

COMMISSION DECISION

of 8 January 1975

relating to a proceeding under Article 85 of the EEC Treaty (IV/27.039 — preserved mushrooms)

(Only the English and French texts are authentic)

(75/77/EEC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community, and in particular Article 85 thereof;

Having regard to Regulation No 17 of 6 February 1962⁽¹⁾, and in particular Articles 1, 3 and 15 thereof;

Having regard to the application submitted to the Commission on 19 September 1972 by the 'Groupe-ment européen des maisons d'alimentation à succursales multiples' (GEMAS) of Brussels for the initiation of proceedings to determine whether Article 85(1) of the Treaty was being infringed by an agreement relating to the German market entered into by the principal French manufacturers of preserved mushrooms;

Having regard to the Commission Decision of 29 April 1974 to initiate proceedings under Article 3 of Regulation No 17, following investigations carried out pursuant to Article 14 of that Regulation in respect of an agreement concluded on 8 January 1973 in Taipei (Taiwan) between five of the principal French producers and all Taiwanese producers of preserved mushrooms;

Having given the undertakings and associations of undertakings involved the opportunity pursuant to Article 19(1) of Regulation No 17, and to Regulation No 99/63/EEC (OJ No 127, 20. 8. 1963, p. 2268/63); of being heard on the matters to which the Commission has taken objection;

Having regard to the Opinion obtained of the Advisory Committee on Restrictive Practices and Dominant Positions pursuant to Article 10 of Regulation No 17 on 28 November 1974;

Whereas:

I

1. The products concerned are preserved mushrooms produced and sold by the following undertakings and associations of undertakings:

- (a) Five of the principal French producers:
- Blanchaud SA, Chacé (Maine-et-Loire), which combines several different production undertak-

ings: preserved vegetables, mushrooms, freeze dried products, and foods for children. Preserved mushrooms account for roughly half its total turnover (or approximately FF 115 million in 1973, a third of which represents exports to Germany);

- Euroconserves, Beaufort-en-Vallée (Maine-et-Loire), an 'economic interest group' (groupe-ment d'intérêt économique) set up in 1970 and involving among others, the 'Coopérative agricole des champignonistes du Saumurois'; the turnover of this undertaking in preserved mushrooms in 1973 was FF 114 million, of which FF 50 million represented exports to Germany;

- Champifrance, Bagneaux/Saumur (Maine-et-Loire), also an 'economic interest group' which markets preserves produced by the Royal Champignons Group which in turn consists of the following agricultural cooperatives:

ROYAL
CHAMPIROC
BORDELAISE
CATS
CHAMPEUROP
CLAIRFIN

(the turnover of the group in preserved mushrooms in 1973 was FF 93 million, of which FF 19 million represented exports to Germany);

- Faval SA, Chinon (Indre-et-Loire), whose sole business is the preservation of mushrooms (with a turnover of almost FF 8 million in 1973); and
- Champex-Centre, Tours (Indre-et-Loire), also an agricultural cooperative, having a turnover of about FF 28 million in 1973, FF 21 million of which represented exports to Germany.

- (b) The Taiwan Mushroom Packers United Export Corporation (TMPUEC), Taipei, the national trade association representing all Taiwan exporters.

2. In Germany each of the French producers markets its products through a sales subsidiary or exclusive agent, and the Taiwanese also make use of exclusive agents in that country. The French producers above account together for almost all French production (85 % in both 1972 and 1973). French and Taiwanese producers have traditionally

⁽¹⁾ OJ No 13, 21. 2. 1962, p. 204/62.

between them produced most of the tinned mushrooms consumed in Germany; in particular, in the 1972/73 marketing year, they accounted for 60 % of the total of preserved mushrooms sold in that country and virtually all sales of the better qualities.

3. On 19 September 1972, GEMAS submitted to the Commission a complaint, requesting that it should find Article 85(1) was being infringed by an agreement between French producers with respect to selling prices in Germany. In the course of the inquiry which followed the complaint, the Commission, acting under Article 14 of Regulation No 17, made on the spot investigations into certain French producers. As a result the existence was discovered of a wider agreement, which had not been notified to the Commission, concluded between the Taiwanese producers (TMPUEC) and the French producers listed in paragraph 1 (who were associated for this purpose in a group called Major French Mushroom Packers (MFMP)). The Commission accordingly initiated under Article 3 of Regulation No 17 *ex officio* proceedings concerning the whole case on 29 April 1974.

4. The agreement between the French and Taiwanese producers was a written agreement which had been signed in Taipei on 8 January 1973, by, or on behalf of the individual French producers of the one part and by TMPUEC as the representative and sole exporter for producers, of the other. It had been preceded during the previous year by a series of meetings. The agreement was deemed to have entered into force on 15 December 1972. The main points of the agreement are as follows:

- (a) cooperation is established between TMPUEC and MFMP with a view to programming production and sales in Germany, and to enable the parties to fix their selling prices 'to meet the requirement of the market' (Article 1);
- (b) the two parties undertake, to inform each other in advance of sales forecast for the German market, and they agree to share their market on the following basis for 1973:
 - approximately 1 402 500 standard cartons for MFMP,
 - approximately 1 350 000 standard cartons for TMPUEC,
 MFMP are to make monthly deliveries of 116 875 standard cartons from January to December; whilst TMPUEC is to deliver 112 500. In subsequent years these quantities will be increased in line with what the German market can absorb (Article 2);
- (c) selling prices in Germany shall always be so fixed that:
 - consumption is promoted; and
 - the quantities specified in Article 2 can be sold each season 'without the parties competing with each other excessively' (Article 3);

- (d) to initiate the cooperation, the two parties are to adjust their respective selling prices upward by 3 % as from 1 May 1973 (Article 4);
- (e) on request either party will allow the other to check sales, production and dispatch documents; a joint accounting organization will be appointed to collect such data for the common information of the parties (Article 5);
- (f) MFMP will help to open up the French market to Taiwan preserved asparagus and to further a complete liberalization of such imports within four years; the parties will develop a joint strategy against competitors and cooperate in general terms on both technical and economic matters (Article 6);
- (g) any clause of the agreement may be reviewed at any time at the request of either of the parties since the relevant circumstances are always subject to modification as a result of action by other French producers and by Dutch and Korean producers, who not being parties to the agreement will be acting freely in the market (Article 7).

5. Taiwan is the largest producer of first quality preserved mushrooms in the world. The second largest producer is France. France is the largest producer in the enlarged Community, producing 100 000 metric tons for the year 1972/73 out of a total Community production of 150 000 metric tons. Of these 100 000 metric tons, 60 % is consumed in France and the balance exported — mainly to Germany. The second largest producer of preserved mushrooms in the Community is the Netherlands, producing 35 000 metric tons in 1972/73, of which approximately 26 000 metric tons were exported to Germany. The mushrooms produced by the Netherlands are 'grade 3' mushrooms and are regarded as being of different quality to first quality mushrooms. Thus the mushrooms produced by the Netherlands do not substantially compete with those produced in France and Taiwan.

The consumption of preserved mushrooms in Germany has been rising steadily and the German market represented a consumption of approximately 100 000 metric tons in 1972/73. The greater part was imported from Taiwan, France and the Netherlands, local production being negligible.

6. On 8 August 1974, the Commission took urgent measures against imports into the EEC from all non-member countries. Commission Regulation (EEC) No 2107/74 of 8 August 1974⁽¹⁾, laid down protective measures applicable to imports of preserved mush-

⁽¹⁾ OJ No L 218, 9. 8. 1974, p. 54.

rooms. The main grounds for these measures were the scale of the imports, their growth rate, the volume of stocks piling up in France and the prices at which preserved products from certain non-member countries new to the market were being offered. In the Regulation the Commission noted that at that time the Community market in the relevant sector was experiencing serious disturbances likely to jeopardize the attainment of the objectives of Article 39 of the Treaty.

7. On 10 June 1974, the Commission sent each of the relevant French undertakings and TMPUEC a statement of objections to their agreement which it claimed was contrary to Article 85 (1) and did not meet the test for exemption under Article 85 (3). In addition it contemplated imposing fines, pursuant to Article 15 of Regulation No 17, on all those involved. Each of the firms involved replied to the statement of objections; they did not deny the facts in the statement of objections, the main points of which have been set forth in this Decision, the French firms, in their written reply, pointed out however, that the agreement had in fact been hardly implemented; they recalled that as far as they were concerned its sole purpose was to forestall difficulties of the kind whose existence the Commission was obliged to recognize in its Regulation of 8 August 1974 and of which they had already realized the threat.

II

Article 85 (1) of the Treaty establishing the European Economic Community prohibits, as incompatible with the common market, all agreements between undertakings, decisions by associations of undertakings, and concerted practices 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.

1. The agreement concluded in Taipei on 8 January 1973 between the five French producers listed in I (1) (a) and the Taiwan Mushroom Packers United Export Corporation, representing all the producers in Taiwan constitutes an agreement within the meaning of Article 85.

2. The sole object of the agreement was to restrict competition within the common market, through the following means:

(a) the obligation entered into by each of the parties (Articles 1, 2, 3 and 4 of the agreement) to coordi-

nate their production and sales programmes in Germany by:

- observing an annual export quota, and
- observing a pricing policy adopted by them jointly with the object of eliminating competition between them;

An obligation of this nature is indeed likely to eliminate all effective competition between the parties once competition in prices is excluded while at the same time each party is obliged to refrain from new deliveries on the relevant market when it has exhausted its quota; similarly it is likely to deprive purchasers of all freedom of choice or discussion;

(b) the obligation (Article 5 of the agreement) on each party to provide the other with all particulars which would enable sales quotas for Germany to be specified and enforced, and the production, sales, prices and conditions of sales applied by each party to be monitored; an obligation of this type is in itself such as to strengthen the restrictions established in point (a) above, in that in particular it goes a long way towards enabling each party to know exactly what the other is going to do.

3. The agreement has as its object the allocation of outlets within the common market, one of its particular concerns being with French exports to Germany. It is likely to affect trade perceptibly between Member States by exerting a direct influence on trade flowing between these States in such a way as to jeopardize the attainment of the aim of a single market.

4. This agreement, which concerns an agricultural product in the list in Annex II to the Treaty, falls under Article 1 of Council Regulation No 26 (OJ No 30, 20. 4. 1962). However, it does not meet the tests for exemption under Article 2 (1) of that Regulation for the following reasons:

the agreement does not form an integral part of a national market organization and is not necessary for the attainment of the objectives set out in Article 39 of the Treaty. It is to be seen from the third recital in Regulation No 26 that the second ground for exemption can apply only where the application of Article 85 (1) of the Treaty would jeopardize the attainment of the objectives of the common agricultural policy as regards the product concerned. Council Regulation

(EEC) No 1427/71⁽¹⁾ of 2 July 1971 introducing protective measures for products processed from fruit and vegetables states the methods which are regarded as necessary with regard to imports from non-member countries. Article 1 states that if by reason of imports the Community market in one or more of the products concerned experiences or is threatened with serious disturbances which may endanger the objectives of Article 39 of the Treaty, appropriate measures may be applied until such disturbances or threat of disturbance has ceased. The necessary means to attain these objectives are thus provided for in the Regulation and its implementing Regulations. The agreement being dealt cannot be regarded as such a measure, from whatever angle it is considered.

5. Accordingly, the agreement is prohibited by Article 85 (1) of the Treaty.

III

Under Article 85 (3) of the Treaty, Article 85 (1) may be declared inapplicable to any agreement between undertakings, any decision by associations of undertakings and any concerted practice which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefits, and which does not impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives and does not afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

1. The agreement concluded in Taipeh on 8 January 1973 between the French and Taiwanese producers has not been notified to the Commission under Article 4 or 5 of Regulation No 17.

2. In any event such market sharing and concerted price fixing, as in this case, within the common market involving the main firms in this particular branch of the food industry are inappropriate and indeed could not produce the improvements required by Article 85 (3). Nor could they make a valid contribution to promoting technical or economic progress; they can only harm the interests of consumers.

3. No grounds therefore exist for granting exemption under Article 85 (3).

IV

Under Article 15 (2) of Regulation No 17 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, they infringe Article 85 (1) or Article 86 of the Treaty. In fixing the amount of the fine regard is to be had both to the gravity and to the duration of the infringement.

1. The agreement of 8 January 1973 constitutes an infringement of the rules of competition of the Treaty. The gravity of this infringement lies in the fact that it is completely contrary to the object of creating a single market, that it constitutes a sharing of the market accompanied by a fixing of sales prices in which virtually all the producers or suppliers in business on the relevant market at the time were involved.

2. Even if the French producers concerned here had had good reason to believe at the end of 1972 that there would be a serious disturbance of the market such as was recognized in Commission Regulation (EEC) No 2107/74 of 8 August 1974, it was not permissible for them, in order to alleviate this situation, to take the initiative by infringing the Treaty or even to participate in an infringement thereof. As far as the Taiwanese producers are concerned, the Commission considers their blameworthiness to be less in view of the fact that in this particular case it is hardly likely that, during the course of the negotiations for the conclusion of the agreement of 8 January 1973, they could have had knowledge of the Opinion of the Commission relating to the import into the Community of products from third countries. This Opinion, published in *Official Journal of the European Communities* No C 111 of 21 October 1972, page 13, made it clear that agreements entered into by enterprises having their seat outside the Community fall equally within the field of application of Article 85 to the extent that the effects of the agreement extend to the territory of the common market, and must be notified to the Commission as prescribed by Regulation No 17.

3. The agreement has now however, been implemented with respect to all its provisions. The selling prices applied by French and Taiwanese producers in Germany, although not identical, were very similar at the time the agreement of January 1973 was prepared and signed; a number of contracts on that market were still being concluded at very similar average net prices by French manufacturers until at least May 1973. At the same time, the simultaneous increase of 3 % provided for in the agreement for 1 May 1973 was never put into effect; on the contrary a downward trend in net selling prices in Germany, which had begun during the summer of 1972, was restarted by virtue of the fluctuations in exchange rates in 1973. The devaluation of the US dollar and the revaluation of the DM in that year reduced the selling price obtained in Germany by the Taiwanese (expressed in US dollars) to 23 % below that obtained by the

⁽¹⁾ OJ No L 151, 7. 7. 1971.

French (expressed in DM), thus largely preventing the Common Customs Tariff from having any effect. Then, under pressure from the French, TMPUEC agreed not to keep strictly to the letter of the agreement (i.e. to let their selling prices in Germany fall in line with the currency in which they were expressed) and they made two unilateral increases — amounting in all to about 10% — one in March and one in April 1973. From the last quarter of 1973 the agreement has in any event been rendered completely inoperative by reason of the inflow into Germany of large quantities of preserved mushrooms from the People's Republic of China. Moreover, the agreement did not in fact reverse the movement towards reduction of prices on the German market which had been observed since 1960.

4. Notwithstanding the fact that the agreement has not produced significant effects on the market, the parties to the agreement had the intention of dividing their market in infringement of Article 85 of the EEC Treaty and for this reason the Commission has decided to impose fines.

5. The Commission has fixed the amount of the fines as set out in Article 3 below by reference also to the degree to which each of the firms concerned were involved in the infringement, their respective positions on the relevant market and their respective size,

- (a) on the *société anonyme* Blanchaud, 32 000 (thirty-two thousand) units of account, that is 177 734 (one hundred and seventy-seven thousand, seven hundred and thirty-four) French francs ;
- (b) on the *groupement d'intérêt économique* Euroconserves, 32 000 (thirty-two thousand) units of account, that is 177 734 (one hundred and seventy-seven thousand, seven hundred and thirty-four) French francs ;
- (c) on the *groupement d'intérêt économique* Champifrance, 26 000 (twenty-six thousand) units of account, that is 144 408 (one hundred and forty-four thousand, four hundred and eight) French francs ;
- (d) on the *société anonyme* Faval, 2 000 (two thousand) units of account, that is 11 108 (eleven thousand one hundred and eight) French francs ;
- (e) on the *société d'intérêt collectif agricole* Champex-Centre, 8 000 (eight thousand) units of account, that is 44 433 (forty-four thousand, four hundred and thirty-three) French francs.

2. This Decision shall be enforceable against the abovementioned undertakings or associations of undertakings in the manner provided by Article 192 of the EEC Treaty.

HAS ADOPTED THIS DECISION :

Article 1

The agreement entered into in Taipeh on 8 January 1973 between the following undertakings and associations of undertakings :

- Blanchaud SA,
- Euroconserves,
- Champifrance,
- Faval SA,
- Champex-Centre,
- Taiwan Mushroom Packers United, Export Corporation,

to share the German market amongst themselves and to apply concerted sales prices constitutes a breach of Article 85 (1) of the Treaty establishing the European Economic Community.

Article 2

The undertakings referred to in Article 1 shall terminate the agreement of 8 January 1973.

Article 3

1. The following fines are imposed in respect of this infringement :

Article 4

This Decision is addressed to the following undertakings :

Blanchaud SA,
BP No 4, F 49580 Chacé.

Euroconserves,
BP No 4, F 49250 Beaufort-en-Vallée.

Champifrance,
BP No 159, F 49400 Saumur.

Faval SA,
BP No 44, F 37500 Chinon.

Champex-Centre,
avenue Charles Bedaux, F 37000 Tours.

Taiwan Mushroom Packers United Export Corporation,
PO Box 1634, Taipeh (Taiwan).

Done at Brussels, 8 January 1975.

For the Commission

The President

François-Xavier ORTOLI