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Agriculture and competition law: a stormy relationship

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Are the Common Agricultural Policy (CAP) and EU competition policies destined for endless mutual misunderstanding and the constant quarrels that seem to have plagued them since the Treaty of Rome came into force?

The reasons behind the dispute are well-known: according to one side, farming should be entirely exempt from competition law due to the peculiarities of the industry which would offer little compatibility with free-market dogmas. Conversely, the other side feels that the nature of the agricultural industry is not so particular that rules as flexible as competition law could not bend to accommodate it without sacrificing their principles. Local interests versus globalisation, devotees of the administered economy versus believers in the free market, all the ingredients are present for a serious, but often caricatured, confrontation.

In France, the EC Commission's decision in the 'French beef' case, upheld in 2006 by the Court of First Instance, and recently confirmed by the Court of Justice (*Coop de France bétail et viande v Commission* conjoined cases C-101/07 & C-110/07, 18th December 2008), resoundingly confirmed this opposition. Even though the sector was going through the major health and economic 'mad cow' crisis and the measures taken to try to halt it (such as the temporary suspension of all imports and the application of a minimum pricing scale for beef to be used by slaughterers) were strongly encouraged, even initiated, by the Ministry for Agriculture, the Commission saw only a flagrant violation of two of the fundamental principles of European Law: the free movement of goods and the freedom of pricing. The large fines originally imposed by the Commission were later reduced by the Court of First Instance because the parties to the agreements in question deliberately went against clear warnings issued by the Commission only a few days after the agreements were put in place.

Cases such as those concerning the agreements in the Italian and Spanish raw tobacco sector – Cases COMP/C.38.238/B.2 (Spain) and COMP/C.38.281/B.2 (Italy) – show that the debate is not confined to France, even if few cases have caused the same repercussions as the 'French beef' decision.

However, leaving aside passionate discourse in favour of one position or the other, when one takes a closer look at the arguments they do not appear irreconcilable. This article will discuss, first, the true meaning of the agricultural exception and then review the specific problems presented by the agricultural sector and the solutions that can be found within competition law.

The so-called agricultural exception

The special regime applied to the farming sector is the result of a combination of several EU provisions. Article 42 (ex-art.33) of the Treaty lays out the principle of the agricultural exception and its limits:

> *"The provisions of the Chapter relating to rules on competition shall apply to production of and trade in agricultural products only to the extent determined by the Council within the framework of Art.43(2) and (3) and in accordance with the procedure laid down therein, account being taken of the objectives set out in Art. 39."*

The objectives listed in art.39 of the Treaty are: increasing productivity, guaranteeing a fair

standard of living for the agricultural community, stabilising the market, securing the availability of supplies and assuring reasonable prices for consumers.

Drawing on Article 42, Regulation 26/62 was adopted in 1962 and replaced and codified by Regulation 1184/2006 adopted in 2006. This regulation provides:

> *"Article 81(1) of the Treaty shall not apply to such of the agreements, decisions and practices referred to in Article 1 of this Regulation as form an integral part of a national market organisation or are necessary for attainment of the objectives set out in Article 33 of the Treaty."*

To apply these provisions, many industry-specific regulations were adopted to put the Common Market Organisation (CMO) in place and provide marketing norms, set up organisations of producers authorised to oversee the distribution of produce, optimise the costs of production, put in place standard contracts, promote the quality of produce, orientate produce towards certain outlets, and so on.

The provisions concerning competition included in the CMO exempt these types of activities from competition law, but only under very strict conditions which forbid the monopolisation of markets, distortions of competition that are not necessary to achieve the CAP's objectives, measures that result in price fixing or discrimination, etc.

When a CMO has been put in place with respect to a given category of products, neither the State nor the market players have much room for manoeuvre left when it comes to any agreements or practices that go against the CAP objectives, which are deemed to be included in full in the CMO. (See *The Commission v. Spain*, case C-113/00 and Henri Courivaud, *La politique agricole commune est-elle soluble dans la concurrence? Lecture critique de la décision « viandes bovines françaises »*, (*"Can a common agricultural policy be reconciled with competition? A critical study of the "French beef case"*) Contrat Concurrence Consommation No.1, January 2005, study 1.)

Thus, far from giving the CAP primacy over EU competition law, these texts in fact provide the opposite while still allowing an exception mechanism which, although very strictly applied, is still much greater than for other sectors.

In particular, the Tribunal held that the exception could only be applied if **all of the objectives** listed in art.39 are fulfilled, while still recognising that they are sometimes contradictory and leaving the Commission the task of "trying to reconcile them". This is somewhat puzzling: cumulative yet contradictory conditions must be applied!

This contradiction is clear from the following passage from the 'French beef' case, cited above, where the Court admits that although the agreement may be anti-competitive, at the same time it can be considered to be aiming to secure an "equitable standard of living for farmers". However, it could not be said to be aiming at stabilising the market, which would entail a drastic reduction in price, rather than keeping prices artificially high (point 203). How can one respect two contradictory and conflicting conditions at the same time … ?

Further, the Court went on to say that only proportionate measures will be considered necessary for the achievement of the CAP's objectives.

In such circumstances, one can easily see that the Commission's margin for manoeuvre is considerable and would not be surprised to read several decisions in which it was decided that at least one of the CAP's objectives was not satisfied.

In reality, besides the mechanisms provided by the CMO, allowing the regulation and centralisation of the output by the farmers' organisations, under strict conditions laid out by

the CMO, any attempts to apply a similar approach at retail level, specifically by fixing retail prices, would almost certainly fail, even during a health crisis for which the CMO did not legislate.

Thus, the debate surrounding possible primacy of policy has clearly turned in favour of competition policy. Yet both EC and national precedents provide a rich database of situations where the particular characteristics of the industry were taken into account. The second part of this article will examine some of these characteristics, in no particular order.

Issues specific to the farming sector

In brief, some principal characteristics of the farming sector taken into account in its relation to competition policy are as follows.

When it comes to production itself, farming is often cyclical and subject to climate and health issues, the produce is perishable and the industry suffers from the fact that there is a significant time-lag between production and the produce being ready to put on the market. As a result, short-term flexibility in the supply of many – but not all – farming products is lacking.

Farming businesses are mostly small scale and fragmented and have to compete with the strong buying power of large industrial farming companies and wide distribution. This explains the historical tendency – on the continent of Europe particularly, if less so in Britain – towards large co-operatives, themselves concentrated within farmers' associations. Although they are not uniform and vary between sectors, these peculiarities have often led to a tailored approach by the competition authorities.

Optimising output within farming associations and exchanges of information

A recent (non-binding) opinion – No.08-A-07, 7th May 2008 – given by the French Competition Council illustrates how the farming associations can optimise their output in a coordinated way and exchange some types of information between them.

The case concerned the economic organisation of the fruit and vegetable sector. After a new CMO came into force on 1st January 2008, the Ministry requested the Council's opinion as to the validity with regards to competition law of two types of farmers' associations: the farmers' trading association and the so-called farmers' 'governance' association.

Citing as reasons the fragmented, precarious and perishable nature of the produce in question (apart from certain specific products), the Council concluded that the inelasticity of output can lead to severe volatility in prices which in turn could lead to serious financial problems for farmers, who are further hampered by the powerful position of distributors. In this context, the Council favoured the commercial farmers' associations, which it sees as tools that allow the offer to be centralised and thereby rebalance the commercial relationship that often tends to be biased too much in favour of consumers.

Also, the Council, which is usually very sensitive to information-sharing by competitors, underlined that in the case of farmers it does not see any reason why they should not regularly share detailed information: the market is not oligopolistic at the point of sale and therefore information exchanges would not produce significant negative effects due to the fragmented character of the market, the absence of barriers to entry, etc. Also, when it comes to perishable produce that can easily be affected by a crisis, such as peaches and nectarines, referred to in opinion No.02-A-12 of 1st October 2002, this policy can contribute to economic progress.

Fixing retail prices prohibited

The flexibility authorised under a CMO has its limits. In an opinion dated 7th May 2008, the French Competition Council reaffirmed its resolute opposition to all steps put in place by a farmers' association which could result in price fixing, as it did recently by sanctioning a price

scale for maize-drying (see decision No.07-D-16 of 9th May 2007).

The Council stated that, on top of the illegality of this approach, it was probably not the most efficient method to solve the problem and suggested other tools such as financial instruments or even revenue insurance.

Regarding coordinated interventions on retail price, the Council's decisions in litigation matters follow the same vein as its (non-binding) opinions. For example, a decision handed down on 29th July 2003 sanctioned the price fixing of a number of varieties of strawberries organised by the members of numerous professional organisations in the South West of France.

Discrimination in access to resources

The Council is equally strict when it comes to practices that limit access to resources or reserve access to only some parties, whether those resources are physical or incorporeal. In a decision, No.04-D-3, handed down on 3rd August 2004 and later confirmed on appeal, several companies were condemned for having put in place a discriminatory system for access to the Laval slaughterhouse.

However, physical infrastructures are not the only ones to attract the Council's attention. In many recent opinions, the Council has made its position clear with regards to quality labels. For example, in its opinion No.07-A-04 of 15th June 2007 concerning the brand "Vollaille de Bresse" ("Bresse chicken") the Council stated that the exclusive nature of certain quality labels can be anti-competitive in certain circumstances.

The role of authorities in anti-competitive practices

One of the arguments put forward by the defendants in the 'French beef' case was that the practices were initiated or encouraged by the authorities, but this case was far from being the only case where the authorities either played an ambiguous role or were even directly involved. For example, one can mention the 'cauliflower' decision, cited above (05-D-10).

The rule is simple: only in cases where the authorities have positively and expressly imposed anti-competitive actions on certain businesses can these companies escape being penalised for those actions, as, for example the *Ladbroke Racing* cases (C-359/95 P and C-379/95 P, ECJ, 11th November 1997). In all other cases, the authorities' intervention comes into play as a deciding factor only when it comes to calculating the severity of the penalty itself.

Conclusion

Tension between competition law and the CAP is by no means over, but the mutual lack of understanding may gradually fade into history if only due to the numerous recent cases that have had profound repercussions in the agricultural industry. The next reform of the CAP, scheduled for 2013, will probably not directly affect the substance of the regulations that govern the application of competition law in the agricultural sector, nor its fundamental principles, but it will speed up the farming sector's shift towards more effective methods of commercialisation and therefore improve its ability to meet evolving demands. This is one of its declared objectives. No doubt competition law will have many other opportunities to interact with agriculture.

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