

Provisional text

JUDGMENT OF THE COURT (Grand Chamber)

14 November 2017 (*)

(Reference for a preliminary ruling — Common agricultural policy — Article 42 TFEU — Regulation (EC) No 2200/96 — Regulation (EC) No 1182/2007 — Regulation (EC) No 1234/2007 — Anticompetitive practices — Article 101 TFEU — Regulation No 26 — Regulation (EC) No 1184/2006 — Producer organisations — Associations of producer organisations — Responsibilities of those organisations and associations — Practice of fixing minimum sale prices — Practice of concertation on quantities placed on the market — Practice of exchanges of strategic information — French endive market)

In Case C-671/15,

REQUEST for a preliminary ruling under Article 267 TFEU from the Cour de cassation (Court of Cassation, France), made by decision of 8 December 2015, received at the Court on 14 December 2015, in the proceedings

President of the Autorité de la concurrence

v

Association des producteurs vendeurs d’endives (APVE),

Comité économique régional agricole fruits et légumes de Bretagne (Cerafel),

Fraileg SARL,

Prim’Santerre SARL,

Union des endiviers, formerly Fédération nationale des producteurs d’endives (FNPE),

Soleil du Nord SARL,

Comité économique fruits et légumes du Nord de la France (Celfnord),

Association des producteurs d’endives de France (APEF),

Section nationale de l’endive (SNE),

Fédération du commerce de l’endive (FCE),

France endives société coopérative agricole,

Cambrésis Artois-Picardie endives (CAP’Endives) société coopérative agricole,

Marché de Phalempin société coopérative agricole,

Primacoop société coopérative agricole,

Coopérative agricole du marais audomarois (Sipema),

Valois-Fruits union de sociétés coopératives agricoles,

Groupe Perle du Nord SAS,

Ministre de l'Économie, de l'Industrie et du Numérique,

THE COURT (Grand Chamber),

composed of K. Lenaerts, President, A. Tizzano, Vice-President, L. Bay Larsen, T. von Danwitz and J. Malenovský, Presidents of Chambers, E. Juhász, A. Borg Barthet, J.-C. Bonichot, D. Šváby (Rapporteur), F. Biltgen, K. Jürimäe, C. Lycourgos and M. Vilaras, Judges,

Advocate General: N. Wahl,

Registrar: V. Giacobbo-Peyronnel, Administrator,

having regard to the written procedure and further to the hearing on 31 January 2017,

after considering the observations submitted on behalf of:

- the President of the Autorité de la concurrence (French Competition Authority), by H. Génin, S. Subrémon Lukasiewicz and I. de Silva, acting as Agents, and by J.-P. Duhamel, avocat,
- the Comité économique régional agricole fruits et légumes de Bretagne (Cerafel), the Comité économique fruits et légumes du Nord de la France (Celfnord), the Association des producteurs d'endives de France (APEF), the Section nationale de l'endive (SNE) and the Fédération du commerce de l'endive (FCE), by H. Calvet, P. Morrier, Y. Chevalier and A. Bouviala, avocats,
- Fraileg SARL and Prim'Santerre SARL, by J.-L. Fourgoux and L. Djavadi, avocats,
- France endives société coopérative agricole, Cambrésis Artois-Picardie endives (CAP'Endives) société coopérative agricole, Marché de Phalempin société coopérative agricole, Primacoop société coopérative agricole, Coopérative agricole du marais audomarois (Sipema) and Groupe Perle du Nord SAS, by B. Néouze, V. Ledoux and S. Pasquesoone, avocats,
- the French Government, by G. de Bergues, D. Colas, S. Horrenberger, C. David and J. Bousin, acting as Agents,
- the Spanish Government, by A. Gavela Llopis, acting as Agent,
- the Italian Government, by G. Palmieri, acting as Agent, and P. Gentili, avvocato dello Stato,
- the European Commission, by X. Lewis, A. Bouquet and B. Mongin, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 6 April 2017,

gives the following

Judgment

- 1 This request for a preliminary ruling concerns the interpretation of Article 101 TFEU, read in conjunction with Article 2 of Regulation No 26 of the Council of 4 April 1962 applying certain rules of competition to production of and trade in agricultural products (OJ, English Special Edition, Series I Volume 1959-1962, p. 129-130), Article 11(1) of Council Regulation (EC) No 2200/96 of 28 October 1996 on the common

organisation of the market in fruit and vegetables (OJ 1996 L 297, p. 1), Article 2 of Council Regulation (EC) No 1184/2006 of 24 July 2006 applying certain rules of competition to the production of, and trade in, agricultural products (OJ 2006 L 214, p. 7), as amended by Council Regulation (EC) No 1234/2007 of 22 October 2007 (OJ 2007 L 299, p. 1) ('Regulation No 1184/2006'), Article 3(1) of Council Regulation (EC) No 1182/2007 of 26 September 2007 laying down specific rules as regards the fruit and vegetable sector, amending Directives 2001/112/EC and 2001/113/EC and Regulations (EEC) No 827/68, (EC) No 2200/96, (EC) No 2201/96, (EC) No 2826/2000, (EC) No 1782/2003 and (EC) No 318/2006 and repealing Regulation (EC) No 2202/96 (OJ 2007 L 273, p. 1), as well as the first paragraph of Article 122 and Article 176 of Regulation No 1234/2007, as amended by Council Regulation (EC) No 491/2009 of 25 May 2009 (OJ 2009 L 154, p. 1) ('Regulation No 1234/2007').

- 2 The request has been made in the context of proceedings between the Autorité de la concurrence (French Competition Authority) and the Association des producteurs vendeurs d'endives (APVE), the Comité économique régional agricole fruits et légumes de Bretagne (Cerafel), Fraileg SARL, Prim'Santerre SARL, the Union des endiviers, formerly the Fédération nationale des producteurs d'endives (FNPE), Soleil du Nord SARL, the Comité économique fruits et légumes du Nord de la France (Celfnord), the Association des producteurs d'endives de France (APEF), the Section nationale de l'endive (SNE), the Fédération du commerce de l'endive (FCE), France endives société coopérative agricole, Cambrésis Artois-Picardie endives (CAP'Endives) société coopérative agricole, Marché de Phalempin société coopérative agricole, Primacoop société coopérative agricole, Coopérative agricole du marais audomarois (Sipema), Valois-Fruits union de sociétés coopératives agricoles and Groupe Perle du Nord SAS as well as the ministre de l'Économie, de l'Industrie et du Numérique (French Minister for the Economy, Industry and the Digital Sector) concerning the decision of the Autorité de la concurrence (French Competition Authority) of 6 March 2012 by which, on the basis of, inter alia, Article 101(1) TFEU, it found, and imposed fines on, a complex and continuous cartel on the French endive market ('the decision at issue').

Legal context

EU law

- 3 The provisions of secondary legislation establishing a common organisation of the fruit and vegetables market that apply to the facts in the main proceedings are laid down in Regulation No 2200/96, applicable until 31 December 2007, Regulation No 1182/2007, repealed by Council Regulation (EC) No 361/2008 of 14 April 2008 amending Regulation No 1234/2007 (OJ 2008 L 121, p. 1), and Regulation No 1234/2007. The latter regulation was repealed, as of 1 January 2014, by Regulation (EU) No 1308/2013 of the European Parliament and of the Council of 17 December 2013 establishing a common organisation of the markets in agricultural products and repealing Council Regulations (EEC) No 922/72, (EEC) No 234/79, (EC) No 1037/2001 and (EC) No 1234/2007 (OJ 2013 L 347, p. 671), which, however, does not apply to the facts in the main proceedings.
- 4 The provisions of secondary legislation governing the application of EU competition rules to the production of, and trade in, agricultural products in the fruit and vegetables market were adopted by the EU legislature in Regulation No 26, which was succeeded by Regulation No 1184/2006 and Articles 175 to 182 of Regulation No 1234/2007.

Regulation No 26

- 5 Article 1 of Regulation No 26 provides:

'From the entry into force of this Regulation, Articles [101 to 106 TFEU] and provisions made in implementation thereof shall, subject to Article 2 below, apply to all agreements, decisions and practices referred to in Articles [101(1) and 102 TFEU] which relate to production of or trade in the products listed in Annex II to the Treaty.'

6 Article 2(1) of that regulation is worded in the following terms:

‘Article [101(1) TFEU] shall not apply to such of the agreements, decisions and practices referred to in the preceding Article as form an integral part of a national market organisation or are necessary for attainment of the objectives set out in Article [39 TFEU]. 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 TFEU] are jeopardised.’

Regulation No 2200/96

7 Recitals 7 and 16 of Regulation No 2200/96 state:

‘(7) Whereas producer organisations are the basic elements in the common market organisation, the decentralised operation of which they ensure at their level; whereas, in the face of ever greater concentration of demand, the grouping of supply through these organisations is more than ever an economic necessity in order to strengthen the position of producers in the market; whereas such grouping must be effected on a voluntary basis and must prove its utility by the scope and efficiency of the services offered by producer organisations to their members; whereas the delivery of products to specialist producer organisations existing before the entry into force of this Regulation is not brought into question;

...

(16) Whereas to stabilise prices it is desirable that producer organisations should be able to intervene on the market, in particular by deciding not to put up for sale particular quantities at particular periods; whereas these withdrawal operations must not be regarded as an alternative outlet to the market itself; whereas Community financing of withdrawals should therefore be restricted to a set percentage of production and the Community compensation granted at a reduced level, though use of the operational funds for this purpose should be permitted; whereas for simplicity Community compensation should be at a single flat rate for each product; whereas, to achieve a comparable reduction for all products, certain differentiations are required’.

8 Article 11(1) of the regulation provides:

‘For the purposes of this Regulation, “producer organisation” means any legal entity:

(a) which is formed on the own initiative of growers of the following categories of product listed in Article 1(2):

...

(iii) vegetables;

...

(b) which has in particular the aim of:

(1) ensuring that production is planned and adjusted to demand, particularly in terms of quality and quantity;

(2) promoting concentration of supply and the placing on the market of the products produced by its members;

- (3) reducing production costs and stabilising producer prices;
- (4) promoting the use of cultivation practices, production techniques and environmentally sound waste-management practices in particular to protect the quality of water, soil and landscape and preserve and/or encourage biodiversity;

...'

- 9 Under the heading 'Intervention arrangements', Article 23(1) of Regulation No 2200/96 states that 'producer organisations and their associations may choose not to put up for sale products listed in Article 1(2) contributed by their members, both in quantities and for periods which they consider appropriate.'

Regulation No 1184/2006

- 10 Article 1a of Regulation No 1184/2006 provides:

'Articles [101 to 106 TFEU] and provisions made for their implementation shall, subject to Article 2 of this Regulation, apply to all agreements, decisions and practices referred to in Articles [101(1) and 102 TFEU] which relate to the production of, or trade in, the products referred to in Article 1.'

- 11 Article 2(1) of that regulation is worded in the following terms:

'Article [101(1) TFEU] shall not apply to such of the agreements, decisions and practices referred to in Article 1a of this Regulation which form an integral part of a national market organisation or are necessary for attainment of the objectives set out in Article [39 TFEU].

...'

Regulation No 1182/2007

- 12 Article 3(1) of Regulation No 1182/2007 provides:

'For the purposes of this Regulation, a producer organisation shall be any legal entity or clearly defined part of a legal entity which complies with the following requirements:

- (a) it is formed on the initiative of farmers within the meaning of Article 2(a) of Regulation (EC) No 1782/2003, who are growers of one or more products listed in Article 1(2) of Regulation (EC) No 2200/96 and/or of such products intended solely for processing;
- (b) it has the objective of the use of environmentally sound cultivation practices, production techniques and waste management practices, in particular to protect the quality of water, soil and landscape, and preserve or encourage biodiversity;
- (c) it has one or more of the following objectives:
 - (i) ensuring that production is planned and adjusted to demand, particularly in terms of quality and quantity;
 - (ii) concentration of supply and the placing on the market of the products produced by its members;
 - (iii) optimising production costs and stabilising producer prices;
- (d) its articles of association provide for the specific requirements as laid down in paragraph 2; and

- (e) it has been recognised by the Member State concerned pursuant to Article 4.'

Regulation No 1234/2007

13 Article 103c(1) of Regulation No 1234/2007 states that operational programmes in the fruit and vegetables sector must have two or more of the objectives referred to in point (c) of the first paragraph of Article 122 of the regulation or of the objectives set out in Article 103c, including that of crisis prevention and management.

14 Under Article 103c(2)(a), crisis prevention and management must be related to avoiding and dealing with crises on the fruit and vegetable markets and to cover in this context, inter alia, market withdrawal.

15 The first paragraph of Article 122 of Regulation No 1234/2007 provides:

'Member States shall recognise producer organisations, which:

- (a) are constituted by producers of one of the following sectors:

...

- (iii) fruit and vegetables in respect of farmers growing one or more products of that sector and/or of such products solely intended for processing;

...

- (b) are formed on the initiative of the producers;

- (c) pursue a specific aim which may in particular, or as regards the fruit and vegetables sector shall, include one or more of the following objectives:

- (i) ensuring that production is planned and adjusted to demand, particularly in terms of quality and quantity;

- (ii) concentration of supply and the placing on the market of the products produced by its members;

- (iii) optimising production costs and stabilising producer prices.'

16 Article 123(1) and (3) of the regulation states:

'1. Member States shall recognise interbranch organisations which:

- (a) are made up of representatives of economic activities linked to the production of, trade in, and/or processing of products in the following sectors:

- (i) the olive oil and table olives sector;

- (ii) the tobacco sector;

- (b) are formed on the initiative of all or some of the organisations or associations which constitute them;

- (c) pursue a specific aim, which may, in particular relate to:

- (i) concentrating and coordinating supply and marketing of the produce of the members;

- (ii) adapting production and processing jointly to the requirements of the market and improving the product;

- (iii) promoting the rationalisation and improvement of production and processing;
- (iv) carrying out research into sustainable production methods and market developments.

...

3. Further to paragraph 1, Member States shall, with regard to the fruit and vegetables sector, and may, with regard to the wine sector, also recognise interbranch organisations which:

...

(c) carry out one, and in the case of the fruit and vegetables sector, two or more, of the following activities in one or more regions of the Community, taking into account the interests of consumers, and, without prejudice to other sectors, in the wine sector taking into account public health and the interests of consumers:

- (i) improving knowledge and transparency of production and the market;
- (ii) helping to coordinate better the way the products of the fruit and vegetables and the wine sectors are placed on the market, in particular by means of research and market studies;
- (iii) drawing up standard forms of contract compatible with Community rules;
- (iv) exploiting to a fuller extent the potential of the fruit and vegetables produced, and the potential of production in the wine sector;
- (v) providing the information and carrying out the research necessary to adjust production towards products more suited to market requirements and consumer tastes and expectations, in particular with regard to product quality and protection of the environment;
- (vi) seeking ways of restricting the use of plant-health products and other inputs and ensuring product quality and soil and water conservation;
- (vii) developing methods and instruments for improving product quality at all stages of production and marketing and, as regards the wine sector, also vinification;
- (viii) exploiting the potential of organic farming and protecting and promoting such farming as well as designations of origin, quality labels and geographical indications;
- (ix) promoting integrated production or other environmentally sound production methods;
- (x) with regard to the fruit and vegetables sector, laying down rules, as regards the production and marketing rules referred to in points 2 and 3 of Annex XVIa, which are stricter than Community or national rules;

...'

17 Article 125a(1) and (2) of the regulation provides:

'1. The rules of association of a producer organisation in the fruit and vegetables sector shall require its producer members, in particular, to:

...

(c) market their entire production concerned through the producer organisation;

...

2. Notwithstanding paragraph 1(c), where the producer organisation so authorises and where this is in compliance with the terms and conditions laid down by the producer organisation, the producer members may:

- (a) sell no more than a fixed percentage of their production and/or products directly on their holdings and/or outside their holdings to consumers for their personal needs, such percentages being fixed by Member States at not less than 10%;
- (b) market themselves or through another producer organisation designated by their own organisation, quantities of products which are marginal in relation to the volume of marketable production of their organisation;
- (c) market themselves or through another producer organisation designated by their own organisation products which, because of their characteristics, are not normally covered by the commercial activities of the producer organisation concerned.'

18 Article 125b(1)(c) and (g) of Regulation No 1234/2007 provides that Member States are to recognise as producer organisations ('POs') in the fruit and vegetables sector all legal entities or clearly defined parts of legal entities applying for such recognition, provided that there is sufficient evidence that they can carry out their activities properly, both over time and in terms of effectiveness and concentration of supply, and that they do not hold a dominant position on a given market unless this is necessary in pursuance of the objectives of Article 39 TFEU.

19 Article 125c of the regulation states:

'An association of [POs] in the fruit and vegetables sector shall be formed on the initiative of recognised [POs] and may carry out any of the activities of a [PO] referred to in this Regulation. To this end, Member States may recognise, on request, an association of [POs] where:

- (a) the Member State considers that the association is capable of effectively carrying out those activities; and
- (b) the association does not hold a dominant position on a given market unless this is necessary in pursuance of the objectives of Article [39 TFEU].

...'

20 Article 175 of Regulation No 1234/2007 is worded in the following terms:

'Save as otherwise provided for in this Regulation, Articles [101 to 106 TFEU] and implementation provisions thereof shall, subject to Articles 176 to 177 of this Regulation, apply to all agreements, decisions and practices referred to in Articles [101(1) and 102 TFEU] which relate to the production of, or trade in, the products covered by this Regulation.'

21 Article 176(1) of that regulation reads as follows:

'Article [101(1) TFEU] shall not apply to the agreements, decisions and practices referred to in Article 175 of this Regulation which are an integral part of a national market organisation or are necessary for the attainment of the objectives set out in Article [39 TFEU].

In particular, Article [101(1) TFEU] 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 TFEU] are jeopardised.’

22 Article 176a(1) and (4) of the regulation provides:

‘1. Article [101(1) TFEU] shall not apply to the agreements, decisions and concerted practices of recognised interbranch organisations with the object of carrying out the activities referred to in Article 123(3)(c) of this Regulation.

...

4. The following agreements, decisions and concerted practices shall in any case be declared incompatible with Community rules:

- (a) agreements, decisions and concerted practices which may lead to the partitioning of markets in any form within the Community;
- (b) agreements, decisions and concerted practices which may affect the sound operation of the market organisation;
- (c) agreements, decisions and concerted practices which may create distortions of competition which are not essential to achieving the objectives of the common agricultural policy pursued by the interbranch organisation activity;
- (d) agreements, decisions and concerted practices which entail the fixing of prices, without prejudice to activities carried out by interbranch organisations in the application of specific Community rules;
- (e) agreements, decisions and concerted practices which may create discrimination or eliminate competition in respect of a substantial proportion of the products in question.’

French law

23 Article L. 420-1 of the Code de commerce (Commercial Code) states:

‘Concerted actions, agreements, express or tacit understandings or coalitions shall be prohibited, even through the direct or indirect intermediation of a company in the group established outside France, where they have the aim or may have the effect of preventing, restricting or distorting the free competition in a market, particularly when they are intended to:

- 1. limit access to the market or the free exercise of competition by other undertakings;
- 2. prevent price setting by the free play of market forces, by artificially encouraging the increase or reduction of prices;
- 3. limit or control production, opportunities, investments or technical progress;
- 4. share markets or sources of supply.’

The dispute in the main proceedings and the questions referred for a preliminary ruling

24 Following inspection and seizure operations conducted by the direction générale de la concurrence, de la consommation et de la répression des fraudes (‘DGCCRF’) (Directorate-General for Competition, Consumer Affairs and the Prevention of Fraud, France) on 12 April 2007, the ministre de l’Économie, de l’Industrie et du Numérique (French Minister for the Economy, Industry and the Digital Sector) referred to

the Conseil de la concurrence (the French Competition Council), now the Autorité de la concurrence (the French Competition Authority), practices applied in the endive production and marketing sector.

- 25 By the decision at issue of 6 March 2012, the French Competition Authority found that APVE, Cerafel, FNPE, Celfnord, APEF, SNE, FCE and Groupe Perle du Nord, as well as the POs Fraileg, Prim'Santerre, Soleil du Nord, France endives, CAP'Endives, Marché de Phalempin, Primacoop, Sipema and Valois-Fruits, had applied in the endive market a complex and continuous cartel prohibited by Article L. 420-1 of the code de commerce (French Commercial Code) and Article 101(1) TFEU, that had consisted of an agreement on the price of endives through different mechanisms — such as disseminating a minimum price on a weekly basis, setting a '*cours pivot*' (central rate), establishing a trading exchange, setting a '*prix cliquet*' (reserve price) and misusing the withdrawal price mechanism — of collusion on the quantities of endives placed on the market and of a system for the exchange of strategic information used for the purpose of price maintenance, those practices having been aimed at the collective fixing of a minimum producer price for endives and having allowed producers and several professional POs to maintain minimum sale prices during a period which started in January 1998 and was still ongoing on the date of the decision at issue. It consequently imposed on them fines totalling EUR 3 970 590.
- 26 In the decision at issue, the French Competition Authority rejected, in particular, the producers' submission that the agreements in question should be regarded as necessary for the attainment of the objectives of the common agricultural policy, on the ground that the derogations provided for in Article 2(1) of Regulation No 1184/2006 and in Article 176 of Regulation No 1234/2007 were not applicable in the present case.
- 27 Several undertakings and organisations fined brought an action for annulment and, in the alternative, for variation of the decision at issue before the Cour d'appel de Paris (Court of Appeal, Paris, France).
- 28 By judgment of 15 May 2014, the Cour d'appel de Paris (Court of Appeal, Paris) varied all the provisions of the decision at issue and held that it had not been established that the provisions of Article L.420-1 of the French Commercial Code and Article 101(1) TFEU had been infringed. In that regard, it indicated, in particular, that, given the difficulties in the interpretation of the rules governing the common organisation of the markets in respect of the exact scope and limits of the responsibility of stabilising prices assigned to the organisations in question under the derogations from competition law resulting from the application of the rules of the common agricultural policy, it had not been established that the dissemination of minimum price instructions was, in every case, necessarily and definitively prohibited, so that it had not been indisputably established that the organisations in question had exceeded the bounds of the responsibilities lawfully assigned to them as regards price stabilisation.
- 29 The President of the French Competition Authority brought an appeal in cassation against that judgment. In support of his appeal, he claims, inter alia, in essence, that, outside the scope of the express derogations to the application of Article 101(1) TFEU, laid down by the regulations applying certain competition rules to the production of, and trade in, agricultural products, the fulfilment of the responsibilities assigned to POs and associations of POs ('APOs') is conceivable only in compliance with the rules on competition.
- 30 In those proceedings, the Commission submitted observations before the Cour de Cassation (Court of Cassation) pursuant to Article 15(3) of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules of competition laid down in Articles [101 and 102 TFEU] (OJ 2003 L 1, p. 1). It explains that there are not only general derogations, adopted on the basis of Article 2 of Regulations Nos 26 and 1184/2006 and Article 176 of Regulation No 1234/2007, from the applicability of EU competition rules to the agricultural sector, but also, under Article 175 of Regulation No 1234/2007, specific derogations laid down in the various regulations on the common organisation of the markets, which impose on organisations active in the production of, and trade in, fruit and vegetables certain specific tasks which would normally be liable to be caught by the prohibitions laid down in the rules on competition. In the present case, according to the Commission, those are, for the period up to the end of 2007, Regulation No 2200/96 and, for the period from 1 January 2008, Regulation No 1182/2007, incorporated into Regulation No 1234/2007. The Commission considers, however, that the main conduct at issue in the main

proceedings, namely the minimum price mechanisms agreed by the main APOs, does not form part of the specific tasks provided for by the common organisation of the market concerned and cannot be considered to be covered by those specific derogations.

- 31 In that regard, the Cour de cassation (Court of Cassation) notes that the Court of Justice, in the judgments of 9 September 2003, *Milk Marque and National Farmers' Union* (C-137/00, EU:C:2003:429), and of 19 September 2013, *Panellinos Syndesmos Viomichanion Metapoiisis Kapnou* (C-373/11, EU:C:2013:567), found that Article 42 TFEU establishes the principle that the European rules on competition are applicable in the agricultural sector and that the maintenance of effective competition on the market for agricultural products is one of the objectives of the common agricultural policy, and yet also held that, even with regard to the competition rules of the FEU Treaty, that provision gives precedence to the objectives of the common agricultural policy over those relating to competition policy.
- 32 However, it is of the opinion that the Court of Justice has not yet ruled on the existence of the 'specific derogations' mentioned by the Commission nor has it indicated, as the case may be, how they interact with the 'general derogations' set out in the regulations applying the rules on competition in the agricultural sector.
- 33 The Cour de cassation (Court of Cassation) therefore decided to stay proceedings and refer the following questions to the Court of Justice for a preliminary ruling:
- '1. Can agreements, decisions or practices of [POs], [APOs] and professional organisations which could be classified as anticompetitive under Article 101 TFEU escape the prohibition laid down in that article on the sole ground that they could be linked to the responsibilities assigned to those organisations under the common organisation of the market [concerned], even if they are not covered by any of the general derogations provided for in turn by Article 2 of Regulation [No 26] and [No 1184/2006], and by Article 176 of Regulation No 1234/2007 [...]?
 2. If so, must Article 11(1) of Regulation No 2200/96, Article 3(1) of Regulation No 1182/2007 and [the first paragraph of] Article 122 of Regulation No 1234/2007, which include, among the objectives assigned to [POs and APOs], those of stabilising producer prices and adjusting production to demand, particularly in terms of quantity, be interpreted as meaning that practices whereby those organisations or their associations collectively fix minimum prices, concert on the quantities placed on the market or exchange strategic information escape the prohibition of anticompetitive agreements, decisions and practices in so far as they are aimed at achieving those objectives?'

Consideration of the questions referred

- 34 By its questions, which should be considered together, the referring court asks, in essence, whether Article 101 TFEU, read in conjunction with Article 2 of Regulation No 26, Article 11(1) of Regulation No 2200/96, Article 2 of Regulation No 1184/2006, Article 3(1) of Regulation No 1182/2007, as well as the first paragraph of Article 122 and Articles 175 and 176 of Regulation No 1234/2007, must be interpreted as meaning that practices such as those at issue in the main proceedings, whereby POs, APOs and professional organisations intervening in the endive sector collectively fix minimum sale prices, concert on the quantities placed on the market and exchange strategic information, are excluded from the scope of the prohibition of agreements, decisions and concerted practices laid down in Article 101(1) TFEU.
- 35 As a preliminary point, it should be noted that endives fall into the 'edible vegetables and certain roots and tubers' category mentioned in Annex I to the FEU Treaty and, accordingly, are subject, pursuant to Article 38 TFEU, to the provisions of Articles 39 to 44 TFEU relating to the common agricultural policy.
- 36 Article 42 TFEU states that the provisions of the chapter relating to the rules on competition apply to the production of, and trade in, agricultural products only to the extent determined by the European Parliament

and the Council of the European Union within the framework of Article 43(2) TFEU and in accordance with the procedure laid down therein, account being taken of the objectives set out in Article 39 TFEU. In that regard, Article 43(2) TFEU provides that the Parliament and the Council are to adopt, inter alia, the provisions necessary for the pursuit of the objectives of the common agricultural policy.

- 37 Accordingly, in pursuit of the objectives of introducing a common agricultural policy and establishing a system of undistorted competition, Article 42 TFEU recognises that the common agricultural policy takes precedence over the objectives of the Treaty in the field of competition and also recognises the EU legislature's power to decide to what extent the rules on competition are to be applied in the agricultural sector (see, to that effect, judgments of 5 October 1994, *Germany v Council*, C-280/93, EU:C:1994:367, paragraph 61, and of 12 December 2002, *France v Commission*, C-456/00, EU:C:2002:753, paragraph 33).
- 38 It follows, as stated by the Advocate General in points 51 and 56 of his Opinion, that the EU legislature's interventions in that respect, rather than being aimed at establishing derogations or justifications for prohibiting the practices referred to in Article 101(1) and Article 102 TFEU, seek to exclude from the scope of those provisions practices which, if they were to take effect in a sector other than that of the common agricultural policy, would come under those provisions.
- 39 With regard, in particular, to the fruit and vegetables sector, and for the periods at issue in the main proceedings, the EU legislature indicated, in turn, in Article 1 of Regulation No 26, Article 1a of Regulation No 1184/2006 and Article 175 of Regulation No 1234/2007, how the common agricultural policy interacts with the rules on competition.
- 40 Article 175 of Regulation No 1234/2007, which reproduces, in essence, the way in which that relationship was specified in Regulations Nos 26 and 1184/2006, states that, save as otherwise provided for in Regulation No 1234/2007, Articles 101 to 106 TFEU and the implementation provisions thereof are, subject to Articles 176 and 177 of the regulation, to apply to all agreements, decisions and practices referred to in Articles 101(1) and 102 TFEU which relate to the production of, or trade in, the products covered by the regulation.
- 41 In the fruit and vegetables sector, Articles 101 to 106 TFEU apply to the practices referred to in those articles, except for the practices referred to in Articles 176 and 176a of Regulation No 1234/2007 and except where otherwise provided for in the regulation, as laid down in Article 175 thereof.
- 42 It should be noted that, under the first paragraph of Article 122 of Regulation No 1234/2007, the provision succeeding Article 11(1) of Regulation No 2200/96, and under Article 125c of Regulation No 1234/2007, a PO or an APO intervening on the fruit and vegetables sector is responsible for ensuring that production is planned and adjusted to demand, particularly in terms of quality and quantity, concentrating supply and placing on the market the products produced by its members, and also, optimising production costs and stabilising producer prices.
- 43 A PO or an APO may, in order to achieve the objectives referred to in those provisions, have recourse to means different from those which govern normal market operations and, in particular, to certain forms of coordination and concertation between agricultural producers.
- 44 Therefore, and unless POs and APOs are to be deprived of the means to achieve the objectives assigned to them under the common market organisation in which they are involved — and in which, as recalled in recital 7 of Regulation No 2200/96, they are the basic elements — and, accordingly, unless the effectiveness of the regulations establishing a common organisation of the markets in the fruit and vegetables sector is to be called into question, the practices of those entities which are necessary in order to achieve one or more of those objectives must escape, inter alia, the prohibition of agreements, decisions and concerted practices laid down in Article 101(1) TFEU.

- 45 It follows that, in that sector, the cases in which Article 101(1) TFEU does not apply are not limited only to those practices referred to in Articles 176 and 176a of Regulation No 1234/2007, but extend also to the practices mentioned in the previous paragraph.
- 46 However, the scope of those exclusions is to be construed strictly.
- 47 As the Court has already held, the common organisations of the markets in agricultural products are not a competition-free zone (judgment of 9 September 2003, *Milk Marque and National Farmers' Union*, C-137/00, EU:C:2003:429, paragraph 61).
- 48 On the contrary, the maintenance of effective competition on the markets for agricultural products is one of the objectives of the common agricultural policy and of the common organisation of the markets (see, to that effect, judgment of 9 September 2003, *Milk Marque and National Farmers' Union*, C-137/00, EU:C:2003:429, paragraphs 57 and 58).
- 49 It is also important to observe that, in accordance with the principle of proportionality, the practices in question may not go beyond what is strictly necessary in order to achieve one or more of the objectives assigned to the PO or APO at issue under the rules governing the common organisation of the market concerned.
- 50 The Court will examine, in the light of those considerations, whether practices such as those at issue in the main proceedings, whereby POs, APOs and professional organisations intervening in the endive sector collectively fix minimum sale prices, concert on the quantities placed on the market and exchange strategic information, are excluded from the scope of the prohibition of agreements, decisions and concerted practices laid down in Article 101(1) TFEU.
- 51 In that respect, it has been recalled in paragraph 44 above that the POs and APOs are the basic elements that ensure, at their level, the decentralised operation of common market organisations.
- 52 Thus, point (c) of the first paragraph of Article 122 and Article 125c of Regulation No 1234/2007 provide that, in the fruit and vegetables sector, Member States are to recognise the POs and APOs that, inter alia, specifically take responsibility for one of the objectives defined by the EU legislature and listed in points (i) to (iii) of the first provision mentioned above.
- 53 It follows that, for EU competition rules to be inapplicable on the basis that the practice in question is necessary in order to achieve one or more of the objectives of the common organisation of the market concerned, that practice must have been implemented by an entity that is actually entitled to do so under the rules governing the common organisation of that market, and, therefore, has been recognised by a Member State.
- 54 A practice adopted within an entity not recognised by a Member State in pursuance of one of those objectives cannot therefore escape the prohibition of the practices referred to in Article 101(1) TFEU.
- 55 That is likely to be the case, inter alia, of the practices of professional organisations such as, in the main proceedings, APVE, SNE and FCE, in respect of which there is nothing in the case file and in the replies to the questions addressed by the Court to show that they have been recognised by the French authorities as POs, APOs or interbranch organisations, within the meaning of Article 123(1) of Regulation No 1234/2007, that being a matter for the referring court to ascertain.
- 56 Concerning the practices applied by a PO or an APO, it is important to note that such practices must remain within a single PO or APO.
- 57 Indeed, in accordance with, inter alia, point (c) of the first paragraph of Article 122 and Article 125b(1)(c) of Regulation No 1234/2007, the responsibilities for production planning, concentrating supply and placing on the market, optimising production costs and stabilising producer prices, which may be assigned to a PO

or an APO under the rules applicable to the common organisation of the market concerned, may relate solely to the production and marketing of the products of the members of only the PO or APO in question. Accordingly, they can justify certain forms of coordination or concertation only between producers that are members of the same PO or APO recognised by a Member State.

58 Accordingly, agreements or concerted practices that are not agreed within a PO or an APO, but are agreed between POs or APOs, go beyond what is necessary in order to fulfil those responsibilities.

59 It follows from the considerations set out in paragraphs 51 to 58 above that practices established between such POs or APOs and, a fortiori, practices involving not only such POs or APOs, but also entities not recognised by a Member State in the context of the implementation of the common agricultural policy in the sector concerned, cannot escape the prohibition of the practices referred to in Article 101(1) TFEU.

60 To the extent that the practices at issue in the main proceedings were not adopted within the same PO or APO, but adopted between several POs, APOs and entities not recognised under the common organisation of the endive market, they could not be excluded from the scope of the prohibition of the agreements, decisions and concerted practices laid down in Article 101(1) TFEU.

61 Concerning, next, practices agreed between producers that are members of the same PO or APO recognised by a Member State, it should be recalled that, under the common agricultural policy in the fruit and vegetables sector, recognised POs and APOs must be responsible specifically for at least one of the three objectives referred to in point (c) of the first paragraph of Article 122 of Regulation No 1234/2007 and set out in paragraph 42 above.

62 It follows that, for EU competition rules in the fruit and vegetables sector to be inapplicable to a practice not covered by Articles 176 and 176a of Regulation No 1234/2007, the practice agreed within the PO or APO concerned must be actually and strictly connected to the pursuit of one or more of the objectives assigned to it in accordance with the rules governing the common organisation of the market concerned.

63 As regards the objectives mentioned in paragraphs 42 and 61 above, it should be observed that the objectives of ensuring that production is planned and adjusted to demand, of concentrating supply and placing on the market the products produced by members, and of stabilising producer prices, necessarily entail the exchange of strategic information between individual producers that are members of the PO or APO concerned, the purpose of which is, inter alia, to acquire knowledge of the characteristics of the products produced by the members. Therefore, exchanges of strategic information between producers within the same PO or APO are liable to be proportionate if they are in fact made for the purposes of one or more of the objectives assigned to that PO or APO and are limited only to the information that is strictly necessary for those purposes.

64 The objective of stabilising producer prices to ensure a fair standard of living for the agricultural community may also justify coordination between agricultural producers in the same PO or APO with regard to the quantities of agricultural products put on the market, as is clear from recital 16 of Regulation No 2200/96 and the intervention arrangements whose operating principle was laid down in Article 23 of that regulation and amended by Article 103c(2)(a) of Regulation No 1234/2007.

65 In addition, the objective of concentrating supply to strengthen the position of producers in the face of ever greater concentration of demand may also justify a certain form of coordination of the pricing policy of individual agricultural producers within a PO or an APO. That applies in particular where the PO or APO concerned has been assigned by its members the responsibility for marketing all their products, as required, save in special cases, by Article 125a(1)(c) of Regulation No 1234/2007, read in conjunction with Article 125c thereof.

66 By contrast, the collective fixing of minimum sale prices within a PO or an APO may not be considered, under the practices necessary in order to fulfil the responsibilities that have been assigned to them under the common organisation of the market concerned, to be proportionate to the objectives of stabilising

prices and concentrating supply where it does not allow producers selling their own products themselves in the cases referred to in Article 125a(2) of Regulation No 1234/2007 to sell at a price below those minimum prices, since it has the effect of reducing the already low level of competition in the markets for agricultural products as a result, in particular, of the possibility given to producers to form POs and APOs in order to concentrate their supply.

67 In the light of the foregoing, the answer to the questions referred is that Article 101 TFEU, read in conjunction with Article 2 of Regulation No 26, Article 11(1) of Regulation No 2200/96, Article 2 of Regulation No 1184/2006, Article 3(1) of Regulation No 1182/2007, as well as the first paragraph of Article 122 and Articles 175 and 176 of Regulation No 1234/2007, must be interpreted as meaning that:

- practices that relate to the collective fixing of minimum sale prices, concertation on quantities put on the market or exchanges of strategic information, such as those at issue in the main proceedings, cannot escape the prohibition of the agreements, decisions and concerted practices laid down in Article 101(1) TFEU if they are agreed between a number of POs or APOs, or are agreed with entities not recognised by a Member State in order to achieve an objective defined by the EU legislature under the common organisation of the market concerned, such as professional organisations not having the status of PO, APO or interbranch organisation, within the meaning of EU legislation, and
- practices that relate to a concertation on prices or quantities put on the market or exchanges of strategic information, such as those at issue in the main proceedings, may escape the prohibition of agreements, decisions and concerted practices laid down in Article 101(1) TFEU if they are agreed between the members of the same PO or the same APO recognised by a Member State and are strictly necessary for the pursuit of one or more of the objectives assigned to the PO or APO concerned in compliance with EU legislation.

Costs

68 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Grand Chamber) hereby rules:

Article 101 TFEU, read in conjunction with Article 2 of Regulation No 26 of the Council of 4 April 1962 applying certain rules of competition to production of and trade in agricultural products, Article 11(1) of Council Regulation (EC) No 2200/96 of 28 October 1996 on the common organisation of the market in fruit and vegetables, Article 2 of Council Regulation (EC) No 1184/2006 of 24 July 2006 applying certain rules of competition to the production of, and trade in, agricultural products, as amended by Council Regulation (EC) No 1234/2007 of 22 October 2007, Article 3(1) of Council Regulation (EC) No 1182/2007 of 26 September 2007 laying down specific rules as regards the fruit and vegetable sector, amending Directives 2001/112/EC and 2001/113/EC and Regulations (EEC) No 827/68, (EC) No 2200/96, (EC) No 2201/96, (EC) No 2826/2000, (EC) No 1782/2003 and (EC) No 318/2006 and repealing Regulation (EC) No 2202/96, as well as the first paragraph of Article 122 and Articles 175 and 176 of Regulation No 1234/2007, as amended by Council Regulation (EC) No 491/2009 of 25 May 2009, must be interpreted as meaning that:

- **practices that relate to the collective fixing of minimum sale prices, a concertation on quantities put on the market or exchanges of strategic information, such as those at issue in the main proceedings, cannot escape the prohibition of the agreements, decisions and concerted practices laid down in Article 101(1) TFEU if they are agreed between a number of producer organisations or associations of producer organisations, or are agreed with entities not**

recognised by a Member State in order to achieve an objective defined by the EU legislature under the common organisation of the market concerned, such as professional organisations not having the status of producer organisation, association of producer organisation or interbranch organisation, within the meaning of EU legislation, and

- practices that relate to a concertation on prices or quantities put on the market or exchanges of strategic information, such as those at issue in the main proceedings, may escape the prohibition of agreements, decisions and concerted practices laid down in Article 101(1) TFEU if they are agreed between the members of the same producer organisation or the same association of producer organisations recognised by a Member State and are strictly necessary for the pursuit of one or more of the objectives assigned to the producer organisation or association of producer organisations concerned in compliance with EU legislation.**

[Signatures]

* [—](#) Language of the case: French.