JUDGMENT OF THE COURT (Third Chamber)

18 December 2008 *

In Joined Cases C-101/07 P and C-110/07 P,

APPEALS under Article 56 of the Statute of the Court of Justice, brought on 20 and 19 February 2007 respectively,

Coop de France bétail et viande, formerly Fédération nationale de la coopération bétail et viande (FNCBV), established in Paris (France), represented by M. Ponsard, avocat, with an address for service in Luxembourg (C-101/07 P),

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

Fédération nationale bovine (FNB), established in Paris,

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

* Language of the case: French.

Jeunes agriculteurs (JA), established in Paris,

represented by V. Ledoux and B. Neouze, avocats (C-110/07 P),

appellants,

the other parties to the proceedings being:

Commission of the European Communities, represented by A. Bouquet and X. Lewis, acting as Agents, with an address for service in Luxembourg,

defendant at first instance,

French Republic, represented by G. de Bergues and S. Ramet, acting as Agents,

intervener at first instance,

THE COURT (Third Chamber),

composed of A. Rosas, President of the Chamber, A. Ó Caoimh, J.N. Cunha Rodrigues, J. Klučka and U. Lõhmus (Rapporteur), Judges,

Advocate General: J. Mazák,
Registrar: R. Grass,

having regard to the written procedure,

after hearing the Opinion of the Advocate General at the sitting on 17 April 2008,

having regard to the order of 2 October 2008 reopening the oral procedure,

after hearing the Opinion of the Advocate General at the sitting on 16 October 2008,

gives the following

Judgment

1 By their appeals, Coop de France bétail et viande, formerly Fédération nationale de la coopération bétail et viande ('FNCBV') (C-101/07 P), and Fédération nationale des syndicats d'exploitants agricoles ('FNSEA'), Fédération nationale bovine ('FNB'),

Fédération nationale des producteurs de lait ('FNPL') and Jeunes agriculteurs ('JA') (C-110/07 P) seek the setting-aside of the judgment of the Court of First Instance of the European Communities of 13 December 2006 in Joined Cases T-217/03 and T-245/03 *FNCBV and Others* v *Commission* [2006] ECR II-4987 ('the judgment under appeal'), by which it, first, reduced the fine imposed on them by the Commission of the European Communities by Commission Decision 2003/600/EC of 2 April 2003 relating to a proceeding pursuant to Article 81 of the EC Treaty (Case COMP/C.38.279/F3 — French beef) (OJ 2003 L 209, p. 12; 'the contested decision'), and, second, dismissed the remainder of the actions for annulment of that decision.

Legal context

2 Article 15(2) of Council Regulation No 17 of 6 February 1962: First Regulation implementing Articles [81] and [82] of the Treaty (OJ, English Special Edition 1959-1962, p. 87) provides:

'The Commission may by decision impose on undertakings or associations of undertakings fines of from 1 000 to 1 000 000 units of account, or a sum in excess thereof but not exceeding 10% of the turnover in the preceding business year of each of the undertakings participating in the infringement where, either intentionally or negligently:

(a) they infringe Article [81](1) [EC] or Article [82 EC]; or

(b) they commit a breach of any obligation imposed pursuant to Article 8(1).

In fixing the amount of the fine, regard shall be had both to the gravity and to the duration of the infringement.'

3 Section 5(c) of the Commission notice entitled 'Guidelines on the method of setting fines imposed pursuant to Article 15(2) of Regulation No 17 and Article 65(5) of the ECSC Treaty' (OJ 1998 C 9, p. 3; 'the Guidelines') states:

'In cases involving associations of undertakings, decisions should as far as possible be addressed to and fines imposed on the individual undertakings belonging to the association. If this is not possible (e.g. where there are several thousands of affiliated undertakings), and except for cases falling within the ECSC Treaty, an overall fine should be imposed on the association, calculated according to the principles outlined above but equivalent to the total of individual fines which might have been imposed on each of the members of the association.'

4 Article 1 of Council Regulation No 26 of 4 April 1962 applying certain rules of competition to production of and trade in agricultural products (OJ, English Special Edition 1959-1962, p. 129) provides that Articles 81 EC to 86 EC and provisions made in implementation thereof are, subject to Article 2 of that regulation, to apply to all agreements, decisions and practices referred to in Articles 81(1) EC and 82 EC which

relate to production of or trade in the products listed in Annex I to the EC Treaty, including, in particular, live animals, meat and edible meat offal.

5 Article 2(1) of that regulation lays down as follows:

'Article [81](1) [EC] shall not apply to such of the agreements, decisions and practices referred to in the preceding Article as form an integral part of a national market organisation or are necessary for attainment of the objectives set out in Article [33 EC]. In particular, it shall not apply to agreements, decisions and practices of farmers, farmers' associations, or associations of such associations belonging to a single Member State which concern the production or sale of agricultural products or the use of joint facilities for the storage, treatment or processing of agricultural products, and under which there is no obligation to charge identical prices, unless the Commission finds that competition is thereby excluded or that the objectives of Article [33 EC] are jeopardised.'

Facts

6 The facts which gave rise to the proceedings before the Court of First Instance, as set forth in the judgment under appeal, may, for the purposes of this judgment, be summarised as follows.

7 The appellant in Case C-101/07 P, FNCBV, comprises 300 cooperative groups of producers in the cattle, pig and sheep-farming sectors and some 30 slaughter and meat-processing groups or undertakings in France.

8 The appellants in Case C-110/07 P, namely FNSEA, FNB, FNPL and JA, are trade unions governed by French law. FNSEA is the main French farmers' union. Territorially it consists of local unions grouped together in departmental (*département*) federations or unions of farmers ('FDSEA'). In addition, FNSEA comprises 33 specialised associations representing the interests of each type of producer, including FNB and FNPL. JA represents farmers under 35 years of age. To be a member of the local centre of JA, it is necessary to be a member of a local union belonging to FDSEA.

9 Following the discovery in several Member States, after October 2000, of new cases of bovine spongiform encephalopathy, so-called 'mad cow disease', as well as cases of foot-and-mouth disease in flocks of sheep in the United Kingdom, the Community institutions adopted a whole series of measures to deal with the loss of consumer confidence, which had led to a decrease in meat consumption.

10 Thus, the scope of the intervention mechanisms for withdrawing certain quantities of cattle from the market so as to stabilise supply in relation to demand was extended and a scheme for the purchase of live animals was set up, together with a purchase scheme based on a tender procedure for carcasses or half-carcasses ('special purchase scheme'). In addition, the Commission authorised several Member States, including the French Republic, to grant aid to the beef sector.

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

12 In October 2001, several meetings took place between the federations representing beef farmers, namely FNSEA, FNB, FNPL and JA, and those representing the slaughterers, namely the Fédération nationale de l'industrie et des commerces en gros des viandes ('FNICGV') and FNCBV. Following a meeting on 24 October 2001, organised at the request of the French Minister for Agriculture, an agreement between the federations of stock farmers and slaughterers on the minimum slaughterhouse entry price scale for culled cows ('the Agreement of 24 October 2001') was concluded between those six federations. On 30 October 2001, the Commission sent the French authorities a letter requesting certain information on that agreement.

13 The Agreement of 24 October 2001 was in two parts. The first was a temporary commitment to suspend imports, which made no distinction between types of beef. The second consisted of a commitment, the arrangements for which were set out in the agreement, to apply the slaughterhouse entry price scale to culled cows, that is to say cows which had been used either for reproduction or milk production. Consequently, it contained a list of prices per kilogram of carcass for certain categories of cows and the method of calculating the price to be applied to other categories, depending inter alia on the special purchase price set by the Community authorities. The Agreement of 24 October 2001 was to enter into force on 29 October 2001 and to be applied until the end of November 2001.

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

15 On 9 November 2001, the Commission wrote to FNSEA, FNB, FNPL and JA and to FNICGV requesting information pursuant to Article 11 of Regulation No 17. As the Commission was not at that time aware that FNCBV had also signed the Agreement of 24 October 2001, it was not sent the request for information. The five federations in question replied to the requests for information on 15 and 23 November 2001.

16 On 19 November 2001, the president of FNICGV informed the president of FNSEA that he felt obliged to bring forward to that day the final date of application of the Agreement of 24 October 2001, initially scheduled for 30 November 2001.

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

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

19 On 24 June 2002, the Commission adopted a statement of objections addressed to the six federations which were signatories to the Agreement of 24 October 2001. They submitted their written observations between 23 September and 4 October 2002. The federations were heard on 31 October 2002. On 10 January 2003, the Commission sent those federations a request for information under Article 11 of Regulation No 17. In particular, it asked them for the total amount, together with a breakdown according to origin, of the income of each federation and their accounting balance sheets for 2001 and 2002, and, for the latest tax year available, the overall turnover and that connected with the production or slaughter of cattle, of their direct and/or indirect members. The appellant federations replied by letters of 22, 24, 27 and 30 January 2003.

20 On 2 April 2003, the Commission adopted the contested decision which was addressed to the appellant federations and to FNICGV.

21 According to the contested decision, those federations had infringed Article 81(1) EC by concluding the Agreement of 24 October 2001 fixing a minimum purchase price for certain categories of cattle and suspending imports of beef into France, and by concluding, at the end of November or beginning of December 2001, an oral agreement with the same object ('the oral agreement'), to be applicable as from the expiry of the Agreement of 24 October 2001.

22 In recitals 135 to 149 in the preamble to the contested decision, the Commission found that the Agreement of 24 October 2001 and the oral agreement were not necessary for attaining the objectives of the common agricultural policy set out in Article 33 EC and refused, in the present case, the exemption provided for by Regulation No 26 in favour of certain activities connected with the production of and trade in agricultural products.

Furthermore, those agreements were not among the means provided for by Council Regulation (EC) No 1254/1999 of 17 May 1999 on the common organisation of the market in beef and veal (OJ 1999 L 160, p. 21) or by the measures implementing it. Lastly, the measures taken under those agreements were not proportionate to the objectives allegedly sought.

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

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

25 The Commission then found that there were several aggravating circumstances in relation to the appellant federations:

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

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

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

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

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

— with regard to FNCBV, the Commission took into account, first, the forceful intervention of the French Minister for Agriculture in favour of the conclusion of the Agreement of 24 October 2001 (30% reduction) and, second, the illegal blockading of their members' establishments by farmers (further 30% reduction).

27 Furthermore, pursuant to Section 5(b) of the Guidelines, the Commission took account of the specific circumstances of the case in question, particularly the economic context marked by the crisis in the industry, and reduced by 60% the fines resulting from the application of the abovementioned increases and reductions.

28 The operative part of the contested decision includes, particularly, the following provisions:

'*Article 1*

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

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

Article 2

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

Article 3

The following fines are hereby imposed:

— FNSEA: EUR 12 million,

— FNB: EUR 1.44 million,

— JA: EUR 600 000,

— FNPL: EUR 1.44 million,

— FNICGV: EUR 720 000,

— FNCBV: EUR 480 000.'

The action before the Court of First Instance and the judgment under appeal

29 By applications lodged at the Registry of the Court of First Instance on 19 and 20 June 2003 respectively, FNCBV, on the one hand, and FNSEA, FNB, FNPL and JA, on the other, brought actions for the annulment of the contested decision and, in the alternative, for the cancellation of the fines imposed on them or the reduction of their amounts. The action brought on 7 July 2003 by FNICGV was dismissed by the Court of First Instance, by order of 9 November 2004, as inadmissible.

30 The French Republic was, by orders of 6 November 2003, granted leave to intervene in each of the two cases in support of the forms of order sought by the appellant federations. The two cases were joined by order of 3 April 2006.

31 By the judgment under appeal, the Court of First Instance:

— set the amount of the fine on FNCBV, the applicant in Case T-217/03, at EUR 360 000;

— reduced the amounts of the fines imposed on the applicant federations in Case T-245/03 to EUR 9 000 000 for FNSEA, to EUR 1 080 000 for FNB, to EUR 1 080 000 for FNPL and to EUR 450 000 for JA;

— dismissed the remainder of the applications;

— ordered the applicant federations to bear their own costs in the main proceedings and to pay three quarters of those of the Commission in the main proceedings;

— ordered the Commission to bear one quarter of its costs in the main proceedings and to pay all the costs in the proceedings for interim measures; and

— ordered the French Republic, the intervener, to bear its own costs.

Procedure before the Court

32 By decision of 29 January 2008, the Court referred the two cases to the Third Chamber, composed of A. Rosas, President of the Third Chamber, U. Lõhmus (Rapporteur), J. Klučka, A. Ó Caoimh and P. Lindh, Judges. Since none of the parties requested an oral hearing, the Court decided to proceed to judgment without one. The Advocate General gave his Opinion at the sitting on 17 April 2008, following which the oral procedure was closed.

33 Since Judge Lindh was prevented from attending, the Third Chamber, in accordance with Article 61 of the Rules of Procedure, having heard the Advocate General, ordered the reopening of the oral procedure for the purposes of replacing her, under the first paragraph of Article 11e of the Rules of Procedure, by the judge following in the order in the list referred to in Article 11c(2) of those rules, in this case, J.N. Cunha Rodrigues.

34 Following the sitting of 16 October 2008, at which the Advocate General gave his Opinion, the oral procedure was closed.

Forms of order sought by the parties to the appeals

35 In Case C-101/07 P, FNCBV claims that the Court should:

— set aside the judgment under appeal;

— annul the contested decision;

— in the alternative, reduce the amount of the fine, set by the judgment under appeal at EUR 360 000; and

— in any event, order the Commission to pay all the costs relating to the main proceedings before the Court of First Instance and the Court of Justice.

36 In Case C-110/07 P, FNSEA, FNB, FNPL and JA claim that the Court should:

— set aside the judgment under appeal;

— annul the contested decision;

— in the alternative, reduce the amounts of the fines set by the judgment under appeal at EUR 9 000 000 for FNSEA, at EUR 1 080 000 for FNB, at EUR 1 080 000 for FNPL and at EUR 450 000 for JA; and

— in any event, order the Commission to pay all their costs before the Court of First Instance and the Court of Justice.

37 The French Republic claims that the Court should uphold the two appeals and set aside the judgment under appeal.

38 The Commission contends that both appeals should be dismissed and that the appellant federations should be ordered to pay the costs.

The appeals

39 The parties and the Advocate General having been heard on the point, Cases C-101/07 P and C-110/07 P were, on account of the connection between them, joined by order of the President of the Court of 18 April 2007 for the purposes of the oral and written procedures and the judgment, in accordance with Article 43 of the Rules of Procedure.

The grounds of appeal for setting aside the judgment under appeal

40 In support of its appeal, FNCBV raises five grounds for setting aside the judgment under appeal and annulment of the contested decision, some of which are in several parts:

— the first ground of appeal asserts that the Court of First Instance erred in law by failing to find that the Commission had infringed the rights of the defence in the statement of objections which it adopted (paragraphs 217 to 225 of the judgment under appeal);

— the second ground of appeal asserts that the Court of First Instance distorted some of the evidence, namely:

— the handwritten notes of the FNB director concerning the meeting of 29 November 2001 (paragraphs 169 to 174 of the judgment under appeal),

— an interview given on 4 December 2001 by the FNB vice-president to *Vendée agricole* (paragraph 176 of the judgment under appeal),

— a memo from the Fédération vendéenne des producteurs (Vendée Producers' Federation) of 5 December 2001 (paragraph 177 of the judgment under appeal),

— an information bulletin issued by FNPL of 10 December 2001 (paragraph 179 of the judgment under appeal), and

— certain passages in the handwritten notes of the FNB director concerning the meeting of 5 December 2001 (paragraph 180 of the judgment under appeal);

— the third ground of appeal asserts error of law as regards the assessment of the evidence of FNCBV's adherence to the oral agreement because:

— the Court of First Instance erred in law in the legal characterisation of that federation's adherence to that agreement, and

— there is contradiction in the grounds of the judgment under appeal between the finding as to that adherence and the violence committed against that federation;

— the fourth ground of appeal asserts, in the alternative, that the Agreement of 24 October 2001 and the oral agreement were not anti-competitive, the Court of First Instance having erred in law by classifying the Agreement of 24 October 2001 as being anti-competitive, and by failing to take account of the effects of the extension of that agreement; and

— the fifth ground of appeal asserts that the Court of First Instance erred in law in the application of Article 15(2) of Regulation No 17, because of:

— breach of the duty to state reasons, and

— contradiction in the grounds.

41 FNCBV raises, in addition, a sixth ground of appeal seeking the setting-aside, in part, of the judgment under appeal and the reduction of the amount of the fine imposed upon it, alleging error of law by the Court of First Instance in the application of Article 15(2) of Regulation No 17.

42 In support of their appeal, FNSEA, FNB, FNPL and JA raise the four following grounds of appeal:

— the first ground of appeal asserts distortion of the evidence in that the Court of First Instance failed to consider two essential pieces of evidence demonstrating that the Agreement of 24 October 2001 was not extended beyond 30 November 2001 (paragraphs 159 to 190 of the judgment under appeal);

— the second ground of appeal asserts breach of the rights of the defence in that the Court of First Instance held that the statement of objections adopted by the Commission was sufficiently clear and precise (paragraphs 217 to 225 of the judgment under appeal);

— the third ground of appeal asserts breach of Article 15(2) of Regulation No 17 in that the Court of First Instance took into account the aggregate turnover of the appellant federations' members in deciding that the fines imposed by the Commission did not exceed the upper limit fixed in that provision (paragraphs 312 to 334 of the judgment under appeal); and

— the fourth ground of appeal asserts breach of the rule against aggregation and of the principle of the proportionality of sanctions in that the Court of First Instance imposed a separate fine on each of the federations taking account of the aggregate turnover of their common members (paragraphs 340 to 346 of the judgment under appeal).

FNCBV's first ground of appeal and the second ground of appeal raised by FNSEA, FNB, FNPL and JA, asserting error of law in that the Court of First Instance refused to accept that the Commission infringed the rights of the defence in the statement of objections it adopted

43 By, respectively, their first and second grounds of appeal, FNCBV, on the one hand, and FNSEA, FNB, FNPL and JA, on the other, claim that the Commission, in the statement of objections, confined itself to setting out the principal elements of fact and of law that could give rise to a fine, such as the gravity and duration of the alleged infringement and the fact that it was committed intentionally or negligently, whereas, contrary to the Court of First Instance's decision, it should have stated that any fine would be calculated taking into account the turnover of their members.

44 Those two grounds of appeal cannot be upheld.

45 It is clear from paragraph 219 of the judgment under appeal that the argument that the Commission ought to have mentioned in the statement of objections that any fine would be calculated taking into account the turnover of the appellant federations' members has already been advanced before the Court of First Instance and correctly rejected, in paragraph 224 of that judgment, on the basis of the case-law of the Court of Justice referred to in paragraphs 222 and 223 thereof.

46 Thus, the Court of First Instance held, in paragraph 221 of the judgment under appeal, that it was at the stage of adopting the contested decision that the Commission took into account the turnover of the appellant federations' basic members for the purpose of verifying adherence, as regards the amount of the fine, to the 10% maximum laid down by Article 15(2) of Regulation No 17.

47 As the Court of First Instance observed, it emerges from the settled case-law of the Court of Justice that, at the stage of the statement of objections, to give indications as regards the level of the fines envisaged, before the undertakings have been invited to submit their observations on the allegations against them, would be to anticipate inappropriately the Commission's decision (Joined Cases 100/80 to 103/80 *Musique diffusion française and Others* v *Commission* [1983] ECR 1825, paragraph 21).

48 In support of their ground of appeal, FNCBV as well as FNSEA, FNB, FNPL and JA assert, moreover, that the Commission's duty to refer in the statement of objections to how any fine will be calculated is even clearer where it departs from its usual approach in calculating fines, as was accepted by the Court of First Instance in paragraph 237 of the judgment under appeal. As those federations could not have foreseen such a change in method and therefore had no opportunity to defend themselves on that point, the Court of First Instance should have recognised the infringement of the rights of the defence committed by the Commission in the statement of objections it adopted.

49 It is clear, however, from the Court of Justice's settled case-law, referred to by the Court of First Instance in paragraph 218 of the judgment under appeal, that, provided that the Commission indicates expressly in the statement of objections that it will consider whether it is appropriate to impose fines on the undertakings concerned and that it sets out the principal elements of fact and of law that may give rise to a fine, such as the gravity and the duration of the alleged infringement and the fact that it has been committed 'intentionally or negligently', it fulfils its obligation to respect the undertakings' right to be heard. In doing so, it provides them with the necessary elements to defend themselves not only against a finding of infringement but also against the fact of being fined (see to that effect, particularly, Joined Cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P *Dansk Rørindustri and Others* v *Commission* [2005] ECR I-5425, paragraph 428).

50 As regards taking into account the appellant federations' members' turnover in the calculation of the fines, it is sufficient to state that such a practice, on the part of the Commission, is not new and has been upheld by the Community Courts (see, particularly, Case C-298/98 P *Finnboard* v *Commission* [2000] ECR I-10157, paragraph 66, and Joined Cases T-39/92 and T-40/92 *CB and Europay* v *Commission* [1994] ECR II-49, paragraph 139). Contrary to the appellant federations' assertions, there was, therefore, on the part of the Commission, no change in method requiring a particular statement in that regard in the statement of objections.

51 The Court of First Instance did not therefore err in law when it concluded that the Commission had not infringed FNCBV's rights of defence or those of FNSEA, FNB, FNPL or JA by not having indicated, in the statement of objections, that it envisaged taking into account the turnover of their members for the purposes of ensuring compliance with the upper limit of 10% set in Article 15(2) of Regulation No 17.

52 Consequently, FNCBV's first ground of appeal and the second ground of appeal raised by FNSEA, FNB, FNPL and JA must be rejected as unfounded.

FNCBV's second ground of appeal, asserting that the Court of First Instance distorted some of the evidence

53 By its second ground of appeal, FNCBV submits that the Court of First Instance's findings of fact are vitiated by a material error since it clearly distorted the meaning, content or scope of the evidence produced before it. It submits that a full examination

of the court file, placed in its context, should have led the Court of First Instance to conclude that FNCBV had not adhered to the secret oral extension of the Agreement of 24 October 2001 beyond its date of expiry.

54 The documents which were distorted by the Court of First Instance are the following:

— the handwritten notes of the FNB director concerning the meeting of 29 November 2001 (paragraphs 169 to 174 of the judgment under appeal);

— other documents which confirm that the appellant federations made an oral agreement, namely the interview given on 4 December 2001 by the FNB vice-president to *Vendée agricole* and a memo from the Fédération vendéenne des producteurs of 5 December 2001 (paragraphs 176 and 177 of the judgment under appeal);

— certain passages in an information bulletin issued by FNPL of 10 December 2001 (paragraph 179 of the judgment under appeal); and

— certain passages in the handwritten notes of the FNB director concerning the meeting of 5 December 2001 (paragraph 180 of the judgment under appeal).

55 For each of those documents, FNCBV complains that the Court of First Instance, in essence, distorted the meaning and, consequently, incorrectly assessed the effect of the facts of the case.

56 The Commission submits that, by its ground of appeal, FNCBV is seeking to challenge the probative value which the Court of First Instance attributed to those documents.

57 In its reply, FNCBV disputes having put in issue the Court of First Instance's findings of fact. It submits, 'the finding of the facts is intended to put in issue the facts as such or their assessment whereas distortion is the alteration of the content of the documentary evidence, failure to take account of its essential aspects or failure to take account of its context'.

58 In that regard, it must be borne in mind that, according to settled case-law, it is clear from Article 225 EC and the first paragraph of Article 58 of the Statute of the Court of Justice that the Court of First Instance has exclusive jurisdiction, first, to find the facts, except where the substantive inaccuracy of its findings is apparent from the documents submitted to it and, second, to assess those facts. When the Court of First Instance has found or assessed the facts, the Court of Justice has jurisdiction under Article 225 EC to review the legal characterisation of those facts by the Court of First Instance and the legal conclusions it has drawn from them (see, in particular, Case C-551/03 P *General Motors* v *Commission* [2006] ECR I-3173, paragraph 51, and Case C-266/06 P *Evonik Degussa* v *Commission and Council*, paragraph 72).

59 Thus, the Court of Justice has no jurisdiction to establish the facts or, in principle, to examine the evidence which the Court of First Instance accepted in support of those facts. Provided that the evidence has been properly obtained and the general principles

of law and the rules of procedure in relation to the burden of proof and the taking of evidence have been observed, it is for the Court of First Instance alone to assess the value which should be attached to the evidence produced to it. Save where the clear sense of the evidence has been distorted, that appraisal does not therefore constitute a point of law which is subject as such to review by the Court of Justice (see, in particular, *General Motors* v *Commission*, paragraph 52, and *Evonik Degussa* v *Commission and Council*, paragraph 73).

60 It is important, also, to point out that an alleged distortion of the facts must be obvious from the documents on the Court's file without there being any need to carry out a new assessment of the facts and the evidence (see, in particular, *General Motors* v *Commission*, paragraph 54, and *Evonik Degussa* v *Commission and Council*, paragraph 74).

61 In this case, FNCBV does not allege that the Court of First Instance's reading of the various documents which it cites is vitiated by a material error. It complains that the Court of First Instance, in particular, did not take account of the essential aspects of those documents and did not place them in their context. Under cover of 'distortion', FNCBV is really challenging the assessment made by the Court of First Instance of the documents' content.

62 Moreover, it is clear from the disputed points in the judgment under appeal that the Court of First Instance did not there conduct a reading of the content of the documents in question but their interpretation. In paragraphs 169 to 180 of the judgment under appeal, which FNCBV challenges, the Court of First Instance examines the various documents and evidence, puts them in their context, interprets them and assesses the probative value of each of them. In paragraph 185 of the judgment under appeal, it concludes that, having regard to that evidence, the Commission proved sufficiently in law the carrying-out of the application of the Agreement of 24 October 2001.

63 Since the Court of First Instance alone has jurisdiction to interpret the evidence and assess its probative value, it follows that this ground of appeal is inadmissible.

FNCBV's third ground of appeal, asserting error of law as regards the assessment of the evidence of its adherence to the oral agreement

64 By its third ground of appeal, which is divided into two parts, FNCBV submits that the Court of First Instance erred in law, in paragraph 185 of the judgment under appeal, in finding it proved that FNCBV had adhered to the oral agreement. It submits that the Court of First Instance could have found against it in respect of its participation in that agreement not on the basis of a presumption, but by showing its clear adherence to an agreement with the farmers, in a context characterised by the expression of the unilateral will on the part of the farmers to apply the scale of minimum purchase prices as a trade union demand.

65 By the first part of this ground of appeal, FNCBV claims that the Court of First Instance misconstrued in law the evidence relied upon to demonstrate FNCBV's alleged will to adhere to the Agreement of 24 October 2001, which does not prove its actual will to continue to apply the scale of minimum purchase prices and the suspension of imports after the expiry of the Agreement of 24 October 2001. FNCBV refers to:

— the manuscript notes of the FNB's director relating to the meeting of 29 November 2001 and that of 5 December 2001 (paragraphs 172 and 180 of the judgment under appeal);

— the e-mail of 6 December 2001 sent by a representative of the Fédération régionale des syndicats d'exploitants agricoles de Bretagne (Regional Federation of the Farmers' Unions of Brittany) to the presidents of the FDSEA of its region (paragraph 178 of the judgment under appeal);

— FNPL's information bulletin of 10 December 2001 (paragraph 179 of the judgment under appeal);

— a memo from the Vendée FDSEA of 18 December 2001 (paragraph 182 of the judgment under appeal); and

— certain documents relating to local actions (paragraphs 183 and 184 of the judgment under appeal).

66 To the extent that FNCBV seeks to put in issue the assessment of the facts made by the Court of First Instance, disputing, in essence, that the evidence accepted in paragraphs 169 to 184 of the judgment under appeal is sufficient to demonstrate its adherence to the continuation of the application of the Agreement of 24 October 2001 beyond the month of November 2001, the first part of this ground of appeal must be declared to be inadmissible, since it seeks to obtain a re-examination of the factual assessments for which, as has been pointed out in paragraphs 58 and 59 of the present judgment, the Court of Justice has no jurisdiction on an appeal.

67 By the second part of its third ground of appeal, FNCBV alleges contradiction in the grounds of the judgment under appeal in that the Court of First Instance found that it had adhered to the oral agreement and, at the same time, found that the conduct complained of against it was the result of unilateral pressure from farmers. By the latter

finding, the Court of First Instance, in paragraphs 279 and 289 of the judgment under appeal, accepted that the farmers' violent actions were unilateral.

68 That second part of FNCBV's third ground of appeal must also be rejected because it is based on a reading of the judgment under appeal which does not take account of the context of the findings of fact in question by the Court of First Instance, namely the taking into account by the Commission of aggravating circumstances for the purposes of increasing the fines imposed on some of the farmers' federations such as FNSEA, FNB and JA.

69 The Court of First Instance cannot be accused of having vitiated the judgment under appeal by contradiction in the grounds in this case, since the aggravating circumstances referred to in paragraphs 279 and 289 of that judgment were taken into account only after the degree and circumstances of the participation of each federation in question in the oral agreement were established on the basis of evidence examined by the Court of First Instance in paragraphs 169 to 184 of the judgment under appeal, which are the subject of the complaints relating to the first part of this ground of appeal which was rejected in paragraph 66 of the present judgment. In the light of that evidence, the Court of First Instance could, without any contradiction, as the Advocate General observed in point 92 of his Opinion, have found that there was, here, an agreement, whilst also noting the carrying-out of certain acts of pressure or coercion by farmers.

70 FNCBV's third ground of appeal must, therefore, be rejected as being, in part, inadmissible and, in part, unfounded.

The first ground of appeal raised by FNSEA, FNB, FNPL and JA, asserting distortion of the evidence in that the Court of First Instance failed to consider two essential pieces of evidence demonstrating that the Agreement of 24 October 2001 was not extended beyond 30 November 2001, as well as a defective statement of the grounds on that point

71 By their first ground of appeal, FNSEA, FNB, FNPL and JA claim that the Court of First Instance distorted the evidence which demonstrated that, where the prices fixed in the scale of minimum purchase prices were reproduced in local agreements after 30 November 2001, it was a consequence not of the voluntary agreement of the federations which were signatories to the Agreement of 24 October 2001, but of trade union pressure at local level by farmers on slaughterers.

72 Those federations submit that that is the case of a document sent by fax on 11 December 2001 by one of the directors of FNB to a departmental federation which contained the scale of minimum purchase prices, accompanied by the statement 'Be careful, that scale has not been renewed by an agreement', and of a communiqué of 12 December 2001 from the Fédération régionale des syndicats d'exploitants agricoles de Bretagne in which it is stated that '[t]he Breton FDSEAs, finding the current trend in the price of adult cattle unacceptable, inform farmers that they have subjected buyers to union pressure in such a way as to re-establish prices equivalent to November prices'.

73 FNSEA, FNB, FNPL and JA submit that the fact that the two documents mentioned in the preceding paragraph, which those federations sent to the Court of First Instance after the hearing of 17 May 2006, are not mentioned in the judgment under appeal shows that they were not taken into account at all. They submit that those two documents show that the producers' federations considered that the slaughterers' federations were not bound by the Agreement of 24 October 2001 and that, consequently, producers could obtain the prices in the scale of minimum purchase prices adopted by that agreement only thanks to local union pressure. By failing to examine the two documents in question, the Court of First Instance failed in its duty to state the reasons for its decision and the judgment under appeal is therefore vitiated by nullity in that respect.

74 It is true that, in order properly to discharge the duty of assessing the facts of the dispute, the Court of First Instance must carefully examine all the documents submitted to it by the parties and take them into account including those which, as in this case, were put on the file after the oral hearing, in connection with a measure of organisation under Article 64 of its Rules of Procedure. It is also true that, in the judgment under appeal, the Court of First Instance failed to refer to the two documents in question, namely the fax of 11 December 2001 and the communiqué of 12 December 2001.

75 However, it is settled case-law that the obligation to state reasons does not require the Court of First Instance to provide an account that follows exhaustively and point by point all the reasoning articulated by the parties to the case. The reasoning may therefore be implicit on condition that it enables the persons concerned to know why the measures in question were taken and provides the competent Court with sufficient material for it to exercise its power of review (see, to that effect, Case C-120/99 *Italy* v *Council* [2001] ECR I-7997, paragraph 28, and Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P *Aalborg Portland and Others* v *Commission* [2001] ECR I-123, paragraph 372).

76 As regards determining whether the Agreement of 24 October 2001 had been orally and secretly renewed beyond 30 November 2001, the Court of First Instance examined in detail, in paragraphs 164 to 184 of the judgment under appeal, in the light of the arguments relied upon by the appellant federations, the documents on which the Commission relied for the adoption of the contested decision, the probative value of which those federations criticised. In particular, the Court of First Instance found that the tenor of the documents examined in paragraphs 169 to 184 of the judgment under appeal led to the conviction, as the Commission maintained, that it was decided, at the meetings on 29 November and 5 December 2001, to renew the Agreement of 24 October 2001.

77 Moreover, the Court of First Instance pointed out, in paragraphs 186 and 187 of the judgment under appeal, that the farmers' federations secretly carried on performing the

Agreement of 24 October 2001 whilst adopting a communication strategy intended publicly to affirm that the agreement had not been renewed and to seek the application of the scale of prices in the guise of a trade union demand.

78 In those circumstances, the first ground of appeal raised by FNSEA, FNB, FNPL and JA must be rejected as unfounded.

FNCBV's fourth ground of appeal, asserting that the Agreement of 24 October 2001 and the oral agreement were not anti-competitive

79 By its fourth ground of appeal, raised in the alternative, FNCBV claims that the Court of First Instance should have held that the Agreement of 24 October 2001 was not anti-competitive because of the economic context in which it arose and that the Court of First Instance should have undertaken an analysis of any effects of the extension of that agreement.

80 FNCBV submits that, in order to determine whether the Agreement of 24 October 2001 was anti-competitive, the Court of First Instance should have taken the economic context into account. The case was very particular in the sense that the sector in question had found itself in a completely exceptional situation which had led the Community authorities to put into place a system of intervention to buy carcasses of meat and enable farmers to subsist.

81 FNCBV submits that the Court of First Instance erred in law in finding that the Commission was not obliged to prove the extension of the Agreement of 24 October 2001 from the examination of its effects on prices made during the period in question. In that regard, FNCBV asks the Court to hold that that extension had no effect because of the lack of compliance with the scale of minimum purchase prices by the various abattoirs in the regions. To that end, FNCBV produces tables which include the prices paid by abattoirs in the various regions of France and which are supposed to demonstrate that the prices actually realised differed from one region to another and that most of them were, after the termination of the Agreement of 24 October 2001, lower than the prices set by that scale.

82 This ground of appeal cannot succeed because it is based on an erroneous reading of paragraphs 81 to 93 of the judgment under appeal.

83 First, in paragraph 82 of the judgment under appeal, the Court of First Instance held that the purpose of the commitment to suspend imports under the Agreement of 24 October 2001 was to seal off the French internal market and thus to restrict competition in the single market. The Court of First Instance found, in paragraphs 84 and 85 of the judgment under appeal, that the federations which concluded that agreement agreed on a scale of minimum purchase prices with which they undertook to comply, by limiting the margin for commercial negotiation between farmers and slaughterers and by distorting the setting of prices in the markets in question.

84 Next, the Court of First Instance examined, in paragraphs 86 to 92 of the judgment under appeal, the context in which the Agreement of 24 October 2001 had been concluded. In that regard, the Court of First Instance took account both of the specific nature of the agricultural markets in question, to which, with certain exceptions, the Community competition rules apply, and of the legal and factual circumstances of the implementation of that agreement in a situation of crisis in the beef industry.

85 Thus, the Court of First Instance pointed out that the prices fixed for a substantial number of cows were significantly higher than the intervention prices set by the Commission. The Court of First Instance also found that Commission Regulation (EC) No 2790/1999 of 22 December 1999 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices (OJ 1999 L 336, p. 21), which is relied upon by the appellant federations, did not apply in this case because the production of the members of farmers' federations greatly exceeded the ceiling of 30% of the relevant market above which that regulation does not permit the benefit of the exemption by category established in favour of vertical agreements.

86 It is clear from that examination of the judgment under appeal that, contrary to FNCBV's allegations, the Court of First Instance took the economic context of the Agreement of 24 October 2001 into consideration in order to determine whether it was anti-competitive.

87 Furthermore, it is well-established case-law that, for the purposes of applying Article 81(1) EC, there is no need to take account of the actual effects of an agreement once it appears that its object is to restrict, prevent or distort competition (see, to that effect, Joined Cases 56/64 and 58/64 *Consten and Grundig* v *Commission* [1966] ECR 299, 342, and Joined Cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P and C-254/99 P *Limburgse Vinyl Maatschappij and Others* v *Commission* [2002] ECR I-8375, paragraph 491).

88 In this case, since the Court of First Instance concluded that it was established that the object of the Agreement of 24 October 2001 was anti-competitive, it correctly ruled, in paragraph 93 of the judgment under appeal, that the Commission was not bound to research the actual effects on competition of the measures adopted by that agreement. Since the extension of the Agreement of 24 October 2001 beyond 30 November 2001 was also established on the basis of documentary evidence, the Court of First Instance made no error of law in finding that it was not necessary to demonstrate that extension also from an examination of its effects on prices paid during the period in question.

89 Accordingly, FNCBV's fourth ground of appeal must be rejected as unfounded.

The third ground of appeal raised by FNSEA, FNB, FNPL and JA and FNCBV's fifth ground of appeal, asserting error of law by the Court of First Instance in the application of Article 15(2) of Regulation No 17

90 By their third ground of appeal, FNSEA, FNB, FNPL and JA, supported by the French Republic, claim that the Court of First Instance erred in law when it held that the upper limit on fines fixed in Article 15(2) of Regulation No 17 could be calculated taking into account the turnover of their members and not that of each federation. The appellant federations submit that it is a radical change compared with the specific, objective and justified requirement, imposed by the case-law, namely the taking into account of the turnover of the members of an association of undertakings in the calculation of that limit is subject to the condition that such association may, under its internal rules, commit its members. In the alternative, the French Republic adds that, since the appellant federations have no power to commit their members, the Court of First Instance should not have accepted the taking into account of their members' turnover in calculating the limit on the fine fixed in that provision without examining whether the Agreement of 24 October 2001 had actually had an effect on the market in beef and veal.

91 By the first part of its fifth ground of appeal, FNCBV claims that such a departure from the case-law, unaccompanied by an adequate statement of reasons, is contrary to the principle of legal certainty since the undertakings concerned could not distinguish the circumstances in which the ceiling of 10% fixed in Article 15(2) of Regulation No 17 would be determined by reference to the turnover of an association of undertakings from those in which it would be determined vis-à-vis the total turnover of the members of that association.

92 It must be noted that the third ground of appeal raised by FNSEA, FNB, FNPL and JA and the first part of FNCBV's fifth ground of appeal are based on a false premiss, which was correctly rejected by the Court of First Instance in paragraphs 316 to 319 of the judgment under appeal.

93 It is true, as the Court of First Instance pointed out in paragraph 317 of the judgment under appeal, that the upper limit of 10% fixed in Article 15(2) of Regulation No 17 may, according to settled case-law, be calculated taking into account the turnover of all the undertakings which are members of an association of undertakings, at least if that association has power to bind its members. However, in the same way as the Court of First Instance noted in the following paragraph of the judgment under appeal, that case-law does not rule out the possibility that, in certain cases, the turnover of the members of an association could also be taken into account even if the association does not possess formal power to bind its members.

94 FNSEA, FNB, FNPL and JA argue however that, in the more recent case-law, namely *Finnboard* v *Commission*, paragraph 66, the Court of Justice clearly ruled out the taking into account of the turnover of the members of an association of undertakings if the association does not have the power to bind its members.

95 That reading of the judgment under appeal cannot be accepted.

96 As the Advocate General observed in point 53 of his Opinion, it is clear from the context of paragraph 66 of the judgment in *Finnboard* v *Commission* that the undertakings which were members of the association on which the Commission had imposed a fine had not been implicated in the commission of the infringement. It was in those circumstances that the Court held, as regards the imposition of a fine on an association of undertakings, whose own turnover often does not reflect its size or power on the market, that the Commission may take into account the turnover of the

undertakings which are members of that association in order to determine a sanction which is deterrent but, for that to be the case, it is necessary that the association has, by virtue of its internal rules, power to bind its members.

97 Consequently, as pointed out by the Commission, the Court of First Instance was entitled to find that, when, as in this case, the members of an association of undertakings have participated actively in implementing an anti-competitive agreement, those members' turnover could be taken into account for the purposes of determining the sanction, even if the association in question, in contrast to the situation referred to in paragraph 66 of the judgment in *Finnboard* v *Commission*, has no power to bind its members. The Court of First Instance was therefore correct in deciding, in paragraph 319 of the judgment under appeal, that such taking into account is justified in 'cases where an infringement on the part of an association involves its members' activities and where the anti-competitive practices at issue are engaged in by the association directly for the benefit of its members and in cooperation with them, the association having no objective interests independent of those of its members'.

98 Furthermore, any other interpretation would run counter to the necessity of ensuring the deterrent effect of sanctions imposed in respect of infringements of the Community competition rules. As the Court of First Instance correctly pointed out, in paragraph 318 of the judgment under appeal, the Commission's option of imposing fines of an amount appropriate to the infringements at issue could otherwise be jeopardised, as associations with a very small turnover but bringing together a large number of undertakings which could not be formally bound but which together have a substantial turnover could be sanctioned only by very small fines, even if the infringements for which they were responsible could have a considerable influence on the markets in question.

99 Contrary to FNCBV's submission, it is clear from paragraphs 318 to 325 of the judgment under appeal that the Court of First Instance's reasoning on that point was sufficient in law.

100 The appellant federations argue also that, in paragraphs 320 to 323 of the judgment under appeal, for the purposes of refraining, in this case, from applying the settled case-law relating to the circumstances in which the upper limit of 10% of turnover fixed in Article 15(2) of Regulation No 17 must be calculated by reference to the turnover of all the undertakings which are members of an association, the Court of First Instance extracted four criteria from the facts of this case, which it described as 'specific circumstances'. They are cases where the primary task of the association of undertakings in question is to defend and represent the interests of its members, where the anti-competitive agreement in question relates to the activity of the members of that association and not to that of the association itself, where that agreement was concluded for the benefit of the members of that association and they cooperated in the anti-competitive practice in question.

101 FNSEA, FNB, FNPL and JA submit, first, that three of those criteria are naturally present in the case of an association of undertakings. Second, the local agreements and the actions of certain groups of farmers, referred to in paragraph 323 of the judgment under appeal, do not prove the cooperation of all the active members of those federations on the market for beef and veal, but demonstrate only the cooperation of some of them. Thus, the conclusion which the Court of First Instance reached is not justified by an objective link between those federations and all their members nor is it based on the indirect participation of those members in the anti-competitive practice in question in the present proceedings.

102 Those arguments are based on an erroneous reading of the judgment under appeal and cannot succeed.

103 In paragraph 319 of the judgment under appeal, the Court of First Instance identified new specific circumstances, applicable to cases of infringements committed by associations of undertakings, to be added to those already recognised by the case-law. By contrast, in paragraphs 320 to 323 of the judgment under appeal, the Court of First Instance considered whether, in this case, the circumstances of the appellant federations were specific, in order to decide whether the upper limit of 10% fixed in Article 15(2) of Regulation No 17 had to be determined by reference to the turnover of their members rather than by reference to that of those federations.

104 It must be pointed out, first, that FNSEA, FNB, FNPL and JA do not challenge the Court of First Instance's findings of fact in their regard in paragraphs 320 to 322 of the judgment under appeal and, second, that, as is pointed out in paragraph 59 of the present judgment, the appraisal of the facts and the assessment of the evidence do not, save where the facts and evidence are distorted, constitute a point of law which is subject, as such, to review by the Court of Justice on appeal (see Case C-104/00 P *DKV* v *OHIM* [2002] ECR I-7561, paragraph 22, and Case C-125/06 P *Commission* v *Infront WM* [2008] ECR I-1451, paragraph 57). Distortion of the facts is not relied upon before the Court of Justice in this case.

105 FNCBV submits that two of the four required cumulative elements as determined by the Court of First Instance are not satisfied in its case. It claims, first, that the signature of the Agreement of 24 October 2001 was of no interest to its members since it included the stipulation as to recommended minimum purchase prices for cattle. That agreement was therefore contrary to their interest. In addition, its signature did not enable the abattoirs to be freed from blockade, since blockades continued as the Commission's file shows. That the signature of the Agreement of 24 October 2001 was not in the interests of FNCBV's members is also confirmed by the very low number of local agreements relied upon by the Commission.

106 Secondly, the independence of FNCBV's interests as against those of its members is made manifest not only by the fact that it does not have the power to bind them, but also by the limited number of local agreements subsequent to the Agreement of 24 October 2001.

107 That argument cannot be accepted.

108 Since the assessment of the facts is within the exclusive jurisdiction of the Court of First Instance, it is not for the Court of Justice to review whether the Court of First Instance correctly concluded, in paragraph 322 of the judgment under appeal, that the Agreement of 24 October 2001 had been concluded directly for the benefit of FNCBV's basic members and, in paragraph 323, that that agreement had been put into effect by the conclusion of local agreements between departmental federations and local farm unions, on the one hand, and the slaughterers, on the other.

109 FNCBV submits also that neither the Commission nor the Court of First Instance showed that it was impossible to make the member undertakings of the appellant federations addressees of the Commission's decisions, so that the fines should be imposed individually on those members. FNCBV submits that it is clear from Section 5 (c) of the Guidelines that it is only when it is impossible to impose individual fines on the members of an association of undertakings that the Commission may impose a fine on the association itself, equivalent to the total fines which it would have imposed on its members. Since neither the Commission nor the Court of First Instance sought to justify the use of the aggregate turnover of the appellant federations' members in the calculation of the amount of the fines inflicted on the federations, the judgment under appeal is vitiated by illegality and should be set aside.

110 That allegation relating to breach of Section 5(c) of the Guidelines was raised by FNCBV for the first time on appeal. It constitutes therefore, under Article 42(2) of the Rules of Procedure, which, under Article 118 of those rules, applies to appeals, a new plea in law, which is inadmissible since it is not based on matters of law or of fact which came to light during the procedure.

111 It follows that the third ground of appeal raised by FNSEA, FNB, FNPL and JA and the first part of FNCBV's fifth ground of appeal must be rejected as being, in part, inadmissible and, in part, unfounded.

112 By the second part of its fifth ground of appeal, FNCBV claims that the grounds relied upon in paragraph 320 et seq. of the judgment under appeal contradict those developed in paragraph 341 et seq., relating to the application of the rule against aggregation of sanctions.

113 In paragraph 341 of the judgment under appeal, the Court of First Instance emphasised the signature of, participation in, responsibility for, individual role in, and even the implementation of the Agreement of 24 October 2001 by the appellant federations to justify the fact that the sanction was imposed on them and not on their members. By contrast, in paragraph 320 et seq., emphasis was laid on the fact that that agreement did not concern the appellant federations' activities, that the measures adopted did not affect them, that the agreement was concluded directly for the benefit of those federations' members and finally that the agreement was put into effect by those federations' members.

114 Thus, the Court of First Instance developed two contradictory lines of reasoning seeking, in the first case, to maintain that the appellant federations played a direct and active role in the conclusion and implementation of the Agreement of 24 October 2001 and, in the second case, to declare that those federations were but the transparent vehicle for the actions of their members.

115 In addition, by accepting, in paragraph 341 of the judgment under appeal, the personal participation of the appellant federations in the infringements punished by the contested decision, the Court of First Instance implicitly recognised that the taking into account of the members' turnover to calculate the upper limit of 10% of turnover under Article 15(2) of Regulation No 17 was not justified in this case.

116 The French Republic submits that the Court of First Instance's statement, in paragraph 343 of the judgment under appeal, that the contested decision imposed no sanction on the basic members of the appellant federations appears to contradict the justification, given in paragraph 319, for taking into account the turnover of those members in the calculation of that 10% limit by the fact that the Agreement of 24 October 2001 was concluded directly for those members' benefit and in cooperation with them.

117 Those alleged contradictions in the grounds are based on an erroneous reading of the judgment under appeal. For that reason, the second part of FNCBV's fifth ground of appeal cannot be upheld.

118 In order to determine whether the 10% limit fixed in Article 15(2) of Regulation No 17 had to be calculated by reference to the turnover of all the members of the appellant

federations, the Court of First Instance reviewed, in paragraphs 320 to 323 of the judgment under appeal, whether the specific circumstances identified in paragraph 319 affected those federations, namely whether the infringement committed by them involved their members' activities and whether the anti-competitive practices at issue had been engaged in by those federations directly for the benefit of their members and in cooperation with them. In carrying out that exercise, the Court of First Instance found it necessary to rely on the task of those federations, to determine the activities covered by the Agreement of 24 October 2001 and the beneficiaries of that agreement and to examine the detailed arrangements for its implementation.

119 On the other hand, in paragraphs 341 to 345 of the judgment under appeal, the Court of First Instance rejected the plea in law relating to the Commission's breach of the principle of non-aggregation of sanctions. In that regard, first, the Court of First Instance established that the sanction imposed on each appellant federation had been pronounced because of its own participation in and responsibility for the infringement, all the appellant federations having participated albeit with different intensities and degrees of involvement. Secondly, the Court of First Instance found that the contested decision had not sanctioned several times the same entities or the same persons for the same acts, because it did not impose sanctions on the basic members, whether direct or indirect, of those federations.

120 The Court of First Instance did not therefore vitiate its judgment with contradiction in the grounds, when, on the basis of its reasoning, it concluded, in paragraph 324 of the judgment under appeal, that, for the purposes of calculating the 10% limit under Article 15(2) of Regulation No 17, it was justified in taking into account the turnover of the basic members of the appellant federations and, in paragraph 344, finding that the infringers were not identical, since the contested decision did not sanction several times the same entities or the same persons for the same acts.

121 It follows that the second part of FNCBV's fifth ground of appeal must be rejected as unfounded.

122 Accordingly, the third ground of appeal raised by FNSEA, FNB, FNPL and JA and FNCBV's fifth ground of appeal must be rejected in their entirety.

The fourth ground of appeal raised by FNSEA, FNB, FNPL and JA, asserting breach of the rule against aggregation and of the principle of proportionality of sanctions in that the Court of First Instance imposed a separate fine on each of those federations taking account of the aggregate turnover of their common members

123 By their fourth ground of appeal, FNSEA, FNB, FNPL and JA submit that the Court of First Instance could not, without infringing the principles of non-aggregation and proportionality of sanctions and without contradicting itself, impose separate fines on FNSEA and each of its three sub-federations, where members which are active on the market for beef and veal are common to them. The Court of First Instance should have held that none of the four federations had interests independent of their common members and those of the three other federations and should not have upheld the Commission's method of calculating the fines on each of the federations, which was based on the aggregate turnover of those members.

124 Those federations claim that the Court of First Instance, in order to justify the aggregation of the sanctions, took into consideration each of the four appellant federations in the general context, that is to say as separate legal persons with their own budgets and interests individual to them. On the other hand, in order to justify not

exceeding the upper limit, it took into consideration each of those federations in the particular context of the conclusion of the Agreement of 24 October 2001, that is to say as federations which had acted in the same single interest, namely that of their common members active on the market for beef and veal. The four appellant federations submit that a single federation, be it FNSEA or be it FNB, each bringing together the entirety of its common members, could be subjected to a common sanction taking into account the financial capacity of those members, and that the sanction imposed on the other three federations should take into account only the amount of their own income.

125 The French Republic submits that, since the basic members of the four appellant federations may be common to several of them, the Court of First Instance overestimated the economic power of those federations. Therefore, taking into account the turnover of the members of each of the four appellant federations in the calculation of the upper limit of the fines imposed on them leads inevitably to the imposition on them of a disproportionate fine.

126 Those arguments, which were already advanced at first instance by the same appellant federations, were rejected by the Court of First Instance in paragraphs 340 to 346 of the judgment under appeal.

127 The Court of First Instance noted, first, the case-law whereby the application of the principle of *non bis in idem* is subject to the threefold condition of identity of the facts, unity of offender and unity of the legal interest protected, a principle which prohibits the sanctioning of the same person more than once for a single unlawful course of conduct designed to protect the same legal asset and held that, in this case, the Commission had fined the appellant federations by reason of the participation and the degree of responsibility of each of them in the infringement.

128 The Court of First Instance decided, next, that the fact that FNB, FNPL and JA are members of FNSEA does not mean that those federations were sanctioned several times for the same infringement, since those federations have separate legal personality with separate budgets and objectives which do not always coincide, and carry out their respective union activity in defence of their own specific interests.

129 Finally, on the basis of its case-law that taking into account the turnover of the members of an association of undertakings in determining the 10% limit does not mean that a fine has been imposed on them or even that the association in question has an obligation to recover the amount of the fine from its members (see *CB and Europay* v *Commission*, paragraph 139), the Court of First Instance concluded, in paragraph 343 of the judgment under appeal, that, since the individual farmers who were indirect members of the appellant federations were not penalised in the contested decision, the fact that the basic members of FNB, FNPL and JA were also members of FNSEA did not prevent the Commission from penalising each of those federations individually.

130 Therefore, the Court of First Instance could conclude, correctly, in paragraph 344 of the judgment under appeal, that the principle *non bis in idem* was not infringed, since the infringers were not identical, nor was the principle of proportionality, since the appellant federations' members, whether direct or indirect, were not fined twice for one and the same infringement.

131 It follows that the fourth ground of appeal raised by FNSEA, FNB, FNPL and JA must be rejected as unfounded.

FNCBV's sixth ground of appeal, seeking the reduction of the amount of the fine imposed upon it

132 By its sixth ground of appeal, FNCBV complains that the Court of First Instance infringed Article 15(2) of Regulation No 17 by setting its fine at EUR 360 000, because that sum corresponds to nearly 20% of its turnover, that is to say the amount of its income, whereas that provision fixes the maximum fine which may be imposed at 10% of the turnover of the infringing undertakings.

133 However, since this ground of appeal is based on the premiss that the Commission was not entitled, in order to determine whether the amount of the fine imposed exceeded the upper limit of 10% of turnover fixed in Article 15(2) of Regulation No 17, to take into account the turnover of the appellant federations' members, it must be rejected, since that premiss is, for the reasons stated in paragraphs 92 to 111 of the present judgment, false.

134 Since the appellant federations have failed on all their grounds of appeal, the appeals must be dismissed in their entirety.

Costs

135 Under the first paragraph of Article 122 of the Rules of Procedure, where the appeal is unfounded, the Court of Justice is to make a decision on the costs. Under Article 69(2) of those rules, which, pursuant to Article 118 thereof, applies to the procedure on appeal, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings.

136 As the Commission has requested that the appellant federations be ordered to pay the costs and as they have been unsuccessful, they must be ordered to pay the costs.

137 The French Republic must bear its own costs.

On those grounds, the Court (Third Chamber) hereby:

1. **Dismisses the appeals;**

2. **Orders Coop de France bétail et viande, formerly Fédération nationale de la coopération bétail et viande (FNCBV), Fédération nationale des syndicats**

d'exploitants agricoles (FNSEA), Fédération nationale bovine (FNB), Fédération nationale des producteurs de lait (FNPL) and Jeunes agriculteurs (JA) to pay the costs;

3. Orders the French Republic to bear its own costs.

[Signatures]