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Cooperative Organizations Can Be Held Liable and Fined Based on their Own Turnover – Conserve Italia v Commission (T-59/22)

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A cooperative organization which is composed of several other associations of undertakings and individual companies can be considered, at the same time, an *undertaking* and an *association of undertakings* for the purpose of applying Article 101 TFEU to the anticompetitive conduct of such an organization. It can be fined by taking into account its own turnover, with no need to refer to the sales realized by the ultimate individual members of the cooperative.

These are the main findings of the Judgment delivered in September 2024 by the General Court, in Case T-59/22 *Conserve Italia v Commission*, which upheld the European Commission's Decision on case *AT.40127 – "Canned vegetables"*, imposing a fine of EUR 20 million on an Italian farming cooperative entity for an infringement of Article 101 TFEU. The judgment is currently under appeal.

It remains to be seen whether the Court of Justice will confirm the judgment. But the case suggests that the more an association of undertaking behaves autonomously on a market and has its own economic capacity (in terms of own turnover), the more such an association would be considered directly liable in the case of an infringement of competition laws, without taking into account the position (and revenues, for the purpose of calculating the fine) of the single companies being part of that organization. The internal rules governing the association may also play a relevant role – for example, in this case the commercial strategy of the group on the market for canned vegetables was determined by the organization, and not by its members.

Background of the case

Conserve Italia Soc. Coop. agricola ("**Conserve Italia**") is a farming cooperative formed by so-called "cooperative members", that are distinct from other "financing members". As of June 2021, Conserve Italia counted 34 cooperative members – each consisting, in turn, of various associations and farming organizations, and counting all together, among their members, about 14,000 farming companies. These farming companies produce raw vegetables and fruits, which are then used by Conserve Italia to produce canned vegetables and canned fruit, drinks made from fruit and other similar products. In particular, 11 out of the 34 cooperative members (counting, in turn, approximately 343 farming companies) supply Conserve Italia with peas, green beans and corn, i.e.

the products used to manufacture the canned vegetables, which were the subject of the Decision (see §§4-8).

Other than Conserve Italia and its controlled company Conserves France S.A., three other entities – whose identities were redacted in the Decision – were involved in the proceedings opened by the Commission in February 2017, under Article 11(6) of Regulation (EC) No. 1/2003 and Article 2(1) of Regulation (EC) No. 773/2004. However, the latter entities engaged in settlement discussions with the Commission and, as a result of their formal request to settle, the Commission continued the investigation only into Conserve Italia.

The case relates to a single and continuous infringement of Article 101(1) of TFEU, relating to the sale of certain types of canned vegetables to retailers and/or the food service industry, lasting from January 2000 until October 2013. In particular, the infringement concerned three inter-related horizontal agreements through which the canned vegetables producers coordinated their commercial conduct on the market. Conserve Italia participated in the following two of the three agreements: (i) an agreement covering sales of canned vegetables such as green beans and peas, to retailers in Belgium, Germany, France and the Netherlands; and (ii) an agreement covering sales of canned sweetcorn, to retailers in Belgium, Germany, Denmark, Ireland, Spain, France, Italy, Luxembourg, the Netherlands, Austria, Portugal, Norway Finland, Sweden and the UK.

The Commission imposed a fine of EUR 20 million on Conserve Italia pursuant to Article 23(2) and 23(3) of Regulation (EC) No. 1/2003, and related points of the Guidelines on the method of setting fines imposed pursuant on Article 23(2)(a) of Reg. 1/2003.

In particular, the basic amount of the fined was determined by the Commission considering the value of sales made by Conserve Italia throughout the EEA from 2000 to 2013, with regard to the products concerned by the investigation. In terms of duration of the infringement, the Commission considered the period from 15 March 2000 to 1 October 2013 for the first agreement, and from 20 October 2000 to 1 October 2013 for the second agreement. A gravity factor of 18% and an additional deterrent coefficient of 18% of the value of sales applied. Further adjustments and reductions applied (see §§ 18-23 of the Judgment).

Grounds for appeal of the Decision proposed by Conserve Italia

Conserve Italia appealed the Decision requesting the partial annulment of the judgment related to the calculation of the fine, and a subsequent reduction of the fine, in light of the following reasons:

- First ground of Appeal: the Commission erroneously determined the maximum amount of the fine by taking into account the total consolidated turnover of Conserve Italia during the year prior to the Decision, instead of the turnover achieved by the farming companies which had supplied the products to Conserve Italia – indeed, Conserve Italia claimed that the Commission wrongly considered Conserve Italia as an undertaking, instead of an association of undertakings.
- Second Ground of Appeal: the Commission erroneously determined the value of sales by taking into account the sales made by Conserve Italia in the whole EEA territory during the year prior to the Decision, instead of considering only the sales made by the farming companies in the context of each relevant agreement, and only in the jurisdictions where each infringement took place.

The Judgment of the General Court

With its Judgment delivered on September 4, 2024, the First Chamber of the General Court confirmed the Decision and rejected Conserve Italia's appeal.

In particular, the General Court rejected the first ground of appeal proposed by Conserve Italia in light of the following reasons:

First, the Commission correctly identified Conserve Italia as an *undertaking* pursuant to Article 23(2) second sub-paragraph, of Regulation (EC) No. 1/2003. Indeed, Conserve Italia carries on an economic activity consisting in offering products in the market for canned vegetables, and such activity is distinct from that carried on by the farming companies that are part of the cooperative – which operate at upstream level, by cultivating and supplying fresh vegetables then used by Conserve Italia to produce canned vegetables (see §§ 32 and 50 of the Judgment).

Such a conclusion should not be challenged by the fact that Conserve Italia is an *association of undertakings* – indeed, according to the General Court, the same entity may be simultaneously be considered as an undertaking and as an association of undertakings (see §§ 33-36 of the Judgment).

In addition, the General Court clarified that even a cooperative entity like Conserve Italia, having a mutualistic scope, can be considered as an undertaking – and this because, as a general principle, cooperative organizations cannot be exempted from the application of EU competition law. That is to say, they can be treated like all other undertakings under EU competition law. On this basis, the General Court said that the fact that Conserve Italia conducts its business for the exclusive benefit of its members is irrelevant, given that the nature of an "undertaking" is not conditioned on the pursuit of a profit-making aim (see §§ 37-40 of the Judgment).

The General Court also pointed out that the internal regulations adopted by Conserve Italia (governing the relationship between the latter and its ultimate members, the farming companies) confer on Conserve Italia (and not on its members) the power to define the commercial strategy of the group on the market for canned vegetables (see § 44 of the Judgment).

Lastly, the General Court also clarified that the Commission correctly applied Article 23(2) second sub-paragraph, of Regulation (EC) No. 1/2003, instead of the third sub-paragraph of that provision, as claimed by Conserve Italia. Indeed, the third sub-paragraph can be used in particular circumstances, where the turnover of the association does not reflect its dimension and economic capacity – which is not the case at stake, the General Court said (see §§ 46-51 of the Judgment).

The second ground of appeal was also rejected by the General Court for the following reasons:

First, the Commission correctly identified the basic amount of the fine pursuant to point 13 of the Guidelines. The value of sales should encompass (all) the sales made in the market where the infringement took place, without there being any need to determine whether those sales were actually the result of the infringement. This is because the value of turnover derived from the sales of products made in the market concerned by the infringement reflects the economic importance of the infringement (see §§ 57-59 of the Judgment).

As regards the relevant geographic area for calculating the value of sales, the Commission correctly considered that the geographical scope of the infringement covered the entire EEA and, consequently, it took into account the value of sales made by Conserve Italia within the whole

EEA. In fact, the Commission found that between the parties to each of the first and the second agreements there was a general policy of non-aggression, under which they prohibited each other from competing in countries not covered by those agreements, with the consequence that the infringement existed even beyond the territorial scope of each agreement (see §§ 60-65 of the Judgment).

The General Court also confirmed that the Commission correctly took into account the sales made by Conserve Italia, and not those of the individual farming companies, because Conserve Italia was the undertaking responsible for the infringement (see above, and §§ 66-68 of the Judgment).

The General Court also confirmed that the Commission correctly considered the gravity of the infringement and imposed the coefficient of 18% as deterrent (see §§ 69-86, and 102-114 of the Judgment).

As regards the duration of the infringement, the General Court considered, *inter alia*, the fact that Conserve Italia did not participate in certain meetings with the other canned vegetables producers that occurred between 2000 and 2013. However, such a circumstance did not exclude the "continuous" nature of the infringement. In fact, according to the General Court, Conserve Italia never provided any evidence (and it has not claimed) of having publicly and clearly taken the distance from those anticompetitive agreements (see §§ 87-101 of the Judgment). Accordingly, the Commission correctly took into account the entire duration of the infringement to calculate the fine imposed on Conserve Italia.

Key takeaways

Although the judgment is currently under appeal, some key takeaways related to the EU enforcement of competition laws can be considered:

- associations of undertakings (including cooperatives, *consortia* and other similar organizations) should be aware that, under certain circumstances, they may be treated like all other undertakings under EU competition law, meaning that these entities must implement their own internal audits and compliance programs to ensure full compliance with antitrust rules;
- said "circumstances" may occur when, for example: the association can be considered an entity independent and separate from its members because it has its own personnel, resources and premises; the association operates autonomously on a market which is distinct from the market where its members operate; the governance structure of the association confers to its Board of Directors the power to orient the day-to-day business of the association; the financial statements of the association indicate relevant revenues collected by the latter (e.g. in terms of million of euros) that can be taken into account by a competition authority to confirm that the association carries on its own business, and that such business is separate from that of its members;
- if an association becomes aware of potential anticompetitive behaviours of its competitors or members, it is not sufficient for it to stop taking part in the relevant meetings, rather, the association has to take concrete actions to distance itself from any anticompetitive behaviour (in writing, and possibly through public channels, for example press releases);
- single members of an organization/association have a general duty to monitor the compliance of their associations with competition rules, particularly to limit the risk of being considered jointly and severally liable with the association for the payment of the fine, in case a competition

authority finds an infringement.

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