

# COMMISSION

## COMMISSION DECISION

of 2 December 1977

relating to a proceeding under Article 85 of the EEC Treaty

(IV/28.948 — Cauliflowers)

(Only the French text is authentic)

(78/66/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 Council Regulation No 17 of 6 February 1962<sup>(1)</sup>, and in particular Article 3 thereof,

Having regard to Council Regulation No 26 of 4 April 1962<sup>(2)</sup>, and in particular Article 1 thereof,

Having regard to the application made on 14 October 1974 pursuant to Article 3 (2) (b) of Regulation No 17 by the Groupement d'Exportation du Léon, Saint-Pol-de-Léon, France,

Having heard the undertakings and associations of undertakings concerned in accordance with Article 19 (1) of Regulation No 17 and with Regulation No 99/63/EEC of 25 July 1963<sup>(3)</sup>,

Having regard to the opinion delivered on 27 July 1977 by the Advisory Committee on Restrictive Practices and Dominant Positions in accordance with Article 19 of Regulation No 17,

Whereas :

### I. THE FACTS

The application for a finding that Article 85 of the Treaty has been infringed made by the Groupement d'Exportation du Léon (hereinafter referred to as 'GreX') relates to the behaviour of a number of Breton vegetable growers and dealers in respect of their trade in certain vegetables by means of auction sales. The main features of the relevant market should, however,

be described briefly before the conduct of these groups of growers and dealers is considered.

### A. Description of the relevant markets

1. Vegetable production in Brittany is geographically concentrated on the narrow band of coastal land roughly 150 kilometres long in the north of the French Departments of Finistère, Côtes-du-Nord and Ille-et-Vilaine. The main crops grown in this area, which enjoys a mild, humid climate, are cauliflowers, artichokes and early potatoes. Some 70 % of French cauliflowers and artichokes and 25 % of early potatoes come from this area.

Aggregate cauliflower production in all the Community countries is nearly 1 500 000 tonnes. Most of this is grown in three Community countries, Italy, France and the United Kingdom, which together account for about 90 % of Community cauliflower output. Figures for 1976 show that 570 000 tonnes were produced in Italy, 443 000 tonnes in France and 254 000 tonnes in the United Kingdom. France alone accounts for some 30 % of Community cauliflower output, chiefly in the vegetable-growing area in northern Brittany. This area produces more than 300 000 tonnes of cauliflowers, representing some 70 % of all French production. There are two varieties of cauliflower cultivated in Brittany, winter cauliflowers, harvested from December to the end of May, and autumn cauliflowers, harvested from October to December. Production of winter cauliflowers, varying from between 240 000 and 280 000 tonnes, is concentrated chiefly around Saint-Pol-de-Léon in northern Finistère and Paimpol in Côtes-du-Nord, whereas autumn cauliflowers, with production ranging from 35 000 to 50 000 tonnes depending on the season, are grown almost exclusively around Saint-Malo in Ille-et-Vilaine.

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

<sup>(2)</sup> OJ No 30, 20. 4. 1962, p. 993/62.

<sup>(3)</sup> OJ No 127, 20. 6. 1963, p. 2268/63.

Only two Community countries produce artichokes: Italy, with more than 600 000 tonnes annually, and France, with roughly 100 000 tonnes annually. Some 70 % of French production comes from Brittany, mostly around Saint-Pol-de-Léon.

Community production of early potatoes is in excess of two million tonnes, the main producer countries being Germany with 800 000 tonnes, France with 500 000 tonnes and the United Kingdom with 450 000 tonnes. Brittany accounts for approximately 25 % of the French output of early potatoes, most of them coming from the area around Saint-Malo.

2. Production of and trade in vegetables in the Community are governed by Council Regulation (EEC) No 1035/72 of 18 May 1972 on the common organization of the market in fruit and vegetables<sup>(1)</sup>. This Regulation establishes standards for a number of vegetables, including cauliflowers and artichokes, with regard to their quality, size, packing and labelling.

When there is a standard for a given product, that product may be marketed within the EEC only if it conforms to that standard. The Regulation further recognizes that the formation of producers' organizations, the members of which are required to comply with certain rules affecting matters such as marketing, is likely to further the attainment of the objectives of the common agricultural policy. Producers' organizations and associations of such organizations are permitted to set withdrawal prices, any withdrawal measures being financed by the member producers. The Member States may grant aids to producers' organizations during the five years following their formation. The Regulation also provides for a system of Community intervention prices so that vegetables may be withdrawn from the Community market where prices fall below a level set each year by the Council. So far only cauliflowers and tomatoes are subject to an intervention system, and the cost of such withdrawals is borne by the EAGGF. Lastly, Regulation (EEC) No 1035/72 provides for protective measures where low-price imports from non-Community countries threaten to disrupt the Community market.

3. The current situation regarding the supply of vegetables from Brittany is the result of profound changes which began to take place around 1960. At that time the vegetable-growing areas around Saint-Pol-de-Léon, Paimpol and Saint-Malo were producing an average of 150 000 tonnes of cauliflowers and 70 000 tonnes of artichokes.

Roughly 20 % of this was marketed by production and sales cooperatives and 80 % by dealers and shippers, against whom the growers were virtually unable to defend themselves. Several thousand individual growers were each day forced to negotiate with a hundred or so dealers, who were able to impose whatever terms they liked. Each morning the growers delivered a large proportion of their produce to the packing centres operated by the dealers and shippers, no price being agreed in advance. All other sales were transacted by private contract under the total domination of the dealers and shippers and when production outstripped consumer demand, prices tended to fall catastrophically. As a result, a group of young farmers decided to form a producers' organization, the members of which were to agree to market their output in accordance with a number of common rules based on the following principles:

- the establishment of a system of 'dial' auction sales, at which the member growers undertook to sell all their produce,
- common rules on sorting, size-grading and weighing,
- agreed minimum sale prices in order to contain the fall in prices at times of overproduction.

In December 1960, about 3 000 farmers agreed to form an organization on this basis and, on 31 March 1961, they formed an agricultural cooperative (Société d'intérêt Collectif Agricole) called the 'SICA-Marché de Vente aux Enchères du Nord-Finistère'<sup>(2)</sup> ('SICA de Saint-Pol-de-Léon') at Saint-Pol-de-Léon. On 22 November 1961 the SICA de Saint-Pol-de-Léon and the Union des Expéditeurs et Exportateurs en Fruits et Légumes du Finistère signed an agreement requiring shippers belonging to the latter association to obtain supplies only from the auction sales held by the SICA de Saint-Pol-de-Léon. Between 1964 and 1966 agreements were entered into by the SICA with three major agricultural cooperatives — the Société de Commercialisation des Primeuristes (SOCOPRIM), the Syndicat spécialisé des Producteurs de l'Armor (SYPA) and the Coopérative des Agriculteurs de Bretagne — which led to the formation of an association of marketing groups where the member producer groups undertook to sell all their produce through the auction sales held by the SICA de Saint-Pol-de-Léon. In the Ille-et-Vilaine a similar process of organization

(1) OJ No L 118, 20. 5. 1972, p. 1.

(2) In April 1975 the 'SICA-Marché de Vente aux enchères du Nord-Finistère' was renamed 'Société d'Investissements et de Coopération Agricoles'.

led to the introduction in 1965 of auction sales at Saint-Méloir-des-Ondes, managed by an agricultural cooperative which included not only the growers that took part in the auction sales but also, unlike the system at the auction sales at Saint-Pol-de-Léon, all the shippers admitted to the auction sales as buyers. This cooperative, called 'Société Interprofessionnelle des Producteurs et Expéditeurs de Fruits, Légumes, Bulbes et Fleurs d'Ille-et-Vilaine — SICA — SIPEFEL' (SIPEFEL), has also entered into agreements with two other producers' organizations (APPRM and Coopérative des Agriculteurs de Bretagne) for the formation of the Association de Mise en Marché de Saint-Méloir-des-Ondes, whose member producers are required to sell solely through the auction sales.

In March 1967 a third system of auction sales, the SICA du Goëlo Trégor, was set up at Paimpol; following amalgamation with a major cooperative in the Côtes-du-Nord, this became 'l'Union des coopératives de Paimpol et Tréguier' in 1974.

Meanwhile, in 1965 the amalgamation of all the producers' organizations in Brittany had led to the formation of the 'Comité Economique Agricole Régional Fruits et Légumes de la région Bretagne'. This Committee ('CERAFEL') is an association of producers' organizations which, under the French Law No 62-933 of 8 August 1962, may extend the rules applied by its members to production and marketing, with the exception of sales contracts themselves, to the whole region.

As a result of this organization of growers into particularly well structured and coordinated groups, the bargaining strength of growers and buyers on the Brittany cauliflower and artichoke markets is now quite different from what it was in 1960. The marketing of more than 90 % of all cauliflowers, artichokes and early potatoes grown in Brittany is handled by three associations of producers' organizations, which sell their produce by auction at Saint-Pol-de-Léon, Paimpol and Saint-Méloir-des-Ondes. These associations are :

- Association des Groupements de Mise en Marché du Nord-Finistère, formed by the SICA de Saint-Pol-de-Léon, SOCOPRIM, SYPA and the

producers in the Saint-Pol-de-Léon vegetable-growing area belonging to the Coopérative des Agriculteurs de Bretagne ;

- Union des Coopératives de Paimpol et Tréguier, consisting of the Coopérative de Goëlo Trégor, the Coopérative La Presqu'île and the Côtes-du-Nord producers belonging to the Coopérative des Agriculteurs de Bretagne ;
- Association de Mise en Marché de Saint-Méloir-des-Ondes, consisting of the SIPEFEL member producers, the APPRM and the producers in the Saint-Malo vegetable-growing area belonging to the Coopérative des Agriculteurs de Bretagne.

The remainder of the cauliflowers, artichokes and early potatoes grown in Brittany (less than 10 %) is marketed by four cooperatives : l'Union des Coopératives Agricoles du Nord-Finistère, la Paimpolaise, la Perrosienne and the GAARM (Groupement des Associations Agricoles pour l'Organisation de la Production et de la Commercialisation des Pommes de Terre et Légumes de la Région Malouine). All these producer groupings, including the four independent cooperatives, belong to CERAFEL.

On the distribution side the organization of dealers and shippers (hereinafter referred to as 'dealers') varies according to where they do their business. The 60 dealers who buy at the Saint-Pol-de-Léon auction sales belong to one or other of the two associations of dealers on that market.

The Union des Expéditeurs et Exportateurs en Fruits et Légumes du Finistère ('Union des Expéditeurs'), the more powerful of the two, consists of 44 dealers, including the largest in business on that market, the remainder belonging to the GEEP (Groupement des Expéditeurs et Exportateurs Primeuristes du Nord-Finistère). At Paimpol only 14 dealers regularly buy at the auctions held by the Union des Coopératives de Paimpol et Tréguier. Unlike the dealers at Saint-Pol-de-Léon and Saint-Méloir-des-Ondes, they belong to no association. Lastly, the 46 dealers who buy at the Saint-Méloir-des-Ondes auctions are members of SIPEFEL and are also affiliated to the 'Syndicat des Expéditeurs et Exportateurs en Légumes et Pommes de Terre Primeurs de la Région Malouine' (Syndicat des Expéditeurs de Saint-Malo).

4. The auctions at Saint-Pol-de-Léon, Paimpol and Saint-Méloir-des-Ondes are held in a large hall using the system of a display dial against which bids are made as the price indicated falls. Each buyer admitted to the auction has his own button, which he presses when he wishes to make a bid; the needle on the dial then stops at the price indicated. The three 'dial' auction centres at Saint-Pol-de-Léon, Paimpol and Saint-Méloir-des-Ondes can be linked up electronically, so that goods offered for sale at Centre A may also be purchased by buyers at Centres B or C. Such link-ups are used as follows:

- between Saint-Pol-de-Léon and Paimpol for the winter cauliflowers and artichokes sold on those markets;
- between Paimpol and Saint-Méloir-des-Ondes, but only for winter cauliflowers for sale at Paimpol; and
- between all three centres, but only for early potatoes.

Payment for all transactions between growers and dealers is carried out through the agency of the particular organization holding the relevant auction (SICA de Saint-Pol-de-Léon, SIPEFEL, or Union des Coopératives de Paimpol et Tréguier). Under the current terms of payment, to be made within two or three weeks depending on the product, the dealer makes payment for his purchase to the organizer at the price shown on the auction dial for the quantities taken. The organizer then transmits the amount due to each grower in accordance with the quantities sold by him, less three centimes per kilogram of produce or per head of cauliflower to cover the costs of running the auction.

Each year the Council of the European Communities, under the common agricultural policy, sets intervention prices for cauliflowers below which producers' organizations may not offer their members' produce for sale. For each quantity thus withdrawn from the market producers are paid the intervention price. These operations are entirely financed by the EAGGF, which pays the sums to be repaid to the various regional bodies. In Brittany CERAFEL is responsible for the receipt, apportionment and payment of these sums on behalf of the local producers' organizations. For other vegetables CERAFEL may itself set a withdrawal price, but financing of withdrawal operations is then handled through an equalization system extending to all the participating growers.

Vegetables offered for sale at the auctions are either packed or in bulk. At Saint-Pol-de-Léon and Paimpol 45 % of artichokes, more than 60 % of cauliflowers and all early potatoes are already packed before being put up for auction. This is done by packers with specially equipped facilities who are under contract to the SICA. The remainder, sold in bulk, is packed by the dealers in their own facilities. Virtually all vegetables sold at the Saint-Méloir-des-Ondes auctions, except early potatoes, are prepacked.

5. The main sales outlets for cauliflowers grown in Brittany are the export markets, as 50 to 60 % are exported, giving an approximate volume of 100 000 tonnes. The main export markets are Germany (40 to 50 000 tonnes), the United Kingdom (15 to 30 000 tonnes) and the Benelux (20 to 25 000 tonnes). From external trade statistics for the past 10 years it can be seen that the volume of sales to these three markets has remained fairly stable, apart from a slight increase in sales to Germany. Virtually all the other vegetables grown in Brittany are for French domestic consumption, only 10 % of the early potatoes and less than 6 % of the artichokes being exported.

#### B. The conduct of the organizations concerned

With regard to the organization of the three vegetable auctions, it is specifically the terms for admission thereto which have been contested and which require examination.

The producers or producers' organizations which sell at the auctions have undertaken to sell their entire crop of cauliflowers, artichokes and early potatoes through these auctions only. This exclusive commitment is consistent with Regulation (EEC) No 1035/72, on the common organization of the market in fruit and vegetables, Article 13 of which provides that the members shall have an 'obligation to sell through the organization' their total output of the product or products in respect of which they have become members.

In return for this exclusive commitment the producers' organizations responsible for the Saint-Pol-de-Léon and Saint-Méloir-des-Ondes auctions impose an exclusive purchasing obligation on dealers who buy at such auctions. Article 5 of the agreement made on 22 November 1961 by the SICA de Saint-Pol-de-Léon and the Union des Expéditeurs provides

that 'buyers undertake to make all their purchases at markets operated by the Marché de Vente aux Enchères du Nord-Finistère and to make no direct purchases elsewhere'. This originally applied only to cauliflowers and artichokes but was extended to early potatoes on 27 July 1966. Similarly Article 5 of the Standing Rules of SIPEFEL, dating from December 1974, requires dealers, when entering into individual agreements with SIPEFEL, to undertake to buy solely on the SIPEFEL auction markets and to refrain from purchasing elsewhere or from non-member growers. In practice, however, the organizations responsible for the auctions tolerate purchases made at the other auction centres and in other regions. The exclusive buying obligation, therefore, has so far been enforced only in the form of a ban on purchases from other growers in Brittany.

The producers' organizations and associations of dealers which are involved in organizing auctions at Saint-Pol-de-Léon and Saint-Méloir-des-Ones make it a condition of admission to the auctions that dealers shall have a packing facility employing paid staff and situated in the catchment area of the auction centre to which they have sought admission. This requirement to have such a packing facility is expressly provided for in the agreement dated 22 November 1961 and made between the SICA de Saint-Pol-de-Léon and the Union des Expéditeurs. Article 18 of the agreement states that 'to be accepted as a buyer ... a dealer must be a licensed shipper and have a packing facility and staff in the vegetable-growing region, and to be established in business on the market in question'. For admission to auctions at Saint-Méloir-des-Ones, Article 18 of the Statutes of the Syndicat des Expéditeurs de Saint-Malo of 5 November 1973 also provides that membership of the Syndicat is open only to dealers established in the Saint-Malo area who 'supply evidence of ownership of a business facility having suitable premises and staff'. The new version of the Statutes, dating from 19 March 1975, imposes the same obligation. These Statutes provide that a dealer seeking admission to membership of the Syndicat des Expéditeurs de Saint-Malo must, among other things, do business in the Saint-Malo area and have the facilities and staff usual in the trade. Individual agreements between dealers and SIPEFEL also require SIPEFEL to admit to the auctions only such dealers as belong to a federation and are licensed to trade in the geographical catchment area of the organization or of the Association de Mise en Marché. As the Syndicat des Expéditeurs de Saint-Malo is the only such federation in the Saint-Malo area, dealers seeking access to the Saint-Méloir-des-Ones auction sales must meet the

conditions imposed by the Syndicat des Expéditeurs de Saint-Malo, which include having a packing centre employing paid staff in the Saint-Malo area.

Under the earlier version of the Statutes of the Syndicat des Expéditeurs de Saint-Malo, new members could be admitted only after a resolution to that effect had been passed by a majority of two-thirds of those present in the general meeting. In the new Statutes the provision has been amended so that new members may now be admitted only on a favourable decision of a majority of the members of the Board of Directors, which consists of 12 members of the Syndicat appointed by the general meeting.

By virtue of the standing regulations of the Syndicat des Expéditeurs de Saint-Malo, each member dealer is 'obliged to purchase, work, dispatch or export goods only for his own account'. This rule was laid down on 5 November 1973 by the general meeting to ensure that dealers not admitted to the Saint-Méloir-des-Ones auction sales would not be supplied by member dealers. The reason was that on 17 September 1973 a major Saint-Pol-de-Léon dealer, GREX, having been refused admission to the Saint-Méloir-des-Ones auction sales, entered into a supply agreement with a dealer who was admitted, under which the admitted dealer undertook to make purchases for delivery to GREX. In spite of this contract, however, the dealer concerned remained wholly liable for payment in respect of all purchases made at the auctions. When the amended standing regulations came into operation, this dealer, after being excluded from the auctions for several days, was obliged to comply with the new standing regulations and to repudiate his contract with GREX.

On 24 October 1974 the SICA de Saint-Pol-de-Léon decided to impose more stringent terms of payment on GREX than on other dealers. In a statement of objections dated 3 September 1975, the Commission informed the SICA de Saint-Pol-de-Léon that it regarded these terms of payment as discriminatory and that it was proposing to find that the rules on competition in the EEC Treaty were thereby infringed. The SICA de Saint-Pol-de-Léon responded by amending its terms of payment to remove all discrimination between the various dealers who obtain supplies at its auction sales.

## II. APPLICABILITY OF ARTICLE 85 (1)

By virtue of Article 1 of Council Regulation No 26, the provisions of Article 85 (1) of the EEC Treaty apply, subject to Article 85 (2), to agreements between undertakings and to decisions by associations of undertakings in respect of the production of or trade in the products listed in Annex II to the Treaty <sup>(1)</sup>.

Article 85 (1) of the EEC Treaty 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.

The agreements and decisions concerning the organization and operation of vegetable auction sales at Saint-Pol-de-Léon and Saint-Méloir-des-Ondes, which are agreements between undertakings or decisions by associations of undertakings as the case may be for the purpose of Article 85 of the Treaty, impose on the parties thereto obligations and rules, some of which restrict competition.

1. The agreements between the producers' organizations participating in the Saint-Pol-de-Léon and Saint-Méloir-des-Ondes auctions and the dealers which obtain supplies there require those dealers to make all their purchases at those auctions. In practice, although this obligation is imposed by the agreements, the producers' organizations do not prevent dealers from purchasing from the other auction centres or in other regional markets. At present such purchases in other regions or at other auction centres are small. However, it is quite possible that if such purchases became more common, for example because access to other markets became freer, the exclusivity obligations could be enforced by those in charge of the auction sales. In any event the fact that this obligation is an integral part of the agreements entered into by the dealers and the producers' organizations participating in the auction sales enables the producers at any time to require compliance with the obligation. If they were to do so, the three Breton auction centres would then be segregated from each other, substantially

restricting competition between dealers on the various local submarkets. The exclusive buying obligation in those agreements therefore has the **object** of restricting competition within the common market.

2. The obligation to have a packing centre in the catchment area of the relevant auction centre is contained in Article 18 of the agreement between the SICA de Saint-Pol-de-Léon and the Union des Expéditeurs. It is also imposed by the agreements between the dealers and SIPEFEL, since these agreements confine access to the auctions to dealers that are members of the Syndicat des Expéditeurs de Saint-Malo and the Statutes of the Syndicat require dealers to have a packing centre in the Saint-Malo area. This requirement for admission has the effect of making entry to the market more difficult for new dealers, especially as the investment entailed in complying with such a requirement is often unnecessary, as a large proportion of the vegetables offered at the auction sales are prepacked. Accordingly this requirement constitutes a substantial restriction of competition.

3. The Statutes of the Syndicat des Expéditeurs de Saint-Malo require a majority of the Board of Directors to be in favour before a new member can be admitted. This condition, imposed by the general meeting on 19 March 1975 in place of a clause originally adopted on 5 November 1973, requiring the approval of two-thirds of the members of the Syndicat, constitutes a decision by an association of undertakings for the purpose of Article 85 (1) of the Treaty. By virtue of the agreements between SIPEFEL and the Syndicat des Expéditeurs de Saint-Malo, only those dealers who are members of the Syndicat have access to the auctions at Saint-Méloir-des-Ondes. The decision of the Syndicat des Expéditeurs therefore has the effect of preventing new dealers from having access to the auctions at Saint-Méloir-des-Ondes. Since the Board of Directors of the Syndicat is composed of 12 dealers appointed by the general meeting, it may be assumed that the majority of the dealers buying at the Saint-Méloir-des-Ondes auctions are most unlikely to vote for the admission of a major new competitor, since the result of a new admission is likely to be a decline in the market shares held by the existing dealers, with a possible rise in the prices at which lots are sold at auction. It is by virtue of this condition that the application by GREX for admission to the Saint-Méloir-des-Ondes auctions has so far been refused. The resulting restriction of competition is particularly serious in that virtually all the autumn

<sup>(1)</sup> Cauliflowers, artichokes and potatoes are among the products listed in Annex II to the Treaty.

cauliflowers grown in Brittany come from the Saint-Malo area, so that only dealers who are members of the Syndicat des Expéditeurs de Saint-Malo may purchase them.

4. The rule that dealers must purchase, work and dispatch goods only on their own account, imposed by the Syndicat des Expéditeurs de Saint-Malo, is also a decision by an association of undertakings for the purposes of Article 85 of the Treaty. Financial security cannot be invoked as a justification for placing the responsibility of paying for purchases solely on dealers possessing a bidding button, as is the case with the three auctions concerned. The aim of this rule must therefore be to ensure that dealers not admitted to the Saint-Méloir-des-Ondes auctions cannot otherwise obtain autumn cauliflowers through admitted dealers. This is what happened in 1973 when a Saint-Malo dealer was obliged to stop supplying GREX under a supply contract. The consequence is that the application of this rule completes the restrictive effect of the other terms for access to the Saint-Méloir-des-Ondes auctions, since the marketing of autumn cauliflowers is strictly confined to members of the Syndicat des Expéditeurs de Saint Malo.

5. The obligations considered above at paragraphs 1 to 4 constitute restrictions of competition enabling access of new dealers to Breton auction sales to be prevented, limited or controlled. Since these restrictions concern the marketing of products most of which are exported to other Community countries and since they also affect the terms of admission of wholesalers from other Member States to the auctions, they are likely to affect trade between Member States. Not only do they limit or prevent access of new dealers, notably those in other Member States, to the Breton auction sales, but they also prevent a dealer admitted to one of the auction centres from obtaining supplies from the two others except in the limited case of simultaneous auctions.

Restrictions of this type on the access to sources of supply have the result of reducing competition between dealers on markets where Breton vegetables are sold, which include not only the French market but also those export markets which account for more than 50 % of sales of Breton cauliflowers and are situated for the most part in other Community countries. For the other vegetables the quantities exported are considerably smaller, but the fact that cauliflowers make up 60 to 65 % of the output of the three vegetables taken together means that one-third of this

output is exported to other Community countries. It follows that the abovementioned requirements, imposed by agreements between undertakings or decisions by associations of undertakings, which appreciably restrict access to the auctions, may affect trade between Member States, and are accordingly within the prohibition in Article 85 (1) of the EEC Treaty.

### III. INAPPLICABILITY OF ARTICLE 2 OF COUNCIL REGULATION No 26

Article 2 (1) of Council Regulation No 26 of 4 April 1962 provides that Article 85 (1) of the Treaty 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 organization or are necessary for attainment of the objectives set out in Article 39 of the Treaty. 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 39 of the Treaty are jeopardized.

The conditions for admission of buyers at these auctions do not qualify for exemption under Article 2 (1) of Regulation No 26, for the following reasons.

1. They do not form an integral part of a national market organization, and in any event a national organization may no longer exist for fruit and vegetables in France since there is a common organization of the market governed by Regulation (EEC) No 1035/72.

2. Furthermore they are not essential to the attainment of the objectives of Article 39 of the Treaty. It is clear from the third paragraph of the opening recitals to Regulation No 26 that the second exemption applies only where the application of Article 85 (1) would jeopardize the attainment of the objectives of the common agricultural policy in relation to the relevant products, and in any event the means for implementing the objectives of the common agricultural policy as set out in Article 39 of the Treaty are determined, as far as fruit and vegetables are concerned, by Regulation (EEC) No 1035/72. Although this Regulation made provision for certain rules being imposed

on member producers' organizations, it did not make provision for rules applying to persons with whom the producers do business, notably dealers. As the conditions for admission were imposed only on dealers they do not come within Regulation (EEC) No 1035/72. Accordingly the obligations at issue, being imposed only on dealers, cannot be regarded as necessary for the attainment of the objectives of Article 39, nor are they necessary for the proper application of the measures provided for by Regulation (EEC) No 1035/72 in respect of producers' organizations, and the removal of these conditions in their present form would in no way affect the smooth operation of the auctions held by these organizations. The withdrawal of these obligations, at least in their present form, would in no way impede the smooth functioning of the auction sales. This is abundantly clear at least as regards the requirement for a majority vote in the Board of Directors of the Syndicat des Expéditeurs de Saint-Malo and the obligation to purchase and dispatch only on the dealers' own account, since the sole effect of these two restrictions is to reserve the Saint-Malo autumn cauliflower market for dealers already established in the area. The same considerations apply to the exclusive buying obligation and the obligation to have a packing centre in the catchment area of the auctions. These two obligations produce not only the geographical segregation of the three Breton auction centres, which is not necessary for the smooth operation of the auctions themselves, but they also exclude access to other sources of supply outside the area covered by the auctions, which is similarly unnecessary.

3. The conditions for the admission of dealers are imposed either by agreements between growers and dealers, such as the exclusive buying obligation and obligation to have a packing centre, or by decisions of the Syndicat des Expéditeurs de Saint Malo, in respect of the requirement for a majority vote on the Board of Directors and the obligation on dealers only to buy and dispatch on their own account. They do not form part of agreements between farmers or decisions of farmers' associations within the meaning of the second sentence of Article 2 (1) of Regulation No 26, so that the exemption provided for therein does not apply in this case.

#### IV. INAPPLICABILITY OF ARTICLE 85 (3)

Under Article 85 (3) of the Treaty the provisions of Article 85 (1) may be declared inapplicable in the case

of any agreement or category of agreements between undertakings, any decisions or category of decisions by associations of undertakings and any concerted practice or category of concerted practices 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 benefit, and which does not impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives or afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

The agreements and decisions setting the conditions for admission to auction sales, considered above, do not qualify for exemption under Article 85 (3), for the following reasons.

As regards the exclusive buying obligation for dealers, it should be noted that, even in the absence of such an obligation, these dealers would have no sources of supply in the region other than from offers made at the auctions. Because of the exclusive supply rule all growers taking part must bring all their produce to the auctions, all other Breton produce being marketed direct by agricultural marketing cooperatives. The operation of the exclusive buying obligation therefore can have the effect only of preventing dealers at one of the auction centres from obtaining supplies from the two others. This segregation of sources of supply in itself makes no improvement to distribution but rather limits competition and is therefore damaging to distribution. Since the first test of Article 85 (3) is thus not satisfied, there is no need to consider the others.

Furthermore, the obligation to have a packing centre cannot be regarded as a means of improving distribution. The bulk of the vegetables sold at auction are already packed, so that the obligation to have packing facilities entails unnecessary investment. Even where a dealer prefers to buy unpacked produce, there is no need to require him to have a packing centre since his desire to meet his customers' requirements will inevitably lead him to equip himself with the necessary facilities. If sellers wished to ensure that bulk buying was gradually abandoned in favour of prepacked

goods, it would be sufficient if they required of dealers the capacity to have part of their vegetable purchases packed, this part not to exceed the proportion of unpacked vegetables offered at auction. Evidence of the necessary packing capacity might then consist of a contract for the hire of a packing centre or simply of a contract with a packer. The obligation in its current form is therefore not indispensable to the attainment of the objective sought.

The decision of the Syndicat des Expéditeurs de Saint-Malo requiring a majority decision of the Board of Directors of the Syndicat for the admission of a new member to the auctions makes no improvement in distribution; the only effect which it can have is to bar the access of new dealers to the auctions. The same applies to the decision of the Syndicat requiring dealers to buy and dispatch only on their own account; if those who buy at the auctions at Saint-Méloir-des-Ondes have been admitted by the organizers in accordance with objective criteria, and have therefore become directly liable for all the purchases they make there, financial security cannot be invoked as justification for any limitation on their freedom to dispose of their purchases as they see fit,

HAS ADOPTED THIS DECISION:

#### *Article 1*

(a) The clauses in the agreements between SICA de Saint-Pol-de-Léon and the Union des Expéditeurs de Saint-Pol-de-Léon and between SIPEFEL and the Syndicat des Expéditeurs de Saint-Malo, whereby dealers who obtain supplies at auction sales held at Saint-Pol-de-Léon and Saint-Méloir-des-Ondes are required to accept the obligations:

- to buy exclusively at the auction sales to which they have been admitted,
  - and
  - to be in possession of a packing centre,
- constitute infringements of Article 85 (1) of the EEC Treaty.

(b) The decisions taken by the Syndicat des Expéditeurs de Saint-Malo:

- subjecting admission of new buyers to the Saint-Méloir-des-Ondes auctions to a favourable decision by the management bodies set up by the Statutes of the Syndicat, without any reference to fixed and objective conditions of admission,
- and
- obliging members to buy, pack and dispatch vegetables only on their own account,

constitute infringements of Article 85 (1) of the EEC Treaty.

#### *Article 2*

SICA de Saint-Pol-de-Léon, the Union des Expéditeurs, SIPEFEL and the Syndicat des Expéditeurs de Saint-Malo shall forthwith bring to an end the infringements referred to in Article 1.

#### *Article 3*

This Decision is addressed to the following associations of undertakings:

- Société d'Investissements et de Coopération Agricoles, of Saint-Pol-de-Léon,
- Union des Expéditeurs et Exportateurs en Fruits et Légumes du Finistère, of Saint-Pol-de-Léon,
- Société Interprofessionnelle des Producteurs et Expéditeurs de Fruits, Légumes, Bulbes et Fleurs d'Ille et Vilaine 'SICA-SIPEFEL', of Saint-Méloir-des-Ondes,
- Syndicat des Expéditeurs et Exportateurs en Légumes et Pommes de terre primeurs de la région Malouine, of Saint-Méloir-des-Ondes.

Done at Brussels, 2 December 1977.

*For the Commission*

Raymond VOUEL

*Member of the Commission*