OPINION OF MR ADVOCATE GENERAL WARNER DELIVERED ON 18 FEBRUARY 1981

My Lords,

I — Introductory

This action is brought against the Commission under Article 173 of the EEC Treaty by the Coöperatieve Stremsel- en Kleurselfabriek of Leeuwarden in the Netherlands (which I shall call "the Cooperative") to challenge a Decision adopted by the Commission under Article 85 of the Treaty on 5 December 1979, which was addressed to the Cooperative and to its members 80/234/EEC — OJ L 51/19 of 25. 2. 1980.

The facts as found by the Commission are clearly and succinctly summarized in the decision, and I do not think it necessary to rehearse them.

The Commission's conclusion was, Your Lordships remember, that the rules of the Cooperative infringed Article 85 in two respects:

(i) in that they required members to purchase their supplies of rennet and of colouring agents for cheese exclusively from the Cooperative, and

(ii) in that they required a resigning member to pay to the Cooperative a sum of HFL 2.50 per litre of the average annual quantity of rennet purchased by that member from the Cooperative over the previous five years. (I shall, for the sake of brevity, call that payment "the fine on resignation".)

The decision ordered the undertakings to which it was addressed to bring those alleged infringements to an end without delay.

In challenging the decision before us, the Cooperative has put forward seven contentions, of which four relate to the applicability of Article 85 (1), one relates to the applicability of Regulation No 26/62, and two relate to the applicability of Article 85 (3). I propose to begin by considering those contentions seriatim under those three headings.

The French Government intervened in the action. In its written observations it contended that the decision should be set aside. At the hearing, however, after having heard the Commission's comments on those observations, it adopted a less extreme stance. I propose to consider the French Government's contentions, as so modified, afterwards.

II — The applicability of Article 85 (1)

1. The Cooperative's first contention was that the Commission had been wrong in holding that the exclusive purchasing obligation imposed on the members appreciably restricted competition in the common market.

The Commission's reason for so holding, as stated in the decision, was that the members of the Cooperative, representing as they did over 90% of the Dutch

dairy-products industry, were, owing to that obligation, prevented from purchasing rennet or colouring agents for cheese from other suppliers — see paragraph 22 of the decision.

The Cooperative, as I understood its argument, challenged that holding essentially on the ground that it misapprehended the very nature of the cooperative system. Traditionally in some countries (such as the Netherlands) and by law in others (such as France) such an obligation was a fundamental feature of that system, a feature without which it could not function. The members were in competition with each other in the market for cheese and for other dairy products, not in the market for rennet or colouring agents. The obligation in question was but the consequence of their decision to cooperate for the purpose of obtaining optimum supplies of these products. The Cooperative was not an independent profit-making undertaking, but merely the means of achieving collaboration between its members.

In my opinion that argument, whilst it may be relevant to the question whether Article 85 (3) applies, in no way meets the Commission's point on Article 85 (1). The fact remains that the obligation in question does have the effect of preventing competition in the supply of rennet and of colouring agents to over 90% of Dutch cheese-makers. There is nothing in the Treaty that exempts an agreement from the provisions of Article 85 (1) simply because that agreement is embodied in the rules of a cooperative.

2. The Cooperative's second contention was that the Commission had been wrong in holding that the exclusive purchasing obligation was liable to affect trade between Member States to an appreciable degree.

The Commission so held, again according to the decision, on the ground that the obligation prevented members of the Cooperative from purchasing rennet and colouring agents for cheese from suppliers in other Member States. The Commission found that rennet of animal origin — the only type of rennet authorized for cheese-making in the Netherlands — was available from suppliers in Denmark, Germany and France, that their rennet was of excellent quality and that their prices were comparable to those of the Cooperative. As to colouring agents, the Commission found that there were in the Community many other suppliers of them. See paragraph 23 of the decision.

The Cooperative's argument on this point started from the fact that, as a matter of history, there had never been any substantial imports of rennet or of colouring agents into the Netherlands, even by cheese-makers who were not members of the Cooperative. The latter had obtained most of their supplies from the Cooperative. So, the argument went on, the Commission had not discharged the onus of showing that, in the absence of the obligation in question, Dutch cheese-makers would buy rennet or colouring agents, in appreciable quantities, from suppliers in other Member States. The statistics quoted by the Commission in paragraph 17 of the decision were no guide as to that, because, as was admitted by the Commission, they lumped together trade in rennet of animal origin and trade in synthetic rennet. No statistics existed of trade between Member States in rennet

of animal origin alone. So conscious were Dutch cheese-makers of the need for high-quality rennet that they would only be tempted to buy from abroad for short periods when, owing to fluctuations in prices on the world market for the fourth stomach of calves, a clear difference in price occurred as between rennet produced by the Cooperative and rennet produced by manufacturers in other Member States. The fact that such occasional purchases might occur did not prove that the obligation in question appreciably affected trade in rennet between the Member States. The Cooperative relied, in support of its argument on the judgments of this Court in Case 73/74 *Papiers Peints de Belgique* v *Commission* [1975] 2 ECR 1491 and in Case 22/78 *Hugin* v *Commission* [1979] ECR 1869. The Commission had not, the Cooperative submitted, adequately analysed the realities of the situation.

That argument has left me unconvinced.

Leaving colouring agents on one side for the moment, the Cooperative has not challenged the findings of the Commission to the effect that supplies of rennet of animal origin of excellent quality, and at prices comparable to those of the Cooperative, are available in Denmark, Germany and France. We know that such rennet is produced in the Netherlands only by the Cooperative itself and that the members of the Cooperative, who are obliged to buy all their rennet from the Cooperative, represent over 90% of the Dutch cheese-making industry. Yet the argument of the Cooperative implies a concession that there have been some purchases of rennet of animal origin by Dutch cheese-makers from other suppliers and a concession that, if its members were relieved of the obligation in question, there could be more such purchases. The *Papiers Peints de Belgique* and *Hugin* cases do not appear to me to be in point. In the former it was held that the decision of the Commission had been inadequately reasoned and the latter turned upon its facts. More in point, in my opinion, is Case 19/77 *Miller* v *Commission* [1978] ECR 131, where the Court said (in paragraph 15 of the judgment):

"In prohibiting agreements which may affect trade between Member States and which have as their object or effect the restriction of competition Article 85 (1) of the Treaty does not require proof that such agreements have in fact appreciably affected such trade, which would moreover be difficult in the majority of cases to establish for legal purposes, but merely requires that it be established that such agreements are capable of having that effect."

Nothing has been said on behalf of the Cooperative about colouring agents that could lead to a different conclusion as to them.

3. The Cooperative's third contention was that the Commission had been wrong in holding that the obligation on a member to pay a fine on resignation made resignation very difficult, if not impossible, for any member wishing to obtain supplies from another source.

The Commission so held in paragraph 24 of the decision. It concluded therefrom that the obligation to pay that fine

constituted an appreciable restriction of competition within the common market. The real question, in my opinion, is whether that conclusion is sustainable.

The argument on this point before us developed, in the main, into a battle between the parties about figures, the Commission seeking to uphold its finding that the obligation would impose a substantial financial burden on a resigning member, and so amounted to a substantial deterrent to resignation, whilst the Cooperative sought to belittle the burden and thereby the deterrent.

I need not however, I think, take up Your Lordships' time going into the figures because, at the hearing, Counsel for the Cooperative, in answer to a question of mine, candidly accepted that the function of the fine was to act as a hindrance to resignation. That being so the Commission cannot in my opinion be criticized for taking the view that, as it submitted to us, the requirement that a resigning member should pay the fine infringed Article 85 (1) at least in so far as it served to reinforce the requirement that a member should buy rennet and colouring agents exclusively from the Cooperative.

4. The Cooperative's fourth contention was that the Commission had been wrong in holding that the obligation to pay a fine on resignation could prevent members from setting up a competing production centre which could also sell rennet in other Member States.

That was an allusion to paragraph 25 of the decision, in which the Commission said this:

"This restriction is also liable to appreciably affect trade between Member States. It is difficult for members to resign from the Cooperative, whether in order to purchase freely in other Community countries or to set up competing production centres which could also sell rennet in other Member States."

So the real question here is whether the Commission could properly find that the obligation to pay a fine on resignation was liable to affect trade between Member States. If I am right in thinking that that obligation operated at least to reinforce the obligation to buy rennet exclusively from the Cooperative, the answer must obviously be "Yes".

Thus, in my opinion, the Cooperative is not entitled to succeed on any of its first four contentions. I turn to its fifth contention, which is about Regulation No 26/62.

III — The applicability of Regulation No 26/62

Your Lordships will remember that Article 42 of the Treaty provides, to put it shortly, that Articles 85 to 94 are to apply to production of and trade in agricultural products only to the extent determined by an act of the Council. "Agricultural products" are defined by Article 38. Paragraph 1 of that Article states that " 'Agricultural products' means the products of the soil, of stockfarming and of fisheries and products of first-stage processing directly related to these products"; whilst paragraph 3 states that "The products subject to the provisions of Articles 39 to 46 are listed in Annex II to this Treaty".

Article 38 (3) went on to empower the Council to add to the list in Annex II within two years of the entry into force of the Treaty. Annex II lists the products in question by reference to what was known, at the time when the Treaty was signed, as the Brussels Nomenclature, and is now called the CCC Nomenclature.

Regulation No 26/62 was adopted by the Council pursuant to Article 42 of the Treaty. Article 1 of it provides, so far as here material, that, subject to Article 2, Article 85 of the Treaty is to apply to all agreements relating to "production of or trade in the products listed in Annex II to the Treaty". Article 2 provides that Article 85 (1) shall not apply to such of the agreements referred to in Article 1 of the regulation "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". It goes on to provide that, in particular, Article 85 (1) "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 Commission, in paragraphs 26 and 27 of its decision in the present case, held that rennet and colouring agents for cheese were not products listed in Annex II of the Treaty, so that Regulation No 26/62 was inapplicable.

The Commission's view is that rennet, being an enzyme, is within heading 35.07 of the CCC Nomenclature, which comprises "Enzymes; prepared enzymes not elsewhere specified or included". That heading is not among those listed in Annex II. The Commission's view accords with the Explanatory Notes to the CCC Nomenclature which, in relation to that heading, say, among other things, this:

"The following are the most important among the enzymes found in trade:

(1) ...

(2) ...

(3) Rennet (lab-ferment, chymosin, rennin).

Rennet is obtained either from the fresh or dried fourth stomachs of calves or by the cultivation of certain micro-organisms. It is a proteolytic enzyme which curdles milk by coagulating its casein. It is available in liquid, powder or tablet form. It may contain salts (e. g. sodium chloride, calcium chloride, sodium sulphate), remaining from the manufacturing process or added for standardization, and preserving agents (e. g. glycerol).

Rennet is mainly used in the cheese industry."

The Cooperative challenges the Commission's view on two grounds.

First it argues that in the context of the Treaty, rennet of animal origin should be classified under heading 05.04 of the CCC Nomenclature, which comprises "Guts, bladders and stomachs of animals (other than fish), whole and pieces thereof" or under heading 05.15 comprising "Animal products not elsewhere specified or included; dead animals of Chapter 1 or Chapter 3, unfit for human consumption". Those headings are both listed in Annex II. Such an interpretation is called for, the Cooperative argues, because rennet of the kind that it produces, being extracted solely from the fourth stomachs of calves, is a product of first-stage processing related to a product of stockfarming within the meaning of Article 38 (1) of the Treaty. Heading 35.07 should be regarded, the Cooperative submits, as comprising only synthetic rennet.

In my opinion, that argument must be rejected.

In the first place I agree with the Commission that Article 38 (1) of the Treaty gives only a general indication of the kind of product that is to be regarded as an agricultural product for the purposes of the Treaty. The binding definition is that contained in Article 38 (3) which refers to Annex II. That must be so, in my opinion, first because of the express power for the Council to add to Annex II within two years of the entry into force of the Treaty; secondly because the list in Annex II conspicuously and, one must take it, deliberately omits some products that would clearly be within the general terms of Article 38 (1), for instance, as the Commission pointed out, wool; and thirdly because the inference is irresistible that the intention of the authors of the Treaty, when they drew up Article 38 (3) and Annex II, was to eliminate possible disputes as to what did or did not constitute an agricultural product for the purposes of the Treaty.

In any case, the Cooperative's rennet is not, in my opinion, a product of first-stage processing within the meaning of Article 38 (1). The relevant product of first-stage processing (of a product of stockfarming) is the calves' fourth stomachs, which are the Cooperative's raw material. They are the product of the slaughtering and cutting-up of the calves, which is the first process.

Thirdly, and more importantly, rennet cannot be brought within heading 05.04, the wording of which, whilst no doubt apt to cover the calves' fourth stomachs used for the extraction of rennet (as the Explanatory Notes to the CCC Nomenclature relating to that heading expressly confirm), cannot be stretched to cover the extract itself. Nor can rennet of animal origin be brought within heading 05.15, because to prefer the general description "Animal products not elsewhere specified or included" in that heading to the more specific description "Enzymes" in heading 35.07 would be to do precisely the reverse of that which Rule 3 (a) of the Rules for the Interpretation of the CCC Nomenclature enjoins.

The Cooperative's second argument on this part of the case was, if I understood it correctly, that Article 2 of Regulation No 26/62 ought to be held to apply because the Cooperative was, in the final

analysis, an association of associations belonging to a single Member State, concerned with the processing of milk into cheese, whose activities were necessary for attainment of the objectives set out in Article 39 of the Treaty.

To my mind there is a short answer to that argument, which is that it disregards what the relevant provisions of the Treaty and of Regulation No 26/62 actually say. It is true, but in my opinion irrelevant, that the members of the Cooperative process milk into cheese. What matters is whether the agreement between them, constituted by the rules of the Cooperative, relates to "production of or trade in agricultural products" within the meaning of the Treaty. It does not because it relates to production of and trade in rennet and colouring agents for cheese, which are not agricultural products as defined by the Treaty.

So, in my opinion, the Cooperative is not entitled to succeed on its fifth contention. I turn to its sixth and seventh contentions, which are, Your Lordships remember, about the applicability of Article 85 (3).

IV — The applicability of Article 85 (3)

Article 85 (3) requires four conditions to be satisfied for an agreement to be exempted thereunder:

(i) the agreement must contribute to improving the production or distribution of goods or to promoting technical or economic progress;

(ii) the agreement must allow consumers a fair share of the resulting benefit;

(iii) the agreement must not impose on the undertakings concerned restrictions which are not indispensable for the attainment of those objectives; and

(iv) the agreement must not afford those undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

The Commission held that, in this case, the first and second conditions were satisfied in that the existence of the Cooperative had contributed to improving production of rennet and of colouring agents for cheese in the Netherlands; in that the Cooperative's stock-holding arrangements ensured a constant and regular supply of those products; in that since the Cooperative was non-profit-making, cost savings that it achieved had always been passed on to its customers, whether members or non-members; and in that final consumers had, in the result, been able to buy cheese made with better quality rennet at a low price. See paragraphs 29 and 30 of the decision.

The Commission held, however, that the third and fourth conditions were not satisfied. The Cooperative's sixth and seventh contentions challenge the Commission's holdings as to the fulfilment of those conditions respectively.

Thus the Cooperative's sixth contention is that the Commission was wrong in holding that the requirement that members should purchase rennet and

colouring agents exclusively from the Cooperative and the requirement that a member should pay a fine on resignation were not indispensable for the attainment of the benefits that the Commission acknowledges flow from the existence of the Cooperative.

I have found this the most difficult point in the case.

The Cooperative's main argument on it is, if I have correctly understood it, that, since the Cooperative has no share capital, so that its only source of money consists in the proceeds of its sales of rennet and colouring agents, no member would readily concur in decisions that the Cooperative should invest in such things as stocks, new production facilities and the like, unless assured that every other member was bound to buy rennet and colouring agents only from the Cooperative and could not easily resign from the Cooperative. In the absence of those obligations a member could not be sure that expenditure incurred by the Cooperative as a result of such decisions would be covered. There was strong support for that argument in the submissions of the French Government. The Cooperative also argued that, in the absence of those obligations, it would need a sales organization, which would add to its costs; and that its system of *ex post facto* pricing would have to be abandoned.

The Commission conceded that some obligation for members to purchase from the Cooperative was necessary. We were told at the hearing, in answer to a question by one of Your Lordships, that, in discussions between the parties, the Commission had suggested that a member should be obliged to buy a minimum of 33⅓% of its supplies from the Cooperative. The Cooperative, however, though prepared, in order to avoid this litigation, to abandon the obligation for a member to buy 100% of its supplies from the Cooperative, could not agree to any figure below 70%.

The Commission also conceded that some restriction on a member's freedom to resign was necessary, but it considered that an obligation to give notice of withdrawal would be sufficient.

I have, after some hesitation, come to the conclusion that the Cooperative has not made good its case on this point, because, in truth, that case, as presented to us, rested on forceful and repeated assertion rather than on proof. No evidence was adduced to show that in fact nothing short of a 100% purchasing obligation and nothing short of a fine on resignation would do. The arguments placed before us, whilst, some of them, impressive, fell short, to my mind, of demonstrating that that was so.

I am, however, less troubled than I might have been about reaching that conclusion because I am clearly of the opinion that the Cooperative's seventh contention must be rejected. The Commission held that the exclusive purchasing obligation and the obligation to pay a fine on resignation had the effect of virtually eliminating competition on almost the entire Dutch market in rennet and colouring agents for cheese — see paragraph 33 of the decision. If that is correct, it is enough to render Article 85 (3) inapplicable.

Bearing in mind that the members of the Cooperative account for over 90% of Dutch cheese production, that the Cooperative is the only Dutch producer of rennet and that it is responsible for 90% of Dutch production of colouring agents for cheese, the Commission's conclusion seems to me almost self-evidently correct. It was attacked by the Cooperative on the ground that a member could leave the Cooperative on payment of a fine, the amount of which was not prohibitive. That fact, however, if it be a fact, does not make it untrue to say that the rules of the Cooperative afford its members, in the words of Article 85 (3), "the possibility of eliminating competition in respect of a substantial part of the products in question".

In the result I am of the opinion that this action must fail. I turn to the observations of the French Government.

V — The observations of the French Government

I hope I shall be acquitted of any discourtesy if I deal with them briefly. I can do so, I think, because, as modified at the hearing in the light of what Counsel for the Commission had said, they amounted to a plea that the Court should not express its judgment in such a way as to jeopardize the survival of small local farmers' cooperatives, of which, we were told, there were some 6 000 in France.

The Court cannot of course rewrite Article 85 of the Treaty or Regulation No 26/62. But it seems to me that this case is not comparable to that of a small local farmers' cooperative. An essential feature of it, as Counsel for the French Government appreciated, is the monopoly or near-monopoly position of the Cooperative in the Netherlands. One may doubt whether, in the case of a cooperative of the kind the French Government seeks to protect, it would be found:

(i) that its rules had as their object or effect appreciably to prevent, to restrict, or to distort competition within the common market;

(ii) that they were liable to affect trade between Member States;

(iii) that they were not exempted by Article 2 of Regulation No 26/62; and

(iv) that they were not exempted by Article 85 (3);

though I realize, of course, that Article 2 of Regulation No 26/62 would not apply to, say, a cooperative hiring agricultural machinery or supplying fertilizers to its members.

More than that I do not think I can usefully say.

VI — Conclusion

This action should, in my opinion, be dismissed with costs.