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## Research for AGRI Committee - New Competition rules for the agri-food chain in the CAP post 2020?

### Abstract

In order to strengthen the bargaining power of farmers and their associations and to provide them with greater legal certainty as regards with the application of these rules, how could the competition rules be further consolidated and clarified in the next CAP ? The report provide an overview of the EU framework of competition rules in the CMO after the adoption of the 2017 Omnibus Regulation. After having analysed the Commission's proposal for the next CAP (COM (2018) 394) and the proposal for a Directive on business-to-business UTPs in the food chain), put forward some recommendations.

### APPENDIX

New competition rules for the agri-food chain in the post-2020 CAP?

Since 1958, the European Treaty has affirmed the primacy of the Common Agricultural Policy over competition rules, as the Court of Justice of the European Union recently reminded in the Endives decision of 14 November 2017. Article 42 of the Treaty confers on the co-legislators the power to determine, in the light of the objectives of the CAP, the extent to which competition rules apply to the production and trade of agricultural products. In agricultural matters, competition is not a goal, a finality, in itself but an instrument, a means, in the service of achieving the objectives of the Common Agricultural Policy defined in Article 39 of the Treaty. Therefore, the application or interpretation of secondary legislation applicable to agricultural products in competition matters must never be interpreted or applied in such a way as the objectives of competition, in particular the objective of economic efficiency of article 101§3 TFEU, prevail in the CAP's objectives.

Article 39 explicitly targets the protection *-the welfare-* of both subjects located at each end of the agri-food chain: agricultural producers (in terms of fair standard of living for the persons engaged in agriculture) and consumers (in terms of reasonable prices for foodstuffs). Obtaining the lowest possible prices for the final consumer cannot be the sole yardstick for the assessment of the agreements and practices of producers with regard to competition law (Article 101 TFEU).



To achieve these objectives, agricultural policy promoted and supported associationism and collective actions in order to counterbalance the fragmentation and asymmetry of farmers' bargaining power vis-à-vis their highly concentrated buyers, industrial and retailers. This structural imbalance within the agri-food chain has negative effects on the agricultural sector and allows the development of unfair trading practices.

Producer organisations (POs) and their associations (AOPs) set up by agricultural legislation to remedy the strong atomicity of the sector and concentrated supply, have so far failed to remedy this imbalance : the restrictive interpretation of derogations and exceptions to competition law has been a hindrance to strengthening the position of farmers in the agri-food chain.

The transition from managed agriculture to a market oriented agriculture, with the gradual abandonment of price support, has amplified the weakness of farmers over their buyers and the uneven distribution of added value along the agri-food chain. This is why the question of the primacy of the CAP over the competition rules and more specifically the applicability of Articles 101 and 102 TFEU to the agreements and decisions of farmers and their organisations (POs and PDOs) has become a crucial issue again.

In accordance with Article 42 of the Treaty, in recent years, European institutions have become aware of the need to strengthen the role and the tasks of producer organisations, and have launched initiatives promoting the contractualisation of commercial relations and collective actions by farmers, and regulating against unfair trading practices.

This awareness was first of all reflected in the adoption of the "*Milk Package*" and Regulation (EU) No 261/2012 promoting the creation of POs in the milk sector and allowing these POs to negotiate collectively, including in terms of prices, on behalf its farmers members.

In November 2016, the *Agricultural Markets Task Force (AMFT)* made in its final report numerous recommendations aimed : to promote market transparency; to strengthen the bargaining power of producers ; to improve the position of farmers in the agri-food chain; to consolidate the competition rules applicable to producers' organisations and to clarify the legal tasks assigned to the POs in concentrating the supply with regard to article 101 TFEU.

In light of those recommendations, and the difficulties raised by the *Endives* litigation, the European Parliament has proposed amendments to the mid-term reform of the Multiannual Financial Framework for 2014-2020 : these amendments were adopted in Omnibus Regulation (EU) No 2017/2393 of 13 December 2017, which came into force on 1 January 2018.

This regulation extended to all production sectors the possibility for POs and AOPs of negotiating contracts for the supply of agricultural products of their members, including price contracts, thus modifying the legal framework of application of the competition rules to the agreements and practices of farmers and their associations. However, this new legal framework is not fully achieved and the text's progress should be consolidated and clarified in order to guarantee a real effectiveness of these provisions and of the primacy of CAP, and a greater legal certainty for operators.

## Objectives

The main objective of this study «*New competition rules for the agri-food chain in the post-2020 CAP?*» is to provide elements of information and reflection in the framework of the legislative process of post 2020 CAP reform.

The overall issue of the study is as follows:

How the next CAP could improve the current legal competition framework in the CMO?

The research focuses on the following points:

- describe and analyze the general pattern of application of the competition rules to agriculture as defined in Article 42 of the TFEU;
- provide an overview of the EU framework of competition rules related to the agriculture sector after the adoption of the 2017 Omnibus Regulation ;
- provide a critical analysis of the application of competition rules to agriculture by the European Commission and / or the national competition authorities and draw lessons for the next reform of the CAP;
- describe and analyse the Commission's legislative proposals in this area: firstly, the proposal amending the CMO regulation (COM (2018) 394 of 1 June 2018) ; secondly, the proposal for a directive of 12 April 2018 on business-to-business unfair trading practices in the food chain (COM (2018) 173 of 12 April 2018);
- put forward policy recommendations to the European Parliament as co-legislator with a view to consolidating and clarifying the conditions for the application of the competition rules in the future post-2020 CMO regulation, in accordance with the principle of primacy of the CAP set out in Article 42 of the Treaty.

## Methodology

The methodology used is based on a threefold approach:

- an analytical approach to study on the one hand the pattern of application of competition rules to agriculture since the Treaty of Rome until the recent Omnibus regulation (EU) No 2017/2393, and on the other hand, the decision-making practice of the authorities and jurisdictions European and national courts, in particular the European Commission and Court of Justice, and, finally, the Commission's legislative proposals for the reform of the post-2020 CAP and the fight against unfair trading practices in business-to-business practices in the food supply chain ;
- a critical approach to positive law and legislative proposals in order to assess, on the one hand, their consistency with the principle of primacy and the objectives of the CAP and, on the other hand, the need to strengthen the position of farmers and their organisations within the food chain;
- a prospective approach to express proposals and recommendations to consolidate and strengthen the regulatory framework established by the Omnibus Regulation in accordance with the principle of primacy of the CAP.

## Conclusions and recommendations

In conclusion, the study points out:

- that the CMO's new competition rules from the Omnibus Regulation (EU) No 2017/2393 should be further consolidated and clarified in order to strengthen the bargaining power of farmers and their associations and to provide them with greater legal certainty as regards with the application of these rules ;
- that the European Commission's legislative proposal for the CAP reform post 2020 (COM (2018) 394) does not contain any provision on the conditions of application of the competition rules

to the agriculture or the concentration of supply; the asymmetry of bargaining power within the agri-food chain is exclusively approached in the proposal for a Directive of 12 April 2018 on unfair trading practices in business-to-business relationships in the food supply chain.

In order to achieve the objectives of Article 39 and in particular to insure a fair standard of living for the agricultural population, to stabilize markets and ensure reasonable prices for deliveries to consumers; to strengthen the position of primary producers in the agro-food supply chain; to clarify and consolidate the possibilities of collective organisation and negotiation established by Regulation 2017/2393; to ensure a real effectiveness of the primacy of the CAP on competition policy and to provide a greater legal certainty for farmers and their associations; to prevent and sanction the occurrence of unfair trade practices in the commercial relationships within the agro-food chain between farmers and their buyers, **the main recommendations are :**

- delete the reference to Article 101 (1) TFEU in Article 152 of Regulation (EU) No 1308/2013: the tasks and objectives of the organisations defined by the CAP, as reminded by Advocate General Wahl and the Court of Justice in the Endives case, necessarily escape the application of the competition rules and in particular Article 101 TFEU;
- delete the reference to "*the transfer of ownership of agricultural products by the producers to the PO*" in Article 152 and 149 of Regulation (EU) No 1308/2013 : the collective bargaining activity in the name and on behalf of farmers members of the organisation concerns only non-commercial structures without transfer of property ;
- specify in Articles 152 and 209 of Regulation (EU) No 1308/2013 that the decisions and practices of farmers and their associations are presumed to be lawful : the decisions of the competition authorities only have effect for the future ;
- clarify the scope regarding the type of structure concerned of Article 209 of Regulation (EU) No 1308/2013 on exceptions to Article 101§1 TFEU;
- abolish the prohibition of price fixing clauses Article 209 (1) of Regulation (EU) No 1308/2013 : allow European farmers to charge common transfer prices as North American farmers have done since the *Capper Volstead Act* of 1922;
- extend the scope of *the Unfair Trade Practices Directive* within the agri-food chain to cover all agricultural products and foodstuffs;
- extend the scope of the *Unfair Trade Practices Directive* within the food chain to all suppliers including non-SMEs;
- accept a general definition of '*Unfair Trade Practices*'.



## Further information

This document is available on the internet in summary with option to download the full text at: <http://bit.ly/2NJWJ9U>

More information on Policy Department research for AGRI: <https://research4committees.blog/agri/>



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