EU COMPETITION FRAMEWORK POLICY AND AGRICULTURAL AGREEMENTS: COLLATION AND COMPARATIVE ANALYSIS OF SIGNIFICANT DECISIONS AT NATIONAL LEVEL
EU COMPETITION FRAMEWORK POLICY AND AGRICULTURAL AGREEMENTS: COLLATION AND COMPARATIVE ANALYSIS OF SIGNIFICANT DECISIONS AT NATIONAL LEVEL

NOTE
Abstract:

The establishment of a set of antitrust compatible agreements is crucial in strengthening the economic power of producers. Better regulation principles call for a smart approach to the Single CMO proposal based on the extension of rules and the promotion of compatible practices like codes of conduct, standards contracts, quality schemes or price observatories. Furthermore, there should be more emphasis given to encouraging a consistent and unique interpretation of EU Competition Law since the overall picture reflects a heterogeneity of national decisions concerning the Internal Market.
CONTENTS

LIST OF ABBREVIATIONS 5

EXECUTIVE SUMMARY 7

1. Preliminary remarks 9
   1.1. CAP and Competition law: a total exemption is simply inaccurate 9
   1.2. CAP exemptions at a glance 11
   1.3. Dominant position 14

2. National antitrust decisions 17
   2.1. Joint production and selling agreements and cooperation involving both: horizontal agreements 17
      2.1.1. Competitive and compatible agreements 18
      2.1.2. Non-compatible agreements 19
   2.2. Codes of conduct and competitive clauses 21
   2.3. Interbranch Agreements: exemption for certain vertical agreements for agricultural products 22
      2.3.1. Extension of rules 22
      2.3.2. Compatible practices 24
      2.3.3. Non-compatible agreements 27
   2.4. Practices and agreements concerning prices 28
      2.4.1. Orientated prices: a heterogeneous perspective 28
      2.4.2. Price Observatories and Price roundtables: a double-edged sword 29
      2.4.3. Index of referenced prices 31
      2.4.4. Price collective recommendations 31
      2.4.5. Centralised Buying Departments 33
      2.4.6. Fixing price: to be caught between the devil and the deep blue sea 33
   2.5. Standard contracts 36
   2.6. Quality Scheme Plans and production quotas 37
   2.7. Other practices from a competition law perspective 39
      2.7.1. Non-aggression pacts 40
      2.7.2. Division of geographical markets 40
      2.7.3. Sharing sensitive information 40
      2.7.4. Boycotts 40
      2.7.5. Discount and linked uniform discounts in the ambit of cartels 41
2.8. Dominant positions 41
  2.8.1. Relevant market and dominant position 41
  2.8.2. Abusive practices 42
  2.8.3. Below-cost selling 43

3. Ending conclusions and proposals 45

REFERENCES 51

ANNEX 55
### LIST OF ABBREVIATIONS

<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Full Form</th>
</tr>
</thead>
<tbody>
<tr>
<td>CAP</td>
<td>Common Agricultural Policy</td>
</tr>
<tr>
<td>CMO</td>
<td>Common Market Organisation</td>
</tr>
<tr>
<td>CNC</td>
<td>Comisión Nacional de la Competencia, Spain</td>
</tr>
<tr>
<td>EC</td>
<td>European Commission</td>
</tr>
<tr>
<td>ECJ</td>
<td>European Court of Justice</td>
</tr>
<tr>
<td>EP</td>
<td>European Parliament</td>
</tr>
<tr>
<td>EU</td>
<td>European Union</td>
</tr>
<tr>
<td>GI</td>
<td>Geographical Indication of Origin</td>
</tr>
<tr>
<td>IPO</td>
<td>Interbranch producer organisation</td>
</tr>
<tr>
<td>NCA</td>
<td>National Competition Authority</td>
</tr>
<tr>
<td>OECD</td>
<td>Organization for Economic Co-operation and Development</td>
</tr>
<tr>
<td>OFT</td>
<td>Office of Fair Trade, UK</td>
</tr>
<tr>
<td>OJ</td>
<td>Official Journal</td>
</tr>
<tr>
<td>PO</td>
<td>Producer Organization</td>
</tr>
</tbody>
</table>
EXECUTIVE SUMMARY

Background
We have taken as a starting point a description of how the EU Competition legal framework is applicable to agricultural practices, conducts and agreements. In the next section the question of whether Member States’ Competition Authorities are applying EU Competition Law to Agro-food sector shall be examined. This comparative analysis will specifically focus on the decisions related to practices in the context of the proposal of a new Single CMO in particular, Articles 104 to 116 and 143 to 145 of the COM proposal (2011).

Aim
The aim of this study is to provide a collation and comparative analysis of significant decisions adopted concerning agricultural practices, conducts and agreements in the application of EU antitrust law.

The overall picture shows the heterogeneity of national decisions within the Internal Market. We propose a better regulation in order to strengthen the economic power of producers, as well as self-regulation initiatives. In addition, the idea of encouraging a consistent and unique interpretation of EU Competition Law must be highlighted in relation to practices, conducts, and agreements of producers, producer organisations and Interbranch associations.

The methodology used comprised a three-step methodological approach: first, a general overview of competition policy and agriculture; second, analysis of primary data collected from requests and Member State case studies; and third, a set of proposals for better regulation. From a broad perspective, this study aims to cover horizontal agreements, codes of conduct, vertical agreements (Interbranch associations’ extension of rules), price-related practices (orientation/directed prices, price indexes and observatories, price recommendation), production quotas, quality programmes and other practices like geographical market division, information sharing, etc.

Mention should be made that the selection of countries for this study was in accordance with the mandatory criteria of main producer countries (Germany, Spain, France, Italy, Netherlands, Poland and United Kingdom) but other Member States were included when decisions were relevant to the main objective of this paper.

Key findings
More joint action between the EU and Member States’ Competition Authorities could strengthen an integrated and effective approach to antitrust CAP exemptions.

The first finding is that the general exemption to the Agro-food sector is not accurate. A second approach would be to decide whether the Single CMO may be improved in relation to the exemptions to antitrust law in application of article 42 of the Treaty. As is set forth in section II, nowadays, each Member State apparently does as it pleases to exempt any conduct or practice in the Agro-food sector.

---

1 The term “agro-food sector” is used throughout this overview paper when referring to the multiple levels of the food chain, since in many cases the issues raised and observed may apply to more than one level (e.g. supply industries, farm level, processing, distribution, retail). OCDE (1996): Competition policy and agro-food sector, OCDE/GD (96)81, p. 5.
The new Single CMO is not too ambitious on this matter; however, one positive outcome is the fact that the proposal contemplates the extension of rules for the entire Annex I of the Treaty.

One of the exemptions is related to horizontal agreements adopted by producer organizations -cooperative companies included. It is clear how exemption works when the horizontal agreement deals with production or commercialization because ancillary restraints are accepted under some conditions as the agreement fosters competition. However, some problems have emerged when the horizontal agreement is related to a private storage measure, which is normally linked to a price fixing.

Concerning extension of rules, better regulation principles call for a smart approach to the extension of rules, which in technical terms is a vertical agreement. To this goal, extension of rules has no sense if the agreement to be extended has to be adopted the year before the extension, as it is stated in the EC proposal. More flexibility is essential. The European Commission and National Administrations have already examined a limited list of agreements to be extended under the system in force. This historical data base contains not only a positive list of agreements that has been extended but also a negative list, where unlawful agreements are compiled.

Another question which calls for close scrutiny is the practice of price fixing. As is well known, it has been accepted under certain conditions by the EU Legislator when adopting the “milk package”.

Price fixing will always fall under Article 101(1) irrespective of the market power of the parties taking into account some exemptions like a single supply price or a collective trade mark. Together with the so-called “milk exemption”, the price fixing is not unlawful when in a production agreement; i.e. there is a need to create an undertaking to fix prices if commercialisation aspects and efficiency are included. Without this price fixing it would otherwise be impossible to ensure (e.g. creating a collective brand if the signing parties do not have 15% of market share) that production is fixed by the parties or is stated for the common managing of production, distribution and commercialization functions. In addition, the price fixing is needed to eliminate transaction costs or to introduce new products in the market by way of commercialization agreements. Nevertheless, there is a grey area in relation to orientative prices and price index references.

Following on from this, the list of compatible practices to foster both a balance in the power of the distribution chain and the transparency of the market would involve establishing codes of conduct, standards contracts, quality schemes or price observatories, etc., where compatibility with EU competition law has not been contested.

Lastly, with regard to dominant position, a reinterpretation of relevant market may be carried out in order to adapt it to the Agro-food sector, due to the diversity of the criteria being applied by National Competition Authorities.
1. PRELIMINARY REMARKS

KEY FINDINGS

- CAP total exemption of antitrust law is inaccurate
- Market inefficiencies can be solved with partial exemptions of competition rules
- The overall picture shows that EU Competition law has stated a set of CAP exemptions: national market organizations; practices needed to reach the complete list of CAP objectives; joint production and selling agreements and cooperation; etc.

1.1. CAP and Competition law: a total exemption is simply inaccurate

The function of competition law is to enhance economic efficiency in the sense of maximizing consumer welfare and achieving optimal allocation of resources. Nevertheless, efficiency is not the only goal of competition policy. A second function may be to protect consumers and smaller firms from large aggregations of economic power, whether in the form of monopolistic dominance of a single firm or of agreements whereby rival players coordinate their activity so as to act as one-unit producers. A third function consists of creating a more consistent Internal Market to grant the maximization of consumer welfare and producer incomes, as some academics have pointed out. Hence, the primary objective of EU competition policy is to contribute to the functioning of the internal market and to benefit EU citizens and businesses.

The idea of getting a total exemption of competition rules to agro-food sector is simply inaccurate. First of all, let us consider how difficult it is to specify any kind of exemption to antitrust law taking into account the plurality of players, practices and actions to be eventually covered by the exemption in this economic sector.

It is claimed, however, that the achievement of CAP goals are not fully compatible with competition law.

In addition, article 42 of the Treaty empowers the European Parliament and Council to delimit the extent of competition rules for production and trade of agricultural products of foodstuffs. Single CMO and Regulation EC num. 1184/2006 are expressions of these powers.
Nevertheless, *market inefficiencies* (externalities, asymmetric access to information, monopolies, etc.) can be solved with partial exemptions of competition rules. The legislation applicable to agricultural products provides for a limited number of withdrawals from the applicability of competition rules to certain agreements and decisions of farmers and farmers’ associations. However, in light of the interpretation that European Courts have given to such withdrawals, the vast majority of the agreements and decisions of farmers do not fulfil the conditions for such withdrawals to be applicable.

Therefore, these agreements must be analysed under the regime of the general competition rules applicable to undertakings\(^6\). As the Single CMO has suggested in recitals 83 and 84 and stated in article 175 competition rules are applicable to practices concerning agricultural products but with the exemptions of article 176.

"(83) In accordance with Article 36 of the Treaty the provisions of the chapter of the Treaty 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 Article 37(2) and (3) of the Treaty and in accordance with the procedure laid down therein. In the various CMOs the provisions on state aid had been largely declared applicable. The application in particular of the Treaty rules applying to undertakings was furthermore defined in Council Regulation (EC) No 1184/2006 of 24 July, 2006 applying certain rules on competition in relation to the production of, and trade in agricultural products [43]. In line with the objective of creating one comprehensive set of market policy rules, it is appropriate to incorporate the provisions concerned in this Regulation.

(84) The rules on competition relating to the agreements, decisions and practices referred to in Article 81 of the Treaty and to the abuse of dominant positions should be applied to the production of, and trade in agricultural products, in so far as their application does not impede the functioning of national organizations of agricultural markets or jeopardize the attainment of the objectives of the CAP”.

We have taken as a starting-point, that agreements, conducts and practices concerning agricultural products are governed by Articles 101 and 102 of the Treaty, which are the basic competition rules, and Article 42, which allows specific rules concerning certain practices and agreements in the framework of the CAP.

Another question is the abuse of dominant position. Agreements, conducts and practices related to the production and trade of agricultural products are contemplated under article 102 of the Treaty “...in so far as their application does not impede the functioning of national organizations of agricultural markets or jeopardize the attainment of the objectives of the CAP” especially when there are specific forms of abuse linked to exclusive purchasing, tying or bundling, etc.\(^7\). Under this framework, new options are opened up to defend the interests of farmers in the ambit of codes of conduct. Any non-compliance with a


\(^7\) Case T-65/98 Van den Bergh Foods v Commission [2003] ECR II-4653. In this case the obligation to use coolers exclusively for the products of the dominant undertaking was considered to lead to outlet exclusivity. See Communication from the Commission — Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, 2009/C 45/02, 24.2.2009.
code of conduct is considered to be unfair competition according to Article 6.2.b) of Directive EC/2005/298.

As is well known, the European Commission introduced a set of CAP reform proposals in 2011; for the sake of better regulation, these were aimed at carrying out a Competitive Impact Assessment and it would have been better if they had been made public. In particular, the forthcoming Single CMO or any new agro exemption to antitrust law must pass through the filter of the principle of proportionality, efficiency, minimum distortion, transparency and predictability in order to eliminate those non-justified competition restrictions. Simultaneously, in 2012, Regulation EC No. 261/2012 has set specific contractual conditions for the dairy sector in new article 185f of the Single CMO and price fixing is accepted under certain conditions.

1.2. CAP exemptions at a glance

What should be established at the very outset is that exemptions to article 101 of the Treaty are not applicable when agreements, practices or conducts do not actually affect or potentially affect trade between Member States. However these agreements will be subject to the national competition rules of the Member States.

As we know, the overall picture shows that EU Competition law has stated the following CAP exemptions:

1. **Internal market organizations** when the CAP goals are not in danger like in the case of the French potatoes national market organization. The last NMO was withdrawn in UK (Milk National Boards UK).

2. **Agreements and practices needed to reach the complete list of CAP objectives** (Article 39 Treaty of Lisbon).
3. Horizontal and vertical agreements, a case-by-case approach:

   - **Horizontal agreements (Joint production and selling agreements and cooperation involving both):** Agreements between farmers, farmers’ associations and associations of farmers’ associations (never trade representatives or trade associations) concerning the production or sale of agricultural products or the use of the joint facilities for the storage, treatment or processing of agricultural products, but price fixing is excluded. It is furthermore required that the agreement may not eliminate competition or jeopardize the CAP objectives.

   This exemption refers to cooperatives companies that usually are de facto PO but may be extended to other types of POs or farmers' associations. The conduct must not produce a restriction of competition by object (for instance, price fixing) or by effect (for example, market power). Ancillary restrictions are accepted when, for instance, they consist on sales goals or price fixing to an immediate customer.

   - **Vertical Agreements (Commercialization agreements between competitors):** When the practices do not involve horizontal price fixing, they are only affected by Article 101(1) if the parties to the agreement have some degree of market power (15 per cent). When commercialisation agreements involve price fixing, quotas or geographical division of markets, they will always fall under Article 101(1) irrespective of the market power of the parties taking into account some exemptions like: a single supply price or a collective trade mark with no more than fifteen per cent of market power.

   - **Interbranch Agreements (vertical restriction):** The Single CMO entitles Interbranch associations to declare the extension of rules of its Interbranch agreements in certain conditions and subjects in their economic area to non-associated producers. This type of agreements is usually classed as a vertical restriction, similar to those adopted by distribution chains. In EU

---

in the French beef case, where the Commission considered that a price fixing cartel between French farmers and slaughterhouse federations could only fulfil one of these objectives (ensuring a fair standard of living for farmers) but not the rest of the goals set down under the above provision (Judgment of 13 December 2006, Joined Cases T-217/03 and T-245/03, FN CBV and others v. Commission, 2006, ECR I-04987.). See: EUROPEAN COMMISSION (2010): Working Paper "The interface between EU, op. cit., p. 8.


The price fixing is acceptable when it is indispensable for the integration of other marketing functions; this integration generates substantial efficiencies; these efficiencies are not savings which result only from the elimination of costs that are inherently part of competition, but result from the integration of economic activities; the agreement does not impose restrictions that are not indispensable to the attainment of the abovementioned benefits; and the parties do not have market power which allows them to eliminate competition (see paragraphs 151 and following of the Horizontal Guidelines).

An "interbranch organisation" ("IPO") is defined in Article 123 of the Single CMO Regulation as an organization made up of representatives of economic activities linked to the production of, trade in, and/or processing of products in a number of sectors. In addition, article 176 bis of Single CMO states that EC must check the compatibility of the extension of rule as an exemption to EU Competition rules [COM(2008) 821 final]. Currently for IPOs there is a Community framework for 5 sectors: fruit and vegetables, tobacco, wine, olives/olive oil and cotton. Member States may recognize IPOs in other sectors, on the basis of national law, provided such IPOs respect EU law (Article 124(1) of the Single CMO Regulation).
Law, an administrative **procedure of specific validation** allows for the review of the given agreements\(^\text{22}\).

Paradoxical as it may seem, the extension only applies to fruit and vegetable [article 125(f) of Single CMO], tobacco [Article 178(3)] and wine [article 125(o)] industries. The proposed Single CMO extends it to the entire sector.

In a nutshell, the extended agreement can focus attention on statistical data of the given market; quality of products; innovation; consumer information; environmental questions; standard clauses of contract like minimal information, arbitration of conflict, etc.\(^\text{23}\)

- **Standard written contracts of the “milk package”**: At this point, it should be pointed out that, in relation to the dairy sector, the EU legislator has considered that standard written contracts help to reinforce the responsibility of operators in the dairy chain and to improve price transmission and to adapt supply to demand, as well as to help to avoid certain unfair commercial practices (recital 9 of Regulation EU no 261/2012).

In addition, Regulation EC no 261/2012 has set specific contractual conditions for the dairy sector in new article 185f of the Single CMO. As a further exemption for Dairy sector, the price payable for the delivery may be set in a so-called model of “written contract”\(^\text{24}\).

4. **General exemptions applicable to agriculture**:

- **Article 101.3 exemption**: following article 101.3 of the Treaty and Regulation (EU) no 330/2010\(^\text{25}\), any agreement or category of agreements between undertakings will be compatible with antitrust law if four conditions are respected:
  - it contributes to improving the production or distribution of goods or to promoting technical or economic progress,
  - it allows consumers a fair share of the resulting benefit;
  - there is no imposition on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives and it does not afford such undertakings the possibility of eliminating

---

\(^{22}\) Single CMO refers article 3 of EC Regulation No. 1/2003, which states the role of the Commission on this procedure. Nevertheless, article 125 h says that “...The Commission shall decide that a Member State shall repeal an extension of the rules decided on by that Member State pursuant to Article 125f (1) where it finds that the extension in question to other producers excludes competition in a substantial part of the internal market or jeopardises free trade, or that the objectives of Article 33 of the Treaty are endangered”. Single CMO reform reproduces the procedure in articles 114 and 116.

\(^{23}\) As stipulated in Article 123 of the Single CMO, such organizations must: (b) be formed on the initiative of all or some of the organizations or associations which constitute them; and (c) pursue a specific aim, which may, in particular relate to: (i) concentrating and coordinating supply and marketing of the produce of the members; (ii) adapting production and processing jointly to the requirements of the market and improving the product; (iii) promoting the rationalization and improvement of production and processing; (iv) carrying out research into sustainable production methods and market developments.”

\(^{24}\) At the choice of the contracting parties, the price payable may be written down as a static price or a price varying depending on defined factors, such as the volume and the quality or composition of the raw milk delivered, without excluding the possibility of a combination of a static price for a certain volume and a formula price for an additional volume of raw milk delivered in a single contract [article 185(f)(1.2).c) of the Single CMO].

competition in respect of a substantial part of the products in question.  

Del Cont says that “in theory, paragraph 3 of Article 101 establishes some applicability conditions wider than those of Article 2§1 of Regulation 1184. Indeed, Article 2§1 refers exclusively to CAP objectives mentioned in Article 39 TFEU, which are interpreted very closely. On the basis of Article 101§3, the Commission may find that the conditions to apply the exception are met. In practice, the Commission and the ECJ (like with the exemptions in Article 2 of Regulation 1184/2006) check whether the agreements are necessary, if the consumer interest is preserved and whether the agreement leaves sufficient competition”. This exemption is interpreted as restrictive as any agricultural exemption as Del Cont points out.  

- Agreements derived from sub-contracting  
- Agreements of exclusive representation by commercial agents  
- Minor agreements; as EC has explained, the safe harbour created by the De Minimis Notice applies to agreements between actual or potential competitors (horizontal agreements) as long as their aggregate market share does not exceed 10%. For agreements between non-competitors (vertical agreements), the market share held by each of the parties should not exceed 15% to benefit from the notice. For markets where there is a cumulative effect of parallel networks of similar agreements, these market share thresholds are reduced to 5%.  

In fact, some opinions point up that the antitrust authority should not punish maximally overall, but punish in a smarter manner such that mild offenses are not fined at all. In general, our results call for a subtle reconsideration of the common wisdom in the economics of crime that setting the fine equal to the available legal upper bound always increases the effectiveness of deterrence.  

1.3. Dominant position  
Nowadays, the existence or not of a distribution dominant position is a current debate. Several pronouncements have already pointed to the relevance of the distribution in the configuration of the Agro-food markets and the responsibility of the Administration in order to prevent any abuse of this position:

---

26 See Communication from the Commission - Guidelines on the application of Article 81(3) of the Treaty [OJ No C 101 of 27.4.2004].  
30 Commission Notice on agreements of minor importance which do not appreciably restrict competition under Article 81(1) of the Treaty establishing the European Community (de minimis) [OJ C 368 of 22.12.2001]. This notice also excludes from its benefit agreements which contain one or more hardcore restrictions, as such restrictions are presumed to have negative effects. As stated in the Guidelines on the application of Article 101(3) TFEU (ex-Article 81(3) TEC), hardcore restrictions are restrictions of competition by object, which by their very nature have such a high potential of restricting competition that it is unnecessary for the purposes of applying Article 101(1) TFEU to demonstrate any actual or likely effects on the market.  
31 HOUBA, HAROLD E. D., et al.: "Antitrust...
“... Overall, the non-processed food supply chains are characterised by atomised weaker suppliers and stronger buyers, who are often intermediary operators and rarely retailers. Such buyers are the often “unavoidable” trading partners for producers. Agricultural producers feel compelled to satisfy terms and conditions stipulated by their buyers – and that farmers often perceive as going beyond what is “fair” – so as not to lose these indispensable buyers.”

Within similar terms, the European Parliament passed a Resolution of 7 September 2010 on “Fair revenues for farmers: A better functioning food supply chain in Europe”(A7-0225/2010).

Therefore, the European Commission's intention to address farmers' lack of value share and the imbalance of power in the food supply chain was shared by many witnesses. However, it is necessary to draw the distinction between the application of article 102 to an abusive dominant position and the application of protection against unfair competition, as it will be explained later on.

Consequently, inefficiencies and contractual tensions are the daily menu of the industry. **But dominant position is not condemned. It is the abuse of a dominant position, not its existence, which is unlawful**

Abuses of buying power are contrary to EC competition law where there is a proven detriment to downstream consumers. Much of the current political interest is in fact focused on issues of "unequal bargaining power" which should be distinguished "buyer power" issues, and actually highlights problems faced by small suppliers in the context of contractual negotiations with stronger buyers.

As is well-known, **Article 102 of the Treaty states that abuse of dominant position is not compatible with the internal market and, therefore, is a forbidden practice in so far as it may affect trade between Member States.** Such abuse may, in particular, consist of:

(a) Directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
(b) Limiting production, markets or technical development to the prejudice of consumers;
(c) Applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
(d) Making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

In any case, the concepts of relevant market and market power are key elements to apply article 102 of the Treaty.

---


33 WEATHERILL, S.: Case & materials..., op. cit, p. 533 y ss.

34 EC : "Competition in the food supply...p. 18.


Finally, concerning dominant position, the Single CMO proposal contains a new concept in EU Competition Law. Article 106 of the proposal considers that dominant position *per se* may be considered unlawful. This is a point to be revised before the adoption of the Regulation as Del Cont has explained\(^\text{37}\).

2. NATIONAL ANTITRUST DECISIONS

KEY FINDINGS

- The overall picture shows the heterogeneity of national decisions in the Internal Market.

- The agreement or conduct which may be caught by Article 101 goes beyond the formal contract, if the conduct is considered to be a concerted practice.

- The material scope of the section shall cover a wide range of practices and agreements: price-fixing practices; price observatories, etc.

Following on from the preliminary remarks and before the analysis of national competition decisions, two matters need to be clarified:

- The agreement or conduct which may be contemplated by Article 101 goes beyond the formal contract, if the conduct is considered a concerted practice.

- Competition law must be applied to the agro-food sector when an anticompetitive practice or conduct is happening. Therefore, independently of the actors (producers, producers' organizations, Co-operative companies, Interbranch Associations, Trade Federations, Geographical Indications of Origin Boards, etc.) the material scope of the note shall cover: fixing prices practices; price observatories; price orientation; standard contracts; production plans or quality programmes; etc. This affirmation is consistent with the open concept of undertaking adopted in EU Law.

2.1. Joint production and selling agreements and cooperation involving both: horizontal agreements

The European Commission has identified as Cooperation Agreements a set of horizontal agreements, when two or more parties agree to co-operate in downstream processing and selling.

These types of practices may cause competition problems when parties agree fixed prices or production quotas, division of the markets or when the cooperation allows them to keep, or increase the market power and the situation produces negative effects in prices, production, innovation or quality of the products. However, horizontal agreements have simultaneously an added value in economic terms. The companies should adapt their structures to a competitive environment and the markets in permanent evolution and co-operation is an accurate instrument to these goals.

---

38 WEATHERILL, S.: Case & materials..., p. 509.
40 Communication from the Commission - Guidelines on the application of Article 81(3) of the Treaty [OJ No C 101 of 27.4.2004].
In the Agro-food sector, joint production or commercialization agreements are those where the parties agree to cooperate in order to improve the processing and selling (for instance a Cooperative company) of a food product\textsuperscript{41}. These practices have pro-competitive effects and, as an exemption to antitrust law, some ancillary restrictions are admitted, like sales premiums or fixing prices to special customers\textsuperscript{42}.

Co-operation agreements between competitors may be allowed under general competition rules when they entail efficiencies\textsuperscript{43}. This preliminary approach concludes that these horizontal agreements will be compatible with the competition rules when there is evidence of economic efficiency. However, these horizontal agreements are not acceptable when there is evidence of price fixing, division of markets or production quotas.

A production agreement where the parties consent to cooperating to improve sales or processing is an admissible practice if freedom to exit or withdraw from the cooperative is granted (so that they can operate autonomously or potentially join another competing cooperative) and their freedom to supply third parties other than the cooperative itself\textsuperscript{44}. When the agreement does not fix prices, it is not affected by Article 101 of the Treaty when market power is below 20 per cent\textsuperscript{45}. One particular issue is raised when the agreement contains a fixing price clause, which is only allowed if the sale function and efficiency is not possible without fixing the Price\textsuperscript{46}.

Commercialisation agreements that involve price fixing will always fall under Article 101(1) irrespective of the market power of the parties taking into account, as it has been said, some exemptions like: a single supply price or a collective trade mark with no more than fifteen per cent of market power. When the practices do not involve horizontal price fixing, they are only affected by Article 101(1) if the parties to the agreement have some degree of market power (15 per cent)\textsuperscript{47}.

With regard to CAP reform, as Del Cont has described, Article 144 of the Single CMO proposal provides the «exceptions for the objectives of the CAP in relation to farmers and their associations». This article is intended to replace Article 176 of Regulation No 1234/2007 by extending its scope and the only innovation concerning this general exception is the deletion of reference to the national market organizations. A second innovation detected by Del Cont is that producer associations in a dominant position may not benefit from the exemption, which is a novelty in EU Competition law. In EU antitrust law, the dominant position is admitted but the abuse of that position may be considered unlawful. The reference to Article 106 restricts, or even contradicts, the scope of this exception in favour of producer associations\textsuperscript{48}.

### 2.1.1. Competitive and compatible agreements

The most notable aspect of the co-operation practices is that there is a wide range of this kind of horizontal agreements allowed by EU Member States Competition Authorities. For


\textsuperscript{42} Judgement of 12.12.1996, C-399/93, par. 12.

\textsuperscript{43} CESARINI, P.: " Ensuring a well functioning...

\textsuperscript{44} Case C-399/93, Oude Luttikhuis.

\textsuperscript{45} It is only where the parties' combined market share exceeds 20% that the restrictive effects have to be analysed on a case-by-case basis as the agreement does not fall within the scope of the Specialisation block exemption regulation [Commission Regulation (EC) No 2658/2000, of 29 November 2000, on the application of Article 81(3) of the Treaty to categories of specialisation agreements].


instance, in the Netherlands, the Coberco case shows how National Competition Authority has considered that “fees payable under the statutes of a cooperative association on withdrawal or exclusion may fall within the derogation provided for in the Regulation”\(^49\)

In connection with this approach, we found also an example in Ireland, with the joint selling agreement Co-operative Dairy Society, considered compatible with competition rules\(^50\); and, in Portugal, the agreements promoted by ALIP, an association of dairy producers\(^51\).

In the United Kingdom, the reference is the Milk Marque case, where the European Court of Justice has stated that "the Treaty rules on the free movement of goods do not preclude the competent authorities of a Member State from prohibiting a dairy cooperative which enjoys market power from entering into contracts with undertakings, including undertakings established in other Member States, for the processing, on its behalf, of milk produced by its members"\(^52\). Here, before the ECJ, according to the UK Competition Commission’s report, the proved adverse effects of the dominant position were: “(i) increases in the price of raw milk, which have at least in part been passed onto consumers so that consumers pay more for fresh milk than they would if Milk Marque had not been able to secure milk prices above competitive levels; and (ii) increased costs and greater uncertainty for the dairy processing industry in Great Britain, so that processors in Great Britain have invested less and have become less competitive in internationally-traded products than they would otherwise have been and output in Great Britain is at a lower level and value than would otherwise have been the case”.

In Germany, Nordzucker and Union-Zucker have developed some agreements of co-operation close to the cartel definition. The agreements were adopted to improve their position in negotiations with the food retail sector by strengthening their power of supply. Nevertheless, the Authorities have considered the admission of the cartel practices under co-operation agreements because of the so-called co-operative privilege\(^53\).

### 2.1.2. Non-compatible agreements

Co-operation agreements are not always compatible with antitrust law. This is for example the case if the parties of a co-operation agreement are fixing prices or output, sharing markets, or if the cooperation enables the parties to maintain, gain or increase market power and thereby causes negative market effects with respect to prices, output, innovation or the variety and quality of products\(^54\).

---

\(^{49}\) Case C-11/05, Friesland Coberco Dairy Foods.
\(^{50}\) CA/43/95 (under prior notification regime Competition Act 2002).
\(^{51}\) See http://www.anilact.pt/.
\(^{52}\) Competition Commission stated that Milk Marque held a powerful position in the milk market in Great Britain and that this has contributed to milk being supplied in Great Britain at a higher price than the level it would have reached under more competitive conditions. Judgement of the Court of 9 September 2003, The Queen v The Competition Commission, Case C-137/00.
\(^{53}\) Berlin Courts of Appeal, Memory 2010.
\(^{54}\) Commission Notice — Guidelines on the applicability of Article 81 of the EC Treaty to horizontal cooperation agreements (Text with EEA relevance) Official Journal C 003 , 06/01/2001 P. 0002 - 0030.
ECJ has already stated that these kinds of horizontal agreements cannot include a fixing price\textsuperscript{55} and that the exemption is not applied when there are commercial agents between the participants on the agreement\textsuperscript{56}.

In Germany, Bundeskartellamt which acts as a competition authority points out once more that the admissibility of market information systems under competition law always depends on individual case and actual structural conditions in the relevant market\textsuperscript{57}.

In the Netherlands, the European Commission has detected in Meldoc that, under an horizontal agreement of cooperation some practices were not compatible with the competition rules as "...The agreement establishing the greater Meldoc organization in so far as it gave rise to the combination of consultation on sales and prices, a quota system with a compensation scheme and actions against imports constitutes an infringement\textsuperscript{58}. A similar decision has been adopted in Coberco, when "the agreements or the clauses in the statutes, a combination of clauses such as those requiring exclusive supply and payment of excessive fees on withdrawal, tying the members to the association for long periods and thereby depriving them of the possibility of approaching competitors, could have the effect of restricting competition". In Milchförderungsfonds, the ECJ has confirmed that an exemption does not apply to agreements that had been implemented by several associations of farmers' trade associations which could not qualify as farmers' associations\textsuperscript{59}.

In conclusion, it is quite interesting (in relation to the horizontal agreements in the agro-food co-operative sector) to partially reproduce the contents of the Spanish National Competition Authority ruling that refers to the Milk Marque case in affirming that that co-operation may not facilitate infringements of competition law. As stated, the Commission Horizontal Guidelines stipulate a check for the concepts of relevant market and geographical market.

In that context, once the definition of relevant market has been established, the co-operative market power should be analysed to check if its quota is not up to 20 percent. Agreements including production goals, which can be defined as ancillary restraints, are welcome if they tie in with co-operative aims and are necessary in reaching objectives\textsuperscript{60}.

\textsuperscript{55} Judgment of the Court (Fifth Chamber) of 30 March 2000. - Coöperatieve Vereniging De Verenigde Bloemeneveilingen Aalsmeer BA (VBA) v Florimex BV, Vereniging van Groothandelaren in Bloemkwekerijproducten (VGB), Case C-265/97.

\textsuperscript{56} Case IV/31.204, Meldoc, op. cit. and C-399/93, HG Oude Luttikhuis , op. cit.

\textsuperscript{57} Bundeskartellamt: Market Power in the Dairy sector – Interim Results of a Sector Inquiry by the Bundeskartellamt. 1512.5.2011.


\textsuperscript{60} CNC: Informe sobre la competencia en el sector agroalimentario, accessible at www.cncompetencia.es/Inicio.
Box 1: The horizontal agreement exemption for cooperatives

HORIZONTAL AGREEMENTS EXEMPTION

Conditions to be applied to cooperatives

Co-operation may not facilitate infringements of competition law. Horizontal agreements or co-operation agreements:
- will be compatible with the competition rules when there is evidence of economic efficiency, and
- are not acceptable when there is evidence of price-fixing, division of markets or production quotas, and
- may not be accepted if they enable the parties to maintain, gain or increase market power and thereby cause negative market effects with respect to prices, output, innovation or the variety and quality of products.

2.2. Codes of conduct and competitive clauses

Codes of conduct, as a commercial practice or soft-law, are extended in the agro-food sector. Being compulsory or voluntary, their contents must respect competition rules and, therefore, anticompetitive clauses are not allowed\(^{61}\). They have been considered to be a useful instrument of better regulation to increase market efficiency and to act as a balance of interests between distribution and production interests in the food chain\(^{62}\).

As a self-regulating mechanism, the Code of Practice on Supermarkets 2003, which has been replaced by the Groceries Supply Code of Practice 2008, is a key reference in the EU\(^{63}\). Some of their clauses may be highlighted: a general obligation of loyalty in commercial relations; the prohibition of modifying contracts retroactively; the prohibition to impose the inventory costs to the supplier; the arbitration system to solve conflicts; the prescription of fees should the contract cease; the person in charge of the Code implementation in each company, etc.

Although there are examples in other Member States, like the Spanish Code signed by ASEDAS-FIAB\(^{64}\), the contents of the French CNIEL Code of Conduct are the key findings on this matter.

In 2011, the CNIEL Guide de bonnes pratiques contains, between the list of compulsory points of a contract, the following clauses: identification of the parties, object, duration and volume of milk; mechanism to fix the price (index of CNIEL or whatever other formula); forms of payment; characteristics of the product, milk quality and control system; modalities of supply; revision clauses; and the creation of a Commission of surveillance and solution of conflicts. Recently, the Dairy Mediator has reached an agreement between Lactalis and the national delegation of dairy producers; it consists of a unique type of contract and a list of price-fixing modalities\(^{65}\).

---

\(^{61}\) SPECE, L.: Y BOURLAKIS, M.: "Moving from CSR to Supply ... 
\(^{62}\) In other legal fields, there has also been a debate about the self regulation. See EMBID IRUJO, J.M.: "Leyes versus códigos (autorregulación) en los..., p.28.
\(^{64}\) Accessible 18.5.2010 at www.fiab.es/archivos/documentoNoticia/1160.pdf.
Any non-compliance with a code of conduct is considered to be unfair competition according to Article 6.2.b) of Directive EC/2005/29 concerning unfair business-to-consumer commercial practices in the internal market.

To sum up, the inclusion of a clause with an instrument to fix the price in a Code of conduct was the singular contribution of CNIEL to the debate on the application of antitrust law to the agricultural products. Nevertheless, this debate has been superseded by the EU, with the Regulation (EU) No. 261/2012, of the European Parliament and the Council, (March 14, 2012) as was explained above.

• Box 2: Spanish CNC approach to Codes of Conduct

<table>
<thead>
<tr>
<th>CODES OF CONDUCT</th>
</tr>
</thead>
<tbody>
<tr>
<td>Voluntary subscription</td>
</tr>
<tr>
<td>Free and voluntary</td>
</tr>
<tr>
<td>Non anticompetitive clauses allowed</td>
</tr>
<tr>
<td>Aiming to improve and to facilitate the relations between producers and the other players of the chain</td>
</tr>
<tr>
<td>Without restrictions in terms of entering or leaving the market</td>
</tr>
<tr>
<td>Efficient arbitration mechanisms</td>
</tr>
</tbody>
</table>

2.3. Interbranch Agreements: exemption for certain vertical agreements for agricultural products

The general rule is that Article 101 of the Treaty applies to Interbranch Associations in the absence of any specific derogation66.

Del Cont has pointed out that Member States were already allowed, «on the basis of national law», to recognise Interbranch organisations in all other sectors of Annex 1, except those recognised under the EU law (Article 211 COM (2010) 799). The difference between these two types of Interbranch organisations arose from the fact that only Interbranch organisations recognised by the EU regulation and authority, benefited from the application of the “extension of rules”67.

2.3.1. Extension of rules

As already stated, traditionally, the Single CMO outlines certain exemptions to the application of EU antitrust law in relation to several practices by Interbranch associations which are looking for an “extension of rules” in a limited number of products like fruit and vegetables (article 125k), tobacco (article 126), wine (article 113c), olive oil and table olives (article 123), and cotton. The entire list of products of Annex I of the Treaty may be subject of these exemptions if the proposed Single CMO is adopted.

Taking into account Article 125l–m of the single CMO, if an Interbranch Association is representative of enough of the production, trade or processing in a given economic area, the effect of the agreement can be extended for a limited period to other operators in the region even though they might not have been associated to it, including when it consists of a financial contribution.

The agreements benefitting from the application of the rule must have been in force for at least one marketing year, may be made binding for no more than three marketing years, and shall not cause any damage to other operators.

The rule cannot be extended and validated for more than 1 season for non-producer members.

Any eventual derogation of competition law to benefit the agreements of the Interbranch Associations may be, in a case-by-case analysis, examined by the public administration because it falls within the category of vertical agreements, in the sense of Regulation (EU) No. 330/2010, of the European Commission.

France and Spain are, nowadays, the Member States whose Interbranch associations are using this mechanism as declared by EC in the DG AGRI web page and documented in the Official Journal. DG AGRI currently publishes the extensions of rules which have been requested:

France has sent to the European Commission several extensions of Interbranch agreements: extension of Quality rules of INTERFEL for Kiwis to set harvesting and marketing dates, combined with a minimum Brix value; extension of Quality rules for INTERFEL for melons to set a minimum size/weight; extension of Quality rules for INTERFEL to set a size and calendar for marketing peaches and nectarines; extension of quality rules for INTERFEL to promote and improve quality control; extension of quality rules for INTERFEL to set a minimum calibre for shallots. Spain has communicated the extension of Quality rules in relation to HORTYFRUTA for marketing only extra (where relevant) and first class quality products. In the past, the extension had benefitted Intercitrus to obtain funding for promotional purposes.

---

68 For fruit and vegetables, the Single CMO (article 176a) states that Article 101(1) shall not apply to agreements, decisions and concerted practices of recognized IPOs, provided that such agreements have been notified to the Commission and that within 2 months, the Commission has not found them incompatible with Community rules. For tobacco, the delay is 3 months (Article 178).

69 OJ L 102, of 23.4.2010.

70 See, for instance, extension of the rules governing PO in the fresh fruit and vegetable sector (Communication pursuant to Article 18(5) of Council Regulation (EC) No 2200/96) OJ C 081, 13/03/2001 P. 0002 - 0004

71 The French authorities notified the Commission on 3.2.2011 of their intention to make binding the extension of rules on quality established by the interbranch organisation INTERFEL (Inter-Branch Association of the Fresh Fruit and Vegetable Industry). The extension of rules will apply for the marketing year 2011-2012.

72 The French authorities notified the Commission on 23.12.2010 of their intention to make binding the extension of rules on quality established by the interbranch organisation INTERFEL. The extension of rules will apply for the 2011 marketing year until 31.12.2011.

73 The French authorities notified the Commission on 13.4.2011 of their intention to make binding the extension of rules on quality established by the interbranch organisation INTERFEL. The extension of rules will apply for the 2011 marketing year until 31.10.2011.

74 The French authorities notified the Commission on 13.4.2011 of their intention to make binding the extension of rules on an ad-valorem contribution established by the interbranch organisation INTERFEL. The extension of rules will apply for the 2011 marketing year until 31.12.2011. The amount of the contribution for 2011 is 0.05% of the marketed value.

75 The French authorities notified the Commission on 5 April 2011 of their intention to make binding the extension of rules on quality established by the interbranch organisation INTERFEL. The extension of rules will apply for the 2011/2012 marketing year until 30.6.2012.

76 The Spanish authorities notified the Commission on 27 December 2010 of their intention to make binding the extension of rules on quality established by the interbranch organisation HORTYFRUTA (Organización Interprofesional Andaluza de Frutas y Hortalizas) operating in the region of Andalusia. The extension of rules will apply from marketing year 2010/2011 up to and including marketing year 2012/2013.

These examples of extensions of rules show how efficiently the system works when an Interbranch association notifies the Agreement to the national Administration and the Agreement is resent to the European Commission. In practice, article 176 bis and the associated rules of the Single CMO contain a double check which grants an effective preventive net aimed at antitrust surveillance.

Therefore, the national administration, or the national competitions authorities by defect, are acting as the primary controllers of compatible and non-compatible practices, as described above. In that context, as we will explain, some cases have shown a disparity of criteria between EU Member States.

To conclude, no procedure is envisaged in case of a crisis or urgent reaction. As Del Cont has considered, the two-month period provided for the notification does not permit any fast and flexible reactions78.

Box 3: Extension of rules

EXTENSION OF INTERBRANCH AGREEMENTS’ DOUBLE CHECK

Pros and cons of the double check

The Single CMO permits the extension of rules in agricultural products as an exception to competition law.

When an Interbranch Association is sufficiently representative of the production, the trade or processing in an area, the effect of its agreements can be extended by National Administration, for a limited period, onto other operators in the region although they were not previously associated, including when it consists of a financial contribution.

As this is a typical vertical practice, the National Administration and the European Commission are acting as controllers of the Agreements adopted by Interbranch Associations. This double check has been regulated in order to improve the degree of efficiency but nonetheless permits greater disparity.

2.3.2. Compatible practices

The Single CMO states a set of exemptions or compatible practices of Interbranch associations, which is also included in article 145 of the Single CMO proposal. The agreements that can be adopted focus on: improving processes and product quality, consumer information measures, environment-friendly and integrated agriculture, standards contracts, on mediation, on innovation, etc.

In Single CMO terms, the aims of the so-called "extension of rules" are different. For fruit and vegetables, it will be based on one of these aims: "(i) production and market reporting; (ii) stricter production rules than those laid down in Community or national rules; (iii) drawing up of standard contracts which are compatible with Community rules; (iv) rules on marketing; (v) rules on protecting the environment; (vi) measures to promote and exploit the potential of products; (vii) measures to protect organic farming as well as designations of origin, quality labels and geographical indications” (article 125l). For tobacco, article 178 of the Single CMO states different goals: "(a) knowledge of production and the market; (b) definition of minimum qualities; (c) use of cultivation methods compatible with the protection

of the environment; (d) definition of minimum standards of packing and presentation; (e) use of certified seed and monitoring of product quality”. For wine Interbranch associations, the extension may be justified for agreements regarding marketing rules to improve and stabilize the operation of the common market in wines and “... shall be proportionate to the objective pursued and shall not relate to any transaction after the first marketing of the produce concerned; allow for price fixing, including where prices are set for guidance or recommendation; render unavailable an excessive proportion of the vintage that would otherwise be available; provide scope for refusing to issue the national and Community certificates required for the circulation and marketing of wines where such marketing is in accordance with those rules” (article 113c).

The compatible agreements may be extended to members and to non-members in the economic area. However, there is a list of rules that may be extended to non-members (Annex XVIa of the Single CMO).

**Box 4: Exhaustive list of rules that may be extended to non-members**

<table>
<thead>
<tr>
<th>EXHAUSTIVE LIST OF RULES THAT MAY BE EXTENDED TO NON-MEMBERS</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>1. Rules on production information</strong></td>
</tr>
<tr>
<td>(a) notification of growing intentions, by product and where appropriate, by variety;</td>
</tr>
<tr>
<td>(b) notification of sowings and plantings;</td>
</tr>
<tr>
<td>(c) notification of total areas grown, by product and if possible, by variety;</td>
</tr>
<tr>
<td>(d) notification of anticipated tonnages and probable cropping dates by product and if possible, by variety;</td>
</tr>
<tr>
<td>(e) periodic notification of quantities cropped and available stocks, by variety;</td>
</tr>
<tr>
<td>(f) information on storage capacities.</td>
</tr>
<tr>
<td><strong>2. Production rules</strong></td>
</tr>
<tr>
<td>(a) choice of seed to be used according to intended destination (fresh market/industrial processing);</td>
</tr>
<tr>
<td>(b) thinning in orchards.</td>
</tr>
<tr>
<td><strong>3. Marketing rules</strong></td>
</tr>
<tr>
<td>(a) specified dates for commencement of cropping, staggering of marketing;</td>
</tr>
<tr>
<td>(b) minimum quality and size requirements;</td>
</tr>
<tr>
<td>(c) preparation, presentation, packaging and marking at first marketing stage;</td>
</tr>
<tr>
<td>(d) indication of product origin.</td>
</tr>
<tr>
<td><strong>4. Rules on the protection of the environment</strong></td>
</tr>
<tr>
<td>(a) use of fertiliser and manure;</td>
</tr>
<tr>
<td>(b) use of plant-health products and other crop protection methods;</td>
</tr>
<tr>
<td>(c) maximum residue content in fruit and vegetables of plant-health products and fertilisers;</td>
</tr>
<tr>
<td>(d) rules on disposal of by-products and used material;</td>
</tr>
<tr>
<td>(e) rules concerning products withdrawn from the market.</td>
</tr>
<tr>
<td><strong>5. Rules on promotion and communication in the context of crisis prevention and management</strong></td>
</tr>
</tbody>
</table>

There are some examples of practices that, at a glance, could be considered clearly anticompetitive agreements but are authorized at national level taking into account some specific reasoning or, simply, the inactivity of the national administration.
In the context of other types of Interbranch agreements, the French Competition Authority has granted a competition rules compatibility status for a commercialization plan that consisted of the reduction of production hectares and on the enlargement of “ageing” periods at the caves. The restriction of production and product on the market has been justified in order to improve the quality of the wines (by ageing) exposed by the Interbranch Board vins doux naturels des Pyrénées Orientales (CIVDN)79.

In a similar sense, the agreements of the Cognac Board for the fixing of individual production quotas and compulsory distillation mechanism were considered acceptable because they were necessary to implement EU Law. In particular, article 28 of Regulation (EC) No. 1493/1999 (former Wine CMO, now integrated in Single CMO) stated a special regime and rights to withdraw wine from the market. The price was fixed by the EC and the quantity of alcohol by hectare by Member State authorities80.

In a different approach, a set of practices admitted by national Administrations are not clearly exempted from the application of Article 101 of the Treaty. For instance, in Spain, there has not been any penalty concerning the referenced prices of Intercitrus, when an agreement concerning referenced prices has been published by the media and welcomed by the regional administration81. In a similar sense, Edovra, which is a Greek interbranch association for peaches and pears intended for processing, has promoted fixed prices over several campaigns82.

Austria is acting with greater clarity on competition rules; by way of the "Nationales Weinkomite" and "Regionale Weinkomite", we find that Interbranch organisations in the wine sector are only allowed by domestic law to define wine characteristics (such as variety, maturing, harvest methods, analytical parameter, etc.) for wines with protected origins and to do some promotional activities for these wines83.

Box 5: Compatible agreements

COMPATIBLE INTERBRANCH AGREEMENTS

Disparities above the EU law

The Single CMO states a set of possible compatible agreements but with differences between products and sectors.

In some Member States, the list of compatible agreements has been extended de facto or de iure to quotas and production programmes or referenced prices in order to improve the quality or to complete the EU legislation.

However, other Member States have completed an accurate transposition of the EU “extension of rules” system.

---

79 Décision n° 04-D-35 du 23 juillet 2004 relative à des pratiques mises en œuvre sur le marché des vins doux naturels d’appellation d’origine contrôlée Rivesaltes
80 Décision n° 06-D-21 du 21 juillet 2006 relative à des pratiques mises en œuvre dans le secteur des eaux-de-vie de cognac par le Bureau national interprofessionnel du cognac
82 Evaluation de l’impact environnemental de l’OCM des cultures permanentes, SPEED report 2005, p. 28
2.3.3. **Non-compatible agreements**

The extension of rules may not cover those “black list” practices set out in the following agreements and practices: those affecting the main elements of the CMO or excluding competition in a substantial part of the internal market or jeopardising free trade; those which may create competition distortions and which are not essential to achieving the objectives of the Common Agricultural Policy; those which entail price-fixing *(without prejudice to activities applying specific Community rules)*; those which consist of collective price recommendation; those which contain indiscriminate linked discounts or bonuses; those which are related to a quality system and offer no benefit to the consumer; those which set sales quotas or production programmes; those which may create discrimination or eliminate competition in respect of a substantial proportion of the products in question, are in any case, incompatible with Community rules.

For instance, if the Agreement consist of fixing prices, *a priori*, such an agreement would be regarded as a hardcore restriction of competition and would not likely benefit from an exception under Article 101(3). As seen above, the Courts have upon several instances insisted that price fixing agreements would run against the very objectives of Article 39 of the TFEU.

In some cases, competition authorities have suspended the enacting of some Interbranch agreements considered not compatible with national and EU competition rules. In Spain, the quality certification scheme of HORTYFRUTA *(Organización Interprofesional Andaluza de Frutas y Hortalizas)*, the Andalusian Interbranch organization for fruit and vegetables, has been considered not compatible with competition rules because no evidence of benefit to consumers has been proven84. In France, the practices of CNIEL consisting of price orientation have been declared contrary to the competition law in 200985. In that sense, the French Competition Authority has acted against the Cantal GI Board because it has adopted a production plan – “Plan Cantal” – on the basis of an extension of rules but acting as a limit on production86.

A specific chapter of interbranch associations is when their agreements are orientated to fix prices of a product or minimum calibre of a product against the official calibre stated by the Public Administration, which is the clearest example of anticompetitive practice.

The French National Competition Authority has declared as non acceptable, in competition terms, the price-fixing agreement under the official pricing adopted by the Interbranch association of Potatoes87. In a similar decision, it was declared that fixing a minimum calibre for potatoes goes against an administrative decision catering for another smaller calibre and hence, it was inadmissible as it was a disguised market barrier.88

---

84 CDCA I06/08.
85 Opinion n° 09-A-48 of 2 October 2009 relative to the operation of the dairy sector.
88 Décision 95/D/15, *Pomme de terre*. 

Box 6: Non-compatible agreements

NON-COMPATIBLE INTERBRANCH AGREEMENTS

Grounds of refusal

The National Administration has a common set of grounds for refusal of Interbranch Agreements.

There is a homogeneous view about price fixing and price orientation or about quality certification schemes, when these practices act like a market barrier or when there is no evidence of benefits for the consumer.

2.4. Practices and agreements concerning prices

2.4.1. Orientated prices: a heterogeneous perspective

Orientated prices are an argued practice in terms of antitrust law. It is clear that imperative oriented prices go against competition but oriented prices are being accepted with some conditions by national authorities, e.g. when they are contributing to consumer interests or intellectual property rights. However, as described above, the National Authorities are paying particular attention to these kinds of practices which are close to the forbidden fixing prices agreements.

In France, the competition authority has accepted an agreement concerning a Poultry Quality Label which consists of a fixed price for each step of the production chain. The reason is that, in a vertical chain, when associates to the Quality system are in competition with the same product, the price of transaction can be agreed if third parties are not affected. In the wine sector, there is the well-known decision permitting a minimum price agreement for the Cahors GI Wine Board as it has been proven that the agreement was not introducing an indicative or compulsory selling price to the consumer and there was a benefit, in terms of the quality of the wine, to consumer.

Some objections have produced the Prix objectifs d’exportation for strawberries Lot-et-Garonne that were promoted by producers’ representative in a bulletin. At the end, the practice has been admitted by the French Competition Authority but the Interbranch association has been sanctioned. In Spain, the National Authority has authorised the elaboration and the publication of a three-monthly price index for dairy market trends.

By contrast, national competition authorities have considered as non acceptable the practices consisting of orientated prices on several occasions.

An instance of this is the Italian Competition Authority in Listine dei prezzi del pane. In UK, OFT has produced a statement of objections to certain evidence of collusion between supermarkets and the dairy industry. The members of the cartel

89 Decision 94-D-41, CCRF, Poultry quality label.
90 Decision 81/14 CC RF, Cahors white wine, de 5.7.1994
91 «95. Enfin, la seule mention d’un "prix objectifs exportation" dans le bulletin de l’AIFLG diffusé pour la journée du 21 avril 1998, sans autres éléments suggérant que ces prix ont été appliqués ou que l’AIFLG a exercé des pressions afin de les faire respecter, est insuffisant pour établir que cette organisation a violé les dispositions de l’article 81 du traité de Rome» CdC, Décision n° 03-D-36 du 29 Juillet 2003 relative à des pratiques mises en œuvre sur le marché des fraises produites dans le Sud-Ouest, par. 95.
93 I695ADC.
have agreed to increase the price of products for milk, cheese and butter. The increased price has been satisfied by consumers\textsuperscript{94}. Before this statement, the OFT had declared a non-compatibility status with competition law in terms of the coordination of prices for certain dairy products in 2002 and/or 2003\textsuperscript{95} and the indirect exchange of future price information\textsuperscript{96}. In Belgium, the Competition Authority has sanctioned in the Flours cartel Decision, the “coordinating repeated price increases as well as their implementation and customer allocation. They also exchanged commercially sensitive information”\textsuperscript{97}. In the French 2009 CNIEL decision, price orientation has been also declared not compatible. As the players had usually signed contracts with each other, and, hence had simply applied the orientations independent of the market prices\textsuperscript{98}. In a similar case, the French Competition Authority, fined French endive growers and trade organizations nearly 4 million euro for engaging in a 14-year price-fixing conspiracy that began in 1998. However, the conspiracy’s limited ability to affect prices – because of the limited impact in consumer prices – was a major factor in the Authority’s imposition of a moderate fine on the growers and their trade organizations\textsuperscript{99}.

Box 7: Price Orientation decisions

<table>
<thead>
<tr>
<th>PRICE ORIENTATION UNDER QUESTION</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Contradictory decisions at domestic level</strong></td>
</tr>
<tr>
<td>When price orientation is promoted by an Interbranch Association, there is no common understanding of the situation in EU Member States.</td>
</tr>
<tr>
<td>In some cases, orientated prices are being accepted with some conditions by national Authorities if there is consumer interest or if there is a need to respect the intellectual property rights in the case of a certification of quality trademark.</td>
</tr>
<tr>
<td>Nevertheless, special attention is required to orientate prices because they can have a similar effect as a price-fixing agreement.</td>
</tr>
</tbody>
</table>

2.4.2. Price Observatories and Price roundtables: a double-edged sword

Price observatories are a usual political instrument in EU Member States. Public Administrations have considered that increasing price transparency was beneficial in strengthening the bargaining power of producers.

It is a well-known fact that Agro food markets are becoming more atomized in terms of demand, as well as more open. The prices received by producers, when there is a price, are less attractive than in the past so the producer associations are asking for transparency of the chain; hence, governments are creating Price Observatories and Price Roundtables to satisfy this demand.

*Price Observatories* produce statistical information with more accuracy than the pre-existing information provided by the various government statistical services.

\textsuperscript{94} OFT Statement of objections, 20.8.2011.  
\textsuperscript{95} OFT Decision 10.8.2011; CE/3094-03  
\textsuperscript{96} 2008 OFT Decision 56/08  
\textsuperscript{97} 23 December 2010, Case CONC-10-08/0009.  
\textsuperscript{98} Avis n° 10-A-28 du 13 décembre 2010 relatif à deux projets de décret imposant la contractualisation dans des secteurs agricoles, par. 37.  
\textsuperscript{99} Décision 12-D-08 du 6 mars 2012 relative à des pratiques mises en oeuvre dans le secteur de la production et de la commercialisation des endives.
Price Roundtables are a forum where producers’ representatives and commercial agents meet to share prices and produce statistical data. In some cases, their foundations directly allow orientated prices as references for future contracts.

From an antitrust law perspective, these boards need specific control because they can be an easy way to go from passing on mere statistical information to forbidden practice like price recommendations, price fixing, oriented price, sharing sensitive information, etc. There are examples in several Member States which can illustrate the difficulties associated with this transparency tool from a competition point of view.

In Spain, there is a wide range of these Price Observatories or Price Roundtables, which are clear examples of the problem. For instance, the Citrus Guild foundations states that one of its goals is fixing orientated prices\textsuperscript{100}. In the case of the ITAP of Albacete, which is the guild of this city of Castilla-La Mancha, there is a simple statement of its willingness to report prices and fix weekly orientated prices, which is not coherent with antitrust law\textsuperscript{101}. In the case of the Agro markets of Andalucía Decree, the regional Competition Authority has reported that the legal scheme of Price Roundtables, promoted by the regional Government by decree was an example of a collective price recommendation and it was not compatible with competition law\textsuperscript{102}. Finally, the Agrarian associations of Almeria have created a workshop to regulate price variation which has been considered unlawful by the National Competition Authority because it was linked to another minimum price pact\textsuperscript{103}.

France has created an Observatory on Food Product Pricing and Margins\textsuperscript{104} and some products have specific observatories like the Observatoire de la formation des prix et des marges accompagne la filière ovine\textsuperscript{105}. In both cases, the French Competition Authority has reported in a positive sense because there was no evidence of unlawful practices. In Italy, price observatories have also been developed. The general price observatory and the online misterprezzi are going about their task\textsuperscript{106}.

European Institutions are, in addition, contributing to the principle of price transparency. In that context, it is relevant that the European Commission has awarded funding to a research project concerning price transparency in the framework of FP 7, the Transparency of Food Pricing Research Project (TRANSFOP), which is promoted by DG RTD and other project partners\textsuperscript{107}. Less academic but more oriented to the consumer, DG SANCO of the European Commission has created a Consumer Scoreboard\textsuperscript{108} and the Improved European Food Price Monitoring tool by DG ESTAT\textsuperscript{109}.

Competition authorities have analysed the Price Roundtable specifically in order to explain that these tables are an interesting instrument to produce historical price information with transparency and liability. In this case, they are useful for consumers and users and to control the price volatility. It is clear that the members of the Roundtable must be independent and the information provided may not suggest any kind of price orientation or

\textsuperscript{100} See http://www.precioscitricos.com/mesa_precios_citricos.asp, available the 16.4.2012.
\textsuperscript{102} Resolución CDCA I/06/08.
\textsuperscript{103} Resolución CNC, expediente sancionador S/0231/10, 16.3.2010.
\textsuperscript{104} See http://agriculture.gouv.fr/L-Observatoire-de-la-formation-des.
\textsuperscript{105} Avis n° 11-A-03 du 15 février 2011 relatif à un accord interprofessionnel dans le secteur ovin
\textsuperscript{106} See http://osservaprezzi.sviluppoeconomico.gov.it/ and http://www.misterprezzi.com/, accessible on
\textsuperscript{108} http://ec.europa.eu/consumers/strategy/facts_en.htm#4CMS.
recommendation. Therefore, it is a reasonable guarantee if Price Roundtables are designed by public administrations and the information produced is characterised by a high level of aggregation and confidentiality.

**Box 8: Price Observatories and Prices Roundtables**

**PRICE OBSERVATORIES AND PRICE ROUNDTABLES**

**Accuracy, liability and confidentiality of data**

Member States are creating Prices Observatories and Price Roundtables in order to control price volatility and to satisfy producers’ demands.

They are instruments to produce historical price information with transparency and liability. To be useful for consumers and users, the members of the Roundtable must be independent and the information data may not consist of orientated prices.

Price Observatories and Price Roundtables must be designed by the public administration and the information produced must grant a significant level of aggregation and confidentiality.

### 2.4.3. Index of referenced prices

The index of referenced prices may produce competitive restrictions like price fixing. Therefore, competition authorities carefully control these kinds of practices as the relevant indexes may cover forms of price fixing.

The French Competition Authority has considered unlawful three systems of price referenced indexation: “indices de référence fiables des prix secteur ovin” for the standard contracts; diffusion of a selling Price catalogue containing “top prices, objective price and attack price” and “Prix orientatifs” for honey. These systems have been considered a collective price orientation. However, in the dairy sector, CNIEL produces an index of referenced prices compatible with competition rules.

### 2.4.4. Price collective recommendations

There is a trend in the attitudes of industry representatives, namely the belief that any public declaration about prices may help to increase the bargaining power of the producers. Sometimes the price recommendation is discovered in a standard contract clause.

Nevertheless, it has been already stated that collective price recommendation is not compatible with EU Competition Law. In particular, collective price recommendation is a forbidden practice and National Competition Authorities have not been very homogeneous in prosecuting these conducts.

Among authorities less flexible with this practice, the Spanish Competition Authority has set systematically against the price collective recommendation. Some

---

110 COMISIÓN NACIONAL DE LA COMPETENCIA : Informe sobre ..., p. 70.
111 Avis n° 11-A-03 du 15 février 2011 relatif à un accord interprofessionnel dans le secteur ovin.
112 Décision n° 90-D-17 du 22 mai 1990 relative aux pratiques relevées sur le marché des pépinières et de l’horticulture.
114 For instance, see http://www.lafranceagricole.fr/actualite-agricole/lait-le-prix-pour-mai-pour-la-bretagne-les-pays-de-la-loire-et-rhone-alpes-42208.html.
examples are the sanction to CEOPAN, a bakery association, for a press release containing expressions like “is needed to sell bread at its real price” or “we tried to keep the prices but, nowadays, it is not sustainable”, etc.; another case was the 200,000€ fine imposed on PROPOLLO, a poultry producer association, for a public declaration that expressed “the price will increase, in the short term, between 0.18 Euro/kg and 0.20 Euro/kg”; the fine of 770,000€ to FIAB and CEOPAN for stating “the increasing cost of the inputs must be transferred to the end price of the product”\textsuperscript{115}.

The Italian Competition Authority has detected in Listino dei prezzi della pasta (1694 ADC) similar conduct in relation to price recommendation.

In France, the Competition Authority has found contrary to competition law a Champagne IG Board’s letter that recommends increasing the quantity of grapes offered and to apply a calculation rule as a good practice in obtaining a wine price\textsuperscript{116}. In the same sense, we have the example of the “cellule de gestion du marché” of LOT et GARONNE strawberries\textsuperscript{117}, the content of “contrat filière élevage”\textsuperscript{118} and the industry publication “L’ Abeille de France” and “La Revue française de l’apiculture” where producer organizations recommend the medium price “a detail” and where readers were subject to disciplinary action concerning prices, etc.\textsuperscript{119} In the Poultry Quality Label case, the Competition Authority has declared that a recommended minimum price in origin is not covered by the CMO’s intervention price\textsuperscript{120}. The European Commission has communicated that in the bananas cartel it had been proven that the members of the cartel “coordinated their price strategy regarding future prices, price levels, price movements and/or price trends and exchanged information on future market conduct regarding prices”\textsuperscript{121}.

However, in other cases, when the evidence of price recommendation was not clear, there was no observed parallel behaviour concerning prices, like the UK Competition Commission with the Grocery Retailing case\textsuperscript{122}. In Portugal, a consistent press release by ANIL about prices in March 2011 has not been sanctioned although it contained a clear collective recommendation to producers to increase prices\textsuperscript{123}. In France, model contracts have been accepted with modalities of price fixing or a top price fixed for Bergerac Wines\textsuperscript{124} and other recommendation methods like a so-called “Mercurial de prix” of imported honey by categories and countries of origin\textsuperscript{125}.

\textsuperscript{115} CEOPAN (resolución S/0046/08); PROPOLLO (Resolución S/0046/08); FIAB y asociados and CEOPAN 2009 (resolución S/0053/08), available at \url{www.cnc.es}, 15.4.2012.
\textsuperscript{117} Décision n° 03-D-36 du 29 juillet 2003 relative à des pratiques mises en œuvre sur le marché des fraises produites dans le Sud-Ouest.
\textsuperscript{118} Avis n° 11-A-11 du 12 juillet 2011 relatif aux modalités de négociation des contrats dans les filières de l’élevage dans un contexte de volatilité des prix des matières premières agricoles
\textsuperscript{119} Décision n° 95-D-77 du 5 décembre 1995 relative à la situation de la concurrence sur le marché du miel pour entremets et desserts, aliments diététiques et divers \url{http://www.autoritedelaconcurrence.fr/pdf/avis/95d77.pdf}, accesible 15.4.2012.
\textsuperscript{120} Op. cit.
\textsuperscript{123} See \url{http://anilact.pt/component/content/article/3753-anil-culpa-distribuicao-pela-crise-no-sector-lacteo}.
\textsuperscript{125} Op cit 101.
Box 9: Collective price recommendation

<table>
<thead>
<tr>
<th>PRICE RECOMMENDATION</th>
</tr>
</thead>
<tbody>
<tr>
<td>Collective price recommendation is not compatible with EU Competition Law because it has the same effects as a price-fixing practice and is therefore, a form of cartel.</td>
</tr>
<tr>
<td>However, there is a belief held by industry representatives that any public declaration about prices might help to increase the bargaining power of the producers. Sometimes the price recommendation is discovered in a standard contract clause.</td>
</tr>
<tr>
<td>The conduct may produce parallel behaviour concerning prices so it has to be controlled.</td>
</tr>
<tr>
<td>The National Competition Authorities have not been too homogeneous controlling these conducts.</td>
</tr>
</tbody>
</table>

2.4.5. Centralised Buying Departments

With the aim of strengthening the power of producers, the Centralised Buying Departments have appeared as an alternative proposal by producers themselves to challenge the centralised buying houses of distributors.

By centralizing the sales of product, it is possible to unify criteria and to qualify suppliers; to develop production protocols; and to agree on supply calendars. Ultimately, the aim is to obtain better prices from distributors by the way of concentrating offers in these types of guilds or centralized markets.

For instance, in Italy, the centralized buying department created by Coop. Italia-Conad- Italia Distribuzione has been authorized by the Competition Authority (I414 ADC). In Spain, the Supreme Court, following ECJ, has validated a centralize buying entity called CECASA but, simultaneously, has said that: “National competition authorities may, on the basis of national competition law, prohibit a privately agreed and financed scheme for the buying-in and storage of olive oil even if such a scheme were to draw inspiration from Article 12a of Regulation No 136/66 and is to be applied in the event of ‘serious disturbance of the market’”\(^{126}\).

A centralized point of supply for agricultural products may be subject to special attention from a competition point of view. There is an eventual worry about how the supply point can go on without any kind of collusive conduct like price recommendation, etc.

2.4.6. Fixing price: to be caught between the devil and the deep blue sea

Producer Organization representatives have always asked for a general exemption to agricultural products concerning the practice of fixing prices. It has been said that “Unequal bargaining power” may be favouring the producer instead of the distributor by stating a minimum fixed price that should be, at least sufficient to cover production costs. Other views agree that other legal options are needed in order to strengthen the bargaining power of producers\(^{127}\).


Direct price control may be done as minimum price fixing for inputs or stating a resale minimum price to commercial agents. This kind of behaviour could be indicative of a monopoly. An easy justification for price-fixing practices is that the CAP permits it but that is not exact because it is not covered by any CMO Regulation.

On this point, the European Commission had declared that freedom of association does not exempt any player from the general cartel prohibition. When the French Beef Sector fixed minimum prices by beef categories during the CJD crisis, the European Commission imposed a fee of 16.7 million Euro. In the Cognac case, when GI Board of Cognac stated fixed pricing, the defendants alleged the freedom of association but the ECJ has not accepted this point and the French Decision allowing the extension of rules has been annulled.

Moreover, fixing prices were not admitted in standard contracts. In Spain, it has been stated that these contracts, usually promoted by administration and producer associations, cannot contain a price-fixing clause (Act 2/2000 about models of contracts) and it must be considered that the inclusion of this type of clause is not part of the freedom of contract.

Prices may not be stated by a GI Board although a decree gave the power to do so. In addition, in Garrigues Olive Oil GI, Regional Competition Authorities have determined that a Geographical Indication Board is not entitled to fix GI product price although the decree containing the GI Regulation vested this power in the Board.

Practices constituting a horizontal agreement to fix minimum prices are considered against antitrust law and fines have been imposed on Associations of Producers and Traders of Fruit and Vegetables (Alhóndigas). In Italy, the agreement fixing buyer maximum prices by the Parma Ham GI Board has been declared illegal by the Competition Authority. The French Competition Authority has also reported the prohibition of fixing minimum prices by authorities or by Interbranch associations.

In general, pricing agreements are rather suspicious ways to “dress” a cartel. For instance, the Federal Competition Authority in Belgium detected a coordination of prices among several players of the fresh flower market in 2010. The Finnish Competition Authority has sanctioned the forestry companies which agreed on fixing prices in 2009 and, in a similar resolution, the Kesko Plc and the K retailer Association that have imposed certain maximum retail prices during 1997-2000. In the bulb and flower industry sector of the Netherlands, a price fixing agreement in 2010 has been sanctioned. In Poland, the Competition Authority has detected a...
cartel, which fixed minimum resale prices of manufactured products including fertilisers, seeds and grass mixes\textsuperscript{139}. The French Competition Authority has declared not compatible the practice of fixing a price under the official quote of the Interbranch association of Potatoes\textsuperscript{140}. To add another well-known example, already referred to, in the Milk Marque case, the OFT rejected a fixing price practice.

However, the last reform of the Single CMO considered, in relation with standard contracts that “...Among the basic conditions, it is important that the price payable for the delivery can be set in the contract, at the choice of the contracting parties, as a static price or a price varying depending on defined factors, such as the volume and the quality or composition of the raw milk delivered, without excluding the possibility of a combination of a static price for a certain volume and a formula price for an additional volume of raw milk delivered in a single contract” (recital 10 of Regulation EU No. 261/2012). Actually, the Regulation allows the producer organizations or their associations to negotiate the contents of the contract, including price. However, new rules for the dairy sector “... should be temporary and subject to review for the purpose of seeing how they have operated and whether they should continue to apply” (recital 21 of Regulation EU No. 261/2012).

In the opinion of the German Competition Authority, the provisions of the so-called “milk package” will expand the exemptions from competition law for the dairy industry and thus be detrimental to the liberalisation of dairy markets. The intended strengthening of producer organisations will extend opportunities for milk producers to engage in cartel agreements\textsuperscript{141}.

To conclude, some national competition authorities have authorised or simply not acted against the practice in a limited number of situations or in a case-by-case sequence.

In Greece, Edovra, which is an Interbranch organization for peaches and pears intended for processing, has price-fixing agreements\textsuperscript{142}. In Germany, according to the law of husbandry, the prohibition of vertical resale price maintenance did not apply to livestock breeding and the Federal Forest Act grants an exemption to price fixing agreements in the forestry sector\textsuperscript{143}. In France, we have already referred to the agreement which declares a minimum price for Cahors white wine to be sold in bulk (Cahors GI Board Interbranch agreement)\textsuperscript{144}. In Poultry Quality Label, the French Competition Authority has admitted a fixed price – “prix de matière prime” – and a reselling price because they are agreed in an entire production chain, as it has been said above.

\textsuperscript{139} According to the findings of the Office of Competition and Consumer Protection, the collusion lasted from January 2004 to June 2008, and as many as six entities participated in it. See www.uokik.gov.pl

\textsuperscript{140} Décision n° 96-D-60 du 15 octobre 1996 relative à la situation de la concurrence dans le secteur des plants de pommes de terre, accesible 20.4.2012 at http://www.autoritedelaconcurrence.fr/pdf/avis/96d60.pdf

\textsuperscript{141} http://www.bundeskartellamt.de/wEnglisch/News/press/2012_01_19.php

\textsuperscript{142} Evaluation de l’impact environnemental de l’OCM des cultures permanentes, SPEED report 2005, p. 28


\textsuperscript{144} Avis ANC nº 172 du 20 novembre 1980
Box10: Fixed prices

FIXED PRICES

To be caught between the devil and the deep blue sea

Producer Organization representatives have always asked for a general exemption for agricultural products when it comes to the practice of fixing prices.

It has been said that "Unequal bargaining power" may be balanced in favour of the producer instead of the distributor by the way of stating a minimum fixed price that should be sufficient, at least, to cover production costs.

Other observers agree that other legal options are needed in order to strengthen the bargaining power of producers.

The European Commission had declared that freedom of association does not exempt any player from the general cartel prohibition.

Nevertheless, the last reform of the CMO for the dairy sector allows “temporary and subject to review” producer organizations and their associations to fix prices in standard contracts.

2.5. Standard contracts

Standard contracts have been developed by auto-regulation and by decree. It is interesting to consider why this scheme of standard contracts has been promoted in both ways.

The standardization of the contracts in agro-food products is a very useful and positive tool because, as the French Competition Authority has highlighted, it contributes to a general price orientation, modifying the relationship between producers and transformers. In addition, it helps to keep limited volatility while respecting Competition law145.

In the absence of EU legislation concerning such contracts, Member States may, within their own contract law systems, decide to make the use of such contracts compulsory as has been introduced by the EC in the proposal of a new Single CMO Regulation146.

However, concerning the dairy sector, the EU legislator has considered that “... The use of formalized written contracts concluded in advance of delivery containing basic elements is not widespread. However, such contracts may help to reinforce the responsibility of operators in the dairy chain and increase awareness of the need to better take into account the signals of the market, to improve price transmission and to adapt supply to demand, as well as to help to avoid certain unfair commercial practices” (Whereas 9 of Regulation EU no 261/2012).

Moreover, it has been set specific contractual conditions for the dairy sector like that the contract must be made in advance of the delivery and be made in writing. Between the contents, the contract will include, in particular, the following elements:“(i) the price payable for the delivery, which shall: — be static and be set out in the contract, and/or, — be calculated by combining various factors set out in the contract, which may include market indicators reflecting changes in market

conditions, the volume delivered and the quality or composition of the raw milk delivered, (ii) the volume of raw milk which may and/or must be delivered and the timing of such deliveries; (iii) the duration of the contract, which may include either a definite or an indefinite duration with termination clauses; (iv) details regarding payment periods and procedures; (v) arrangements for collecting or delivering raw milk; and (vi) rules applicable in the event of force majeure”. (Article 185f of Single CMO following Regulation EU no 261/2012).

Moreover, when the standard contract contains a clause of price revision, that clause may refer to the Interbranch indicators or leave freedom for a subsequent price review. In this case, it can never be considered to be a fixed price or recommended price although they may help the producer to fix the individual price and its margins as a trend indicator147.

With the exemption of the dairy sector, as has been already stated, price fixing is not admitted in standard contracts.

In France, the Decree 2010/1753 following Article 12 of Loi 2010-874 de modernization de l’agriculture et de la pêche, has declared it compulsory for the dairy industry to propose contracts in writing. From 1 April 2011, dairy contracts must include the duration, the characteristics of the product, the payment mode, the criteria or modalities of price fixation and the revision and cancellation of the contract. Concerning the mechanism of price fixation, the contract can refer to the CRIEL publications and the CRIEL trends index or another formula. The producer knows at the beginning of each month if the basic price and the trends index are reflecting the milk price evolution in France and in the EU, the value of butter, etc.

In Spain, the National Competition Authority produced a report in 2009 in relation to an agreement on milk homologate contracts. It has been stated that this kind of contract, usually promoted by the administration and producer associations, may not contain a price-fixing clause (Act 2/2000 about models of contracts) and it is considered that the inclusion of this type of clause is not part of the freedom of contract148.

### 2.6. Quality Scheme Plans and production quotas

The EU Food quality scheme is a developed quality model in the context of WTO. Nevertheless, one of their key elements is that the managing and protection of the Geographical Indications may be granted by an entity, whose legal definition is open at EU level. Therefore, EU Law does not state how the government of a GI should be. This is because each Member State has a different legal tradition concerning the quality foods symbols and Regulation EC No. 510/2006 has respected these traditions. In fact, there is an absence of a definition of how the GI Boards are composed and which is the GI’s legal nature, public or private149.

In some Member States, like France, the GI Board may be a private entity under the attire of an Interbranch association. In other countries, a GI Board may alternatively be an interbranch association or public corporation, the so-called Spanish Consejo Regulador or the Italian Consiglio. Both options, private or public, do not matter to

---

149 GUILLEM CARRAU, J.: Singularidades..., p. 31.
our aim because competition law must be respected independently of the legal nature of the board.

The fact that some of the members of a GI Board are appointed by the Public Administration does not mean an exemption of antitrust law, as the ECJ has declared in BNIC case, already cited.

The Spanish Interbranch association, Horyfruta (CDCA I06/08) is a noteworthy case. This interbranch has asked for an extension of its quality rules but the Regional Competition Authority has considered that it was not justified according to CAP development guidelines and there were no evidenced benefits for consumers\(^\text{150}\).

The Horyfruta Quality rule was not considered justified in terms of the goal of the technical improvement of products. Nevertheless, it has been defined as a limit to the marketing of basic products, which were usually authorized and imported from third countries. Better quality should not be a barrier to trade with third countries, or provoke higher prices or make the offer of a product less diversified.

These reasons were used before by the ECJ when revising the agreement of GI Board of Cognac where white wine fixed price or commercialization quotas were stated. These decisions were based on the interest to balance the *eau de vie* in the region of Charentes but the ECJ concluded there was no sufficient basis to deem this practice as anti-competitive\(^\text{151}\).

In Italy, there has been description of how GI Board measures of total control of the offer were clearly a cartel case. When a GI Board organizes the annual programme, it is not allowed to indicate and dictate production quotas or to enforce the quotas with sanctions. In a similar sense, maximum prices for inputs or resale agents’ prices fixed by the GI Board are against competition law. All these practices are far away from the essential powers and functions of GI Boards\(^\text{152}\).

For instance, the Italian Competition Authority has forbidden the business plan of Parma Ham San Daniele Consiglio, where companies who wanted to use the label were forced to ask the Consiglio for a quota; similar reasons were exposed in the cases of GI Board Cheese Parmigiano-Reggiano, Grana Padano and Gorgonzola\(^\text{153}\).

In France, the Competition Authority has not validated the production plan of Cantal Cheese GI Board because the annual limit of production or the methods of allocation of offers were measures not needed to improve product quality\(^\text{154}\). In a similar sense, concerning an agreement of the Conté Cheese GI Board that set a maximum of *cuves* per associate, the French Competition Authority decided that is was not compatible with competition law\(^\text{155}\).

\(^{150}\) Resolución, de 10 de julio de 2008, del Consejo de Defensa de la Competencia (CDCA I06/08)...


\(^{152}\) LUCATELLI 2000, p. 16 a 21.


\(^{154}\) Décision nº 92-D-30, de 28 de abril 1992, relative à des pratiques du Comité interprofessionnel des fromages produits dans le département du Cantal et dans l’aire géographique de l’appellation d’origine ‘Cantal.’

\(^{155}\) Décision nº 07-D-10 du 28 mars 2007 relative à une plainte à l’encontre du Comité interprofessionnel du gruyère de Comté.
In addition, the French Competition Authority has revised the “barème de séchage du maïs”, which was created by an Interbranch association\textsuperscript{156} and the production plan of Poultry Label limiting the access to the Label for newcomers by the way of stating non objective requirements to join the certification label\textsuperscript{157}.

In Spain, some practices of GI Boards “Consejos reguladores” have been placed under scrutiny recently. The National Competition Authority has sanctioned the Jerez Wine GI Board because of the adoption of selling and production quota agreements\textsuperscript{158}. Another example, already cited, is that the Catalan Regional Competition Authority has considered not acceptable, in competition law terms, the recognition of the ability to fix prices in the Standing Orders of the Denomination of Origin Garrigues Olive Oil.

In Ireland, the Competition Authority has acted against a production plan adopted by members of BIDS, the Beef Industry Development Society. These plans involved the major players in the industry agreeing to pay those players who would voluntarily leave the industry. In return for that payment, the players leaving would agree to decommission their plants, refrain from using the associated lands for processing for a period of five years and sign a two-year non-competition clause with regard to processing anywhere in Ireland\textsuperscript{159}.

**Box 11: Plans and programmes of GI Boards**

<table>
<thead>
<tr>
<th>EU QUALITY FOOD SCHEME</th>
</tr>
</thead>
</table>

**Plans and programmes of GI Boards under question**

The EU Quality Food Scheme is supported by a large number of GI Boards, which are responsible of the protection and goodwill of the designation of origin.

Independently of its legal personality, public or private, the GI Boards are called to respect antitrust law. For instance, quality plans may not cover production or commercialization quotas or capacity of the Board to fix prices.

To be useful for consumers and users, the legal treatment should be similar to the one granted to collective trademarks or certification trademarks.

**2.7. Other practices from a competition law perspective**

This section describes a complex set of other practices from a competition law perspective, where national competition authorities have decided with more uniformity than in the situations related above.

References for collusive conducts include non-competition pacts among competitors, division of markets, sharing sensitive information, boycotts, etc. but sometimes national competition authorities have not considered these practices to be anticompetitive or, at least, contrary to fair competition.

---

\textsuperscript{156} Décision n° 07-D-16 du 9 mai 2007 relative à des pratiques sur les marchés de la collecte et de la commercialisation des céréales.


\textsuperscript{158} Op. Cit.

\textsuperscript{159} The Competition Authority approach has been confirmed by an ECJ Judgement of 20.11.2008, case C-209/07, Competition Authority and BIDS and http://www.tca.ie/EN/News--Publications/News-Releases/Competition-Authority-wins-beef-industry-case.aspx?page=1&year=0.
2.7.1. Non-aggression pacts

Non-aggression pacts damage efficiency, innovation and choice. From a competition perspective, they are usually a part of a general cartel agreement. As is well-known, a non-aggression pact among competitors is a collusive practice and, moreover, an infringement of antitrust law. For instance, in the Netherlands, the Competition Authority has detected a non-aggression pact between some flour producers from Belgium, Germany and the Netherlands. In particular, Dutch flour producers (Meneba, Ranks and Krijger), three Belgian flour producers (Dossche, Brabomills and Ceres) and eight German flour producers were cited for a mutual understanding to stabilize the market and thereby creating a non-aggression pact. This conduct is not allowed and, moreover, may be sanctioned\textsuperscript{160}.

2.7.2. Division of geographical markets

Division of geographical markets is also a collusive topic. In Belgium, the Competition Authority has acted against a practice in BSE test market to prevent the laboratories of other European member states from being active in the Belgian market. Besides the geographical partition of the market, the laboratories concerned have drawn up agreements and exchanged information between them in order to influence the price of BSE tests in Belgium markets\textsuperscript{161}.

In France, the Competition Authority has detected and sanctioned a division of geographical markets of bananas in the so-called Banana cartel because it has been proven that the cartel has agreed on the total elimination of eventual competition\textsuperscript{162}, another case is the division of the poultry slaughtering market by certified poultry label where it was shown that the agreements were not proportional to the goals pursued (trademark quality and preservation of good will)\textsuperscript{163}.

2.7.3. Sharing sensitive information

Sharing sensitive information can inefficiently affect competition conditions and is usually connected with other non-admissible practice like division of geographical markets, non-aggression pacts, price-fixing, etc.

In the UK, the OFT has reported tacit coordination of Tesco and Sainsbury but with not enough evidence to act against them\textsuperscript{164}. In France, the Competition Authority has analyzed the register of standard contracts in Bergerac Wine GI Board (Interbranch Association) and has declared that the transparency of prices are only allowed if price publication is by way of anonymous index or accumulated information and with long-standing past information. In other cases, Cérégrain et al., has examined the exchange of price information in the cereals sector\textsuperscript{165}.

2.7.4. Boycotts

Competition law considers that boycotts go against the internal market and constitute evidence of this per se. The boycott’s icon is the one suffered by Spanish strawberries

\textsuperscript{160} Board of the Netherlands Competition Authority; Decision of December 16, 2010; case number 6306.
\textsuperscript{161} Resolution of 11th of June 2010, College of Competition Prosecutors, Belgium.
\textsuperscript{164} UK Competition Commission: The supply of groceries in the UK market investigation, 2008.
\textsuperscript{165} Décision n° 07-D-16 du 9 mai 2007 relative à des pratiques sur les marchés de la collecte et de la commercialisation des céréales.
(Fresas) by French producers. The latest have collapsed the French motorways in order to impede free circulation of the Spanish strawberry. In that case, the French Competition Authority considered this type of conduct as anticompetitive\(^{166}\), as did the EC and the ECJ which in turn condemned the French Republic in a bid to protect the basis of the internal market\(^{167}\).

In some Member States, Unfair Competition rules are the basis to act against the boycotts and to grant the free movement of goods. For instance, again in France, the Competition Authority has pointed out that a promotional campaign, the so called “Boycott Gironde” was clearly a kind of boycott against Bordeaux wines. However, the promotion campaign has been allowed because there was no evidence of damage\(^{168}\). In Germany, a call for the boycott to the dairies not respecting a minimum milk price has been promoted. The Competition Authority decided that such conduct was not an infringement\(^{169}\).

2.7.5. Discount and linked uniform discounts in the ambit of cartels

Bonus or uniform discounts linked to certain circumstances like quality of the product are usual practices in agro-food markets. In Spain, the Competition Authority has examined an agreement of price fixing adopted by a milk industry association, which finally was not proven. The investigation found an internal letter of the association with a list of uniform discounts linked to milk quality and that the final fee had to reach an amount equivalent to 90,000€\(^{170}\). In Portugal, the Tribunal de Comercio de Lisboa has detected linked uniform discounts as operating for a cartel operating in the coffee distribution chain\(^{171}\).

2.8. Dominant positions

2.8.1. Relevant market and dominant position

In the event of a suspected infringement of the competition rules, the first element to be considered is the relevant market. Defining the relevant market means determining the scope of the competition rules in respect of restrictive practices and abuses of a dominant position.

Market definition is a tool to identify and define the boundaries of competition between stakeholders. It serves to establish the framework within which competition policy is applied by the Commission. The relevant market within which to assess a given competition issue is therefore established by the combination of the product and geographic markets. So, for the European Commission, a relevant product market comprises “...all those products and/or services which are regarded as interchangeable or substitutable by the consumer, by reason of the products’ characteristics, their prices and their intended use”. The relevant geographic market comprises “...the area in which the undertakings concerned are involved in the supply and demand of products or services, in which the conditions of competition

166 CdC Décision n° 00-D-01 du 22 février 2000 relative à des pratiques constatées dans le secteur des fruits et légumes.
167 Council Regulation (EC) No 2679/98 on the functioning of the internal market in relation to the free movement of goods among the Member States establishes an information and monitoring mechanism as regards major obstacles to trade which inflict serious losses on individuals, such as the border blockades by farmers which were the subject of the judgment in Case C-265/95 Commission v. France.
169 Decision of OLG Dusseldorf (Higher Regional Court) of 09/09/2009, file number: VI-Kart 13/08 (V).
are sufficiently homogeneous and which can be distinguished from neighbouring areas because the conditions of competition are appreciably different in those area"\textsuperscript{172}.

Therefore, the definition of an agro market must include two factors: product and geographical element, but the interpretation by the National Competition Authorities has not been very consistent.

For instance, the French Competition Authority has considered that the cauliflower market is an EU market (Decision 5-D-10, 15.3.2005) and the strawberry market is a national one (Decision 3-D-36, de 29.7.2003)\textsuperscript{173}.

The assessment of whether an undertaking is in a dominant position and of the degree of market power it holds is a first step in the application of Article 102. According to the case-law, holding a dominant position confers a special responsibility on the undertaking concerned, the scope of which must be considered in the light of the specific circumstances of each case\textsuperscript{174}.

\textbf{2.8.2. Abusive practices}

The abusive conducts of those operators who have a dominant position calls directly to our attention. Following the ECJ, the first step in the application of article 102 is the evaluation of the dominant position and the definition of the market. In addition, the special responsibility required to dominant undertakings may be studied in a case-by-case basis\textsuperscript{175}.

In Spain, the Basque Regional Competition Authority has described how dominant position allows great distribution to insert typical abusive clauses. This report produces a list of practices concerning the following items: the form of the contract (non-written); the retroactivity of marketing conditions; the payment by preference on the shelves, by increasing products assorted or by using supermarket gondolas or replacement of products; global discounts not linked to sales; the payments for waste management or the delay of payment up to 30 days and the agreement of clauses like "most favoured customer"; and finally the so-called “Great Wall of China” of white trademark products on the shelves\textsuperscript{176}.

In the UK, the NFU has exposed a large list of scenarios that retailers impose payments on the supply chain including for better in-store position of their products; suppliers funding the cost of promotions such as “buy one get one free”; suppliers paying for a specific promotion (gondola ends, advertising allowances, etc.) where payments exceed the actual costs to the retailer; suppliers financing retrospectively promotions already undertaken; being subjected to late order cancellations or rejected orders for invalid reasons, etc.\textsuperscript{177}

\textsuperscript{172} Commission Notice on the definition of relevant market for the purposes of Community competition law (97/C 372/03).
\textsuperscript{173} Accesible www.autoritedelaconcurrence.fr on 2012-04-11.
\textsuperscript{176} TRIBUNAL VASCO DE DEFENSA DE LA COMPETENCIA (2009), “La distribución de...”
\textsuperscript{177} NFU Response to COPA Questionnaire: «How can we provide long-term support for the competitiveness of the agri-food sector? Priorities», 2011.
2.8.3. Below-cost selling

It is worthy to say that sometimes practices or conducts can be defined as not respecting the loyalty of the commercial relationships and they can affect the general interest. Taking into account that this matter has not been completely harmonized at EU level, Member States may regulate this area with regard to unfair competition, i.e. the behaviour is objectively against bona fides - and that the conduct attacks the public interest and jeopardizes free competition.

Below-cost selling is the practice which consists of selling without fixed pricing and without any guarantee of getting a price back, only verbal agreement is done. This is very usual in fruit and vegetables sector. It is also the case when a price is fixed but not in writing and the buyer does not pay it\(^{178}\).

Where there is evidence of dominant position, not to fix the price in the contract - and that means in writing - is defined as abusive and is against competition law. When there is no evidence of dominant position, the only way to claim is the ordinary jurisdiction as an unfair competition practice.

Germany, Spain, France, UK and Portugal have legislated against the below-cost selling but in Ireland it is allowed. On the one hand, some voices have asked for criminal sanctions to below-cost selling practices. On the other, it has been said that the interdiction of the below-cost selling is always detrimental to the consumer\(^{179}\).


3. ENDING CONCLUSIONS AND PROPOSALS

Within the set of the regulations laying down the legislative framework for the CAP in the period 2014-2020, the European Commission has included the revision of the Single CMO. The application of articles 101 and 102 of the Treaty continues unchanged and, as a novelty, the exemption of Interbranch associations’ extension of rules has been expanded to the entire CAP agro-food sector – annex I of the Treaty\textsuperscript{180}.

The first thing to be said is that a general exemption to the agro-food sector is not accurate. A second approach would be to decide whether the Single CMO may be improved concerning the exemptions to antitrust law in application of article 42 of the Treaty.

As it has been described in section II, nowadays, each Member State does as it pleases to exempt any conduct or practice in the agro-food sector.

In the case of horizontal cooperation agreements, the sense of decisions taken by competition authorities has depended on each individual case and the structural conditions of “relevant market”; there are always examples where the competition authorities have been more flexible (Ireland, United Kingdom and Spain) whilst in others, their resolution has been more contradictory (Germany and the Netherlands).

With regards to codes of conduct, it has become clear that the experiences of the United Kingdom and France have been the most successful. The standard contracts have generally been well accepted in France, although they have been closely scrutinised whenever there was any indication of price fixing.

As for interbranch agreements, the Member States that have most successfully developed the system are France and Spain. They have applied the notion of extension of rules but they have also controlled the development of cartels by way of quality guidelines or the setting of minimum calibres, for example.

In relation to price orientation, the Spanish competition authority has been strict in sanctioning cases of price orientation and has even resorted to press releases; In Italy, there has been a strict application of antitrust rules for Price agreements (\textit{listine dei prezzi del pane}) and, in a similar sense, the UK authorities have acted accordingly (dairy products) as have the Belgian ones (\textit{flour} industry). France has taken a more alternative approach (Bergerac wine, honey, poultry quality label, Cahors wine and Lot-et-Garonne strawberries).

In contrast, in relation to price fixing, almost all of the states have acted against this practice except in the specific cases of Greece (Edovra), Germany (Livestock breeding and forestry sector) and France (Cahors Wine and poultry label). There is a certain amount of contradiction in Spain as the Supreme Court has validated the CECASA platform as a centralised purchasing department to avoid prices from collapsing within the former COM framework for olive oil. France has validated agreements and quotas set for DO Cahors and the interbranch for poultry meat whilst it has as sanctioned other operators (Interbranch of potato). In Germany, the forest industry as well as the sale of certain livestock and animal husbandry products have been exempt from

\textsuperscript{180} See \url{http://ec.europa.eu/agriculture/cap-post-2013/legal-proposals/com626/626_en.pdf}. 
price-fixing prohibitions. However, Bundeskartellamt has expressed their worries about the effects of the so-called milk package.

Price observatories or round tables have been generally well received by the competition authorities, but in the case of Spain, for example, more attention should be given to the drawing up of its objectives to avoid simulations of price recommendations.

The quality guidelines and programmes of the various IG Boards (Interbranches or Public Bodies) have also been under surveillance by the national competition authorities. In Italy, various IG Boards have been sanctioned for agreeing on production plans (Gorgonzola, San Daniele, Parma). In France, sanctions have taken place for the same infringement on several occasions (Cantal Cheese, Barème du sechages du maïs), as has been the case with Ireland (BIDS agreements).

Within the set of possible modes of collusion, there has been a clear divergence between Member States with respect to boycotts, non-aggression pacts, geographic market division, reimbursements or uniform discounts and the sharing of sensitive information.

Lastly, as for the abuse of position of dominance, differences have also been described regarding the very concepts of dominant position, relevant market and below-cost selling.

The new Single CMO proposal is not too ambitious on this matter although it must be considered positive the fact that the proposal contemplates the extension of rules for the entire agro-food sector [article 145(1) of the proposal].

As for specific exceptions, the proposal is not innovative; one of the exemptions is related to horizontal agreements adopted by producer organizations – cooperative companies included. It is clear how exemption works when the horizontal agreement deals with production or commercialization because ancillary restraints are accepted under some conditions because the agreement has pro-competitive effects. In the Commission Guidelines on Horizontal Agreements there are some clear examples about this. However, some problems have been highlighted when the horizontal agreement is related to a private storage measure, which is normally linked to a price fixation.

Concerning extension of rules, better regulation principles call for a smart approach to the extension of rules, which in academic terms is a vertical agreement. To this goal, extension of rules has no sense if the agreement to be extended has to be adopted the year before the extension, as it is stated in the EC proposal.

More flexibility is essential and the Single CMO must allow Interbranch associations to ask for the extension for a campaign, before starting or already started, once it is on course, and to have a reply from the administration with a minimum delay of no more than ten symbolic days.

If there are problems during the campaign – for instance, bad weather provokes smaller fruits –, the Interbranch association needs to react immediately, not the following year. Interbranch association might be empowered to agree changes in commercialization rules to face certain externalities – for example climate changes
or pests – or to agree a minimum price, including for private storage to grant a public interest like consumer protection or to protect the integrity of the market.

Such an assertion can be countered with the argument that an exemption to antitrust law must be carefully revised. However, the type of agreements to be extended is quite similar and repetitive. The European Commission and National Administrations have examined already a limited list of agreements to be extended under the system in force. Year to year, as it has been listed in section II, the extension of rules falls down, more or less, on the same matters and the same Member States. So, the complexity of the required analysis cannot stop what is needed: to gain flexibility.

Another interesting proposal concerning the extension of rules is to increase the diffusion of the extended agreements. To date, the extended agreement is published in the OJ and DG AGRI website. A historical data base of extended agreements can be useful in order to facilitate, on the one hand, the Interbranch association agreements and, on the other, the evaluation of the agreements to be extended by the public administration.

This historical data base may contain not only a positive list of agreements that have been extended but also a negative list, where unlawful agreements are compiled.

The former list of agreements to be extended may be the following: agreements about the knowledge of the market (statistics,…); agreements or rules to improve quality products and process; agreements on innovation; agreements on publications and consumer information; agreements related to the environmental questions and the integrated agriculture; agreements stating a standard contract and the minimal content of the contract.

The latter list of forbidden pacts, written or not, may be the following: agreements damaging the usual CAP development; agreements causing competition failures that are not indispensables to reach CAP goals; agreements that cause discrimination or eliminate competition for a considerable part of the products in question; price-fixing, minimum and maximum price, collective price recommendation; agreements containing bonus or uniform linked discounts; agreements on extension of quality rules which are not beneficial to consumers; agreements on quotas or production programmes, etc.

From a material perspective, the list of “extendible“ Interbranch agreements to non-members could take the form of a positive list of practices inserted in the Single CMO (like Annex XVIa of the Single CMO) or in a Guidance subject of a Notice of the European Commission. The list may work also as a positive list of compatible agreements for the rest of the agro-food operators. The main reason of the similarity is that competition law is an objective law, which means that it is applicable to the actions independently of the actor.

Another question, which merits revision, is the practice of price fixing. As is well-known, there has been acceptance by the EU Legislator of certain conditions when adopting the “milk package” in written contracts.

Joint to the so-called “milk exemption”, the price fixation is not unlawful when in a production agreement the price fixation is required because it is needed to create
an undertaking whose production is fixed by the parties or is stated for the common managing of production, distribution and commercialization functions. In addition, the price fixation is needed to eliminate transaction costs or to put in the market new products in commercialization agreements.

There is a grey area around the orientative prices and the index of price references. On the one hand, orientation prices have been admitted by Competition Authority in one Member State and, simultaneously, they have been rejected in another Member State. On the other, the publication of index of price references produces normally that they are taken as minimum prices, which is a not compatible practice. Therefore, index of price references may be accepted if the market indicators have been objectively chosen and they are composed with rigorous and stable methods, periodically revisable and tailored to the sector structure. It is worthy also to point out the practice of including open price clauses on the standard contracts, like TOMP contracts in the US, which consist of an agreement of payment of the best market price at the precise moment of supply, or like MFC clause, which imposes an obligation on a supplier to give a "favoured" customer a price which is at least as low as the best price which is given to its other customers (or "on no less favourable terms"). They come in various guises but are commonly encountered in commercial agreements in the energy and resources sector181.

Thirdly, in this context, there is a list of compatible practices to be promoted in order to balance the power of distribution chains and the transparency of the market, whose compatibility with EU competition law has not been argued, like codes of conduct, standards contracts, quality schemes or price observatories.

One option would be to extend the proposals to improve contractual relations in the dairy sector (the 'Milk Package') into other sectors. However, it must be stressed that an attempt should not be made to find a "one size fits all" model at EU Level in terms of contractual relations. However, it will extend opportunities for milk producers to engage in cartel conducts.

Another option is extending the Code of Practice idea into the establishment of a legally enforceable EU Code of Conduct, including both grocery chains and for manufacturers, whose monitoring for compliance may require an independent enforcement body. It has been also highlighted the connection of the respect of the Codes and the fair competition (Directive EC/2005/29).

In connection or not with the Code of Conduct, the creation of standard contracts at EU level and to state the elements such as duration, volume, characteristics of the product, annulment of abusive clauses, financial liabilities and modalities of price fixing may also be a useful tool to increase the transparency of the agro-food markets. In any case, if the standards contracts remain voluntary, their efficiency will be limited.

Fourthly, with regard to dominant position, any kind of reinterpretation of the "relevant market" must be carried out in order to fix up the agro-food sector, due to the diversity of the criteria being applied by national competition authorities. As stated,

the Commission Horizontal Guidelines stipulate a check for the concepts of relevant market and geographical market, which are relevant in the acceptance of ancillary restraints.
REFERENCES

• EUROPEAN COMMISSION (2004), Guidelines on the application of Article 81(3) of the Treaty [OJ No C 101 of 27.4.2004].


• EUROPEAN COMMISSION (1978), Communication of 18.12.1978, OJ C1 de 3.1.1979


• Houba, Harold E. D., Motchenkova, Evgenia and Wen, Quan (2011), “Antitrust Enforcement and Marginal Deterrence” (November 22, 2011), Tinbergen Institute, Discussion Paper No. 11-166/1.


• Nihoul, P., (2005), Introducción al Derecho de la Competencia. Posición de las autoridades, de los consumidores y de las empresas, Universidad Externado de Colombia, 2005.


• Tribunal Vasco de Defensa de la Competencia (2009) “La distribución de bienes de consumo diario: competencia, oligopolo y colusión tácita, accesible el 18.5.2010 en http://www.ogasun.ejgv.euskadi.net/r51-.


### ANNEX

<table>
<thead>
<tr>
<th><strong>Horizontal Agreements: Cooperation agreements: production and joint commercialization</strong></th>
<th><strong>Allowed</strong></th>
<th><strong>Not allowed</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Ireland:</strong> joint selling agreement Co-operative Dairy Society</td>
<td>Netherlands: Meldoc case “and Coberco case”</td>
<td><strong>Aude case:</strong> exemption not to be applied in case of prices fixing</td>
</tr>
<tr>
<td><strong>Netherlands:</strong> Coberco case “fees payable under the statutes of a cooperative association on withdrawal or exclusion may fall within the derogation provided for in the Regulation”</td>
<td><strong>UK:</strong> Milk Marque case</td>
<td><strong>Germany:</strong> Bundeskartellamt points out once more that the admissibility of market information systems under competition law always depends on the individual case and actual structural conditions in the relevant market</td>
</tr>
<tr>
<td><strong>-UK:</strong> Milk Marque case</td>
<td><strong>Germany:</strong> Nordzucker y Union-Zucker: Admission of a cartel practices under co-operation agreements because of the so-called Co-operative privilege</td>
<td><strong>Milchförderungsfonds case:</strong> on the granting of support for exports within the common market</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th><strong>Codes of conduct</strong></th>
<th><strong>UK:</strong> Groceries Supply Code of Practice</th>
<th><strong>Spain:</strong> C.N.C. report</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Spain:</strong> ASEDAS- FIAB</td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>France:</strong> CNIEL</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th><strong>Interbranch agreements</strong></th>
<th><strong>Greece: Edovra, Interbranch organisation for peaches and pears intended for processing; fixing prices</strong></th>
<th><strong>Spain:</strong> Quality certification scheme of HORTYFRUTA (Organización Interprofesional Andaluza de Frutas y Hortalizas). Andalusian Interbranch organisation for fruit and vegetables</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Austria: &quot;NATIONALES WEINKOMITEE&quot; AND &quot;REGIONALE WEINKOMITEE;</strong> interbranch organisations in the wine sector are only allowed to define wine characteristics (such as variety, maturing, harvest methods, analytical parameter, etc.) of wines with protected origins and to do some promotion activities for these wines.</td>
<td><strong>France:</strong> CNIEL price orientation; Cantal IG Board: “Plan cantal” extension of rules acting as a limit of production; Fixing a price under the official cotisation (Interbranch association of Potatoes); Fixing a minimum calibre for potatoes against and Administrative decision stating another smaller</td>
<td></td>
</tr>
<tr>
<td><strong>EC and Spain:</strong> Extension of Quality rules of HORTYFRUTA for Marketing only extra (where relevant) and first class quality products</td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>France:</strong> Agreement to reserve product to improve quality of the product (vieillissement ) of the Interbranch Board vins doux naturels des Pyrénées Orientales à AOC(CIVDN)</td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>France:</strong> Agreements of the Cognac Board concerning fixation of quotas and compulsory distillation mechanism to implement EU Law.</td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>EC and France:</strong> Extension of Quality rules of INTERFEL for Kiwis to set harvesting and marketing dates, combined with a minimum Brix value; Extension of Quality Rules of INTERFEL for melons to set a minimum size/weight ; Extension of Quality rules of INTERFEL to set a size and calendar for marketing peaches and nectarines; Extension of quality rules of INTERFEL to promotion and to improve quality control; Extension of quality rules of INTERFEL to set a minimum calibre for shallots</td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Price orientation</strong></td>
<td><strong>France:</strong> Poultry Quality Label: price fixed step by step of the chain; Minimum prices for Wine (Decision 81/14 CC RF, de 5.7.1994, Cahors wine IG Board); Prix objectived d’exportation for strawberries LOT-ET-GARONNE in a sectorial bulletin; Endives</td>
<td><strong>Italy:</strong> Listine dei prezzi del pane (I695ADC)</td>
</tr>
<tr>
<td><strong>UK:</strong> coordinating increases in the prices consumers paid for certain dairy products in 2002 and/or 2003 (OFT Decision 10.8.2011; CE/3094-03); Indirect exchange of future price information (2008 OFT Decision 56/08)</td>
<td><strong>Belgium:</strong> Flours cartel Decision &quot;coordinating repeated price increases as well as their implementation and customer allocation. They also exchanged commercially sensitive</td>
<td></td>
</tr>
<tr>
<td><strong>Policy Department B: Structural and Cohesion Policies</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>----------------------------------------------------------</td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Price Observatories or price’s standing tables</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Spain: Citrus Guild (fixing oriented prices); Cork Price Table (stating prices and categories); ITAP Albacete (report of prices) France: Observatory on formation of Food Products’ Prices and Margins; Observatoire de la formation des prix et des marges accompagne la filière ovine Italy: Price Observatory and misterprezzi.com EC DG RTD and project partners: _FP 7 Transparency of Food Pricing Research Project (TRANSFOP) EC DG SANCO: Consumer Scoreboard</td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Index of price references</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>France: ‘indices de référence fiables des prix secteur ovin’</td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Collective price recommendation</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>UK: Grocery Retailing, non evidence about parallel prices Portugal: Nota de imprensa ANIL 23.3.2011 France: Contrat interprofessionnel du vin de Bergerac with modalities of price fixing or a top price fixed “Mercurial de prix of imported honey” by categories and countries of origin</td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Centralized purchasing department</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Price fixing</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Greece: Edovra, Interbranch organisation for peaches and pears intended for processing; fixing prices Germany: according to the law of husbandry, the prohibition of vertical resale price maintenance does not apply to livestock breeding. Federal Forest Act: exemption to agreements in the forestry sector France: Minimum price for white wine; in bulk (Cahors Board interbranch agreement) Poultry Label &quot;prix de matière prime&quot; and of resaling because is fixed in a production chain</td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Standard Contract</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Spain: Informe CNC 50/11 (Decreto Sector Lácteo) UK: Defra 2011 France: Decret de contractualisation; Contrat filière ovin; Contrat filière élevage; Contrat cadre dinde with specific clause concerning price; Contrat interprofessionnel</td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Price fixing</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>France: CNIEL price orientation (Décret 2010)</td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Index of price references</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>France: diffusion of a selling Price catalogue containing top prices, objective price and attack price “Prix orientatifs” of honey</td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Collective price recommendation</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Spain: Associations press notes_CEOPAN, PROPOLLO, FIAB fines Andalusian Price table Decree Italy: Listino dei prezzi della pasta (I694 ADC) EC: Bananas Cartel France: Champagne IG Board Letter that recommends to increase quantity of grapes offered and to apply a calculation rule as a good practice to get a wine price cellulde gestion du marché strawberries LOT et GARONNE Contrat filiere élevage In a sectorial publication &quot;L’Abeille de France&quot; and ”La Revue francaise de l’apiculture” the producer organizations recommends of the medium price “a detail”, recommendation of being disciplined concerning prices, etc.</td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Centralized purchasing department</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Price fixing</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Greece: Edovra, Interbranch organisation for peaches and pears intended for processing; fixing prices Germany: according to the law of husbandry, the prohibition of vertical resale price maintenance does not apply to livestock breeding. Federal Forest Act: exemption to agreements in the forestry sector France: Minimum price for white wine; in bulk (Cahors Board interbranch agreement) Poultry Label &quot;prix de matière prime&quot; and of resaling because is fixed in a production chain</td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Standard Contract</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Spain: Informe CNC 50/11 (Decreto Sector Lácteo) UK: Defra 2011 France: Decret de contractualisation; Contrat filière ovin; Contrat filière élevage; Contrat cadre dinde with specific clause concerning price; Contrat interprofessionnel</td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Price fixing</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>France: standard contract with fixing price CCLF avec l’autre producteur Cidreries ; Standard contract for potatoes with price clause and with penalties for not respecting the tariffs</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Quality Scheme Plans, quotas and similar</td>
<td>France: Agreement of the IG Cheese Board of Conté to set a maximum of cuves by associated “Table de bord” with generic information provided by producer organization (sinalaf) in the framework of the Poultry Label</td>
<td>Italy: Gorgonzola, San Daniele and Parma Boards decisions on quality programs, production quotas and market geographical distribution France: Cantal GI Cheese Board agreement on production annual limits and allocation of offers barème de séchage du maïs Production plan of Poultry Label limiting the access to the Label of new comers by the way of stating non objective requirements to join the certification label Ireland: agreement by members of BIDS to leave the beef processing industry in return for payment.</td>
</tr>
<tr>
<td>Non-aggression pacts</td>
<td>Netherlands: Dutch flour producers (Meneba, Ranks and Krijger), three Belgian flour producers (Dossche, Brabomills and Ceres) and eight German flour producers for mutual understanding to stabilize the market and non aggression pact</td>
<td></td>
</tr>
<tr>
<td>Division of the geographical market</td>
<td>Belgium: BSE test market to prevent laboratories of other European member states to be active on the Belgian market. Besides the geographical partition of the market the laboratories concerned have made agreements and exchanged information between them in order to influence the price of BSE tests in Belgium. France: Banana cartel; Division of slaughtering market by poultry label certification units</td>
<td></td>
</tr>
<tr>
<td>Boycott</td>
<td>France: Promotional Campaign “Boycott Gironde” against Bordeaux wines (allowed because there was not any evidence of damage)</td>
<td>Germany: call for the boycott to the dairies not respecting a minimum milk price EC and France: Spanish strawberry case</td>
</tr>
<tr>
<td>Linked uniform discounts in cartels</td>
<td>Spain: Bonus or uniform discounts linked to milk quality Portugal: Coffee distribution agreements</td>
<td></td>
</tr>
<tr>
<td>Sharing sensitive information</td>
<td>UK: Tacit coordination of Tesco and Sainsbury France: Interprofessionel du vin de Bergerac and its register of standard contracts. Only allowed if price publication is by index or by mercurial, anonymous, cumulated and with past information,</td>
<td>France: Cérégrain et al. (exchange of price information)</td>
</tr>
<tr>
<td>Bellow selling cost</td>
<td>Ireland</td>
<td>Germany France UK Spain Portugal</td>
</tr>
</tbody>
</table>
Role

The Policy Departments are research units that provide specialised advice to committees, inter-parliamentary delegations and other parliamentary bodies.

Policy Areas

- Agriculture and Rural Development
- Culture and Education
- Fisheries
- Regional Development
- Transport and Tourism

Documents