate criterion. First, as the parties are federations, they have not got market shares properly so called. Second, in the case of the farmers' federations even the market shares of the members do not provide a basis for a comparison between the federations themselves. One of the federations, the FNSEA, is a grouping of farmers in general; another represents a particular social category of farmer, namely young farmers; and the other two specialise in particular areas of activity, namely beef and dairy production.
- (170) The ratio between the amount of the annual membership fees collected by each of the farmers' federations and that collected by the main farmers' federation appears to be an objective criterion reflecting the relative size of the different farmers' federations, and consequently their individual degree of responsibility in the infringement. This degree of responsibility reflects the real capacity of the members of each federation to cause serious harm. The same criterion should be applied to the two slaughterers' federations. The fact that they do not operate on the same market as the farmers is irrelevant here, given that the basic amounts of the fines cannot in any event be determined by reference to market shares, as has just been said. Accordingly, the basic amount of the fine to be imposed on the main federation involved, the FNSEA, in order to take account of the gravity of the infringement, should be set at EUR 20 million. Those imposed on the FNPL, the FNICGV and the JA should be set at, respectively, 1/5th, 3/20ths and 1/20th of that amount, and those imposed on the FNB and the FNCBV at 1/10th of that amount.
- (171) Turning now to the duration of the agreement, the facts set out above show that the infringement began on 24 October 2001. For purposes of the fine it may be held that it lasted until 11 January 2002, as the Commission has no evidence that would demonstrate that it continued beyond that date. The infringement was therefore of short duration, which may well be due in large part to the rapid intervention on the part of the Commission. This also shows that in so far as the agreement did produce any effects, it did so for only a short time. In accordance with the guidelines, the short duration of the infringement means that there should be no increase in the basic amount.
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- ⁽¹⁹³⁾ OJ C 9, 14.1.1998, p. 3.
- ⁽¹⁹⁴⁾ Statistics regularly updated on OFIVAL's Internet site, www.ofival.fr.

(172) Taking account of the gravity and duration of the infringement, therefore, the basic amount of the fine is to be determined as follows:

- FNSEA: EUR 20 million,
- FNB: EUR 2 million,
- JA: EUR 1 million,
- FNPL: EUR 4 million,
- FNICGV: EUR 3 million,
- FNCBV: EUR 2 million.

3.7.2. Aggravating and mitigating circumstances

3.7.2.1. Aggravating circumstances

(173) Under the heading of aggravating circumstances account should be taken of the fact that the farmers who were members of the farmers' federations in question used violence in order to compel the slaughterers' federations to accept the agreement of 24 October 2001. They also used physical force to set up mechanisms to verify that the agreement was being applied, such as the illegal 'inspections' to establish the place of origin of meat. The information available to the Commission, including press articles, repeatedly refers to the local sections of the FNSEA, the JA and the FNB. In view of this aggravating circumstance the amount of the fines imposed on those three farmers' federations should be increased by 30 %.

(174) Account should also be taken of the fact that the parties continued their agreement in secret, in another form, at the end of November and the beginning of December 2001, even though they had received a letter of formal notice from the Commission, and had given an assurance that the written agreement of 24 October 2001 would not be extended (see recital 4 of this Decision). The basic amount of the fine imposed on each of the six parties should therefore be increased by 20 %.

(175) Lastly, there is the preponderant role played by the FNB, the federation of livestock farmers, in the preparation and implementation of the infringement. It is clear from the documents in the case that the initiative for a price scale and associated measures in respect of imports came from the FNB. The FNB was especially emphatic in support of an oral agreement, as statements made by its vice-president show. The basic amount of the fine imposed on the FNB should therefore be increased by 30 %.

3.7.2.2. Mitigating circumstances

(176) Among mitigating circumstances there is the forceful intervention of the French Minister for Agriculture in favour of the conclusion of such an agreement. This was reflected in his speeches in parliament and his press release the day the agreement was concluded. His intervention put strong pressure on the slaughterers to

conclude an agreement. In particular, it will be seen from the facts set out here that at a meeting between the parties on 23 October 2001, before the Minister intervened, the slaughterers refused to sign the agreement presented to them by the farmers (see recital 32). Account should be taken of this mitigating circumstance by reducing the fine imposed on each of the slaughterers' federations by 30 %. But the Minister's intervention was in turn the result of several weeks of demonstrations by farmers who were members of the farmers' federations involved, demonstrations which were aimed at securing the slaughterers' signature to an agreement; consequently, the benefit of this mitigating circumstance should not be allowed to the four farmers' federations.

(177) The two federations of slaughterers, the FNICGV and the FNCBV, were faced with a very special situation. In the weeks preceding the conclusion of the agreement their members were subjected to illegal action in which industrial plants were blockaded, thus preventing from carrying on any economic activity, and meat was destroyed. In some cases serious damage was done to their premises. From the account of the facts it will be seen that the two federations representing the slaughterers nevertheless opposed the conclusion of any agreement until 23 October 2001 (see recital 32). This physical coercion should be considered a mitigating circumstance in the case of the FNICGV, and to a lesser extent in the case of the FNCBV, in view of the role that the President of the FNCBV attributed to his federation after the fact (see recital 35). The amount of the fine should accordingly be reduced by 30 % in the case of the FNICGV and 30 % in the case of the FNCBV.

(178) The Commission has no evidence to show that the federation representing milk producers, the FNPL, played any special part in the conclusion or the application of the agreement at issue. It would appear that the FNPL played a passive or 'follow-my-leader' role in the agreement. The amount of the fine imposed on that federation should therefore be reduced by 30 %.

(179) Taking account of the aggravating and mitigating circumstances set out above, the amount of the fines should be set at:

- FNSEA: EUR 30 million,
- FNB: EUR 3,6 million,
- JA: EUR 1,5 million,
- FNPL: EUR 3,6 million,
- FNICGV: EUR 1,8 million,
- FNCBV: EUR 1,2 million.

3.7.3. Other circumstances

(180) In point 5(b) of the Guidelines on the method of setting fines (see recital 164 of this Decision), the Commission states that 'Depending on the circumstances, account should be taken (...) 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 adjusted accordingly'.

(181) Thus the guidelines allow the Commission to take account of the specific circumstances of a case. The present Decision is the first to penalise an agreement concluded entirely between federations and which relates to a basic agricultural product and involves two links in the production chain, and the Commission accordingly considers that it ought to take account of the specific economic context of the case; the relevant factors are as follows.

(182) First, beef consumption had been falling for some ten years; the fall quickened after the first 'mad cow' crisis, in 1996, and again after the second crisis, in 2000. Over the whole of 2001 consumption fell by 7 % as compared with 2000 (see recital 13). The difficulties in France in the second half of 2001 came at a time when the sector was already weakened by several hard years.

(183) The Community adopted measures aimed at regulating the beef market and restoring balance. Measures of this kind were in force throughout 2001 and at the beginning of 2002. As explained in recitals 23 to 27, the intervention measures provided for in the CMO were adapted in the course of 2001, widening their scope in order to deal with a market that was still 'disrupted' and 'unstable' ⁽¹⁹⁵⁾; a special scheme applied in the period from July 2001 to March 2002, under Article 38(1) of the CMO (see recital 21 of this Decision). The French authorities made extensive use of these mechanisms. They were the first to take advantage of the special scheme in force from July 2001 to March 2002; two thirds of the purchases made under that arrangement took place in the period covered by the agreement at issue. In 2001 and 2002 the Commission also authorised France to grant aid to the farmers most seriously affected. The analysis justifying the authorisation was based on the existence of 'exceptional occurrences' within the

meaning of Article 87(2)(b) of the Treaty ⁽¹⁹⁶⁾. The authorising decisions emphasised in particular that what the beef sector was facing was not merely a short-term fall in prices or the presence of a well-known disease. Factors such as the loss of consumer confidence linked to the fear of Creutzfeld-Jakob disease, which affected human beings, had created a specific context; that context ought to be taken into account in this case too.

(184) At the time the agreement was concluded the slaughterhouse entry prices farmers were receiving for cattle had fallen again, despite the Community adjustment measures, which were applied on a large scale in France. As explained in recital 14, the prices of the cows that were the main subject of the agreement had dropped by some 15 % to 20 % from the middle of 2001, reaching levels that were even lower than those of November 2000, when the second 'mad cow' crisis was at its worst. Final consumer prices, on the other hand, had remained stable (see recital 15).

(185) In this specific context, which went beyond a straightforward collapse in prices or the presence of a well-known disease, the fines should be reduced by 60 %.

(186) In these circumstances the final amount of the fine imposed on each of the parties to the agreement should be set at:

- 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,

HAS ADOPTED THIS DECISION:

Article 1

The Fédération nationale des syndicats d'exploitants agricoles (FNSEA), the Fédération nationale bovine (FNB), the Fédération nationale des producteurs de lait (FNPL), the Jeunes agriculteurs (JA) (formerly the Centre national des jeunes agriculteurs), the Fédération nationale de l'industrie et des commerces en gros des viandes (FNICGV) and the Fédération nationale de la coopération bétail et viande (FNCBV) infringed Article 81(1) of the Treaty 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 the beginning of December 2001.

⁽¹⁹⁵⁾ See for example the recitals to Commission Regulation (EC) No 1922/2001 (OJ L 261, 29.9.2001, p. 52) and Commission Regulation (EC) No 2579/2001 (OJ L 344, 28.12.2001, p. 68).

⁽¹⁹⁶⁾ See the decisions on State aid referred to in footnotes 24 and 25 to this Decision.

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.

Article 4

The fines shall be payable within three months of the date of notification of this Decision, to the following account:

Account No 642-0029000-95
Commission européenne/Europese Commissie
Banco Bilbao Vizcaya Argentaria (BBVA)
IBAN code: BE76 6420 0290 0095
SWIFT code: BBVABEBB
Avenue des Arts/Kunstlaan 43
B-1040 Brussels

After that time interest shall automatically be payable at the interest rate applied by the European Central Bank to its main refinancing operations on the first working day of the month in which this Decision was adopted, plus 3,5 percentage points.

Article 5

This Decision is addressed to:

1. Fédération nationale des syndicats d'exploitants agricoles, 11, rue de la Baume, F-75008 Paris;
2. Fédération nationale bovine, 149, rue de Bercy, F-75012 Paris;
3. Fédération nationale des producteurs de lait, 42, rue de Châteaudun, F-75014 Paris;
4. Jeunes agriculteurs, 14, rue La Boétie, F-75008 Paris;
5. Fédération nationale de l'industrie et des commerces en gros des viandes, 17, place des vins de France, F-75012 Paris;
6. Fédération nationale de la coopération bétail et viande, 49, avenue de la Grande-armée, F-75116 Paris.

This Decision shall be enforceable under Article 256 of the Treaty.

Done at Brussels, 2 April 2003.

For the Commission

Mario MONTI

Member of the Commission