II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 28 October 1988

relating to a proceeding pursuant to Article 85 of the EEC Treaty

(IV/B-2/31.424, Hudson's Bay-Dansk Pelsdyravlerforening)

(Only the Danish text is authentic)

(88/587/EEC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community,

Having regard to Council Regulation No 17 of 6 February 1962, first Regulation implementing Articles 85 and 86 of the Treaty (1) as last amended by the Act of Accession of Spain and Portugal, and in particular Articles 3 (1) and 15 (2) thereof,

Having regard to the application for a finding of an infringement submitted on 4 January 1985 pursuant to Article 3 of Regulation No 17, by Hudson's Bay and Annings Ltd, London, UK (hereinafter 'HBA'),

Having regard to the notification and application for negative clearance submitted to the Commission by Dansk Pelsdyravlerforening (Danish Fur Breeders' Association — hereinafter DPF) of Glostrup, Denmark, on 27 August 1985, concerning the following agrements and decisions :

(a) Love for Dansk Pelsdyravlerforening — the Regulations of the Danish Fur Breeders Association ;

(b) Regler for avlernes kapitalfond — the Rules of the Capital Fund ;

(c) Regler for katastrofehjælpsordningen — the Rules regarding the Emergency Assistance Scheme,

Having regard to the Commission Decision of 30 March 1987 to initiate proceedings in this case,

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

After consulting the Advisory Committee on Restrictive Practices and Dominant Positions,

I. THE FACTS

(1) **Complaint and notification**

On 4 January 1985 and subsequently, HBA formally complained to the Commission which was requested to make findings of infringement of Article 85 (1) and Article 86 in respect of the following agreements and/or practices :

(a) Section 4, part 1 (f) of the DPF Regulations (as set out in paragraph 3 (a) below) which obliges members not to organize or support sales by competitors of DPF and which was invoked to threaten expulsion of three DPF members because they acted as agents for HBA. Two of these were in fact expelled from the DPF ;

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

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

(b) Section 5 of the Rules of the Emergency Assistance Scheme as set out in paragraph 3 (b) below which provides for refusal of emergency assistance if the member has supplied fur sale outlets other than Danske Pels Autioner (Danish Fur Sales) hereinafter DPA;

(c) the terms on which the DPF makes a money advance to its members in repect of young animals (a 'kit advance', which was introduced on 11 April 1975 by decision of the Board) in so far as the member must first undertake to sell his entire production through DPA and secondly, become a member of the Emergency Assistance Scheme; the 100 % obligations thus reinforced one another;

(d) the obligation on fox fur farmers who wish to take a course in artificial insemination of foxes or who are qualified to act as DPF artificial inseminators of foxes not to send production to competitors of DPF and not to inseminate animals for farmers who send skins to competitors of DPF;

(e) Section 5 of the Standard Pelting Control Agreement (by which DPA undertakes to supervise pelting in a Pelting Centre) in providing that 'the Pelting Centre undertakes solely to look after the interests of the DPA and among other things must not show their own or delivered skins to anybody other than the representative of the DPA. The Pelting Centre also undertakes not to arrange sale or another kind of dispatch of skins to buyers or sales organizations other than DPA';

(f) the rules for inclusion on a 'hit list' i. e. a list of members producing quality skins, requiring the farmer to consign his entire farm production for sale by DPA including types of skin for which inclusion on the hit list is not sought;

(g) the operation by the DPA of a quota system under which a certain percentage of each member's production is sold at each of the five auctions held annually.

(2) The parties

(i) HBA, principal auctioneer of furs in the UK, has subsidiaries in Denmark, Holland, Finland, Sweden and Norway. In Denmark (as elsewhere) it retains agents for the purposes of soliciting and collecting the furs for auction in London. HBA was purchased by Finnish Fur Sales on 19 December 1986 and is now known as Hudson's Bay Company Properties (UK) Ltd;

(ii) DPF, a cooperative association of over 5 000 fur breeders [3] [4], provides for its members and advisory and consultancy service, a veterinary service, educational facilities, a monthly magazine and experimental and research operations. Certain services are free to members, others must be paid for. DPA is the selling branch of the DPF and conducts the auctions. Operations overseas are carried out by agreement with Global Fur A/S, the shares in which are owned by the provincial associations.

(3) The notified agreements and decisions

The relevant parts of the agreements and decisions notified to the Commission are as folows:

(a) the Regulations of the DPF in particular so far as section 4, part 1 (f) provides that members 'undertake not to organise a sale or in any other way support the sale of skins in competition with the sales activity of the Danish Fur Breeders Association';

(b) the Rules regarding the Emergency Assistance Scheme in so far as they provide that:

— emergency assistance is paid for losses incurred by members by the death of their animals,

— a new member has no right to emergency assistance until he has been a member for one year; emergency assistance after three months is, however, available if he pays Dkr 3 per animal on his farm at the time of registration,

— emergency assistance is refused under section 5 of the Regulations if the insured 'has supplied for sale outlets other than the DPA in the year of damage (15 August to 14 August) or the previous financial year' (private consumption excepted).

The Rules of the Capital Fund are not the subject matter of any complaint.

(4) The market

(i) The product involved is fur skins such as mink, fox, racoon and fitch. For all practical purposes however only mink and fox skins are of importance in this case. Denmark produces annually about nine million mink (which represents 72 % of EEC production and 27 % of world production) around 240 000 foxes and

[1] Below the DPF itself there are five provincial associations each of which in turn has local associations below it. Any fur farmer joining a provincial association thereby becomes a member of the DPF.

[2] The DPF stated at the hearing that membership includes a very high proportion of Danish mink farmers.

some chinchilla. In 1985/86 the DPA sales were 11,7 million skins including 8 million Danish mink and 185 000 Danish fox. In 1986/87 over 13 million skins were sold at DPA auctions including 8,3 million Danish mink and about 190 000 Danish fox.

Sales of furskins are either private sales to fur dealers or more usually sales by public auction. Copenhagen is the main public auction centre in Europe with buyers coming from all over the world. (In 1986/87 995 buyers from 28 different countries attended the DPA auctions.)

Sales of mink furs at Copenhagen account for one third of world production. About 98 % of the furs traded are exported. Prices fluctuate widely in response to international economic conditions. Danish furs can be sold through certain foreign undertakings, the most important of which is HBA. Only a small proportion of Danish furs is traded at foreign auctions.

(ii) For the 1985/86 and the 1986/87 seasons HBA obtained the following percentages of national production from the Scandinavian countries:

(in percent)

	1985/1986		1986/1987	
	Mink	Foxes	Mink	Foxes
Denmark	1,7	13,5	2,4	12,9
Finland	8,9	7,6	Figures not furnished	
Norway	8,8	1,4		
Sweden	15,2	31,0		

(iii) DPF revenue is almost entirely generated by fixed fees charged to producers and by commission on sales paid by purchasers.

These sales which in 1985/86 totalled ECU 226 million and in 1986/87 totalled ECU 504 million included skins sent from Finland, Sweden, Norway etc. Fees and commission amounted to ECU ± 16 million and ECU ± 23 million respectively. Profits for the year are directly related to turnover and are divided among the members' operating and capital fund accounts in accordance with a ratio for distribution between the two funds decided annually at the general meeting. The individual's right is proportionate to the volume of business he has done via the DPA (section 22 of the Regulations of the DPF.)

After payments for research, courses, salaries etc. there was a surplus in 1986/87 of ECU 2,97 million which was allocated as to ECU 2,3 million to the members' operating and capital funds by way of interest and as to ECU 0,67 million to the members' operating funds. In 1985/86 there was a deficit of ECU 1,7 million which was borne by the DPF's capital fund.

5. The submissions of the DPF

In reply to the statement of objections issued on 13 April 1987 as well as in the course of the proceedings the DPF denied infringement of the competition rules and claimed that its rules and practices were justified by the special nature of the services they provided for members of the cooperative and the DPF asserted in particular:

(a) with reference to 1 (a) above — section 4, part 1 (f) was a ban on actively competing with the auction business of DPA and it did not prohibit a farmer from offering his own production for sale elsewhere;

(b) with reference to 1 (b) above — it would be unfair on other participants if a member could be covered by the Emergency Assistance Scheme without supplying his furs for sale through DPA as he would make no financial contribution for the Scheme;

(c) with reference to 1 (c) above — the 100 % supply obligation as condition precedent to receipt of the kit advance endeavours to protect the assets out of which the advance is distributed;

(d) with reference to 1 (d) above — it is denied by DPF that there are any such obligations relating to artificial insemination of foxes;

(e) with reference to 1 (e) above — DPF denied that section 5 of the Standard Pelting Control Agreement restricts competition;

(f) with reference to 1 (f) above — qualification for inclusion on the 'hit list' required an expert assessment not only of particular skins but of a farmer's entire stock; only then could accurate recommendations for breeding purposes be made;

(g) with reference to 1 (g) above — DPF argued that the quota scheme operated at auctions was justified by lack of storage space and by it being in the interests of members to ensure that at each auction there is an adequate choice for buyers. DPF has explained that all the animals are killed and pelted at the end of November of any given year. It is agreed with all the members that the delivery of the fur skins is to take place in instalments with a specified percentage of the agred number of fur skins to be sold at each of the five annual auctions and against a fixed commission. An immediate skin advance is available calculated on the basis of the number of fur skins to be sold via the DPA.

6. **The DPF proposals**

Although DPF formally defended its position it nevertheless submitted the following proposed amendments :

(i) by letter of 4 June 1987 to the Commission :

(a) as far as the kit advances are concerned, all farmers — members and non-members — are to receive the kit advance on the condition that they commit themselves only to supply a number of skins equivalent to the number of animals for which a cash advance has been granted.

In addition the kit advance agreement would in future involve no obligation to be a member of the Emergency Assistance Scheme ;

(b) whilst membership of the Emergency Assistance Scheme would remain voluntary and would continue to cover the entire herd of each member-farmer, the 100 % sales commitment through the DPA would be abolished ; emergency assistance paid would be calculated in proportion to the percentage of skins supplied for sale through the DPA in the financial year prior to the damage year ;

(c) the rules of the 'hit list' competition will apply to only one type of skin. (For example, a farmer wishing to enter his mink skins on the 'hit list' competition would only be required to supply his entire production of mink skins. He would be free to sell his production of fox skins via other outlets.) The DPF later offered to amend the rule further by requiring only supply of the entire production of either light colours or dark colours ;

(ii) by letter of 26 November 1987 :

(a) the prohibition contained in section 4, part 1 (f) of the DPF Regulations against organizing or supporting sales in competition with the sales of DPF will be deleted ; and

(b) section 5 of the Standard Pelting Control Agreement will be deleted.

With the possible exception of the rules for the kit advance scheme which was to come into force in July 1988 the proposed amendments have not, to the Commission's knowledge, been implemented.

II. Legal assessment

A. Article 85 (1)

7. Article 85 (1) provides that 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, restrictions or distortion of competition within the common market shall be prohibited as incompatible with the common market.

8. The fur breeders who are members of the DPF are undertakings within the meaning of Article 85 of the EEC Treaty and the agreements between them are agreements within the meaning of that provision in so far as they constitute the basic regulations of the DPF.

The DPF is an association of undertakings within the meaning of this Article and the rules adopted by its competent bodies constitute decisions of such an association within the meaning of Article 85 [1]

9. The regulations and rules which govern the legal relationship between the DPF and its members include, among their objects, the prevention of the consignment or sale of furs by DPF members to any of DPF's competitors by obliging the DPF members to sell 100 % of their production through DPA.

10. The following regulations and rules are considered to have as their object and effect the restriction of competition within the meaning of Article 85 (1) (application of Article 85 (1) is not excluded by Article 2 of Council Regulation No 26 [2] as skins are not included in Annex II to the Treaty) :

(i) section 4, part 1 (f) of the DPF Regulations imposed a non-competition obligation on its members. This obligation in particular prohibits members from acting as collecting agents for competitors thus sealing off the Danish market against entry by competitors. The restrictive

[1] In some respects the DPF is also an association of the local and provincial associations but this is not relevant for this case.

[2] OJ No 30, 20. 4. 1962, p. 993/62.

effect of the ban was augmented by concerted practices which consisted in members not consigning skins to competitors at all. The DPF, although requested by the Directorate-General of Competition to clarify this matter with the members, refused to do so as it considered clarification unnecessary;

(ii) The 100 % obligations attached to the kit advance, to membership of the Emergency Assistance Scheme, to entry in the 'hit list' competition and contained in the Pelting Control Agreement tie up the options of the members who are thereby prevented from independently determining their sales policy. They hinder market entry by competitors as they corner the main source of supply of skins in Denmark.

11. Trade between Member States is affected as the aim of these rules, obligations and concerted practices has been to limit market entry by competitors by virtually monopolizing the supply and sale of mink skins in Denmark. Limiting or eliminating effective competition has resulted in partitioning the common market in as much as Denmark is virtually inaccessible to competitors of the DPF. It can be safely assumed that if the 100 % obligations were abolished or reduced a larger percentage of furs (especially mink) would be sent by DPF members to competitors of DPF including HBA, as is the case in the other Scandinavian countries. Members are and have been prevented by such rules and obligations from sending part of their production to other Member States either to be auctioned or as direct sales [1]. Furthermore, the possibility of Danish farmers selling privately to buyers in other Member States is almost entirely eliminated. Bearing in mind the importance of the fur sector in Denmark (over 27 % of world mink production) the effects on trade between Member States are appreciable.

12. **Article 85 (3)**

(i) The effect of section 7, part 1 (f) of the DPF Regulations as well as the 100 % obligations is to eliminate competition in respect of a substatial part of the furs produced by DPF members who are thereby prevented from offering their furs for sale through auction houses wishing to compete with DPA. Furthermore, members are denied the possibility of making even private sales. The notified rules and regulations cannot therefore benefit from exemption under Article 85 (3), as a condition in respect of a substantial part of the products in question. Moreover, sufficient justification has not been advanced to show that these obligations are indispensable to achieving the objectives of the DPF.

(ii) The standard of agreement for a kit advance, the conditions relating to entry on the 'hit list' and the Pelting Control Agreement have not been formally notified to the Commission in accordance with Article 4 (1) of Regulation No 17. The purpose of these agreements and conditions is to prevent parallel exports. They do not therefore fall within Article 4 (2) of that Regulation as they do not comply with the requirement that they do not relate either to imports or exports between Member States [2]. No decision in application of Article 85 (3) may therefore be taken in respect of these agreements. In any case, these agreements would not have benefitted from application of Article 85 (3) as they restrict competition in the same way as the obligations mentioned at (i) above.

(iii) Although the DPF has made proposals for amendments to its rules in order to make them compatible with the provisions of Article 85 these amendments have not, with the possible exception of the rules for the kit advance scheme, been implemented.

The Commission will decide regarding exemption or negative clearance only after the amendments proposed by the DPF have been made and it has had an opporunity to examine the practical application of the amended rules and regulations.

13. **Article 15 (2) of Regulation No 17**

Under Article 15 (2) of Regulation No 17, the Commission may impose fines of from ECU 1 000 to ECU 1 million or a sum in excess thereof, but not exceeding 10 % of the turnover in the preceding business year of each undertaking participating in the infringement, where, either intention-

[1] In regard to an import restriction the Court has stated: 'because it restricts the freedom of members to import direct into the Netherlands, this clause is liable to interfere with the natural movement of trade and thus to affect trade between member countries' (Frubo v. Commission /1975/ ECR 584.)

[2] In IAZ, Joined Cases 96-102/82, 104/82, 105/82, 108/82 and 110/82 (Report of Cases before the Court, 1983, page 3369) the Court held at point 35 of its Judgment that 'the purpose of the agreement was appreciably to restrict parallel imports ... and it thus tends to isolate the Belgium market in a manner incompatible with the fundamental principles of the common market'.

ally or neglilgently, such undertaking(s) infringe Article 85 (1) or Article 86 of the Treaty. In fixing the fine, regard shall be had both to the gravity and to the duration of the infringement.

The Commission believes that a fine is merited in the present case in respect of the infringements which were committed deliberately or at least negligently. The DPF must have known that the 100 % obligations has as their object or effect the restriction of competition. The infringements themselves were serious since they resulted in other fur trading agencies being almost totally excluded from obtaining supplies in Denmark and thus almost eliminating any competition with the DPF there. Denmark's importance as a producer of furs within the EEC which gives DPF a virtually dominant position in fur sales within the common market means the seriousness of the infringements is aggravates. The DPF has few if any competitors as a supplier of services (veterinary, consultancy and technical advice, laboratory etc.) and products essential for the great majority of Danish fur breeders who are members of the Association.

14. The infringements began at the latest on the following dates

(i) the 100 % obligation in respect of the kit advance and the Emergency Assistance Scheme on 11 April 1975 and 1 January 1973 respectively;

(ii) the obligation not to organise or support the sale of skins by competitors of DFA on 22 October 1976;

(iii) the 100 % obligation attached to entry on the 'hit list' came into force during the year 1984/85;

(iv) the 100 % obligation in the Standard Pelting Control Agreement — 1 January 1973.

The Commission has taken into account in deciding the size of the fine the following mitigating factors:

— that since receipt of the statement of objections the DPF has made concrete proposals to eliminate the restrictions complained of,

— the fact that DPF is a cooperative association deserves special consideration. A characteristic feature of cooperatives is that they are owned by farmers who in terms of their income depend directly on the business results of the cooperative.

15. On these grounds and having regard to the circumstances mentioned the Commission considers that a fine should be imposed on the DPF. As regards the notified agreements and decisions the Commission will take account of the period up to 27 August 1985, the date of notification.

16. **Article 3 of Regulation No 17**

Under Article 3 (1) of Regulation No 17, the Commission may, if it finds that there has been an infringement of Article 85 of the Treaty, require by decision that the undertakings concerned bring such infringement to an end. Since the DPF has not as yet implemented all the amendments the Commission is of the opinion that it must order that the infringements be terminated,

HAS ADOPTED THIS DECISION:

Article 1

1. The following agreements and decisions by associations of undertakings of the Dansk Pelsdyravlerforening (the Danish Fur Breeders Association) and concerted practices constitute infringements of Article 85 (1):

(a) section 4, part 1 (f) of the Regulations of the DPF which provides that active members are, *inter alia,* those 'who undertake not to organize a sale or in any other way support the sale of skins in competition with the sales activity of the Danish Fur Breeders Associations' and the application of this provision;

(b) section 5 of the Regulations regarding the Emergency Assistance Scheme which refuses emergency assistance when the insured has suppliled furs for sale through sales outlets other than the DPA in the year of damage or the previous financial year;

(c) the obligations on a member to supply his/her entire production for sale by the DPA:

— in the event of the member being granted a kit advance

— in the event of the member wishing to enter the 'hit list' competition;

(d) section 5 of the Standarde Pelting Control Agreement which prohibits the Pelting Centre from showing or arranging the sale for dipatch of skins to anybody other than the DPA.

2. The DPF shall, to the extent that it has not already done so, terminate the infringements found in paragraph 1 and shall in future refrain from taking any measure ahving the same object or effect as the above restrictions.

3. An exemption under Article 85 (3) for the Regulations notified to the Commission and which are referred to at paragraph 1 (a) and (b) is hereby refused.

4. The DPF shall inform the two members expelled from the Association because they acted as agents for HBA that the obligation which led to their explusion was found to have infringed Article 85 (1). The DPF shall forward to the Commission a copy of this communication and any replies thereto.

Article 2

1. For committing the infringements referred to in Article 1, a fine of ECU 500 000 (five hundred thousand) is hereby imposed on the Danish Fur Breeders Association.

2. The fine shall be paid by the Danish Fur Breeders Association into

(a) account No 1013823 of the Commission of the European Communities, Brussels (for payment in ECU) at Kjoebenhavns Handelsbank, 2 Holmen's Kanal, KD-1091 Copenhagen K;

(b) account No 7351-6 operational account of the Commission of the European Communities, Brussels (for payment in Danish kroner) at Denmarks Nationalbank, Havnegade 5, DK-1093 Copenhagen K, within three months from the date of notification of this Decision.

After three months, interest shall automatically be payable at the rate charged by the European Monetary Cooperation Fund on its ecus operations on the first working day of the month in which this Decision was adopted, plus 3,5 percentage points, i.e. 10,75 %.

Should payment be made in Danish kroner the exchange rate applicable shall be that prevailing on the day preceding payment.

Article 3

The Danish Fur Breeders Association shall inform its members of this Decision by 31 January 1989 and shall inform the Commission of the manner in which this has been done.

Article 4

This Decision is addressed to:

Dansk Pelsdyravlerforening,
(The Danish Fur Breeders Association),
Langagervej 60,
DK-2600 Glostrup.

This Decision is enforceable pursuant to Article 192 of the EEC Treaty.

Done at Brussels, 28 October 1988.

For the Commission

Peter SUTHERLAND

Member of the Commission