

## II

*(Acts whose publication is not obligatory)*

## COMMISSION

## COMMISSION DECISION

of 30 July 1992

relating to a proceeding under Article 85 of the EEC Treaty (Case No IV/33.494  
— Scottish Salmon Board)

(Only the English text is authentic)

(92/444/EEC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Whereas :

Having regard to the Treaty establishing the European Economic Community,

## I. THE FACTS

Having regard to Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles 85 and 86 of the Treaty <sup>(1)</sup>, as last amended by the Act of Accession of Spain and Portugal, and in particular Article 3 thereof,

Having regard to the Commission's decision of 21 June 1990 to initiate proceedings in this case,

Having given the undertakings concerned the opportunity to make known their views on the objections raised by the Commission, pursuant to Article 19 (1) of Regulation No 17 and Commission Regulation No 99/63/EEC of 25 July 1963 on the hearings provided for in Article 19 (1) and (2) of Regulation No 17 <sup>(2)</sup>,

Having heard the undertakings concerned in accordance with Article 19 (2) of Regulation No 17 and Regulation No 99/63/EEC,

After consultation of the Advisory Committee on Restrictive Practices and Monopolies,

## A. Subject-matter of procedure

- (1) This procedure concerns a price-fixing agreement in respect of farmed salmon concluded between Fiskeoppdretternes Salgslag A/L (the Norwegian Fish Farmers' Sales Organization) and the Scottish Salmon Growers' Association Limited, the Scottish Salmon Farmers' Marketing Board Limited and the Shetland Salmon Farmers' Association. The agreement came into effect at the end of 1989.

## B. The product

- (2) The product is farmed salmon. Farmed salmon are reared in pens or cages and the farmer controls the production factors such as farm size, stocking and feeding of fish. The production cycle for farmed salmon is a period of one to two years in a brood-stock farm where the smolts (young salmon) develop before being transferred to grow-out farms where they are harvested when they reach a weight of between 1 and 5 kg.

Farmed salmon are sold gutted or round. The distribution chain extends from growers, usually through wholesalers and exporters, to processing outlets and the retail and catering sectors.

<sup>(1)</sup> OJ No 13, 21. 2. 1962, p. 204/62.

<sup>(2)</sup> OJ No 127, 20. 8. 1963, p. 2268/63.

In Europe the principal producers of farmed salmon are located in Norway, Scotland, Ireland, the Faroes and Iceland.

### C. The parties

(3) The parties in this case are :

- Fiskeoppdretternes Salgslag Organization (FOS),
- The Scottish Salmon Growers' Association Limited (SSGA),
- The Scottish Salmon Farmers' Marketing Board Limited (SSB),
- The Shetland Salmon Farmers' Association (SSFA).

(4) FOS was established in 1978. Membership was open to licensed fish farmers. Under an Act of 14 December 1951 (Råfiskloven) and a Royal Decree of 28 July 1978, amended by a Royal Decree of 29 June 1990, FOS was given certain exclusive rights. These included the right to issue purchase licences and set minimum prices for farmed fish. All first hand sale of farmed fish had to go through or be approved by FOS.

FOS was financed by an operational fee on every transaction between a fish farmer and a first hand buyer of farmed fish. Each party paid 1,5 % of the amount of the sale to FOS.

FOS first introduced a minimum price system for farmed salmon in 1978. Minimum prices were established annually after negotiations between FOS and Norges Ferskfiskomsetnings Landsforening (the Norwegian Fresh Fish Trade Association) (the NFOL), which represents exporters. The minimum price was intended to correspond to the expected market price. That price was obligatory and sales below it infringed Norwegian law. On 13 November 1991, FOS was declared bankrupt. As a result, its minimum price system was brought to an end.

(5) The SSGA was incorporated in 1982 to represent the interests of Scottish salmon growers. Its objects include the promotion of the profitable sale of Scottish salmon, the maintenance and improvement of the quality of Scottish salmon and the compilation and dissemination of salmon industry statistics. Membership is voluntary and currently stands at 61, accounting for approximately 80 % of total Scottish salmon production.

Since May 1987 the SSGA has operated a price information system based on weekly returns by participating members. A recent review of the system resulted in the issue on a weekly basis of more comprehensive reports which include infor-

mation not only on average prices for gutted and round salmon by weight categories but also high and low price information, volume of fish sold, Norwegian minimum prices, and production forecasts of SSGA members for the coming week, month and quarter. According to the SSB, the main objective of the price information system is to provide accurate average industry prices and Norwegian delivered minimum prices at actual exchange rates to strengthen members' negotiating position with the trade. A fax dated 19 April 1989 stated in relation to the new system : 'As a result, from 1 May, the SSB will be able to monitor trade prices better in the future and hopefully be able to motivate Scottish suppliers thereafter to sell at market or above market prices.'

(6) The SSB was incorporated in 1988 to represent the marketing interests of both the SSGA and the SSFA. The company's objects include the maintenance of a premium price level for Scottish farmed salmon. Until the end of 1989 SSB membership consisted of 80 % SSGA members and 20 % SSFA members. In December 1989 the SSFA withdrew from the SSB.

(7) The SSFA was formed in June 1985. It represents, on a voluntary basis, the interests of the 59 salmon farms currently operational in the Shetland Islands.

### D. The market

(8) Salmon farming began in the 1960s. The industry developed slowly at first but advances in fish husbandry and factory-farming techniques have revolutionized the industry over the last decade. Norway plays a leading role in the production of farmed salmon. Norwegian farmed salmon production grew from 601 tonnes in 1974 to 45 675 tonnes in 1986 and 114 866 tonnes in 1989. Norway's share of the Community market for farmed salmon amounted to approximately 58 % in 1986 and 1987 and increased to 65 % in 1988 and an estimated 70 % in 1989. Scottish production grew from 250 tonnes in 1978 to 28 000 tonnes in 1989. Of this, Shetland farmed salmon production increased from 700 tonnes in 1985 to 6 731 tonnes in 1989. Scotland's share of the Community market is 26 %. Ireland's production, 69 % of which is exported to the EC, increased from 1 000 tonnes in 1987 to 6 000 tonnes in 1989. From 1986 to 1989 the combined Irish and Scottish shares of the Community market remained stable at around 32 %, while Community consumption increased by nearly 190 %. However, in 1989 Community producers saw their market share fall by 2,3 % on the previous year, their sales having risen by only 31,59 % against an increase in Community consumption in 1989 of 40,98 %.

- (9) Consumption of fresh and chilled salmon in the Community rose from 36 500 tonnes in 1986 to an estimated 106 000 tonnes in 1989, an increase of some 190 %. The major Community markets are France, the United Kingdom and Germany.

France is the largest Community market for farmed salmon. In 1987 it imported 46 000 tonnes, of which the bulk was fresh salmon mainly from Norway but which significant quantities from Scotland and Ireland. Imports of farmed salmon into France in 1987 included :

(in tonnes)			
Country	Fresh gutted	Frozen	Smoked
Norway	9 868	2 152	150
United Kingdom	2 681	234	341
Ireland	1 116	31	48

French imports of salmon increased by 250 % over the period 1980 to 1987.

The United Kingdom is the second largest salmon market in Europe after France, consuming approximately 16 000 tonnes in 1987. It is a major producer and exporter of farmed salmon with a large domestic market. Scottish farmed salmon now represents nearly 60 % of United Kingdom supplies, having risen from negligible proportions in 1980. The United Kingdom also imports farmed salmon from Norway.

Germany imported 11 000 tonnes of salmon in 1987. Seventy percent of salmon imports are fresh chilled, the remainder is mainly smoked. Germany imports from Denmark substantial quantities of smoked salmon of Norwegian origin. Imports into Germany in 1987 included :

(in tonnes)			
Country	Fresh gutted	Frozen	Smoked
Norway	4 566	423	94
United Kingdom	267	5	14
Denmark	751	397	1 978

- (10) Despite the significant increase in consumption of farmed salmon in the Community, an analysis of salmon prices shows a decline over recent years. The cif price of imported salmon fell by 17 %

between 1986 and 1989. The impact of price competition on the French, Dutch and German markets coupled with the effect of volume forced Community producers to cut the price of sales on the Community market. Scottish trade prices fell by 25 % over the period 1988 to 1989. There was a drop of 18 % in weighted average sale prices during the second half of 1989.

However, a comparison of the prices reported in the SSGA price information system for the last 12 weeks of 1989 with those for the first 12 weeks of 1990 show that the prices of Scottish salmon exported to Europe increased by nearly 25 % on average for gutted fish. The figures for 1 to 2 kg gutted fish show an even greater price increase, 30 % on average. SSGA records show that prices within the United Kingdom rose by between 9 to 16 %. Norwegian prices reported by the SSGA to its members show average increases of around 13 to 14 % for this period.

E. Price-fixing agreement

- (11) The decline in salmon prices in 1989 was attributed to a combination of over production of farmed salmon by Norwegian producers and breaches of the Norwegian minimum price system which set the bench-mark for the industry. Following the implementation in 1985 of legislation liberalizing smolt production in Norway the number of smolt-production licences increased from 152 in 1985 to 692 in 1988. This resulted in an over production of smolts, some 20 million of which were put in sea cages on a temporary basis in 1988. Following the growth cycle of 16 to 18 months these smolts came on the market in 1989 adding a surplus 30 000 tonnes of farmed salmon to available supplies. As a result of this oversupply, farmed salmon was being sold at prices below the established minimum prices. On 8 June 1989, in the face of intense pressure from Norwegian exporters who claimed that Norwegian minimum prices were not competitive, the FOS was forced to reduce its minimum prices by an average of 15 %.

Despite this measure, prices for farmed salmon did not stabilize. A fax sent to the FOS on 22 November 1989 by the chairman of the SSB states, 'Since we spoke about two weeks ago, all producers and sellers in Scotland have seen a further drastic reduction in prices in all markets but particularly in France and Germany. I am sorry to report that on each occasion, heavy supplies of Norwegian salmon are cited as being the cause. In addition, all sectors of the trade report that the minimum prices are being consistently breached and to all extents and purposes do not exist.'

- (12) On 13 December 1989 the SSB, acting on behalf of the SSGA and the SSFA, and the Irish Salmon Growers' Association (ISGA) lodged a complaint with the Commission in respect of the alleged dumping in the Community of Norwegian salmon. On 2 February 1990 the Commission announced the initiation of an anti-dumping proceeding concerning imports of Atlantic salmon originating in Norway. Contacts were made between the Commission and the Norwegian Government during the course of the investigation involved. The investigation resulted in a finding that Norwegian salmon was being sold in the Community with a dumping margin of 11,3 %, causing in a drop in prices in the Community and causing financial difficulties for Community producers. During the course of the investigation the Norwegian fish farming industry took action to try to restore the effectiveness of its minimum price scheme. Concurrently, the Norwegian Government adopted a series of measures aimed at restricting the volume of salmon supplied to the market. Further, it offered to enter into consultations with the Commission, upon notification of a market problem causing an abnormal development of prices, with a view to finding appropriate solutions to these problems in conjunction with the Norwegian industry and exporters. Having regard to these circumstances, together with the fact that salmon prices on the Community market had stabilized in 1990, and despite the finding of a dumping margin of 11,3 %, the Commission considered that it was unnecessary to impose anti-dumping measures in respect of farmed salmon originating in Norway. Accordingly, the anti-dumping proceeding was terminated without the imposition of trade protection measures. Commission Decision 91/142/EEC to this effect was adopted on 15 March 1991<sup>(1)</sup>.

- (13) The Norwegian salmon farming industry was in difficulties at this time. The combined pressure of severe market conditions affecting its members and complaints from other producers, culminating in the initiation of anti-dumping proceedings, resulted in FOS taking steps to improve the situation.

It reviewed its minimum price system and drew up concrete plans to restore its effectiveness. The new plan, which was to take effect from 2 January 1990, proposed the introduction of a freezing programme for fresh salmon which producers could not sell on

the market at the minimum price level. FOS would pay farmers the full minimum price for such fish. In order to finance the freezing storage, FOS would levy on all fresh fish sales a Nkr 5 surcharge. This in effect meant that an exporter would need to pay the fish farmer at least Nkr 5 above the current minimum prices in order for the fish farmer to deliver fresh fish to the exporter rather than to FOS for freezing. These measures were expected to result in higher prices for Norwegian salmon. The Commission was notified of these measures on 13 December 1989.

- (14) Before implementation of the new measures, however, FOS contacted SSB on 14 December 1989 to advise them of the details. A letter dated 15 December 1989 from SSB to its members attaching a circular outlining the new measures stated, referring to the pressure brought to bear against the Norwegians by other salmon growers, 'The attached paper indicates this pressure has had a material effect. It is hoped that the Norwegian action will improve the position considerably, i.e. by maintaining the official minimum prices and increasing them by Nkr 5 per kilo for fresh and chilled salmon. There is still some way to go by the Norwegians before we would be convinced that the action would be 100 % effective, and this will not be evident until January.' The circular dated 15 December 1989 stated, 'We were contacted yesterday by the Norwegian Fish Farm Sales Organization (FOS) who advised us of their new proposals to introduce stability into the market and to improve prices.' Details of the proposals were then outlined. The circular continued, 'The effect of this proposal will be dramatic since the integrity of the minimum price system will be re-established and will in effect be increased for fresh fish by Nkr 5 per kg.' It concludes, 'This is clearly a most welcome move by the Norwegian Fish Farm Sales Organization and one which should have an enormous impact on our own pricing.'

On 19 December 1989 FOS sent faxes to the SSB, the ISGA, the SSFA, and representatives of salmon producers in The Faroes and Iceland stating, 'The Fishfarmers Sales Organization and the Norwegian exporters have agreed upon a plan to stabilize and improve the salmon prices. To introduce this plan, we should like to arrange a telephone meeting at 9.30 hrs (Norwegian time) Wednesday 20 December.'

Hand-written notes of this telephone conference, taken from an office at SSB premises, recorded details of the proposed Norwegian plan and

<sup>(1)</sup> OJ No L 69, 16. 3. 1991, p. 32; Corrigendum OJ No L 75, 21. 3. 1991, p. 64.

included the comments 'no benefit to fish farmer, benefit to Scots, Irish, Faroes, Iceland. Norwegian fish farmers paying the burden. Support from others ... little competition ... will follow suit ... test period for first half of year ...'.

Following this telephone conference the SSB sent a circular dated 20 December 1989 to its members stating:

1. We are confident that the Norwegian proposals will be effective in stabilizing and improving prices.
2. The speed with which the proposals are implemented will be affected by the response of other producing countries.'

It then cited proposed Norwegian minimum prices and Scottish minimum prices adding a premium of 5 to 10 % which Scottish salmon has traditionally achieved over Norwegian prices.

The circular continued, 'These Norwegian proposals are perhaps the most dramatic event in the history of the salmon farming industry.'

On 21 December 1989, following the telephone conference, the SSFA sent a circular to its members stating: 'The Norwegian initiative is extremely welcome and should, with effect from 2 January 1990 be instrumental in dramatically increasing prices for fresh salmon to at least Nkr 5 per kg above Norwegian minimum prices. However, in order to succeed, the United Kingdom and Irish industries must give their complete and immediate support. ... In particular, therefore all sales companies and members who sell independently are strongly urged to ensure that they at least bring their prices into line with Norway from 2 January 1990 onwards.'

The SSB circulars dated 15 and 20 December 1989 were faxed to FOS on 22 January 1990 with the comment, 'Please find attached the letters put out to all our members, which explained the effects of FOS proposals. It is in the interests of all salmon farmers to adhere to these levels.'

The Commission has further evidence of communication between the Scottish organizations and FOS to clarify the situation before the introduction of the new minimum prices.

- (15) The new minimum price scheme took effect on 2 January 1990 and in the first week the scheme resulted in the freezing of 35 000 tonnes of Norwegian farmed salmon. Following the introduction of the new scheme communication continued between the parties to ensure coordination of their pricing strategies.

In a circular to its members dated 1 February 1990 the SSB quotes Norwegian minimum prices in the market and continues, 'we made contact with the Norwegian Fish Farm Sales Organization (FOS) to ascertain why their system did not appear to be taking effect on the smaller sizes of fish. The response was as follows:

1. They were not aware that Norwegian fish were being generally quoted at these price levels. They undertook to investigate any particular case which was brought to their attention ...'

A copy of this letter was faxed to FOS on 2 February 1990 with the comment:

'As promised, I attach a copy of my letter to all SSGA members and sales groups. I hope this will help quell the rumours which are so damaging.'

The Commission has other communications between FOS and the SSB exchanging price information and drawing attention to breaches of the agreement.

On 18 April 1990 FOS sent a fax to the SSB stating 'FOS' plan to increase and to stabilize the salmon prices is carried out with only small deviations from the original plan.' It then outlined quantities and prices and expressed the frustrations of the Norwegian fish farmers in the following terms,

'They are feeling little support in their attempt to increase the prices. We experience from time to time unbelievable low Scottish prices ... The Norwegian fish farmers' willingness to cooperate seems to meet increasing difficulty.

I feel sure that the less intelligent way to solve the temporary problems we are in, is to fight each other.

A cooperation as in "good old days", is a much better way to go.'

The SSB replied to this fax by letter dated 20 April 1990 in which it states, '... the members present at our meeting yesterday wished me to convey to you their strong appreciation of the efforts of your organization and its members which have reversed the price declines in the marketplace.' The suggestion is made for the visit of a delegation to Norway and the hope that the visit will be of value 'in maintaining and strengthening the dialogue between our two industries.'

A circular dated 24 April 1990 from the SSB to its members concludes, 'In summary then the new Norwegian minimum prices are now very well established and have raised general market price levels throughout the world.'

In a FOS memorandum entitled 'current situation sales of salmon in Norway' dated 27 April 1990 and sent to SSB on 3 May 1990, the comment is made, 'Today, in late April, the plan has been successfully implemented and we are pleased to observe that the positive effects exceed our sober forecast in most areas .... Prices are improving and are approaching a level corresponding to the objective of the measures introduced in 1990.'

- (16) On 2 October 1991, the SSB sent to all members of the SSGA and the SSFA letters in which it stated that 'it is not the function of the SSGA or SSFA to make recommendations about the prices you charge or about any aspect of your pricing policy or in any way whatsoever to influence your decisions about the prices you charge'. The communications to members dated 15 and 20 December 1989, which referred to Norwegian minimum prices, were formally withdrawn. On the same date a letter was sent to FOS advising them of this action.

## II. LEGAL ASSESSMENT

### A. Article 85 (1) of the EEC Treaty

- (17) Article 85 (1) prohibits as incompatible with the common market all agreements between 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, and, in particular, those which directly or indirectly fix prices.

#### 1. Undertakings

- (18) The Norwegian Fish Farmers' Sales Organization (FOS), the Scottish Salmon Farmers' Marketing Board Limited (SSB), the Scottish Salmon Growers' Association Limited (SSGA) and the Shetland Salmon Farmers' Association (SSFA) are associations of undertakings within the meaning of Article 85 (1).

These organizations act on behalf of their members who are producers of farmed salmon and, therefore, undertakings. An agreement between such associations of undertakings which has as its object or effect the restriction of competition within the common market between their members who are undertakings falls within the type of conduct which is prohibited by Article 85 (1).

## 2. Agreement

- (19) It is considered that during the course of a series of communications, both written and verbal, between FOS, the SSB, the SSGA and the SSFA, an agreement was reached. The **object** of the agreement was to fix minimum prices for farmed salmon. The Commission considers that there were two elements in this agreement:

- FOS measures on the one hand, minimum prices backed by a freezing scheme,
- on the other, supporting measures taken by the SSB, the SSGA and the SSFA to ensure price discipline on the part of their members.

Prior to the implementation of the new minimum price system, FOS contacted the SSB on 14 December 1989 to advise them of its plan to introduce stability into the market and to improve prices. Following this, on 20 December 1989, FOS held a telephone conference with representatives of farmed salmon producers in Europe, including the SSB and the SSFA. It is the Commission's view that the purpose of this telephone conference was, in exchange for FOS's commitment to price discipline through its minimum price system, to secure the support of the other producers for the new measures and to ensure price discipline on their part by maintaining, on the basis of the Norwegian minimum price, the traditional price differential between Scottish and Norwegian farmed salmon.

Following the telephone conference, the SSB and the SSFA sent circulars to their members in which they outlined details of the FOS measures, cited the new Norwegian minimum prices and gave new Scottish prices based on the Norwegian minimum prices plus the traditional Scottish premium of 5 to 10 %. They strongly urged their members to comply with the new minimum prices. The SSB later faxed copies of its circulars to FOS, thus demonstrating its implementation of the agreed supporting measures.

In its defence to the statement of objections FOS stated that the purpose of the telephone conference was to inform the British and Irish salmon farmers of the new measures and to persuade them to withdraw the anti-dumping complaint. In this regard, it is noted that the SSB had had this information since 14 December. Furthermore, this defence does not explain the follow-up measures taken by the SSB and the SSFA. It is also noted that salmon producers not party to the anti-dumping procee-

dings, such as those from the Faroes and Iceland, were invited to participate in the telephone conference. FOS has stated that the new measures were taken unilaterally. Even if those measures were unilateral at the outset, this does not prevent them from also being part of the object of the agreement.

Taking all these elements together it is considered that the measures implemented by FOS on 2 January 1990 were used as the basis of a coordinated plan to stabilize and increase salmon prices. The SSB, the SSGA and the SSFA contributed to this plan by assuring FOS that they had urged their members to exercise price discipline in support of the Norwegian action. Thus, any uncertainty on the part of FOS as to the reaction of SSGA and SSFA members to the Norwegian measures was substantially reduced, if not eliminated.

The cooperation between the organizations continued after the implementation of the new measures. The SSB provided FOS with the confidential volume and price statistics reported by SSGA members for the first quarter of 1990 and requested a comparison with prices being achieved by FOS members. The SSGA price information system was one of the instruments used to implement the agreement.

The regular contacts to exchange price information provided the parties with an opportunity to monitor the success of their agreement. There is evidence that details of producers selling below the minimum price were exchanged between the parties and undertakings given to investigate breaches by their respective members of the agreed pricing system.

### 3. Restriction of competition

- (20) The agreement had as its **object and effect** the restriction or distortion of competition within the common market. An agreement to fix prices *per se* limits competition within the meaning of Article 85 (1). The agreement between FOS and the SSB, the SSGA and the SSFA to fix minimum prices was intended to ensure price discipline and thus eliminate competition.

The agreement enabled the parties to coordinate their pricing strategies in order to stabilize and increase market prices for their produce. The agreement thus reduced uncertainty on the part of each organization as to the activities of the other.

The economic context in which the agreement was made also provides further evidence of its restrictive object and nature. At that time the farmed salmon industry had considerable surplus capacity and, as a result, prices were falling. The Norwegians were held responsible for this situation by their competitors. As a result of international pressure culminating in the initiation of an anti-dumping proceeding by the Commission upon notification of a complaint by the SSB and the ISGA, the Norwegians undertook a review of their minimum price system. It is in this context that the agreement between FOS and the SSB, the SSGA and the SSFA to fix minimum prices was made. FOS, the major supplier in the market, could unilaterally have put into effect controls to stabilize prices. FOS, however, required discipline from its competitors. The Scottish producers of farmed salmon agreed to comply with Norwegian measures to increase prices and took the steps outlined above to implement the agreement.

By planning common action on price initiatives the producers has as their object the elimination of the risks which would be involved in any unilateral attempt to increase prices.

There is evidence to prove that the effect of the agreement between FOS and the SSB, the SSGA and the SSFA was an increase in the price of farmed salmon in the Community. Prices of farmed salmon from Norway and Scotland rose significantly in the weeks following the introduction of FOS' minimum price system. An increase was noticeable within weeks of the telephone conference of 20 December 1989 and the introduction of the new minimum prices on 2 January 1990.

### 4. Effect on trade between Member States

- (21) The agreement between the producers was likely to have an appreciable effect on trade between Member States by increasing the market price for farmed salmon within the common market.

Producers in Norway and Scotland account for over 90 % of farmed salmon supplied to the Community. Their agreement to fix prices at an artificial level was designated to, and did, restrict price competition throughout the Community. It was likely to have an appreciable effect on trade, in particular, between the continental Member States, which are the major consumers of farmed salmon, and those Member States which are producers of farmed salmon.



## B. Inapplicability of Council Regulation No 26

- (22) Regulation No 26<sup>(1)</sup> provides for the exemption from the application of Article 85 (1) of certain agreements which form an integral part of a national market organization or are necessary for the attainment of the objectives set out in Article 39 of the Treaty.

For Article 2 (1) of Regulation No 26 to apply, the agreement must relate to a product listed in Annex II to the Treaty. Fish is a product which is listed in this Annex.

However, it is considered that the agreement between FOS and the SSB, the SSGA and the SSFA cannot be exempted from the application of Article 85 (1) by the provisions of Article 2 of Regulation No 26 for the following reasons:

1. Provision has been made for the establishment within the Community of a common organization of the market in fishery products by Council Regulation (EEC) No 3796/81<sup>(2)</sup>. Given the existence of the common organization of the market, there is no scope for a national market organization. For that reason, the agreement which is the subject of this procedure cannot be considered to form an integral part of a national market organization.
2. The agreement cannot qualify for the exemption contained in Regulation No 26 since it was not necessary for the attainment of the objectives set out in Article 39 of the Treaty. It was not necessary because Community law provides procedures aimed at redressing economic difficulties such as that described above. In this case an anti-dumping procedure was availed of. Following a complaint in December 1989 by the ISGA and the SSB the Commission initiated an anti-dumping proceeding in respect of imports of farmed salmon from Norway. Concurrently, however, and without awaiting the outcome of that proceeding, the SSB, the SSGA and the SSFA entered into a private price-fixing agreement with FOS, the organization representing Norwegian producers of farmed salmon.

A further possible remedy available under Community law was the safeguard clause contained in Regulation (EEC) No 3796/81.

This clause specifically provides for the granting, in certain circumstances, of compensation to producers of salmon in order to safeguard their income level.

Regulation (EEC) No 3796/81 also provides for the establishment of a minimum import price for fish.

Accordingly, having regard to the procedures available under Community law, it was not necessary, within the terms of Article 2 of Regulation No 26, for the parties to enter into an agreement to fix prices.

Even if these procedures resulted in unilateral measures by the Commission resolving the problem, the parties could in no way justify taking supplementary supporting measures in contravention of Article 85.

3. The agreement could not qualify for the exclusion provision in the second sentence of Article 2 (1) of Regulation No 26 since it is not an agreement of farmers, farmers associations or associations of such associations belonging to a single Member State.

## C. Article 85 (3)

- (23) The agreement between FOS and the SSB to fix minimum prices does not qualify for an exemption under Article 85 (3) since it was not properly notified in accordance with Article 4 of Regulation No 17.

Nor was the agreement exempt from notification under paragraphs 1 and 2 of Article 4 (2) of Regulation No 17.

Even if the agreement had been properly notified, it could not have been exempted since, given the remedies provided by Community law, the restrictions imposed on the undertakings concerned were not indispensable to the attainment of the objectives outlined in Article 85 (3) and, in particular, could not allow consumers a fair share of the resulting benefit.

## D. Article 3 of Regulation No 17

- (24) The Commission considers that the infringement has now ended. In October 1991, the SSB and the SSGA wrote to members withdrawing the circulars referring to Norwegian minimum prices. In November 1991, the bankruptcy of FOS brought the Norwegian minimum price system to an end.

<sup>(1)</sup> OJ No 30, 20. 4. 1962, p. 993/62.

<sup>(2)</sup> OJ No L 379, 31. 12. 1981, p. 1.



However, it is the Commission's practice to issue a decision establishing an infringement, even in cases where the infringement has ended, if the decision might clarify a point of law and thus prevent the same or similar infringements from being committed in the future, as stated in Commission Decision 75/497/EEC<sup>(1)</sup>. Such a practice makes for legal certainty and has been endorsed by the Court of Justice (see ground 25 of the Court's judgment in Case 7/82 GVL v. Commission [1983] ECR 483).

In this case the point of law requiring clarification is that undertakings or associations of undertakings, when confronted by a situation requiring the intervention of the Community by way of procedures such as an anti-dumping proceeding or safeguard clauses, are not permitted under Regulation No 26, either in addition to or instead of such procedures, to enter into a restrictive private agreement in order to remedy the situation,

HAS ADOPTED THIS DECISION :

*Article 1*

Fiskeoppdretternes Salgslag A/L, the Scottish Salmon Growers' Association Limited, the Scottish Salmon Farmers' Marketing Board Limited and the Shetland Salmon Farmers' Association infringed Article 85 of the

EEC Treaty by entering at the end of 1989 into an agreement to fix minimum prices for farmed salmon.

*Article 2*

This Decision is addressed to :

- The Scottish Salmon Growers' Association Limited, Drummond House, Scott Street, UK-Perth PH1 5EJ,
- The Scottish Salmon Farmers' Marketing Board Limited, Drummond House, Scott Street, UK-Perth PH1 5EJ,
- The Shetland Salmon Farmers' Association, 18 Alexandra Buildings, Lerwick, UK-Shetland ZE1 0LL,
- The Fiskeoppdretternes Salgslag A/L, Pir-Senteret, N-7005 Trondheim.

Done at Brussels, 30 July 1992.

*For the Commission*

Leon BRITTAN

*Vice-President*

---

<sup>(1)</sup> OJ No L 228, 29. 8. 1975, p. 3.