Competition Act 1998

Decision of Director General of Fair Trading
No. CA98/1/2003

Decision of the Northern Ireland Livestock and Auctioneers' Association of undertakings to recommend that its members introduce a buyer's commission in Northern Ireland cattle marts

3 February 2003
(Case CP/0504-01)

SUMMARY

The Director General of Fair Trading has concluded that the Northern Ireland Livestock and Auctioneers' Association (the NILAA) has infringed the Competition Act 1998 (the Act) by recommending that its members introduce a standard (or uniform) commission payable by purchasers of livestock in Northern Ireland cattle marts.

The NILAA met on 9 August and 19 December 2000 to debate the imposition of a charge on buyers for the purchase of cattle at cattle marts in Northern Ireland. At the meeting on 19 December 2000, the NILAA reached a consensus that a buyer's commission should be introduced by the marts. A level of £2 per head of cattle was proposed. On 19 January 2001, the Chairman of the NILAA, Mr Irvine, issued a press release that expressed the recommendation of the NILAA, as decided at the meeting of 19 December 2000. The Director considers that the recommendation to introduce a buyer's commission constitutes a decision by an association of undertakings that had as its object the prevention, restriction or distortion of competition in the provision of services by cattle auctioneers at livestock marts in Northern Ireland.

The Director considers that agreements between undertakings, decisions of associations or concerted practices that relate to price fixing are among the most serious infringements of the Act and especially if they are covert - merit deterrent financial penalties. However, in this case the recommendation of the NILAA was publicised. The Director has also taken into account the wholly exceptional circumstances present in this case as a result of the effects of the diseases BSE (Bovine Spongiform Encephalopathy) and Foot and Mouth...
Disease (FMD) on the cattle industry in Northern Ireland generally, and cattle auctioneers in particular, by way of increased veterinary health regulation, reduction in throughput of cattle and the total closure of the marts from the end of February 2001 until August 2001. In the light of the overt nature of the recommendation combined with these exceptional circumstances, the Director has concluded that the NILAA should not pay a penalty in this case.
I THE FACTS

A The complaint

1. On 2 February 2001, the Ulster Farmers Union (‘the UFU’) complained to the OFT that members of the NILAA (undertakings engaged in owning or running livestock auction marts in Northern Ireland) had introduced a uniform buyer’s commission of £2 per head of cattle with effect from the beginning of February 2001.1

2. On 18 January 2001, the Chairman of the NILAA, Mr Shaun Irvine, sent the UFU a copy of a press release listing the marts or markets2 that intended to introduce the charge from 1 February 2001, and the reasons for doing so.3 A copy of that press release (‘the Press Release’)4 was sent to the Irish News and Farmers Life on 19 January 2001.

3. In a press release dated 19 January 20015 the UFU rejected ‘...the livestock auctioneers plans to impose a levy on sales of animals in marts' and said that farmers would be unable to sustain the imposition of further costs. In another press release, dated 25 January 2001,6 the UFU urged its members not to pay the levy. The UFU President said that 'it was clear that the individual circumstances of each mart will differ and the introduction of a flat rate levy was therefore unacceptable.' In a final press release dated 31 January,7 the UFU said that discussions with the NILAA had not resulted in an agreement. The UFU ‘... remains opposed to a flat rate fee, which was anti-competitive and therefore unacceptable.'

B Background

4. Since about 1996, BSE8 and the regulations introduced as a result9 have affected the cattle farming industry throughout Northern Ireland (and the rest of the UK). Cross-border trade in cattle was prohibited and those regulations also required the removal of all cattle over 30 months old from the food chain. That latter aspect of the regulations remains in force. According to evidence presented by the solicitors to the

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1 Note of telephone conversation dated 2 February 2001 between Mr Wesley Aston of the UFU and Mr Sean McNabb of the OFT.
2 The terms marts and markets are used interchangeably throughout the Decision.
3 The text of the Press Release is set out at paragraph 23 below.
4 Document SM3, given to OFT officers during a visit to Mr Irvine on 14 February 2001.
8 Bovine Spongiform Encephalopathy.
NILAA\textsuperscript{10} (‘the Report’) livestock prices at markets in Northern Ireland declined by around 30 per cent between 1997 and 2000, while operating costs increased due to higher rates and the need to introduce new technology in order to comply with the Department for Agriculture and Rural Development Northern Ireland (‘DARD’) requirements for tracing the movements of all cattle.\textsuperscript{11} At the same time turnover declined due to controls on the movement of animals as a result of BSE regulations. A buyer’s commission was seen by the members of the NILAA as a method of increasing earnings in order to reduce losses by the marts.\textsuperscript{12} That decline in turnover was accelerated in 2001 by further controls on the movement of animals as a result of Foot and Mouth Disease (‘FMD’) regulations.\textsuperscript{13} At that time, and currently, fat or finished cattle, which are ready for slaughter, and for which the marts held a substantial share of the market, tend to be directed straight to slaughterhouses.\textsuperscript{14}

5. The Report\textsuperscript{15} also explained that the main function of the livestock marts is to provide premises where farmers can bring their cattle to sell and where purchasers can view and buy cattle at auction. The types of cattle that go through the marts include fat cattle, store cattle for fattening, pedigree animals and heifers for breeding, dairy cows and calves. The operator of the mart, the auctioneer, checks the identification of the cattle brought for sale and gives it an auction number. The cattle are shown in a sale ring and bids are made for the various lots from potential purchasers. The operator provides pens for the cattle both before and after the sale and sometimes keeps them overnight. The operator is responsible for checking all the necessary documentation required by DARD and for the welfare of the cattle whilst in its care. Each head of cattle has its own ‘passport’ throughout its life so that its provenance and movements can be monitored.

C The investigation

6. On 8 February 2001, the Director decided that there were reasonable grounds for suspecting that the NILAA had made a decision and its members had entered into an agreement to introduce a buyer’s commission from 1 February 2001, thereby

\textsuperscript{11} The Report, page 12.
\textsuperscript{12} The Press Release, see paragraph 23 below.
\textsuperscript{13} FMD (Controlled) Area Orders 1-6 (Northern Ireland) 2001. DARD banned all marts on 28 February 2001.
\textsuperscript{14} The Report, page 13.
\textsuperscript{15} The Report, page 7 et seq.
infringing the Act. The Director then began a formal investigation under the Act.\textsuperscript{16} The Director authorised his officers under section 27 of the Act\textsuperscript{17} to enter the premises of J A McClelland & Sons (Auctioneers) Limited, which were believed to be where the NILAA was based as its Chairman, Mr Irvine, was a director of that company.

7. Officers of the Director sent a document, (the section 27 Notice) to Mr Irvine by recorded delivery and by fax giving two working days' notice of an intention to enter his premises.\textsuperscript{18} The section 27 Notice stated that the Director had reasonable grounds to suspect that the Chapter I prohibition had been infringed in that the NILAA had '...decided to impose a standard charge in respect of the supply of auction mart services in Northern Ireland for the supply of cattle...' The section 27 Notice required the NILAA to produce to the Director information and documents relevant to the investigation.

8. On 14 February 2001, the Director's officers entered the premises of J A McClelland & Sons (Auctioneers) Limited in accordance with the section 27 Notice. In the course of the visit the officers were given copies of various documents including agendas, lists of attendees and minutes of meetings of the NILAA on 9 August 2000 and 19 December 2000.

9. Notices requiring information under section 26 of the Act\textsuperscript{19} ('the section 26 Notices') were sent in April, May and June 2001 to members of the NILAA and those undertakings that the Director considered were parties to an agreement to introduce a new charge, known as a buyer's commission. The section 26 Notices said that the Director had reasonable grounds to suspect that there had been an infringement of the Chapter I prohibition in that the NILAA had recommended to its members the introduction of a buyer's commission and that members had agreed to proceed accordingly. Further section 26 Notices were sent to some of the undertakings on 6 and 7 March 2002.

\textsuperscript{16} Section 25 of the Act empowers the Director to conduct an investigation where there are reasonable grounds for suspecting that the Chapter I prohibition has been infringed. See paragraph 30 below for a definition of the Chapter I prohibition.

\textsuperscript{17} Section 27 of the Act provides that the Director may enter premises in connection with an investigation under section 25 of the Act. He must, so far as is reasonably practicable, give two working days' notice of the intention to exercise this power unless he has a reasonable suspicion that the premises are or have been occupied by a party to the agreement that he is investigating under section 25 of the Act.

\textsuperscript{18} Section 27 Notice dated 9 February 2001 addressed to Mr Shaun Irvine.

\textsuperscript{19} Section 26 of the Act empowers the Director, for the purposes of an investigation under section 25 of the Act, to require any person to produce to him a specified document, or to provide him with specified information, which he considers relates to any matter relevant to the investigation.
10. In accordance with Rule 14 of the Director’s procedural rules (‘the Director’s Rules’), the Director sent a Notice (‘Rule 14 Notice’) to the NILAA’s solicitors on 31 October 2002 proposing to make a decision that the Chapter I prohibition has been infringed by the NILAA. The Rule 14 Notice set out the facts on which the Director relies, the matters to which he has taken exception, the action he proposes to take and his reasons for it.

11. The NILAA was given a reasonable opportunity to make both written and oral representations in response to the Rule 14 Notice but made neither oral nor written representations.

D The association of undertakings

12. The NILAA, which has been in existence for at least 40 years, was set up by undertakings engaged in the business of running marts for the sale of livestock in Northern Ireland, in order to provide a channel for communication with the Northern Ireland Department of Agriculture (now DARD) and to represent the industry. In Northern Ireland in 2000, around 27 per cent of cattle were sold through local marts and in 2001, around 19 per cent. The NILAA does not represent all the marts in Northern Ireland. It represented 30 of the 46 marts (65 per cent) in March 2000, and in June 2002, 26 of the 41 marts (63 per cent) that remained open in Northern Ireland.

13. The objectives and constitution of the NILAA are as follows:

   '(A) To represent Livestock Marts in matters pertaining to their industry
   and to provide a contact point with the Department of Agriculture:

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20 Section 26 response from Mr J C Allen of Joseph Allen (Cookstown) Limited dated 23 April 2001. Mr Allen states that his company ‘... has been a member of the association since its formation in 1954.’ The Report states at page 6 that, 'The Association [the NILAA] has been in existence since approximately 1960.'

21 Attendance note of meeting held on 14 February 2001, between Mr Steve Hickman, Mr Sean McNabb and Mr John Ward of the OFT, Mr Shaun Irvine, Chairman of the NILAA and a solicitor, Ms Olive O’Neill of McCartan Turkington Breen.

22 Email from DARD to the OFT dated 8 July 2002. Total Number of moves 2000 - 1,672,088, Farm - Market 457,673 = 27.37%. 2001 Total Number of moves 1,189,651 Farm - Market 233,074 = 19.59%.

23 List of members of the NILAA supplied in response to a section 26 Notice to the NILAA with a letter dated 27 April 2001 from McCarten Turkington Breen.

24 The Report, Appendix 2.

25 Section 26 response from Mr Sean Kyle, Secretary of the NILAA, to the OFT dated 19 March 2002.
(B) Organisation/Structure: Chairman and Secretary - to conduct and record outcome of discussions:

(C) Membership requirement:Ownership and operation of a Livestock Mart:

(D) Funding: a membership fee of £100 per annum and a levy collected from those Marts which hold an over 30 month collection (i.e. Marts which are permitted to hold a collection of culled animals which are over 30 months old and cannot enter the food chain due to BSE regulations) - the latter recently introduced in order to support the Association's financial status:

(E) Appointment of Officers: By democratic vote at a General Meeting:

(F) Cessation of Membership: purely voluntary - no existing provision for expulsion.'

14. Mr Sean Kyle has been the Secretary of the NILAA since about March 1966.26 The President is Mr George A McIlrath of H A McIlrath & Sons Limited and the Chairman is Mr Irvine of J A McClelland & Sons (Auctioneers) Limited.27

15. Financial statements for the NILAA show that the turnover in 2000 to 31 December was [.....] and in 2001, [.....].28

16. In answering questions in section 26 Notices, the following undertakings confirmed that they run auction marts for livestock in Northern Ireland29 and that they were members of the NILAA:30

Joseph Allen (Cookstown) Limited;
Automart Livestock and Farm Sales Limited;
Clogher Valley Livestock Producers Company Limited;
J Colgan & Sons;

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26 Section 26 response on behalf of the NILAA dated 27 April 2001 from McCarten Turkington Breen to the OFT.
27 List of officers of the NILAA attached to letter dated 27 April 2001 from McCarten Turkington Breen to the OFT.
28 Attachment to section 26 response dated 19 March 2002 from Mr Kyle to the OFT. The figures in the accounts include balances brought forward. The relevant turnover figures in 2000 consist of membership fees [.....] and a contribution to a dinner [.....] and in 2001, membership fees. The actual turnover figures have been redacted from the public version of the Decision for reasons of confidentiality in accordance with section 56 of the Act.
29 See map of Northern Ireland with the member marts marked in Annex I to this Decision.
30 See Annex 1 for responses to section 26 Notices, tabs 12-35.
Dungannon Farmers Mart Livestock Auctioneers;
Fane Valley Co-operative Society Limited;
Alexander Gourley (Limavady) Livestock Sales Limited;
Hilltown Farmers Attested Sale Limited;
Mr Seamus Kearney, Trading as Sperrin and Bann Valley Mart;\textsuperscript{31}
J A McClelland and Sons (Auctioneers) Limited;
H A McIlrath & Sons;
Omagh Auction Mart Limited;
O’Neill & McBride;
Rathfriland Farmers Co-operative Society Limited;
SAFE Livestock Limited;
Ulster Farmers’ Mart Company Limited.

E  The conduct of the NILAA

9 August 2000 Meeting

17. At a meeting of the NILAA held on 9 August 2000, at Oaklin Hotel, Moy Road, Dungannon at 7.30 p.m. under item four on the Agenda, 'Buyers Commission', the members present discussed whether or not to introduce a buyer’s commission and at what level. Twenty of those present (members and at least one non-member) signed an attendance list.\textsuperscript{32}

18. The minutes of the meeting state at point 2:

‘Buyers Commission: Discussion followed on this topic, various views being expressed. It was suggested that a fee of £2, plus VAT (say £2.35) be charged on all cattle. Members should be notified and given time to decide whether to implement this proposal or not. NIAPA [Northern Ireland Agricultural Producers Association] and the NFU [National Union of Farmers] should be informed and due publicity given in advance.’

19 December 2000 Meeting

19. On 11 December 2000 Mr Kyle, the Secretary of the NILAA issued the Agenda for the next meeting of the NILAA and faxed copies of it to members.\textsuperscript{33} It was held on 19 December 2000, at the Norman Inn, Main Street, Moira, County Antrim at

\textsuperscript{31} Mr Kearney ran the mart at Swatragh.
\textsuperscript{32} Agenda and list of attendees at the meeting on 9 August 2000, supplied by the NILAA plus copy of list signed by attendees.
\textsuperscript{33} Copy of Agenda for meeting on 19 December 2000.
7.30pm and the NILAA provided the Director with a list of attendees, indicating that the following member undertakings were represented at the meeting:

Joseph Allen (Cookstown) Limited,
J Colgan & Sons,
Dungannon Farmers Mart Livestock Auctioneers,
Fane Valley Co-operative Society Limited,
Alexander Gourley (Limavady) Livestock Sales Limited,
Mr Kearney,
J A McClelland & Sons (Auctioneers) Limited,
H A McIlrath & Sons,
O'Neill & McBride
Ulster Farmers' Mart Company Limited.

20. The subject of 'Commission Charges' was one of five items on the Agenda and the minutes recorded at point 3 that:

‘Commission: The whole question of commission charges was then fully discussed. Members freely expressed their views. It appeared clear that the Saintfield and Kilrea Marts would not, at this stage, consider implementing a charge of £2 per head, but could well do so at a later date, based on general experience. It was pointed out that the UFU knew of the proposed recommendation and it was ultimately agreed that a suitable Press Release be worked on and the UFU duly informed etc. It was noted that the proposed charge was a recommendation only and it would be at the discretion of each Mart to a) implement it and b) decide the level of charge. It was generally felt that a mid January date was most suitable to then implement the change.’

21. In January 2001, a draft copy of the Press Release was circulated to the member marts mentioned in it for comments but none were received.

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34 List of attendees at the meeting on 19 December 2000, supplied by the NILAA plus copy of list signed by attendees.
35 Copy of Agenda for the NILAA meeting 19 December 2000 supplied to the OFT with the section 26 response on behalf of the NILAA by McCartan Turkington Breen on 27 April 2001.
36 Copy Minutes of the NILAA meeting on 19 December 2000 produced by Mr Kyle and circulated to members.
37 See paragraph 23 below for the text of the Press Release. It includes names of member and non-member marts. The non-member marts were Derrylin and Fintona, Fivemiletown and Newtonstewart. At the time of the Press Release Markethill was still a member.
22. On 18 January 2001, the Chairman of the NILAA, Mr Irvine, sent a message by fax to the Business Development Manager of the UFU, Mr Trevor Lockhart. It said: ‘Re Purchaser’s Commission at Marts’

‘Further to our telephone conversations I attach a copy press release in relation to the above. The intended introduction date 1 February. I understand that the President has already been made aware of the situation by Stuart Johnston of UFM Enniskillen. Shaun.’

23. The text of the Press Release is as follows:

**Marts Introduce Buyers Commission**

'Northern Ireland livestock marts will introduce a buyers commission in an attempt to reverse the pattern of trading losses suffered over the past four years. The BSE crisis as anyone in farming realises has resulted in serious reductions in the value of stock and distortions to the regular marketing of cattle which have greatly impacted on livestock market businesses. Auction marts which operate by charging commission on the sale price of cattle have seen incomes fall as stock values have fallen and with over thirty month cattle having been taken off the market and the loss of calves through the calf processing scheme numbers of cattle going through marts have reduced. The last four years have also seen a large increase in regulations, record keeping and rises in rates, water charges, etc. However unlike other sectors of the industry marts have received no Government aid or compensation for their losses. As a result members of the NI Livestock Markets Association [sic NILAA] agreed that they could no longer continue to operate at a loss and that they must increase their earnings through the commissions charged. The choice lay either to increase vendor commissions from their present level of 2-2.5% to those charged in the rest of the UK i.e. 3-3.5% or to look at an alternative buyers commission as charged in Southern Ireland. In view of cattle prices being lower here than the rest of the UK it was felt that it would be unreasonable to increase commission charges to the vendor – a charge to the purchaser would not be unfamiliar to many market customers who also operate in the South and who purchase stock at on farm dispersals and pedigree sales. Furthermore purchasers now require to know much more

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38 Section 26 response dated 24 May 2001 from McCarten Turkington Breen on behalf of the Chairman, Mr Irvine, and attendance note of meeting with OFT officers on 14 February 2001.
39 Copy fax dated 18 January 2001 from Shaun Irvine at J A McClelland & Son to the UFU.
40 UFM – Ulster Farmers’ Mart Company Limited.
about the animals they are buying and the provision of this information has meant an increase in time and labour costs. This service will shortly be greatly improved with assistance from DARD who are developing a computer system to help markets improve the accuracy of this information however it will involve substantial capital investment and staff training by markets themselves. The rate of commission to be charged which has been kept to a minimum will be a flat rate of £2 per head plus VAT on each animal sold through the following markets: Ballyclare, Ballymoney, Camlough, Clogher, Cookstown, Crumlin, Cullybackey, Derrylin, Draperstown, Dungannon, Enniskillen, Fintona, Fivemiletown, Hilltown, Keady, Kilrea, Limavady, Lisahally, Lisnaskea, Markethill, Newtownhamilton, Newtownstewart, Omagh, Pomeroy, Portadown, Rathfriland and Swatragh. The additional income from this charge will hopefully enable markets to continue to provide for purchasers a venue where they can select and purchase a wide range of stock to suit their respective requirements.

24. A copy of the Press Release, which is identical to the Press Release above, dated 19 January 2001, was given to the Director’s staff on 14 February 2001 by the Chairman of the NILAA, Mr Irvine. On it was written ‘Press Release Final Draft’ and ‘Sent IN & FL.’

25. On 14 February 2001, during the course of the inspection under section 27 of the Act, the Chairman of the NILAA, Mr Irvine, in the presence of a solicitor, told officers of the OFT that Mr Kyle circulated minutes of the meetings to members. Mr Irvine said that copies of the Press Release had been faxed to all the members mentioned in it and that he had received no comments about it. He added that not all the members had introduced a buyer’s commission.

26. The UFU issued press releases on 19, 25 and 31 January 2001, rejecting the NILAA plans which were to be implemented on 1 February 2001, and advising its members not to pay the buyers' commission. The UFU said that the individual circumstances of each mart would differ and a flat rate fee was anti-competitive and therefore unacceptable to farmers.

41 Irish News and Farmers Life.
42 Attendance note of meeting on 14 February 2001, between Mr Steve Hickman, Mr Sean McNabb and Mr John Ward of the OFT and the Chairman of the NILAA, Mr Shaun Irvine and Ms Olive O’Neill, solicitor of McCartan Turkington Breen.
44 See also paragraph 3 above.
27. The buyer’s commission was introduced at all the marts mentioned in the Press Release except Derrylin and Fintona, on or around 1 February 2001. The actual date on which the new charge was introduced varied according to which day of the week an undertaking held its mart.

28. The table below sets out information about the undertakings mentioned in the Press Release of 19 January 2001. It includes information on whether they were members of the NILAA, whether they were represented at the meetings of the NILAA on 9 August 2000 and 19 December 2000 at which the issue of introducing a buyer’s commission was discussed, and whether or not they introduced a buyer’s commission.45

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<th>Undertaking</th>
<th>Marts</th>
<th>Company Status</th>
<th>NILAA Member</th>
<th>Meeting 9/8/00</th>
<th>Meeting 19/12/00</th>
<th>In press release</th>
<th>Buyer’s commission</th>
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<td>Yes</td>
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<td>Yes</td>
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<td>Yes</td>
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<td>Yes</td>
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<td>Yes</td>
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<td>Alexander Gourley (Limavady) Livestock Sales Limited</td>
<td>Limavady and Lisahally</td>
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<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
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45 The information in this table was obtained from the Press Release, minutes and attendance lists of the meetings and responses to section 26 Notices from the individual undertakings.

46 £1.70 plus VAT = £2.
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<th>Hilltown Farmers Attested Sales Limited</th>
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<td>Mr Kearney trading as Sperrin and Bann Valley Mart</td>
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<td>Mr Kelly</td>
<td>Derrylin and Fintona</td>
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<td>Yes</td>
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<td>Yes</td>
<td>Yes</td>
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<td>Yes</td>
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</tbody>
</table>

29. On 19 February 2001, FMD was first detected in England and on 23 February 2001, the Minister of Agriculture and Rural Development for Northern Ireland requested the voluntary cessation of livestock marts. DARD banned the holding of livestock marts on 28 February. They were reopened at the beginning of August 2001 when the banning order was lifted.47

II LEGAL AND ECONOMIC ASSESSMENT

A Introduction

30. Section 2(1) of the Act provides that any agreements between undertakings, decisions by associations of undertakings or concerted practices which may affect trade within the UK, and have as their object or effect the prevention, restriction or distortion of competition within the UK, and for present purposes, in particular, those which directly or indirectly fix purchase or selling prices, are prohibited unless they are exempt in accordance with the provisions of Part I of the Act ('the Chapter I prohibition').

31. Accordingly, to find an infringement by the NILAA of the Chapter I prohibition, the Director must establish that there was a decision by an association of undertakings, that may affect trade within the UK and has as its object or effect the prevention, restriction or distortion of competition. Conduct of members of an association subsequent to a decision of the association, may be considered as an agreement between the member undertakings and/or as evidence of a decision of that association.

32. For the purposes of this Notice, the Director is only concerned with the decision of the association of undertakings to recommend that its members introduce a buyer's commission in the cattle marts in Northern Ireland. The Director does not contend there was also an agreement between the member undertakings of the NILAA that infringed the Chapter I prohibition.

B The relevant market

33. There is only an obligation on the Director to define the market where it is impossible, without such a definition, to determine whether the agreements, concerted practices or decisions of associations are liable to affect trade in the UK and have as their object or effect the prevention, restriction or distortion of competition. There is no such obligation in this case because it involves a price fixing decision of an association that has the object of preventing, restricting or distorting competition. Nevertheless market definition is the first step in the process of assessing penalties.

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48 Under section 2(3) of the Act, subsection (1) applies only if the agreement, decision or practice is, or is intended to be, implemented in the United Kingdom and under section 2(7), 'United Kingdom' means in relation to an agreement which operates or is intended to operate only in a part of the United Kingdom, that part.

49 The Chapter I prohibition came into force on 1 March 2000.


52 OFT 423, The Director General of Fair Trading’s Guidance as to the Appropriate Amount of a
As in the very special circumstances of this case the Director does not intend to impose a financial penalty on the NILAA, there is no requirement for a market definition. However, although the Director is not obliged to define the market, he takes the view that this case concerns the services provided by cattle auctioneers at livestock marts in Northern Ireland.53

C Undertakings

34. The word 'undertaking' is not defined in the EC Treaty but is a wide term that the European Court of Justice ('the ECJ') has said covers 'any entity engaged in an economic activity, regardless of the legal status of the entity or the way in which it is financed.'54 It includes any natural or legal person that is capable of carrying on commercial or economic activities. The term includes limited companies, unlimited companies, partnerships, trade associations, sole traders, and agricultural co-operatives. It is immaterial whether the undertaking makes a profit or not. The Director considers that the members of the NILAA are undertakings for the purposes of Chapter I, as they undertake the economic activity of running marts for the sale of livestock in Northern Ireland.55

D Associations of undertakings

35. Any body that is formed to represent the interests of its members in commercial matters may be an 'association of undertakings' within the terms of section 2 of the Act. For a body to be classified as an association of undertakings it is unnecessary for it to carry on any commercial or economic activity of its own. One of the objects of the NILAA is 'to represent Livestock Marts in matters pertaining to their industry...'.56 It does not matter how the association is organised, provided that it represents the interests of its members in commercial matters. Nor is it necessary for it to have any formal constitution or be able to make binding recommendations to come within the scope of the Act.57 The members of the NILAA have referred to it as being a very loose knit organisation58 although the Secretary provided a copy of its

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Penalty, March 2000, paragraph 2.3.
53 See paragraphs 12, 13 and 23 above.
55 See paragraphs 13 and 23 above.
56 See paragraph 13 above.
57 OFT 408, Trade Associations, Professions and Self-Regulating Bodies, paragraphs 1.2 and 2.3
58 See note of a telephone conversation with Mrs H Bates of the OFT, in a response to a section 26 Notice. Mr Harrison Boyd (Clogher Valley Livestock Producers Company Limited) said that the NILAA was a very loose-knit organisation.
constitution, which sets out minimal rules.\textsuperscript{59} In the Director's view the looseness of
the organisation of the NILAA does not take it outside the Chapter I prohibition.

36. The Director is therefore satisfied that the NILAA is an association of undertakings
within the terms of the Chapter I prohibition.

E Decision of an association of undertakings

37. The Chapter I prohibition applies to decisions by associations of undertakings. Any
decisions, rules, recommendations or other activities of associations of undertakings,
which have as their object or effect the prevention, restriction or distortion of
competition are capable of infringing the prohibition.

38. A recommendation made by an association of undertakings can amount to a
decision,\textsuperscript{60} and may infringe the Chapter I prohibition where it affects the competitive
conduct of its members in the market.\textsuperscript{61} Also, the fact that the recommendation is
not binding upon\textsuperscript{62} nor has been fully complied with by its members does not exclude
it from the application of Chapter I.\textsuperscript{63}

39. In a case concerning recommendations by an association of insurers, Verband der
Sachversicherer eV \textsuperscript{64}at paragraph 23 the Commission said that;

\begin{quote}
'In spite of the fact, therefore, that the title of the recommendation describes
it as being 'non-binding', the recommendation was in the nature of a
'decision' by an association of undertakings within the meaning of Article
85. It is sufficient for this purpose that the recommendation was brought to
the notice of members as a statement of the association's policy provided
for in, and issued in accordance with, its rules.'
\end{quote}

40. When considering the appeal in Verband\textsuperscript{65} the ECJ concluded at paragraph 32 that:

\textsuperscript{59} See paragraph 13 above.
\textsuperscript{60} Re the Application by the National Sulphuric Acid Association OJ [1980] L260/24, [1980] 3
\textsuperscript{61} The Commission set out the position succinctly in Fenex at paragraph 60:'While it is normal
practice for a trade organisation to provide management assistance to its members, it must not
exercise any direct or indirect influence on competition, notably in the form of tariffs applicable to
all undertakings regardless of their own cost price structure.' Fenex, OJ 1996 L161/28: [1996] 5
CMLR 332.
\textsuperscript{62} Case 8/72, Vereeniging van Cementhandelaren v Commission [1972] ECR 977.
\textsuperscript{64} Case IV/30.307 OJ L 35/20 [1985] 3 CMLR 246.
'In view of those factors it must be stated that the recommendation, regardless of what its precise legal status may be, constituted the faithful reflection of the applicant's resolve to coordinate the conduct of its members on the German insurance market in accordance with the terms of the recommendation. It must therefore be concluded that it amounts to a decision of an association of undertakings within the meaning of Article 85(1) of the EEC Treaty.'

The Meeting on 9 August 2000

41. Although the issue of a buyer's commission was on the agenda and was discussed at the meeting of the NILAA on 9 August 2000, no agreement was reached at that meeting, nor does the Director consider that there was a recommendation by the NILAA on that date to introduce it. It was suggested that a buyer's commission should apply to all cattle at a level of £2 per head plus VAT. The minutes of the meeting state that members would be given time to decide whether or not to implement the proposal. Those preliminary discussions set the scene for the issue to be on the agenda for the next meeting of the NILAA on 19 December 2000. There would have been no need for further discussions of the issue at the meeting on 19 December 2000 if a decision or agreement had been reached at the earlier meeting.

The Meeting on 19 December 2000

42. Those members who were represented at the meeting on 19 December 2000 clearly discussed the issue of a buyer's commission. The minutes of the meeting show that a consensus was arrived at that a buyer's commission should be introduced by the marts at a level of £2 per head of cattle from mid-January 2001. The Director does not regard it as necessary that the actual price levels should have been fixed although he is satisfied that the recommended figure was £2 and that that was implemented by those undertakings that introduced the buyer's commission, plus or inclusive of VAT.

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66 See paragraphs 17 and 18 above.
67 See paragraph 20 above.
68 Six of the undertakings introduced a buyer's commission of £2 plus VAT (one changed to £2 inclusive of VAT) and 13 charged £2 inclusive of VAT as illustrated in the table in paragraph 28 above, showing the levels of buyers' commission charged and the dates on which the undertakings first introduced it.
43. As stated above, it is not necessary for an association's recommendation to be binding on its members for it to come within the scope of Chapter I. Therefore the fact that implementation and the level of the recommended charge were both discretionary\(^{69}\) does not exclude the NILAA's recommendation from the scope of the Chapter I prohibition.

44. The fact remains that the NILAA had conducted itself in such a manner as to influence competition amongst its members by recommending that they introduce a buyer's commission as from mid-January 2001, irrespective of the members' individual cost structures.

45. This influence took the form of the NILAA providing the forum for discussions regarding the introduction of a buyer's commission, resulting in the NILAA making a recommendation to its members to that effect. Furthermore, the Secretary of the NILAA circulated the minutes of the NILAA's meetings to its members and the Press Release was issued by the Chairman, Mr Irvine, on behalf of the NILAA, ensuring that the association's recommendation was widely circulated amongst the members.

46. In the Director's view the fact that the minutes of the meeting of the 19 December 2000 state that 'the proposed charge was a recommendation only and it would be at the discretion of each Mart to (a) implement it and (b) decide the level of the charge'\(^{70}\) does not change the legal character of the discussion. Nor does it alter the fact that the recommendation was to the members of the NILAA to act in an anti-competitive manner by introducing a buyer's commission at a rate of £2.

**The Press Release**

47. The Press Release,\(^{71}\) which was issued by Mr Irvine, the Chairman of the NILAA faithfully expressed the recommendation of the NILAA, as set out in the minutes of the meeting of 19 December 2000.\(^{72}\) It also specifically said that the '...members of the NI Livestock Markets Association agreed that they could no longer operate at a loss and that they must increase their earnings through the commissions charged.' The Press Release then set out the choices that had been available to the members: either to increase the vendor's commission or to introduce a buyer's commission.

\(^{69}\) See paragraph 20 above.

\(^{70}\) See paragraph 20 above.

\(^{71}\) See paragraph 23 above.

\(^{72}\) See paragraph 20 above.
48. It is clear that the NILAA, in making its recommendation, and having carefully considered the merits of the proposed options mentioned in the Press Release, sought to influence the conduct of its members in the market, by recommending that they introduce a buyer’s commission to increase their earnings.

Conclusion on finding of a decision of the association of undertakings

49. The Director considers that the recommendation to introduce a buyer's commission recorded in the minutes of the meeting on 19 December 2000 of the NILAA and expounded in the Press Release issued by the Chairman of the NILAA, constitutes a decision by an association of undertakings. The NILAA's recommendation sought to influence its members' conduct in the market by introducing and co-ordinating a buyer's commission charged by its members per head of cattle sold.

F Prevention, restriction or distortion of competition

50. The Chapter I prohibition expressly prohibits agreements between undertakings, decisions of associations of undertakings or concerted practices that have as their object the prevention, restriction or distortion of competition through directly or indirectly fixing prices or any other trading conditions.\(^73\) It is established case-law that there is no need to take account of the concrete effects of an agreement, decision or concerted practice in order to conclude that it is prohibited by section 2(1) of the Act, when it is apparent, as in this case, that it had as its object the restriction of competition.\(^74\)

51. The object of a decision of an association of undertakings for the purposes of the Director's analysis is to be found by an objective assessment of its aims rather than an assessment of the undertakings' or association's subjective intent.\(^75\) Thus, if the clear nature of a decision of an association of undertakings is to restrict competition then, in law, that is its object, even if the parties claim that that was not their intention, or if the decision had other objects.\(^76\)

52. It is not necessary for the Director to show that the members of an association that has decided to recommend the introduction of a charge have put it into effect.\(^77\)

\(^73\) Section 2(2)(a) of the Act.


although the majority did in this case.\textsuperscript{78} It is sufficient for the application of section 2(1) of the Act that a price fixing recommendation was made which had the object of restricting competition.

53. In Verband,\textsuperscript{79} the ECJ said at paragraph 40 that; ‘...it must be noted that the aim of the recommendation at issue was to restore sound financial conditions for the undertakings...by providing for an across-the-board increase in premiums.’

54. The judgment continued at paragraph 41;

 ‘Thus through the instrument of the recommendation the association sought to achieve a collective fixed-rate increase in the price of the services offered by its members. In that respect it must be noted that the very first example given by Article 85(1)(a) of anti-competitive conduct concerns an agreement, decision or concerted practice whose object is ‘directly or indirectly [to] fix purchase or selling prices or any other trading conditions.’

55. The Director considers that the recommendation by the NILAA to its members to charge a buyer’s commission of £2 from the same date had the object of restricting competition and eliminated the uncertainty of the market place thus infringing Chapter I of the Act. The recommendation was intended to replace the risks of competition with co-operation in the market.

56. That view is supported by the judgment of the Court of First Instance ('the CFI') in a case concerning a Dutch association of cement dealers, which had set target prices for its members. In Vereeniging van Cementhandelaren v Commission\textsuperscript{80} at paragraph 21, the CFI said that:

 ‘In fact the fixing of a price, even one which merely constitutes a target, affects competition because it enables all the participants to predict with a reasonable degree of certainty what the pricing policy pursued by their competitors will be.’

57. The object of the decision of the NILAA recommending the introduction of a buyer’s commission at £2 per head of cattle from 1 February 2000 was to co-ordinate price increases for its members. As the Press Release explained, the members of the

\textsuperscript{78} See the table in paragraph 28. A majority of those undertakings mentioned in the Press Release introduced the buyer’s commission at the beginning of February 2001.


\textsuperscript{80} Case 8/72, Vereeniging van Cementhandelaren v Commission [1972] ECR 977.
NILAA had to increase their income in relation to supplying services at cattle marts throughout Northern Ireland as they could no longer run at a loss.\textsuperscript{81} Therefore, the object of the recommendation to charge a buyer's commission at an agreed rate from the same date was to achieve an increase in the fees paid to the NILAA members. Under the Chapter I prohibition, price fixing decisions are, by their very nature, considered to be restrictive of competition. Therefore, the Director takes the view that the decision of the NILAA recommending the introduction of a buyer's commission of £2 had as its object the prevention, restriction or distortion of competition within the meaning of the prohibition in section 2(1) of the Act.

**G  Effect on trade within the UK**

58. For the purposes of the Chapter I prohibition, the UK includes any part of the UK where an agreement operates or is intended to operate.

59. The recommendation by the NILAA to its members to fix prices by introducing a buyer's commission was to be implemented within the whole of Northern Ireland. The 26\textsuperscript{82} marts that were at the relevant time members of the NILAA and are represented by it are located throughout the Province. Although some of the marts are close to the border with the Republic of Ireland, in 2000 and 2001 there was no legitimate cross border trade in cattle as a result of the prohibitions on the movement of cattle within the EC due to BSE and FMD.

60. By its very nature a decision of an association of undertakings to fix prices by, in this case, agreeing to charge a buyer's commission restricts competition and may have an effect on trade. Given that at the time of the decision of the association the NILAA represented around 63 per cent of the marts in Northern Ireland, the potential for the recommendation to affect trade within a part of the UK was clearly significant.\textsuperscript{83}

**H  Appreciability**

61. A decision of an association of undertakings will infringe the Chapter I prohibition only if it has as it object or effect the appreciable prevention, restriction or distortion of competition in the UK. The Director generally takes the view that an agreement will have no appreciable effect on competition if the parties' combined share of the relevant market does not exceed 25 per cent.\textsuperscript{84} However, the Director will generally regard any decision which directly or indirectly fixes prices as being capable of having

\textsuperscript{81} See paragraph 23 above.
\textsuperscript{82} See paragraph 12 above.
\textsuperscript{83} List of marts supplied by DARD in 2001 and see also paragraph 12 above.
an appreciable effect, even where the combined market share of the members falls below the 25 per cent threshold.\textsuperscript{85}

62. In relation to the decision of the NILAA to recommend a buyer’s commission of £2 per head of cattle, a decision which was clearly related to the fixing of prices for cattle auction services in Northern Ireland, the Director takes the view that it had the object of preventing, restricting or distorting competition to an appreciable extent.\textsuperscript{86} As discussed above at paragraphs 50 to 52, it is not therefore necessary to consider whether it had an appreciable effect on competition for these services.

I \hspace{1cm} \textbf{Duration}

63. The Director considers that the infringement began at the meeting of the NILAA on 19 December 2000. The NILAA was put on notice of a possible infringement of the Chapter I prohibition by the section 27 Notice dated 9 February 2001.\textsuperscript{87} The enforced closure of all the marts in Northern Ireland took place at the end of February 2001 as a result of FMD restrictions. The Director takes the view that those actions brought the infringement to an end, at the latest by 1 March 2001.\textsuperscript{88} Even though some of the marts charged a buyer’s commission from August 2001, when they reopened, in this case, there is no evidence that the decision of the NILAA was later revived or renewed. The Director considers that the undertakings were then all acting independently in the market and that there was no nexus between the decision of the NILAA approximately nine months’ earlier and the charging of a buyer’s commission after August 2001.

J \hspace{1cm} \textbf{Conclusion on the application of the Chapter I prohibition}

64. The NILAA recommendation to its members, recorded in the minutes of the meeting of 19 December 2000 and the Press Release that was sent to members in January 2001, to introduce a buyer’s commission amounted to fixing prices and had the object of appreciably preventing, restricting or distorting competition in a part of the UK. The recommendation was not notified to the Director for exemption and no relevant block exemption or exclusion applies.\textsuperscript{89}

\textsuperscript{84} See OFT Guideline 401 The Chapter I Prohibition (March 1999), paragraphs 2.18 and 2.19. \\
\textsuperscript{85} See OFT Guideline 401 The Chapter I Prohibition’ (March 1999), paragraph 2.20. \\
\textsuperscript{86} The Director does not consider the decision produced only insignificant effects in the sense outlined in Case 5/69 Volk v. Vervaecke [1969] ECR 295. \\
\textsuperscript{87} See paragraph 7 above. \\
\textsuperscript{88} The date of the banning order, 28 February 2001. See footnote 13. \\
\textsuperscript{89} Sections 3 and 4 of the Act.
III DECISION

65. The evidence set out in part I of this decision formed the basis of the Rule 14 Notice sent to the NILAA. Having reviewed the evidence and analysis as set out in the Rule 14 Notice, and in the absence of any representations by the NILAA, the Director finds that the NILAA's decision to recommend that its members introduce a commission on buyers for the purchase of livestock in Northern Ireland cattle marts infringed the Chapter I prohibition in the period from 19 December 2000 until 1 March 2001.
IV PROPOSED ACTION

66. This section sets out the action that the Director intends to take and his reasons for it.

A Directions

67. Section 32(1) of the Act provides that if the Director has made a decision that an agreement infringes the Chapter I prohibition, he may give to such person or persons as he considers appropriate such directions as he considers appropriate to bring the infringement to an end. No directions are necessary in this case as the Director is satisfied that the infringement has ceased.

B Financial penalties

68. Section 36(1) of the Act provides that on making a decision that conduct has infringed the Chapter I prohibition, the Director may require the undertaking concerned to pay him a penalty in respect of the infringement. The 'undertaking concerned' comprises those legal bodies forming single economic entities. No penalty which has been fixed by the Director may exceed 10 per cent of the turnover of the undertaking calculated in accordance with the provisions of the Competition Act (Determination of Turnover for Penalties Order) 1998.

69. Section 39(3) of the Act provides that a person is immune from the effect of section 36(1) if he is party to a small agreement. However, by virtue of section 39(1)(b), a price fixing agreement may not constitute a 'small agreement' for the purposes of the Act.

70. The Director may impose a penalty on an undertaking which has infringed the Chapter I prohibition only if he is satisfied that the infringement has been committed intentionally or negligently.

90 'Undertaking' includes a trade association, OFT 400, The Major Provisions, paragraph 1.9. See also OFT 407, Enforcement, at paragraph 4.45 and OFT 408 Trade Associations, Professions and Self-Regulating Bodies, at paragraph 1.6.
91 Section 36(8) of the Act and SI 2000/309.
92 'Agreement' includes a concerted practice and a decision of an association of undertakings.
93 Section 2(5) of the Act provides that : ' A provision of this Part which is expressed to apply to, or in relation to, an agreement is to be read as applying equally to, or in relation to a decision by an association of undertakings ...' Thus, the provisions on small agreements apply equally to decisions of associations of undertakings.
94 Section 36(3) of the Act.
71. The Director generally considers that infringements of the Chapter I prohibition that have as their object the restriction of competition are by their very nature committed intentionally.\textsuperscript{95} Ignorance or any mistake made by a party as to the law, even where there is no dishonesty, is no bar to a finding of intentional infringement under the Competition Act 1998. The Director is satisfied that the NILAA could not have been unaware that their recommendation to their members to introduce a buyer's commission at a rate of £2 per head of cattle from 1 February 2001 would prevent, or at least restrict or distort competition. In fact the Press Release specifically referred to the need to increase prices. That recommendation was intended to lead to a significant degree of price co-ordination and the likelihood of restriction of price competition between the undertakings.

72. The Director considers that agreements between undertakings, decisions of associations or concerted practices that relate to price fixing are among the most serious infringements of the Act and – especially if they are covert – merit deterrent financial penalties. However, in this case the recommendation of the NILAA was publicised. That is an important factor that the Director takes into account in arriving at his conclusion that the NILAA should not be fined. The Director has also taken into account the wholly exceptional circumstances present in this case as a result of the effects of BSE and FMD on the cattle industry in Northern Ireland. These diseases let to increased veterinary health regulation, reduction in throughput of cattle in markets and the total closure of the marts from the end of February 2001 until August 2001.

73. In the light of the overt nature of the recommendation combined with the exceptional burdens on the NILAA and its members at the time, the Director has decided in this case to exercise his discretion under section 36(1) of the Act not to impose a financial penalty on the NILAA.

\textit{John Vickers}

\textit{Director General of Fair Trading}