STUDY

Requested by the AGRI Committee

European Parliament

Research for AGRI Committee – New competition rules for the agri-food chain in the CAP post 2020

Agriculture and Rural Development

Policy Department for Structural and Cohesion Policies

Directorate-General for Internal Policies

PE 617.497 - September 2018

EN

Research for AGRI Committee – New competition rules for the agri-food chain in the CAP post 2020

Summary

In connection with the next reform of the CAP post 2020, the Commission has proposed a new Regulation (COM(2018)394 of 1 June 2018) on the common market organisation, amending Regulation (EU) No 1308/2013 of 13 December 2013 (amended by Regulation (EU) No 2017/2393 of 13 December 2017). This draft regulation does not, however, cover questions on the relationship between the CAP and competition; the proposal does not contain any provisions concerning the responsibilities of professional and interbranch organisations and the possible conditions of their submission to competition rules. The recent Omnibus Regulation (EU) No 2017/2393 has made changes to the legal framework for the application of competition rules to the agreements and practices of farmers and their associations. However, this new legislative framework is not yet entirely consistent and, in the light of the Court of Justice judgment handed down on 14 November 2017 in the Endive case, the progress ought to be consolidated and clarified in order to guarantee the real effectiveness of these provisions and greater legal certainty for operators.

This study analyses the development of the relationship between the CAP and the competition rules and highlights the need to take corrective action with respect to current farming legislation to ensure that the CAP has primacy over the competition rules and the implementation of the objectives set out in Article 39 of the Treaty.

This study was requested by the European Parliament's Committee on Agriculture and Rural Development.

AUTHORS
Catherine Del Cont, University of Nantes, France
Antonio Iannarelli, University of Bari, Italy

Research manager: Albert Massot
Project and publication assistance: Lyna Pärt
Policy Department for Structural and Cohesion Policies, European Parliament

LANGUAGE VERSIONS
Original: FR

ABOUT THE PUBLISHER
To contact the Policy Department or to subscribe to updates on our work for the Committee on Agriculture and Rural Development, please write to:
Poldep-cohesion@ep.europa.eu

Manuscript completed in September 2018

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

Download the full text at:
http://www.europarl.europa.eu/RegData/etudes/STUD/2018/617497/IPOL_STU(2018)617497_EN.pdf

More information on Policy Department research for the AGRI Committee:
https://research4committees.blog/agri/
Follow us on Twitter: @PolicyAGRI

Please use the following reference to cite this study:
Del Cont C., Iannarelli A., Research for AGRI Committee – New competition rules for agri-food chain in the CAP post 2020, European Parliament, Policy Department for Structural and Cohesion Policies, Brussels, 2018
Please use the following reference for in-text citations:
Del Cont and Iannarelli (2018)

CONTENTS

LIST OF ABBREVIATIONS

Art.	Article
ADLC	French competition authority
EC	European Community
ECJ	Court of Justice of the European Community
CJEU	Court of Justice of the European Union
ECN	European Competition Network
OJ	Official Journal of the European Community
OJEU	Official Journal of the European Union
CMO	Common Market Organisation
PO	Producer organisation
IBO	Interbranch organisation
CAP	Common Agricultural Policy
TFEU	Treaty on the Functioning of the European Union
ECN	European Competition Network
Reg.	Regulation
Riv. D. Agr.	Rivista di diritto agrario ed agroalimentare
Riv. D. Agroalimentare	Rivista di diritto agroalimentare
EU	European Union

SUMMARY

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

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

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

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

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

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

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

This awareness was first of all reflected in the adoption of the 'Milk Package' and Regulation (EU) No 261/2012 promoting the creation of POs in the milk sector and allowing these POs to negotiate collectively, including in terms of prices, on behalf of their farmer members.
In November 2016, the Agricultural Markets Task Force (AMFT) made numerous recommendations in its final report aimed at promoting market transparency, strengthening the bargaining power of producers and clarifying and consolidating the competition rules applicable to producer organisations with regard to the concentrating of supply as required by legislation.

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

This Regulation extended to all production sectors the possibility for POs and APOs to collectively negotiate contracts for the supply of agricultural products, including price contracts, thus modifying the legal framework for applying competition rules to the agreements and practices of farmers and their associations. However, this new legislative framework has not yet been fully finalised and the proposals would benefit from being consolidated and clarified in order to guarantee the real effectiveness of these provisions and the principle of primacy of the CAP and greater legal certainty for operators.

Objectives

The main objective of this study on 'New competition rules for the agri-food chain in the post-2020 CAP?' is to provide information and points for consideration in connection with the post-2020 CAP reform legislative process. The study's overriding focus is on the following question: What improvements should the next CAP make to the provisions of the CMO relative to the application of competition rules?

The research focuses on the following points:

- describe and analyse the general pattern of application of competition rules to agriculture as defined in Article 42 TFEU;
- describe and analyse the framework for the application of competition rules after the adoption of the 2017 Omnibus Regulation; (Regulation (EU) No 2017/2393);
- provide a critical analysis of the application of competition rules to agriculture by the European Commission and/or the national competition authorities and draw lessons for the next reform of the CAP;
- describe and analyse the Commission's legislative proposals in this area: firstly, the proposal amending the CMO Regulation (CMO(2018)394 of 1 June 2018); secondly, the proposal for a directive of 12 April 2018 on business-to-business unfair trading practices in the food chain;
- put forward policy recommendations to the European Parliament as co-legislator with a view to consolidating and clarifying the conditions for the application of the competition rules in the future post-2020 CMO Regulation, in accordance with the principle of primacy of the CAP set out in Article 42 of the Treaty.

Methodology

The methodology used is based on a threefold approach:

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

- a prospective approach to express proposals and recommendations to consolidate and strengthen the regulatory framework established by the Omnibus Regulation in accordance with the principle of primacy of the CAP.

Conclusions and recommendations

In conclusion, the study points out:

- that the CMO's new competition rules from the Omnibus Regulation (EU) No 2017/2393 should be further consolidated and clarified in order to strengthen the bargaining power of farmers and their associations and to provide them with greater legal certainty as regards the application of these rules;
- that the European Commission's legislative proposal on 'The Future of Food and Farming' for the CAP reform for 2020 does not contain any provisions on the conditions of application of the competition rules to agriculture or the concentration of supply; the asymmetry of bargaining power within the agri-food chain is covered exclusively in the proposal for a Directive of 12 April 2018 on unfair trading practices in business-to-business relationships in the food supply chain.

In order to achieve the objectives of Article 39, and in particular to ensure a fair standard of living for the agricultural population, stabilise markets and ensure that supplies reach consumers at reasonable prices; to strengthen the position of primary producers in the agri-food supply chain; to clarify and consolidate the possibilities of collective organisation and negotiation established by Regulation (EU) No 2017/2393; to ensure the real effectiveness of the primacy of the CAP in competition policy and to provide greater legal certainty for farmers and their associations; and to prevent and penalise unfair trade practices in the commercial relationships within the agri-food chain between farmers and their buyers,

the key recommendations are:

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

- extend the scope of the Unfair Trade Practices Directive within the agri-food chain to all suppliers including non-SMEs;
- accept a general definition of 'Unfair Trade Practices'.

1. INTRODUCTION

MAIN CONCLUSIONS

- From the Treaty of Rome up to the current Treaty on the Functioning of the European Union, the European legislative framework has always affirmed the principle of primacy of the Common Agricultural Policy over the competition rules: the competition rules are only applicable to the production and marketing of agricultural products to the extent determined by Parliament and the Council and taking into account the objectives set out in Article 39 of the Treaty.
- In agricultural matters, competition is not an end in itself but an instrument, a means, at the service of achieving the Common Agricultural Policy objectives defined in Article 39; under Article 42 of the Treaty, any application of the competition rules to agriculture must be compatible with the attainment of the CAP objectives.
- Due to the strong atomicity of the agricultural sector, implementing laws for the CAP have instituted and encouraged the formation of horizontal collective structures, producer organisations and their associations, (POs and APOs), in order to help achieve its objectives.
- However, up until Regulation (EU) No 1308/2013, agricultural legislation gradually introduced provisions widening the scope of the competition rules within the CAP, thus contradicting the principle of primacy of the CAP and weakening the role of cooperatives and producer organisations.

Since the Treaty of Rome, European law has always affirmed the primacy of the Common Agricultural Policy over the competition rules. Article 42 of the Treaty solely confers on European legislators the power to determine if, in the light of the objectives of the Common Agricultural Policy set out in Article 39, the competition rules are applicable to the production and marketing of agricultural products.

The transition from managed agriculture to a market oriented agriculture, with the gradual abandonment of price support, has amplified the weakness of farmers in the face of their buyers, processors and/or retailers, who are the unavoidable gateways to the market. The goal of decent and fair remuneration for agricultural producers is undoubtedly the most difficult objective of the Common Agricultural Policy to achieve; many studies have highlighted both the difficulties for farmers to obtain remunerative prices, and therefore decent incomes, and the unequal distribution of value along the food chain[1]. Producer organisations (POs) and their associations (APOs), set up by agricultural legislation to remedy the strong atomicity of the sector and concentrate supply, have not been able to offset the bargaining and purchasing power of other operators in the agri-food sector. One of the fundamental causes of this failure was, and still is in part, due to the fact that collective bargaining and setting common prices cannot be carried on, and more generally their legal responsibilities cannot be fulfilled without risking infringing the competition rules and in particular laws on agreements, decisions and concerted practices. The restrictive interpretation and application of agricultural specificity has hindered

[1] See for example the recent report by the Agricultural Markets Task Force, Improving market outcomes, Enhancing the position of farmers in the supply chain, Brussels, November 2016, http://ec.europa.eu/agriculture/sites/agriculture/files/agri-markets-task-force/improving-markets-outcomes_en.pdf. Also the European Parliament Resolution of 7 June 2016 on unfair trading practices in the food supply chain (2015/2065(INI)).

strengthening the position of farmers in the agri-food chain and the development of collective organisations as key players in the regulation of agricultural trade relations.

This is why, in recent years, the question of the primacy of the CAP over the competition rules and more specifically the applicability of Articles 101 and 102 TFEU to the agreements and decisions of farmers and their organisations (POs and APOs) has become a crucial issue again.

The recent Omnibus Regulation (EU) No 2017/2393 of 13 December 2017[2] (amending Regulation (EU) No 1308/2013) extended the possibility of negotiating transfer contracts, including price contracts, collectively to all production sectors thus modifying the legal framework for applying the competition rules to the agreements and practices of farmers and their associations. However, this new legislative framework has not yet been fully finalised and the proposals would benefit from being consolidated and clarified in order to guarantee the real effectiveness of these provisions and greater legal certainty for operators.

On the eve of a new reform of the CAP, in a context marked by a new phase of concentration of industrial processors and retailers in Europe, and by a steady decline in farmers' incomes, it is essential to ask questions about the need to propose new competition rules for the agri-food chain under the post-2020 CAP.

In order to answer questions about possible amendments to Regulation (EU) No 2017/2393, called the Omnibus Regulation of 13 December 2017, and in particular to respond to the singular approach adopted by the European Commission regarding the forthcoming CAP, the evolution of the relationship between PAC and competition in recent decades needs to be briefly traced out.

As a preliminary point, it is important to specify how and why Regulation (EU) No 1308/2013 on the common organisation of markets and the recent amendments introduced by the Omnibus Regulation (EU) No 2017/2393 of 13 December 2017 were adopted. These developments and amendments follow, on the one hand, the recent proposals of the European Parliament born out of a successful collaboration between the Committee on Agriculture and Rural Development (COMAGRI) and the Committee on Economic Affairs and, on the other hand, the Endives litigation which led to Decision C-671/15 of the Court of Justice of 14 November 2017[3].

[2] Regulation (EU) No 2017/2393 of the European Parliament and of the Council of 13 December 2017 amending Regulations (EU) No 1305/2013 on support for rural development by the European Agricultural Fund for Rural Development (EAFRD), (EU) No 1306/2013 on the financing, management and monitoring of the common agricultural policy, (EU) No 1307/2013 establishing rules for direct payments to farmers under support schemes within the framework of the common agricultural policy, (EU) No 1308/2013 establishing a common organisation of the markets in agricultural products and (EU) No 652/2014 laying down provisions for the management of expenditure relating to the food chain, animal health and animal welfare, and relating to plant health and plant reproductive material (OJEU, 29.12.2017, L 350/15).

[3] Decision of the Competition Authority (ADLC) 12-D-08 of 6 March 2012, Endive Production and Marketing Sector, http://www.autoritedelaconcurrence.fr/user/avisdec.php?numero=12D08; Judgment of 15 May 2014, Court of Appeal of Paris, Pole 5 - Chamber 5-7, http://www.autoritedelaconcurrence.fr/doc/ca_12d08.pdf; Judgment No 1056 of 8 December 2015, Commercial Chamber, http://www.autoritedelaconcurrence.fr/doc/cass_endives_12d08.pdf; Opinion of Advocate General N.Wahl in Case C-671/15, 6 April 2017, https://eur-lex.europa.eu/legal-content/FR/TXT/?uri=CELEX%3A62015CC0671; Judgment of the Court of Justice in Case C-671/15 of 14 November 2017, http://curia.europa.eu/juris/liste.jsf?language=en&num=C-671/15.

1.1. The primacy of the Common Agricultural Policy over the competition rules

As of the Treaty of Rome up to the current Treaty (TFEU), the European legislative framework has always affirmed the specificity of agriculture as regards the application of competition rules. All the other economic sectors have however, since 1957, been submitted to the direct and immediate application of Articles 85 and 86, currently Articles 101 and 102 TFEU. These provisions are intended to protect the competitive order by prohibiting anti-competitive behaviour, agreements and practices that impede free competition, and abuses of dominance.

Article 42 of the current TFEU confirmed the original provision of the Treaty of Rome in all respects stating the principle of non-application of the rules of competition to the production and marketing of agricultural products. The competition rules are applicable only to the extent determined by Parliament and the Council and 'taking into account the objectives set out in Article 39', i.e. taking into account the CAP.

Article 42 TFEU, as recognised and affirmed by the Court of Justice on several occasions[4], expresses the primacy of the CAP over competition policy. Through this text, 'the primacy of agricultural policy over the competition objectives of the Treaty and the power of the Council to decide to what extent the competition rules apply to the agricultural sector has been recognised'[5]. This power, it should be emphasised, is neither arbitrary nor unlimited since it must always be exercised 'taking into account the objectives set out in Article 39'. This means that the application or interpretation of secondary legislation applicable to agricultural products in competition matters must never be interpreted or applied in such a way as to prioritise the objectives of competition, in particular the objective of economic efficiency of competition. Article 101(3) TFEU, on the objectives of the CAP[6].

Since 1957 then, Article 42 has made it possible to prioritise two objectives of the Treaty embodied in two policies: the establishment of a common agricultural policy and the establishment of an undistorted competition regime. This order of priority clearly and indisputably expresses the primacy of the CAP over competition policy. In this respect, in 1994, Advocate General Gulmann in Case C-280/93 pointed out that the primacy of the CAP implied that 'there is no reason to consider whether the organization of the market in fact entails restrictions on competition which in other contexts might be contrary to the competition rules in the Treaty'.[7]

Indeed, if the objectives of the current Article 101 TFEU relating to the prohibition of agreements, practices and decisions which may prevent, restrict or distort competition are

[4] This is a consistent position. See the Judgment of 9 September 2003 Case C-137/00, paragraph 81; the Judgment of 5 October 1994 Case 280/93, paragraph 61, which is in line with what the Court had already stated in the Judgment of 29 October 1980, Case C-139/79, Maizena paragraph 23.

[5] Furthermore, the Commission acknowledged in the Decision of 15 December 2009 (2010/473/EU) on support measures, as regards the relationship between Article 42 and Article 39, 'What emerges from these Articles is that competition policy must take these TFEU objectives into account', (2010/473/EU), paragraph 209 (OJEU L235/1, 4.9.2010).

[6] The various meanings of the efficiency referred to in Article 101(3) are at the heart of heated debates which tend to call into question the reading proposed by the Chicago School, a dominant school even in the official European antitrust culture, but which subjects the Court of Justice's contribution to reservations, see DEUTSCHER and MAKRIS, Exploring the Ordoliberal Paradigm: the Competition-Democracy Nexus, The Competition Law Review, 2016, Vol. 11 p. 181 and following; TALBOT, Ordoliberalism and Balancing Competition Goals in the Development of European Union, in The Antitrust Bulletin 2016, Vol. 61 p. 264 and following). Among the most recent critical analyses that are moving towards a return to a more conventional approach to the fight against monopolies, see KAHN, Amazon's Antitrust Paradox in Yale Law Journal 2017, Vol. 126 p. 710 and following, especially p. 743.

[7] As we shall see, this position was taken up again (without reference to the findings of Advocate General Gulmann) very recently by Advocate General Wahl in his Opinion in the Endives case, and in part by the Court of Justice. On the other hand, the Commission continues to make a reverse reading (see below).

compared to those defined in Article 39 of the Treaty it is easy to see that there is a profound difference.

Article 101 relates exclusively to the proper functioning of free competition and aims to protect the consumer and/or the efficiency of the market in accordance with Article 101(3)[8]. Conversely, there are many CAP objectives contained in Article 39 of the Treaty, which, according to Article 42, are binding on the European legislator: in addition to the objectives of productivity, price stabilisation and security of supply, the text expressly refers to objectives of a social nature. Thus Article 39 includes the objective of ensuring a fair standard of living for the agricultural population and that of guaranteeing reasonable prices for consumers. Ultimately, in agricultural matters, competition is not an end in itself but an instrument, a means, at the service of achieving the Common Agricultural Policy objectives defined in Article 39[9].

A careful reading of Article 39 shows that the text is specifically aimed at explicitly protecting - the well-being- of subjects at both ends of the agri-food chain: agricultural producers and consumers[10]. This bipolarity of Article 39 expresses recognition and consideration of the weakness of these two categories of subjects vis-à-vis other operators in the sector, manufacturers and distributors. Fundamentally for farmers this position of weakness is reflected and expressed in terms of income because of the gap between the production costs and the prices imposed on them by their buyers. For the end consumer, it translates into exorbitant product prices. Even today there is a gap between the very low price paid to the producer and the high price of food products paid by the final consumer, for the profit of processors and retailers[11].

The complexity of the implementation of the CAP did not escape the founders of the Treaty of Rome. Pursuant to Article 40 TFEU, the objectives of the CAP can be implemented through the creation of a market organisation which may take various forms: (1) common rules on competition, (2) compulsory coordination of the various national market organisations; 3) a European market organisation.

In accordance with Article 40, 'The common organisation established in accordance with paragraph 1 may include all measures required to attain the objectives set out in Article 39, in particular regulation of prices, aids for the production and marketing of the various products, storage and carryover arrangements and common machinery for stabilising imports or exports'.

---

8 Regarding competition, the Court of Justice has argued that 'in any event, Article 81 EC, like the other competition rules of the Treaty, is designed to protect not only the immediate interests of individual competitors or consumers but also to protect the structure of the market and thus competition as such', Hearing of 14 March 2013 Case T-588/08, paragraph 65. According to the Commission, 'the objective of Article 101 is to protect competition on the market as a means of enhancing consumer welfare and of ensuring an efficient allocation of resources', Communication from the Commission, Guidelines for application of Article 81, paragraph 3 of the Treaty (OJ, 27.4.2004, C101/77, paragraph 13).

9 In other words, competition as such can be sacrificed if it is necessary for the attainment of the objectives of the CAP precisely because of the primacy of this policy. See on this issue the Judgment of the Court of Justice of 19 September 2013, Case C-373/11, paragraph 39 according to which: 'it should be noted that, according to settled case-law, even in regard to the competition rules of the Treaty, Article 36 EC gives precedence to the objectives of the CAP over the objectives of competition policy (Judgment of 9 September 2003, Milk Marque and National Farmers' Union, Case C-137/00, Rec. p. I-7975, paragraph 81)'.

10 It is no coincidence that Parliament has always insisted on this point. In its recent Resolution on unfair commercial practices in the food supply chain (2015/2065 (INI)) of 7 June 2016, paragraph 28, the Parliament again recalls 'that it is essential to ensure that EU competition law takes into account the specific features of agriculture and serves the welfare of producers as well as consumers, who play an important role in the supply chain; believes that EU competition law must create the conditions for a more efficient market that enables consumers to benefit from a wide range of quality products at competitive prices, while ensuring that primary producers have an incentive to invest and innovate without being forced out of the market by unfair trading practices', paragraph 28.

11 See on this point Commission Communication Com(2008)821 on the price of food products in Europe.

The reference in Article 40 to the main forms of intervention by the Community legislator in order to achieve the objectives of the CAP makes it possible to understand the reasons why it is now crucial to address the question of the relationship between the CAP and the competition rules, and in particular Articles 101 and 102 TFEU.

Indeed, for many years, in order to achieve the objectives of Article 39, the CAP has relied on strong public intervention in agricultural markets, starting with the fixing of price guarantees for farmers. During this long historical period when the CAP was characterised by interventionism in the market prices of agricultural products, thus removing them from the free play of competition, the question of distortions in competition caused by private initiatives by farmers remained very marginal[12]. In other words, throughout this period the preferential treatment of Article 42 of the Treaty only played a negligible role in practice. The solution adopted in Council Regulation No 26/62[13], in which for the first time the question of competition in agriculture is envisaged, remained in force in substantially unchanged terms until the adoption of CMO Regulation (EU) No 1308/2013.

The change that took place in 2013, which will be the focus of our thinking, is the subject of special and new attention concerning the application of the competition rules to agriculture. Indeed, the decrease in price support has brought to the fore the deep functional limitations that characterise agricultural markets. These limits are due, on the one hand, to the lack of elasticity of the demand and supply of agricultural products, and, on the other hand, to the structural weakness of agricultural producers in their market relations with buyers of their primary production, namely processors, trading companies and more and more often large-scale retailers.

In reality, two lines of legal policy now stand in opposition. The first, that of Parliament, which focuses on the specificity of agricultural markets and the primacy of the CAP, and stresses the urgent need to address the weakness of producers in the agri-food sector. The second, supported by the Commission and the national competition authorities, is based on the conviction that the promotion and preservation of competition has positive effects on the economic system as a whole and which is also likely to benefit the agricultural sector; on the other hand, the fear that failure to apply competition common law to the agricultural sector could lead to fragmentation of the European market, thus favouring the process of renationalisation of agricultural policies.

The question of the special treatment to be accorded to the agreements and decisions of agricultural producers, that is to say to agricultural associationism, is now of greater strategic importance than that accorded to it in the Treaty of Rome.

The tension between the PAC and competition has increased with the recent market-oriented reforms (abandonment of price supports and return to free competition) reinforcing agricultural associations and cooperation, factors both of renationalisation of farming sector trade relations and rebalancing the economic balance of power between farmers and their partners.

---

[12] For a similar conclusion, see Mr Monti, The relationship between CAP and competition policy - Does EU competition law apply to agriculture? Speech/03/537, according to which 'Where a market is heavily regulated – as agricultural markets have been in the past in the EU, there can only be "a residual field of competition" as the Court of Justice said in its 1975 sugar case. That is certainly one of the reasons why the record of competition decisions in the past is rather limited. However, in recent years, the CAP has, generally speaking, evolved towards a more market-oriented approach. Volume-based measures have disappeared from most CMOs; the intervention price is generally limited to a role of a safety net and protective measures at EU borders are being progressively lifted or reduced. This more market-oriented approach will certainly give an additional importance to competition law in the agricultural sector'.

[13] The Regulation of 4 April 1962 applying certain competition rules to production and trade in agricultural products replaced by Regulation (EC) No 1184/2006 of 24 July 2006 applying certain rules of competition to production and trade in agricultural products (OJ, 4.4.2006).

In this context, it has become essential to verify the impact of agricultural exception and the primacy of the CAP over the competition rules and particularly on the law on agreements, decisions and concerted practices in Article 101 TFEU.

Indeed, although the Commission regularly asserts the primacy of the CAP, its legislative choices however tend to call it into question. These choices, as we will see below, are based on the idea that the legal solutions adopted in the area of the CAP would simply be derogations from competition common law. This analysis is in contradiction with the Treaty as Advocate General Gulmann and very recently Advocate General Wahl recalled in the now famous Endives case[14] (see below).

In other words, the Commission's schizophrenic, dual position is explained by the fact that it is both the Union's steering and governing body, thus contributing to the development of policy choices and the European competition authority, which is also the European authority in charge of the European network of national competition authorities.

In many past communications, as in the recent Communication COM (2017) 713 final on the Future of Food and Agriculture, [15]it recalls the importance of recognising the strategic centrality of producer organisations to strengthen their position and bargaining power with regard to processors and distributors[16]. As stated in recital 21 of Regulation (EU) No 1305/2013, 'Producer groups and organisations help farmers to face together the challenges posed by increased competition and consolidation of downstream markets in relation to the marketing of their products including in local markets. The setting up of producer groups and organisations should therefore be encouraged'[17].

But at the same time, contradicting these programmatic announcements, the Commission continues to be rather reserved, even suspicious, with regard to producer organisations and their responsibilities. The Commission's assertion that associationism between agricultural producers must in principle be given preferential treatment, in particular as regards the application of the competition rules, is in practice contradicted or at least restricted: the Commission gives an non-contextualised reading of competition law that is unfavourable to any form of horizontal agreement between agricultural producers. The Commission's position has for many years contaminated the interpretation of written law by the Court of Justice. Influenced by the dominant antitrust economic culture, this interpretation has neutralised a number of

---

[14] Opinion of Advocate General N.Wahl in Case C-671/15, 6 April 2017, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62015CC0671; Judgment of the Court of Justice in Case C-671/15 of 14 November 2017, http://curia.europa.eu/juris/liste.jsf?language=en&num=C-671/15.

[15] In this November 2017 document, the Commission argues not only that 'This should be facilitated by strengthening the support for peer-to-peer exchange, networking and cooperation amongst farmers including through producer organisations (POs), as these can be important vehicles of knowledge sharing, innovation as well as cost savings for the farmers on a very regular basis', p. 13, but also that 'The position of farmers in the food chain is an important factor, and will also be addressed by the scheduled proposal to improve the EU food supply chain. Additional reflection is needed on the role and effective functioning for agricultural producer organisations. Recognised producer organisations can be a useful tool to enable farmers to strengthen their bargaining position in the value chain and to cooperate to reduce costs and to improve their competitiveness to improve market reward. As producer organisations are particularly relevant for small farmers, it is important that they are organised so they offer opportunities for them', p. 18, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, The Future of Food and Farming, COM(2017) 713 final of 29 November 2017, https://ec.europa.eu/transparency/regdoc/rep/1/2017/EN/COM-2017-713-F1-EN-MAIN-PART-1.PDDF.

[16] See for example recital 10 of Regulation (EC) No 1184/2006: 'Producer organisations are the basic actors in the fruit and vegetables regime, the decentralised operation of which they ensure at their level. In the face of ever greater concentration of demand, the grouping of supply through these organisations continues to be an economic necessity in order to strengthen the position of producers in the market. Such grouping should be effected on a voluntary basis and prove its utility by the scope and efficiency of the services offered by producer organisations to their members'.

[17] On the effectiveness of POs, see the recent study by K.Van Herck, Assessing efficiencies generated by agricultural Producer Organizations, June 2014, Report for the European Commission, http://ec.europa.eu/competition/publications/agricultural_producers_organisations_en.pdf.

provisions (introduced in different regulations) relating to the responsibilities assigned to producer organisations with a view to achieving the objectives of the CAP and which are necessary in order for these objectives to be recognised.

As we will try to show in this study, translations of the primacy assigned to competition by the Commission can be detected in recent agricultural legislation. Conscious of this development of the CAP, the European Parliament has adopted an opposite position over the last years as evidenced by the adoption of the Omnibus Regulation (EU) No 2017/2393 of 17 December 2017.

1.2. Agriculture and competition: from Council Regulation No 26/62 to Regulation (EC) No 1234/2007

The pattern of application of the competition rules to the agricultural sector was established by the European legislator, on the basis of Article 42 of the Treaty, by Council Regulation No 26/62 of 4 April 1962. These provisions were incorporated, without substantial modification, in the successive Regulations[18]. At that time, the CAP was in its infancy and it was necessary to supervise agricultural associationism within market organisations.

1.2.1. The applicability of the competition rules to the agricultural sector

Council Regulation No 26/62, reversing the pattern of Article 42, asserts in Article 1 that the competition rules are applicable in principle (Articles 85 and 86, now 101 and 102 TFEU): these texts are applicable to all agreements and decisions relating to the production and marketing of agricultural products listed in Annex I to the Treaty.

1.2.2. Exceptions to the application of competition rules

Then in Article 2, it sets out three possible derogations from competition law. Article 101 TFEU does not apply in 3 cases:

- 'agreements which form an integral part of a national market organisation or are necessary for attainment of the objectives set out in Article 39 of the Treaty;
- or the agreements that are necessary for the achievement of the objectives set out in Article 39 of the Treaty;
- agreements, decisions and practices of farmers, farmers' associations, or associations of such associations belonging to a single Member State which concern the production or sale of agricultural products or the use of joint facilities for the storage, treatment or processing of agricultural products, and under which there is no obligation to charge identical prices, unless the Commission finds that competition is thereby excluded or that the objectives of Article 39 of the Treaty are jeopardised'.

Article 2(2) goes on to specify the role of the Commission: 'After consulting the Member States and hearing the undertakings or associations of undertakings concerned and any other natural or legal person that it considers appropriate, the Commission shall have sole power, subject to review by the Court of Justice, to determine, by decision which shall be published, which agreements, decisions and practices fulfil the conditions specified in paragraph 1'.

Recalling these 1962 provisions, identical to Article 176 of Regulation (EC) No 1234/2007, makes it possible to understand how, over time, the Commission (with the approval of the Court

[18] Regulation (EU) No 1308/2013 added Articles 206 to 210. On the 2013 reform, see C. Del Cont, A.Iannarelli, L.Bodiguel, EU Competition Framework: specific rules for the food chain in the new CAP, IP/B/AGRI/CEI/2011-097/E012/SC1 May 2012.

of Justice) sought to resize, to restrict, the scope of these exceptions to the prohibition of agreements, decisions and concerted practices[19].

The first hypothesis had only a residual importance since market organisations were gradually eliminated to make room for the common market organisation.

The second hypothesis (Article 2, 1st sentence) targets all agreements regardless of the products and whoever their protagonists are: it concerns the agreements between producers or between producers and their co-contractors (including with regard to prices) and the associative structures constituted either exclusively by farmers or by others sector operators[20]. The Commission and the Court have given a particularly restrictive interpretation of its scope.

The Commission and the Court have reversed the burden of proof onto operators. The benefit of the derogation presupposes that operators demonstrate that the agreement is the only way to achieve the objectives of the CAP and, on the other hand, that this agreement enables all the objectives laid down in Article 39 to be achieved[21].

The third hypothesis (Article 2, second sentence), and repeated in Article 176(1) second sentence of Regulation (EC) No 1234/2007, which is the result of a European Parliament amendment, deserves special attention[22]. As a first step, this hypothesis was not considered as an independent derogation but as a simple illustration of the 1st exception. A judgment by the Court of 12 December 1995 confirmed its independence[23]. At the same time, the scope of this exception has also been reduced in contempt of the letter of the law. Whereas the text provided that competition law did not apply to agreements between farmers 'unless the Commission finds that competition is thereby excluded or that the objectives of Article 39 of the Treaty are jeopardised' the Court has again reversed the burden of proof here. In order to benefit from the derogation, farmers must demonstrate that their agreement does not have the effect of excluding competition and does not jeopardise the objectives of the CAP[24][25]!

---

19 For a detailed study of these exceptions, see the report EU competition framework: specific rules for the food chain in the new CAP, C. Del Cont et A. Iannarelli, May 2012, in particular pp 11 to 23, http://www.europarl.europa.eu/thinktank/fr/document.html?reference=IPOL-AGRI_NT(2012)474541.

20 It is precisely with reference to this derogation that interbranch organisations cannot exercise an operative function on the market.

21 See the Judgment of 14 May 1997, Cases T-70/92 and T-71/92 and the Judgment of 14 December 1998 Case IV/35280 Sicasov. See also p. 14 of the above-mentioned report EU Competition Framework and the many references cited.

22 In the conclusions of 16 and 17 June 1975 on Cases 40 to 48, 50, 54 to 56, 111 and 113 to 114-73, Advocate General Mayras recalled: 'It was inserted at the request of the European Parliament and of the majority of the national delegations which wanted in this way to legalize cooperatives and groups of agricultural producers which exist in all the Member States and are considered with favour by the national legislative systems', https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:61973CC0040&rid=2.

23 paragraph 20:' The interpretation of the second sentence in the sense that it does not have an independent scope would be precisely contrary to the will of the legislator to the extent that the agreements which ought to be subject to a more flexible regime would have more stringent conditions applied to them, since they would have to fulfil the conditions set out in both the first sentence and the second sentence. Furthermore, it is difficult for the Commission to find that an agreement endangers the attainment of the objectives of Article 39 of the Treaty if, by virtue of the derogation in the first sentence, it is already established that such an agreement or decision is necessary to achieve these objectives', Combined Cases C-319/93, C-40/94 and C224/94.

24 For a critical analysis of the court's decision of 12 December 1995, see Cases C.319-93, 40-94 and 224-94, A. Iannarelli, Il regime della concorrenza nel settore agricolo tra mercato europeo e globalizzazione dell'economia, in Riv. dir. agr. 1997, I, 439. According to this derogation hypothesis, there is a presumption of compliance of the agreements and it would therefore be up to the Commission to prove the contrary. Also D. Cockborne, Les régles communautaires de concurrence applicables aux entreprises dans le domaine agricole in Rev. trim dr. europ, 1988, p.306, note 59.

25 At the initiative of the Commission, this questionable solution was subsequently introduced into Regulation (EU) No 1308/2013 in Article 209. It was on the happy initiative of the Parliament that a partial change subsequently took place. The Omnibus Regulation (EU) No 2017/2393 of 13 December 2017 thus amended Article 152 of Regulation (EU) No 1308/2013 on this point: it is now up to the Commission and the national competition authorities to prove the exclusion of competition or the endangerment of the objectives of the CAP, (see below).

The specific content of this derogation calls for some observations that are needed in order to better understand the central issue of this report.

In the first place, the text requires that only farmers, associations of farmers or associations of such associations participate in the agreement.

In order to benefit from the exception in Article 101, it is irrelevant whether farmers act directly or through first or second-level collective structures. In 1962, Community law did not yet include a specific provision for agricultural associationism; this is why the text set out very generic legal forms of associations. The term 'producer associations' was broadly defined and included both corporate and non-corporate contractual forms. Community law only required that only farmers be members of these collective structures. Thus, the derogation applied that the agreement should intervene between 100 agricultural producers taken individually, or between collective structures of which these 100 producers are members. It should be made clear on this point that the opposite solution would be totally illogical since the impact of the agreement on competition depends on the economic weight of farmers and not on their legal form[26].

Secondly, it should be emphasised that the provision basically targets the associative structures that exercise a normative function, namely that define rules in terms of production, marketing, storage, etc., rules that each farmer is obliged to respect in the exercise of their own activity. In other words, the text concerns associative structures which do not exercise a specific economic activity on the agricultural market, i.e. which act for the functioning of the market but not on the market.

This analysis is supported by the statement 'under which there is no obligation to charge identical prices': this targets exactly such cases in which the agreement concluded within the collective organisation forces each independent producer to apply an identical, determined price for the sale of their own production.

Thirdly, agreements that include the obligation to charge a fixed price or price fixing clause are excluded from the scope of the derogation. This exclusion deserves special attention and calls for two essential reflections.

First of all, if we compare the European position set since 1962 and confirmed in Article 209 of Regulation (EU) No 1308/2013, with the solution adopted in the North American Capper Volstead Act that has been in effect since 1922[27], it is clear that the solutions chosen are radically

[26] It is important to note that the solution adopted in the Endives case by Advocate General Wahl and then the Court diverges from this point (see below). It should be noted that North American law makes a similar analysis of the indifference of the legal form to the validity of such agreements. See District Court of Columbia in United States v. Maryland Cooperative Milk Pro. 145 F.Supp.151 /D.C.1956). In the opinion of Judge Holtzoff, it is recalled that, under US law, antitrust law does not apply to agreements between agricultural producers and between producers and their associations where no other operator participates in it: 'It seems immaterial whether a large group of farmers organizes a single organization or divides itself into several organizations. Their joint activity, whether in the form of a single association or two or more associations, is not an illegal combination in restraint of trade in the light of the provisions of the Clayton Act. Surely, the legality of the actions of a group of farmers should not depend on such a nebulous consideration as the question whether they found it convenient to organize a single large cooperative or two smaller groups. The effect of the joint action is the same in either event and should be tested by the same yardstick. The exemption should be construed as applicable to a group of farmers irrespective of whether they are joined into a single cooperative or into several cooperative associations acting jointly. Any other construction would result in partially defeating the intent of the Congress and frustrating the meaning of the Act. We were admonished centuries ago that, "The letter killeth but the spirit giveth light"'. The solution was repeated, and is now constant, in fundamental Decision Treasure Valley Potato Bargaining Association et al., plaintiffs-appellants, v. Ore-ida Foods, Inc.497 F.2d 203 (9th Cir. 1974), see the note published in 53 Tex. L.Rev.1975,840.

[27] Indeed, US law has had one exception to antitrust law since 1922, the Capper Volstead, which allows producers and their associations to concentrate their offer, including by practising common selling prices: 'persons engaged in the production of agricultural products as farmers, planters, ranchmen, dairymen, nut or fruit growers may act together in associations, corporate or otherwise, with or without capital stock, in collectively processing, preparing for market,

divergent. This divergence does not stem from a different conception of competition but from a different approach to interpretations of agricultural policy and competition policy.

The prohibition of price fixing clauses in Europe since 1962 can principally be explained by the fact that for a long time the CAP was characterised by strong public intervention in terms of prices. The prohibition of agricultural price agreements was conceived primarily as an instrument of defence of the CAP and not of competition: to prevent private initiatives by agricultural producers from jeopardising the Community's pricing policy. From this perspective, such a prohibition expressed and confirmed the primacy of the CAP centred on the pricing of agricultural products. Therefore, once direct interventionism on agricultural prices had been definitively abandoned, this prohibition became obsolete and unjustified; the principle of coherence should lead Europe to adopt the North American solution.

It must also be emphasised that the prohibition to use identical prices to benefit from the exception does not coincide with the prohibition of agreements, decisions and concerted practices under the normal system. Article 101 TFEU does not distinguish between direct price fixing and indirect fixing: these two hypotheses are considered by the case law as agreements due to their purpose such that the concrete effects of such agreements on competition do not need to be identified[28]. Conversely, the prohibition of Article 2 of Regulation No 26/62, now contained in Article 209 of Regulation (EU) No 1308/2013, refers only to the hypothesis of 'the obligation to charge a fixed price', or in other words the direct fixing of an identical price[29]. In competition law, the indication of a minimum price, even if not mandatory and indirect, constitutes a violation of Article 101 of the Treaty but does not amount to the fixing of an identical, determined price in the sense of agricultural legislation[30].

Next, still on the issue of price fixing, a clear distinction needs to be made between, on the one hand, associative structures that determine the rules producers must respect, the normative organisations, and on the other hand, associative structures that are companies and market the production of their members. This is the case of the cooperative societies that make up the vast majority of producer organisations. The member producers entrust their production to them so that the collective structure sells it on the market, with or without processing[31]. These cooperative societies, and in general the producer organisations to which the members transfer the ownership of their production for sale, do not fall within the scope of the prohibition on setting a specific price within the meaning of the current Article 209 of Regulation (EU) No 1308/2013 and previously of Regulation No 26/62 and Regulation (EC) No 1234/2007. The collective structure operates on the market as an

handling, and marketing in interstate and foreign commerce, such products of persons so engaged. Such associations may have marketing agencies in common; and such associations and their members may make the necessary contracts and agreements to effect such purposes', see Carstensen, Agricultural Cooperatives and the Law: Obsolete Statutes in a Dynamic Economy , in South Dakota Law Review p. 465, 2013; American Bar Association, Federal Statutory Exemptions from Antitrust Law, 2007 in particular. p. 103; C. Del Cont, 'Les producteurs agricoles face au marché, Contrats, concurrence et agriculture dans le règlement (UE) n° 1308/2013', Revue de Droit rural Vol. 436, Oct. 2015, case 16. See also Chapter 2 below and references cited.

[28] In reality, the distinction between restriction due to purpose and restriction due to effects has always been the subject of discussion; in a judgment of 11 September 2014, Case C-67/13, the Court recalled the principle of strict interpretation of this type of competition restriction. On the notion of agreements due to their purpose, see Droit européen de la concurrence, ententes et abus de domination, C. Prieto and D. Bosco, published by Bruylant, in particular pp. 517 to 563.

[29] See p. 38 and following below.

[30] This is not the Court's interpretation in the Endives case, see below p. 38 and following.

[31] For a comparative dimension on the transfer of ownership of products to producer organisations see VAN CANEGEM, TAYLOR, CLEARY and MARSHALL, Collective Bargaining in the Agricultural Sector, University of Sidney Law School research paper 18/20, 04/2018.

independent company and seeks to collect the highest possible price for its members[32]. In other words, it is important to distinguish between the collective structures composed of agricultural producers entrusted with the production of farmers in order to concentrate supply and marketing, and the collective structures in which the members remain owners of their production[33].This distinction is recognised by European antitrust authorities such as the French Competition Authority[34] or the UK Office of Fair Trading[35].

Thus for the French Authority, summarising the position of all the European authorities, 'there are two types of structure enabling the concentration of supply of producers, depending on whether the producer transfers the ownership of their production to the structure or not. In case of transfer of ownership, the producers deliver this production to the organisation, such as an agricultural cooperative. As members of the PO, they participate in the determination of a mechanism for sharing revenue from the sale of all production. However, there is no commercial negotiation between the producer and the PO, and even less so between the producer and entities downstream. It is a simple mechanism of concentration of supply, in which the different producers behave as if they constitute a single company'[36]. In the same vein, the Swedish Competition Act of 2008 states that the prohibition on setting identical prices in agreements between agricultural producers and their associations only applies to cases in which 'selling prices are directly or indirectly fixed for goods when the sale takes place directly between the member and a third party'[37].

In conclusion, the prohibition of price fixing, charging an identical price, only concerns agreements concluded between agricultural producers, including within a collective structure, which coordinate their selling price while remaining the owner of their production and acting on the market as independent producers.

Despite this analysis, common to practice and the competition authorities, recent agricultural legislation has introduced confusing provisions (see below) extending the scope of competition within the CAP, weakening the traditional role of cooperatives and producer organisations[38].

---

[32] It is considered that what characterises this type of cooperatives 'does not maximize. Rather its objective is to maximize the return to its farmer-members'. See Carnes, Haynes and King, Farmer cooperatives and competition: Who wins, who loses and why, Monash Business School, Discussion paper 51/15 of 13 October 2015.

[33] Legal literature and practice have on many occasions highlighted this distinction between cooperatives, see for example the OECD study, Competition and Regulation in Agriculture: Monopsony Buying and Joint Selling DAF/COMP(2005)44, p. 187.

[34] See opinion No 09-A-48 of 2 October 2009 relative to the operation of the dairy sector, paragraph 118: 'This is therefore a simple mechanism for concentration of supply, in which the different producers behave as if they were a single company'. An identical analysis can be found in other Authority opinions on transfer-of-ownership producer organisations, see Decision No. 12-D-08 on the Endives case, paragraph 589; see also the thematic study: Agriculture et concurrence, in particular p. 109 in Rapport annuel de l'Autorité de la Concurrence, 2012, http://www.autoritedelaconcurrence.fr/user/standard.php?lang=fr&id_rub=572.

[35] The OFT, in its document How competition law applies to co-operation between farming businesses: Frequently asked questions, after recalling that 'Crucially, the agreement must not involve an obligation on the farmers to charge identical prices for their products' states that 'Arrangements whereby farmers agree to sell through a co-operative and take whatever price the co-operative realizes in the market should, however, be acceptable'.

[36] This Competition Authority analysis repeated and validated in the OECD report Competition Issues in the Food Chain Industry, 2013, p. 131, https://www.oecd.org/daf/competition/CompetitionIssuesintheFoodChainIndustry.pdf.

[37] In English, http://www.konkurrensverket.se/globalassets/english/competition/the-swedish-competition-act.pdf.

[38] In this respect, it suffices to read the Resolution of the Heads of the European Competition Authorities of 21 December 2012, in particular on the reform of the CAP; it emphasises strongly that 'Through the promotion and creation of cooperatives and other efficiency enhancing forms of cooperation among producers, farmers can become more competitive by reducing their costs and reinforcing their bargaining position in the chain through larger scales and tailored placement on the market. In those situations where consolidation has not taken place yet, such forms of cooperation are not only allowed but encouraged by competition authorities'. In addition, in Cases C-399/93 Oude Luttikhuis T-70/92 and T-71/92 Florimex and VGB v Commission, the Court of Justice recalled that the institutional activities of cooperatives do not contravene competition law: if such was the case, they could not exist!
Referring specifically to the European experience of Article 2 of Regulation No 26 of 1962, the OECD document, Competition and Regulation in Agriculture: Monopsony Buying and Joint Selling 2004, p. 189 appropriately pointed out that: 'Commercialisation agreements may raise some concern about possible price-fixing activity. However, arrangements whereby farmers selling through a co-operative receive proportionally the same realised price for

1.3. Producer organisations (POs) and the CAP: from Regulation (EC) No 26/62 to Regulation (EU) No 1308/2013

In order to achieve the objectives of Article 39 of the Treaty, implementing texts for the CAP have been adopted in addition to the regulations on the application of the competition rules to the agricultural sector. These texts, establishing the market organisations, are also intended to determine the responsibilities, the legal conditions of recognition, the mandatory statutory clauses and the legal form of producer organisations.

In order to fully understand what is at stake in these provisions, the relevant and premonitory observations of Advocate General Gulmann (above) arguing that the implementing texts of the CAP are by definition outside the scope of the competition rules precisely because of the principle of primacy of the CAP must be borne in mind. Thus to apprehend these rules firstly through competition law and then to analyse them as derogations from Article 101 TFEU constitutes an error of analysis and reasoning.

1.3.1. Fruit and vegetable producer organisations and the CAP

From the 1960s onwards Community agricultural legislation was mainly concerned with producer organisations in the fruit and vegetables sector. In this sector, in fact, the highly perishable nature of products, the uncertainties weighing on production and the instability of prices on the market, increase the contractual weakness of producers. It was therefore necessary to develop associative structures giving producers real bargaining power in their relations with the downstream segments of the sector. With Regulation (EEC) No 1035/72 of 18 May 1972[39] then Regulation (EC) No 2200/96, as amended by Regulation (EC) No 1184/2006, Regulation (EC) No 1234/2007, and Regulation (EC) No 361/2008, European law has built a rigorous and consistent model of producer organisations in the fruit and vegetable sector.

Under this model, member producers are required to pass on the entire production to the organisation for sale on the market. This organisational model has emerged as the most effective way to defend the interests of producers but also the most difficult to implement because it assumes that the organisation has sufficient financial capacity to carry out this task[40]. It is precisely for this reason that the texts require that the collective structure be a legal entity endowed with the financial and material means required for the exercise of its activity and the pursuit of one or more of the following objectives:

- ensuring that production is planned and adjusted to demand in terms of quality and quantity;
- ensuring concentration of supply and the placing on the market of the products produced by its members;
- optimising production costs and stabilising producer prices.

The members are required to sell all of their production through the collective structure which must concentrate the offer and sell it on the market.

---

their products cannot be considered as cartel-like behaviour. If it were otherwise, it would probably be impossible for agricultural cooperative marketing arrangements to benefit from the exemption laid down in Article 2(1) of Regulation No 26 or to be found compatible with Article 81 EC'.

39 Regulation on the common organisation of the market in fruit and vegetables.

40 It should be noted that Regulation (EC) No 2200/96 of 28 October 1996 states, among the conditions for recognition of POs, for the first time, that they not be in a dominant market position. This condition, put forward once again by the Commission, was abolished with the adoption of Regulation (EU) No 1308/2013 following an amendment by the European Parliament.

The text states: 'The placing on the market referred to in the first subparagraph shall be carried out by the producer organization, ... Placing on the market shall include among others the decision on the product to be sold, the way of selling and unless the sale is by means of auction, the negotiation of its quantity and price'[41]. In other words, POs acting as a single company can legitimately negotiate the selling price with third-party buyers[42].

[41] Originally, this was Article 26(1) subparagraphs 2 and 3 of Regulation (EU) No 543/2011 (amended by Regulation (EU) No 499/2014). Now it is Article 11 of (EU) No 891/2017; Commission Delegated Regulation integrating Regulation (EU) No 1308/2013.

[42] The conditions of concentration of the offer mentioned in the text have been endorsed by court of law concerning the sale to third parties of the members' production by the PO acting in its own name. See the Court's decision of 30 September 2009, Case T432/07, paragraph 54 which states that: 'the concept of sale of production within the meaning of Article 11(1) subparagraph c)(3) of Regulation (EC) No 2200/96 is defined as the agreement on the item and the price. Therefore, the producer organisation is responsible for controlling the conditions of sale and in particular for fixing the selling price of the production...'. This is why it was held that situations where 'the sale of the production is not to be carried out in the name of the producer organisation' and where 'the definitive selling price is not fixed by the producer organisations, but by the producers themselves' were not in line with the regulatory framework.

1.3.2. Other producer organisations and the CAP

For other productions, Community legislation has been much less specific and detailed. With Regulation (EEC) No 1360/78 of 19 June 1978, replaced by Regulation (EC) No 952/97 of 20 May 1997, the Community legislature intended to promote and encourage the formation of producer organisations in sectors other than fruit and vegetables but only in certain Member States. Subsequently, through Regulation (EC) No 1257/1999 of 17 May 1999 repealing Regulation (EC) No 952/97, the question of producer organisations came under the jurisdiction of the Member States until 2007.

In view of the difficulties encountered in developing agricultural associations, Community law, through Regulation (EC) No 952/97, only applied to organisations exercising exclusively normative functions concerning the production and marketing of products[43]. However, Member States still had the option of introducing into their national legislation supply and marketing concentration structures similar to the organisations in the fruit and vegetable sector. The Regulation laid down the conditions under which such organisations could market the products of their members[44].

Subsequently, Regulation (EC) No 1234/2007 of 22 October 2007 establishing the common market organisation[45] (Regulation in which the provisions of Regulation (EC) No 361/2008 of 14 April 2008 and Regulation (EC) No 261/2012 of 14 March 2012 were progressively integrated until the adoption of Regulation (EU) No 1308/2013[46]) instituted a new legislative framework for producer organisations and interbranch organisations. The text integrated the solutions previously adopted for fruit and vegetable organisations and gave the Member States, with a few exceptions, the task of defining the rules governing producer organisations.

Two points in this legislative framework must be emphasised and deserve special attention. Firstly, the pattern of application of the competition rules to agriculture was confirmed and strengthened. Secondly, for the first time, an implementing provision of the CAP allowed producer organisations to bargain collectively on the price of fresh milk with third-party purchasers, in derogation to the prohibition on setting identical prices under Article 176 of the same Regulation (repeating the prohibition initially introduced by Regulation (EEC) No 26/62 and then Regulation (EC) No 1184/2006).

---

[43] Article 6 of Regulation (EC) No 952/97 of 20 May 1997 imposed on organisations the obligation to define and impose 'common rules on production, in particular on product quality or use of organic practices, common rules for placing goods on the market and rules on production information, with particular regard to harvesting and availability' on their members. In addition, the text required that the articles of association 'at least require producers who are members of groups and recognized producer groups that are members of the association to place on the market all of the production for marketing of the products in respect of which they belong to the group or association, in accordance with the rules on supply and placing on the market drawn up and supervised by the group or by the association'.

[44] Conferring the option to set up such organisations on Member States, Article 6 provided that: 'Member States may authorize this obligation to be replaced by an obligation to have all the production for marketing by the group or by the association of the products in respect of which they are recognized placed on the market either in the name of the members of the group or of the association and on their behalf, or on their behalf but in the name of the group or the association, or in the name and on behalf of the group or the association'. Obviously only the last two forms of placing on the market allow an effective concentration of supply; in the first hypothesis, we are talking about a simple sales mandate given by each producer to the organisation.

[45] Providing for the common market organisation in the agricultural sector and specific provisions for certain products in this sector ('Single CMO' Regulation).

[46] Amending Council Regulation (EC) No 1234/2007 as regards contractual relations in the milk and milk products sector.

1.3.2.1. Regarding the link between the CAP and competition rules

The Regulation made a legal distinction between the rules for implementing the CAP outside the scope of the competition rules on the basis of Article 42 of the Treaty and the other rules of agricultural legislation.

Article 175 of the Regulation opening Part IV entitled 'Competition rules' reads as follows: 'Save as otherwise provided for in this Regulation, Articles 81 to 86 of the Treaty and implementation provisions thereof shall, subject to Articles 176 to 177 of this Regulation, apply to all agreements, decisions and practices referred to in Articles 81(1) and 82 of the Treaty which relate to the production of or trade in the products referred to in points (a) to (k) and Article 1 (...) of this Regulation'[47].

The text thus made a clear distinction between the rules contained in the Regulation and the texts to which Article 175 expressly refers. The rules contained in the Regulation are outside the scope of competition law precisely because they are the rules for implementing the CAP: from a technical point of view, they cannot be considered as exemptions from competition law, as Advocate General Wahl and the Court of Justice recalled in the Endives case, [48]it is a 'true exclusion'[49] from the scope of competition law.

1.3.2.2. Regarding the derogation from the prohibition of identical price fixing introduced for raw milk (derogation provided for by Regulation (EU) No 261/2012 of 14 March 2012 to Article 126(c) integrated into Regulation (EU) No 1308/2013 in Article 149)

In the face of the serious crisis experienced by the dairy industry at the end of quotas, producer organisations were authorised to negotiate milk delivery contracts for their members, including the determination of identical pricing (Article 126(c) of Regulation (EU) No 61/2012 and Article 149 of Regulation (EU) No 1308/2013). Thus member producers could avail themselves of contractual conditions, including pricing, negotiated by the PO in their dealings with dairies or processors.

This faculty of collective bargaining of the contractual terms including pricing obviously only involved POs to which members did not transfer ownership of their production. In other words, only non-commercial POs, that is to say those confined to negotiating framework contracts with dairies and industrialists; the framework contract being implemented subsequently by each producer individually, or by the PO acting as agent in the name and on behalf of each producer. Equally the faculty of collective bargaining was not granted to POs to which the member producers conferred ownership of their entire production. Indeed, in the latter case, the PO acting on the market as a single undertaking, collective bargaining would be meaningless.

It is also interesting to note in this regard that the French decree of application of this text[50] was built on the explicit distinction between these two categories of PO: that which 'becomes the owner of the production of its members, which it groups together for the purpose of marketing' and the one which 'markets its members' production, in the absence of transfer of ownership, within the framework of a mandate granted by each milk producer for the duration of their membership, enabling the producer organisation to collectively bargain the components of the milk sales contract with the buyer(s)'.

---

47 The same formula was used in Article 206 of Regulation (EU) No 1308/2013.
48 See the developments below in Chapter 2.
49 Ibid.
50 Decree No 2012-512 of 19 April 2012 relative to economic organisation in the cow's milk sector, codified in Article D.551-129 of the French Rural and Forestry Code. On this point, see J. Bizet Le rôle des organisations des producteurs dans la négociation du prix du lait, Senate Information Report, 27 July 2012, p. 20.

However, although this legislative framework is clear and unambiguous, from Regulation (EU) No 261/2012, the text of Article 126(c), setting quantitative limits for dairy POs, applied without distinction to both POs without transfer of ownership, that is to say the normative PO or bargaining cooperatives and POs with transfer of ownership, namely, commercial POs or marketing cooperatives. This solution was then incorporated into Regulation (EU) No 1308/2013 in Articles 149 and 169, 170, 171 and in the recent Omnibus Regulation (EU) No 2393/2017 in Article 152.

This conflation between the two categories of PO seems to us not only erroneous but also dangerous. In fact, this solution could lead to a reduction in the scope of collective commercial organisations such as cooperatives defined by agricultural law by imposing the same intervention limits on them as on normative producer organisations.

1.4. Producer organisations and competition law in Regulation (EU) No 1308/2013 of 13 December 2013

The legislative framework studied previously was subject to significant changes on the occasion of the adoption of Regulation (EU) No 1308/2013 of 13 December 2013. The legislative process highlighted significant differences in the assessment of the relationship between the CAP and competition within the European institutions, divergences that were confirmed by the French Competition Authority's Decision of 12 March 2012 in reference to the Endives case[51].

As far as the subject of our study is concerned, the text modified the provisions relating to producer organisations (1.4.1), as well as the provisions on the competition rules previously set out in Part IV of Regulation (EC) No 1234/2007 (1.4.2).

1.4.1. Changes relating to producer organisations

These new rules concern on the one hand the rules of recognition (1.4.1.1) and on the other, the responsibilities of the professional organisations (1.4.1.2).

1.4.1.1. Concerning the conditions of recognition of professional organisations

Chapter III 'Producer organisations and associations and interbranch organisations' made a distinction between POs that Member States can recognise on request and those they must recognise at the request of organisations.

Article 152 gives POs the freedom to choose the objective or objectives they intend to pursue among those set out in paragraph 1 of the text. These proposed objectives are identical to those already defined by the previous legislation for the fruit and vegetables sector and then for the dairy sector. These objectives are required in accordance with recital 131 of the same Regulation such that 'Producer organisations and their associations can play useful roles in concentrating supply, in improving the marketing, planning and adjusting of production to demand, optimising production costs and stabilising producer prices, ..., thereby contributing to strengthening the position of producers in the food chain'.

Material and technical assistance objectives were added to these objectives to improve the functioning and competitiveness of the activity of the member producers and ultimately of the entire food industry. The legislator also allowed POs to exercise the functions of concentration of supply and placing on the market (option that existed previously for fruit and vegetable POs and replicated in Article 160 of the Regulation).

[51] Decision of the Competition Authority (ADLC) 12-D-08 of 6 March 2012, Endive Production and Marketing Sector, http://www.autoritedelaconcurrence.fr/user/avisdec.php?numero=12D08.

In addition, Article 156 of the Regulation allowed Member States to recognise associations of producer organisations made up of recognised producer organisations with a view to exercising any PO activity or function of their choice.

Article 157, on the other hand, introduced the option of recognising interbranch organisations (IOs), consisting of representatives of economic activities related to production and related to at least one of the activities of the supply chain (processing, marketing, or distribution of products), and electing one or more stated objectives to the exclusion of any marketing activity for agricultural products.

1.4.1.2. Regarding contractual relations

Section 5 of Chapter III entitled 'Contract systems' allowed (Article 168) Member States to make the written form for transfer contracts between agricultural producers and their first purchasers compulsory, following the model laid down by Article 126(c) of Regulation (EU) No 261/2012.

In the dairy sector, no special conditions are required for the exercise of collective bargaining with the exception of compliance by POs with the quantitative limits defined by Article 149(2)(c).

However, the three new cases introduced in Articles 169, 170 and 171 required producer organisations to pursue at least one of the objectives expressly set out in the text, objectives which correspond to those defined for fruit and vegetable organisations (Article 160). At the same time, trading in the name of and on behalf of members was subject to a new and unique condition: 'provided that the pursuit of those objectives leads to the integration of activities and such integration is likely to generate significant efficiencies so that the activities of the producer organisation overall contribute to the fulfilment of the objectives of Article 39 TFEU' (Article 169(1), 170(1b), and 171(1)). The European legislator correspondingly gave jurisdiction to the national competition authorities 'to check the validity of the negotiations and to decide on the advisability of reopening or putting an end to the negotiations in order to prevent the exclusion of competition or the endangering of the objectives referred to in Article 39 TFEU'.

The lack of intrinsic clarity of these provisions and the uncertainties that they gave rise to among producers did not escape the Commission, which published guidelines on this subject in December 2015[52].

It should be emphasised that these three provisions, like the one on milk, refer to all forms of producer organisations without any distinction between them, 'with or without the transfer of ownership of the products by the producers to the PO' (Article 169(2), 170, and 171(2)). This led to confusion between organisations that engage in collective bargaining (bargaining cooperatives)[53], namely those that operate without the transfer of ownership of their members'

[52] See on this point Commission Communication (2015/C 431/01), Guidelines on the application of the specific rules set out in Articles 169, 170 and 171 of the CMO Regulation on the olive oil, beef and veal and arable crops sectors (OJEU C431/1, 22.12.2015).

[53] In the English version of Regulation (EU) No 621/2012, the term used is, quite rightly, 'negotiate on behalf of its farmer members' and recital 14, uses the expression 'to jointly negotiate contract terms, including price, for some or all of its members' production […]'. Similarly, recital 128 of Regulation (EU) No 1308/2013 refers to 'to collectively negotiate with a dairy contract terms, including price, for some or all of their members' raw milk production'. The text clearly explains that the organisation 'may negotiate on behalf of its farmer members, in respect of all of their joint production, contracts for delivery[…]'. This expression is replicated in Articles 169, 170 and 171. Although these provisions are clear and unambiguous, a DG Competition document of June 2016, An overview of European competition rules applying in the agricultural sector, intended to take stock of the application of the competition rules to agriculture, uses particularly ambiguous formulas. Firstly, as regards the legislative content of Article 149 of Regulation (EU) No 1308/2013 (identical to Articles 169, 170 and 171), it states that the text 'allows the joint supply and fixing of prices' by producer organisations. Next, with regard to Articles 169, 170 and 171, it wrongly submits that they 'allow producers of olive oil, beef and veal and arable crops to jointly sell/commercialise their products through Producer Organisations (POs)'! The same misunderstanding is found in the Commission's guidelines: according to this document, it is ultimately an 'implementation of the new rules regarding joint sales by producers of olive oil, beef and veal and arable crops'.

production, and the transfer-of-ownership organisations that genuinely concentrate supply by selling their members' output on the market (marketing cooperatives). Collective bargaining does not make sense for the second type of cooperative because, being the owner of the production, they act as companies on the market!

1.4.2. Changes relating to the competition rules

The main change concerns Part IV on the competition rules, and more specifically Chapter I entitled 'Rules applying to undertakings', Articles 206 to 210. These are three introductory provisions (Articles 206 to 208) and two substantive provisions (Articles 209 and 210) which determine the current derogations from the application of Article 101(1) for agreements and decisions concerning the production and marketing of agricultural products.

1.4.2.1. Amendments to Articles 206 to 208

In accordance with Article 42, Article 206(1) states that the competition rules, Articles 101 to 106 TFEU, apply to the production and marketing of agricultural products except as provided for in Articles 207 to 210 of the Regulation. The exception provided for in Article 206(1) covers not only Articles 209 and 210 determining the exceptions but also Articles 207 and 208 defining the concepts of 'relevant market' and 'dominant position'. These definitions are necessary in order to identify dominant market positions and possible abuses of this position. To a very large extent Regulation (EU) No 1308/2013 reproduced the definitions derived from the case-law of the Court of Justice. It is important to underline that the codification of these notions of 'relevant market' and 'dominant position', operated by their introduction into the Regulation, now makes them mandatory for the Commission and the Court of Justice.

1.4.2.2. Amendments to Article 209

Article 209 essentially reproduces Article 176 of Regulation (EC) No 1234/2007 previously studied, but includes some changes.

As is logical, the exception concerning practices, agreements and decisions within the framework of national market organisations has been abolished since they have given way to the common market organisation.

Article 209(1) focuses on the other two hypotheses already present in Regulation (EC) No 1234/2007 but introduces significant differences to previous legislation.

As regards the agreements and decisions of farmers, associations of farmers or associations of such associations, Article 209 repeats the previous text but adds an explicit reference to the recognition of such organisations within the meaning of Articles 152 and 156 of the Regulation.

This reference to recognised collective structures only, calls for clarification. Indeed, it could be incorrectly inferred from this provision that the recognition of organisations on the basis of CAP rules, Articles 152 and 156, is not sufficient to rule out their subjection to competition law, in complete contradiction with the principle of primacy of the CAP over the competition rules.

In fact, since, as stated in Article 206 (as previously in Article 176 of Regulation (EC) No 1234/2007), Articles 101 and 102 TFEU apply, with the exceptions provided for in Articles 207 to 210, 'Save as otherwise provided in this Regulation, and in accordance with Article 42 TFEU', the reference to recognised organisations is not of fundamental importance here and has only

a residual effect[54]. Insofar as they comply with the rules of European law governing them, Articles 152 et seq. of the Regulation, activities carried out by recognised organisations are by definition outside the scope of competition law[55]. In other words, Article 209 applies to recognised organisations if, and only if, their actions and conduct are not provided for, or they exceed, the provisions of the CAP, in this case Regulation (EU) No 1308/2013. It should also be emphasised that this reference to recognised organisations could however prove useful if, as is now the case in Regulation (EU) No 1308/2013, they are not exclusively composed of agricultural producers (as long as non-producers remain in the minority within the organisation).

Next, Article 209(2) contains another change from the previous legislation. Article 176(2) of Regulation (EC) No 1234/2007 made it possible to subject agreements to the prior opinion of the Commission, which had exclusive power, subject to review by the Court of Justice, to assess the compliance of the agreements with the conditions required by the text. However, Article 209(2) expressly provides that 'Agreements, decisions and concerted practices which fulfil the conditions referred to in paragraph 1 of this Article shall not be prohibited, no prior decision to that effect being required'; prior agreement from (or notification of) the competition authority is no longer required. This text bears the mark of an alignment of European agricultural law with European competition law, and particularly with Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the competition rules provided for in Articles 81 and 82 of the EC Treaty, which abolished advance notifications allowing for negative clearance[56].

Finally, the same paragraph codified the restrictive and at least questionable solution of the Court of Justice that 'the burden of proving an infringement of Article 101(1) TFEU shall rest on the party or the authority alleging the infringement' and that the 'party claiming the benefit of the exemptions provided in paragraph 1 of this Article shall bear the burden of proving that the conditions of that paragraph are fulfilled'. In so doing, the legislature has emptied the derogation in favour of producer organisations, which must now bear a double legal risk, of its substance: legal uncertainty in the absence of prior notice from the Commission and the risk of proof of compliance with the conditions of Article 209 in order to benefit from exemptions[57].

This legislative framework was modified in 2017 by the Omnibus Regulation (EU) No 2017/2093 which reinforced contractualisation and the role of producer organisations in collective bargaining of transfer contracts with the first buyers in the downstream chain.

The purpose of the developments in this report is, first of all, to study the legal framework for the exclusion and application of the competition rules in the common market organisation resulting from the Omnibus Regulation. Secondly, we will analyse the legislative proposals on the subject formulated by the Commission for the CAP reform for 2020 and the proposal for a directive of 12 April 2018 on unfair commercial practices in the food chain. These proposals will also be studied in the light of objectives for strengthening the position of farmers in the agri-food sector, securing the practices and collective actions of producer organisations and

[54] To retain this reference to recognition as being substantial would be tantamount to deleting the distinction that the European legislator has made between recognised and unrecognised organisations.

[55] Speaking of recognised organisations under Article 122 of Regulation (EC) No 1234/2007, just before the adoption of Regulation (EU) No 1308/2013, the lawyer Van Der Sangen considered that 'EU competition rules might not apply to a particular cooperative recognised according to Article 122 of CMO Regulation where exceptions stated in Article 176 of CMO Regulation are met', Support for Farmers' Cooperatives EU synthesis and comparative analysis Legal Aspects, 2012, Report for the European Commission, https://ec.europa.eu/agriculture/sites/agriculture/files/external-studies/2012/support-farmers-coop/fulltext_en.pdf

[56] Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, Official Journal L 001 of 04/01/2003, p. 1 to 25.

[57] The use of the term exemption is surprising in that Article 209 is entitled 'Exceptions for the objectives of the CAP and farmers and their associations'. By substituting the term exemption for exception, the nature of the measure is changed, the principle/exception logic is reversed, considering that the principle is the application of Article 101 TFEU; it therefore makes sense to place the burden of proof on the plaintiff. This provision reflects the primacy of the logic of competition over the CAP.

consolidating the primacy of the CAP over the competition rules. Lastly, we will make recommendations and proposals for reforming the current legal framework in order to achieve these objectives.

2. COMMON AGRICULTURAL POLICY AND COMPETITION LAW: FROM REGULATION (EU) NO 1308/2013 TO OMNIBUS REGULATION (EU) NO 2393/2017

MAIN CONCLUSIONS

- In the Endives judgment of 14 November 2017, the Court of Justice of the European Union confirmed the primacy of the CAP over the competition rules: the responsibilities and objectives of the organisations defined by the CAP are necessarily exempt from the application of the competition rules and in particular Article 101 TFEU.
- Omnibus Regulation (EU) No 2017/2393 of 13 December 2017 amending Regulation CMO (EU) No 1308/2013 strengthened the role and responsibilities of producer organisations by extending to all sectors the possibility of collective bargaining, including on price, in the name and on behalf of member producers.
- The progress made in the Omnibus Regulation on the methods of collective action and concentration of supply of producer organisations and excluding the application of Article 101 TFEU to the responsibilities entrusted to them should be clarified and consolidated in order to counterbalance the growing purchasing power of the downstream chain and to ensure greater legal certainty.

The pattern of application of the competition rules to agriculture adopted by Regulation (EU) No 1308/2013 was strongly influenced by the Commission's guidelines tending to gradually weaken the principle of primacy of the CAP over the rules of competition. This approach by the Commission was not without ambiguity inasmuch as the compromise reached with Parliament led to the adoption of vague provisions with uncertain delimitations: Articles 169, 170 and 171 studied previously come to mind in particular. In this respect, it is particularly significant to note that the report by the Task Force, Enhancing the position of farmers in the supply chain[58], in November 2016, strongly denounced the lack of clarity and legal certainty of this pattern: 'Between them, agricultural law and competition law do not present a clear picture of what agricultural producers are allowed to collectively do' (paragraph 141). More specifically, this report highlighted, on the one hand, the lack of certainty as to the validity of the responsibilities of producer organisations in terms of concentration of supply with regard to the competition rules (Article 101 TFEU). On the other hand, it pointed out the persistent divergence between European law and North American law regarding the determination of transfer prices by producers and their associations even though the historical justifications for the European prohibition of common prices have faded away[59].

At the same time, making a critical analysis of Regulation (EU) No 1308/2013, legal doctrine considered that: 'the challenges that Parliament will have to face are both immense and perilous: on the one hand it will need the strength of Hercules to resist and hinder the Commission's legal policy and, on the other, the ability to escape the fate of Sisyphus'[60].

In fact, the opportunity for a thorough reflection on the relationship between the CAP and competition came in a timely manner shortly after the adoption of Regulation (EU) No

[58] Report cited above, see in particular on this point paragraphs 141, 146, 147.
[59] See introduction above.
[60] A. Iannarelli, Profili giuridici del sistema agro-alimentare e agro-industriale Soggetti e concorrenza, Caccuci editore, Bari 2016, p.260.

1308/2013 and the abovementioned Commission Communication on the application of the specific rules set out in Articles 169, 170 and 171.

Firstly, the intensification of agricultural crises and the ever-weaker position of farmers in the agri-food sector, have made it possible to shed a very bright light on the need to make POs and cooperatives genuine actors in the defence of producers, and therefore the need to give concrete content, i.e. real effectiveness, to the principle of primacy of the CAP over competition rules.

The Endives case and its legal developments then paved the way for a renewed legal (and not just economic) analysis of the relationship between agriculture and competition. The Endives case originated in France, during the discussion process for Regulation (EU) No 1308/2013, with the Competition Authority Decision of 6 March 2012. The case was then the subject of a judgment by the Paris Court of Appeal of 14 May 2014, a judgment of the Court of Cassation with reference for a preliminary ruling that led to the judgment of the Court of Justice of 14 November 2017[61]. The interpretative, hermeneutic conclusions reached by Advocate General Wahl in his April 2017 conclusions and the Court of Justice in November 2017 are essential for understanding the content and scope of the innovations introduced by the Omnibus Regulation (EU) No 2017/2393.

This case, and its various court judgments, which greatly influenced the legislative process then under development of the Omnibus Regulation (EU) No 2393/2017, highlighted a dividing line between the Commission's approach and that of the European Parliament.

As we will try to show, certain interpretations retained by the Advocate General and the Court have reinforced the European Parliament's desire to strengthen the primacy of the CAP and the role of POs. The Commission (which we note is directly involved in the litigation)[62], sought to introduce into the text provisions likely to resize and restrict the scope of these interpretations.

Also, the legislative content of the current Regulation (EU) No 1308/2013 resulting from the adoption of the Omnibus Regulation, is far from being fully consistent. On the contrary, it reflects the divergence of approaches between Parliament and the Commission.

The purpose of this chapter will be to analyse the issues and contributions of the Endives case (2.1), and then to study the new pattern of application of the rules of competition to agriculture resulting from the Omnibus Regulation (2.2).

[61] Decision of the Competition Authority (ADLC) 12-D-08 of 6 March 2012, Endive Production and Marketing Sector, http://www.autoritedelaconcurrence.fr/user/avisdec.php?numero=12D08; Judgment of 15 May 2014, Court of Appeal of Paris, Pole 5 - Chamber 5-7, http://www.autoritedelaconcurrence.fr/doc/ca_12d08.pdf; Judgment No 1056 of 8 December 2015, Commercial Chamber, http://www.autoritedelaconcurrence.fr/doc/cass_endives_12d08.pdf; Opinion of Advocate General N.Wahl in Case C-671/15, 6 April 2017, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62015CC0671; Judgment of the Court of Justice in Case C-671/15 of 14 November 2017, http://curia.europa.eu/juris/liste.jsf?language=en&num=C-671/15.

[62] The Commission intervened before the Court of Cassation and a careful reading of the judgment makes it possible to affirm that it is precisely the conclusions of the Commission that led the French Court of Cassation to refer the preliminary question to the Court of Justice in order to clarify its proposed interpretation of the relationship between the CAP and competition. See C. Del Cont, «Affaire Endives» suite et bientôt fin : la Cour de cassation saisit la Cour de Justice de l'Union européenne, Réflexions sur l'arrêt du 8 décembre 2015, in Rivista di diritto agrario 2016/2 ; L'arrêt de la Cour d'appel de Paris du 14 mai 2014, «l'affaire endives»: quels enseignements pour l'avenir de la relation spéciale entre agriculture et concurrence ? Rivista di diritto agrario 2015/2.

2.1. The Endives case

In this case, a number of POs, APOs and interbranch organisations in the endive sector had implemented concertation measures on quantities and prices with a view to stabilising them. These measures included the exchange of information on formation and changes in price and the dissemination of minimum selling price lists[63][64].

2.1.1. The French Competition Authority considered that these measures constituted a general agreement on prices and not, as the parties argued, an implementation of the legal responsibilities conferred on professional organisations within the general framework of the CAP and regulations on the organisation of the market. It examined the lawfulness of operators' practices under the competition rules, and considered that they could not fall within the scope of the exceptions specific to the agricultural sector.

On 6 March 2012, it imposed a fine of EUR 3.6 million for a complex and continuous agreement on the French endive market from 1995 to 2010 on the basis of Articles L420-1 and 101 TFEU.

2.1.2. The Paris Court of Appeal came to a completely different conclusion. In its judgment of 15 May 2014, varying the Competition Authority's decision in its entirety, it considered that the agreement grievance could not be retained. The reasoning of the Appeal Judges rests entirely on the recognition of the existence of an agricultural exception in competition and the assertion of the primacy of the objectives of the CAP.

The French Competition Authority lodged an appeal with the European Commission. The Commission argued with regard to the application of the competition rules to the agricultural sector, that the European legal system not only included 'general derogations', namely those contained in Articles 2 of Regulation No 26/62 and then Regulation (EU) No 1184/2006, Article 176 of Regulation (EC) No 1234/2007 and now in Article 209 of Regulation (EU) No 1308/2013-, but also 'specific derogations laid down in the various regulations on the CMO', especially those relating to the fruit and vegetable sector.

[63] The grievances are listed in paragraph 50 of the Authority's decision. For a detailed analysis of these grievances see C. Del Cont, «Affaire Endives» suite et bientôt fin : la Cour de cassation saisit la Cour de Justice de l'Union européenne, Réflexions sur l'arrêt du 8 décembre 2015, cited above; L'arrêt de la Cour d'appel de Paris du 14 mai 2014, «l'affaire endives»: quels enseignements pour l'avenir de la relation spéciale entre agriculture et concurrence?, cited above.

[64] Following the decision of the Court of Justice on 12 September 2018, the commercial chamber of the French Court of Cassation therefore handed down a judgment censuring the judgment of the Paris Court of Appeal of 15 May 2014. The case will therefore be retried by the differently constituted Paris Court of Appeal, which will have to apply the interpretation adopted by the Court of Justice. It is particularly interesting to note that all of the grounds raised by the Competition Authority have been rejected. The Court of Cassation censures the Authority's reasoning concerning the link between the CAP and competition. Taking up the reasoning followed by the Paris Court of Appeal, the Court of Cassation recalls the primacy of the Common Agricultural Policy over the other objectives of the Treaty in the field of competition, and the power of the EU legislature to exclude the application of the competition rules and not just derogations or justifications. Moreover, the Court confirms the interpretation of the pattern of application of the competition rules in agricultural matters: the Paris Court of Appeal did not reverse the principle/exceptions pattern by considering that the competition rules, and in particular Article 101 TFEU, may be applied to the production and marketing of agricultural products only to the extent that such application does not jeopardise the attainment of the objectives of the CAP. In short, once again, it confirms that in agricultural matters, competition is not an end in itself but an instrument, a means, at the service of achieving the Common Agricultural Policy objectives defined in Article 39.

2.1.3. In a judgment of 8 December 2015, the Court of Cassation stayed the proceedings and referred the matter to the Court of Justice of the European Union for a preliminary ruling. Noting that the Court of Justice had not yet ruled on the existence of 'specific derogations' in the legislation on POs in the fruit and vegetables sector and considering that 'the dispute poses a serious difficulty as regards the interpretation of Community regulations on the common market organisation in this sector, and the scope of the derogations 'specific' to the competition rules that they may contain in their provisions relating to POs and APOs, in particular with regard to the objective of regulating producer prices assigned to these organisations and the possibility for these bodies to set withdrawal prices', the High Court decided to seize the Court of Justice.

It asked the following two questions:
(1) Can agreements, decisions or practices of producer organisations, associations of producer organisations and professional organisations which could be classified as anti-competitive under Article 101 TFEU escape the prohibition laid down in said Article on the sole ground that they could be linked to the responsibilities assigned to those organisations under the [CMO], even if they are not covered by any of the general derogations provided for in turn by Article 2 of Regulation (EC) No 26 of 4 April 1962, Regulation (EC) No 1184/2006 of 24 July 2006, and Article 176 of Regulation (EC) No 1234/2007 of 22 October 2007?

(2) If so, must Article 11(1) of Regulation (EC) No 2200/1996, Article 3(1) of Regulation (EC) No 1182/2007 and the first paragraph of Article 122 of Regulation (EC) No 1234/2007, which include, among the objectives assigned to producer organisations and their associations, those of stabilising producer prices and adjusting production to demand, particularly in terms of quantity, be interpreted as meaning that practices whereby those organisations or their associations collectively fix minimum prices, concert on the quantities placed on the market or exchange strategic information escape the prohibition of anticompetitive agreements, decisions and practices in so far as they are aimed at achieving those objectives?

2.1.4. Opinion of the Advocate General

Before examining the arguments of the Court of Justice in its decision C671/15 of 14 November 2017, it is important to summarise the findings of Advocate General Wahl issued on 6 April 2017[65].

In his submissions, Advocate General Wahl articulated his analysis around three key points.

First of all, his reasoning begins with a general premise intended to highlight and clarify the Commission's interpretative doctrine on the relationship between agricultural legislation and the competition rules. The Advocate General clearly distances himself from the Commission's argument, which is the subject of the first question submitted to the European Court by the Court of Cassation. According to the Advocate General, the decisions and behaviour of producer organisations determined and authorised by agricultural legislation (CAP) cannot be qualified as derogations from competition law precisely because of the primacy of the CAP over competition law: 'rather than a derogation (or exemption, depending on the terminology used) from the application of competition law, it is more a case here of an exclusion from that application, arising from the need to carry out the responsibilities assigned to the key players in the CMOs'[66]. The practices 'followed in the context of a CMO are, ultimately, strictly

[65] For a thorough analysis of these findings, see A. Iannarelli, Il caso «indivia» alla Corte di giustizia. Atto primo: le conclusioni dell'avv. generale tra diritto regolativo europeo e diritto privato comune, in Riv. dir. agr., 2017, I, p. 366.

[66] See paragraph 51 conclusions. The Advocate General also clarified the terminology used: 'This terminological precision is not unimportant. On the contrary, it has significant implications both for the methods used to examine measures taken by players in the CMOs and for the burden of proving the potentially anticompetitive nature of those

necessary for the fulfilment of those responsibilities, the application of the rules on competition, and particularly those on anticompetitive agreements, must automatically be excluded'[67]. Contrary to the position defended by the Commission and the French Competition Authority, the conduct in question cannot therefore be regarded a priori as 'anticompetitive', for the simple reason that it does not unfold in an area that is subject to competition. In other words, the practices and decisions which fall within the responsibilities defined by the CAP, in this case the Fruit and Vegetables Regulations in force at the time of the disputed actions, necessarily escape the application of Article 101(1) TFEU prohibiting anticompetitive agreements, decisions and concerted practices; 'this is about drawing all the appropriate conclusions from the agricultural derogation provided for by the Treaties' (paragraph 88).

This affirmation contradicts the position supported by the Commission, not only in this case, but also with regard to the application of Articles 169, 170 and 171 of Regulation (EU) No 1308/2013.

Secondly, as regards the rules specific to professional organisations in the fruit and vegetable sector, the Advocate General pointed out that these texts refer exclusively to decisions 'adopted within a PO or APO which is in fact in charge of managing the production and marketing of its members' products', only such 'internal' practices are exempt from the application of competition law (paragraphs 101 and 102). However, practices that take place between POs, between APOs, within non-marketing entities or between POs/APOs and other types of actors are subject to competition law. Consequently, and without prejudging the applicability of the derogation of Article 176, now Article 209 of Regulation (EU) No 1308/2013, only the agreements, decisions and concerted practices of the POs and APOs necessary for performing the responsibilities entrusted to them and complying with the rules relating to the CMO concerned (paragraph 106) shall be exempt from the prohibition against agreements.

The analysis then focused on the central and most sensitive and delicate point in this case, the question of fixing a minimum selling price: namely whether the task of regulation and adjustment may result in the fixing, within a PO or APO and in concertation with its members, of minimum sale prices for the products covered by the CMO (paragraph 113).

It is recalled first of all that this question does not arise for all the collective structures actually responsible for marketing all or almost all of their members' production, as is the case for the POs and APOs recognised in the fruit and vegetable sector; the latter act as a single negotiator with downstream actors in the sector. Therefore, 'there is, by definition, no point in one of those entities fixing a minimum price which cannot be varied. Minimum price-fixing practices are only feasible in a context where the producers of the product concerned still have some power when it comes to negotiating the sale price for that product' (paragraphs 116 and 117), namely POs and APOs that do not have the responsibility of marketing their members' products.

However, external decisions taken between POs, between APOs, remain subject to competition law. In other words, exclusion from the application of Article 101 TFEU cannot be extended to concertation practices operating between different POs or APOs, or within unrecognised entities or groups (paragraph 120).

The same solution was adopted to determine the quantities to be produced and/or placed on the market, decided upon within a PO or within an APO. In an internal configuration, these

measures.' Paragraph 53 recalls 'that it has been clearly established that it is for the authority responsible for prosecuting anticompetitive behaviour by undertakings both to prove that the measures in question fall within the scope of the competition rules, and to demonstrate that they have effects which restrict competition'.

[67] Paragraph 51.

measures adopted within the framework of the European legislation for the exercise of their responsibilities (to regulate production for the purposes of stabilising prices) should escape the application of competition law. Conversely, external practices should be subject to Article 101(1) (paragraphs 134 and 135).

This solution stems, logically, from the interpretation made previously in the conclusion of responsibilities devolved to the collective structures.

2.1.5. The judgment of the Court of Justice of 14 November 2017

It essentially confirmed the solutions put forward by the Advocate General, recalling the need to respect the legal content of the CAP and not to deprive it of effectiveness for the sole reason that it could call into question certain postulates and rules of the common law of competition. The Court, in turn, and echoing the historical observations of Advocate General Gulmann in 1995 (see above), recalled that the European legislation implementing the CAP 'rather than being aimed at establishing derogations or justifications for prohibiting the practices referred to in Article 101(1) and Article 102 TFEU, seek to exclude from the scope of those provisions practices which, if they were to take effect in a sector other than that of the common agricultural policy, would come under those provisions' (paragraph 38). Still according to the Court, and in the light of the responsibilities and objectives assigned by the CAP to recognised producer organisations, 'the practices of those entities which are necessary in order to achieve one or more of those objectives must escape, inter alia, the prohibition of agreements, decisions and concerted practices laid down in Article 101(1) TFEU' (paragraph 44). If that were not the case 'POs and APOs [would be] deprived of the means to achieve the objectives assigned to them under the common market organisation in which they are involved [...] and, accordingly, unless the effectiveness of the regulations establishing a common organisation of the markets in the fruit and vegetables sector is to be called into question' (paragraph 44).

At the same time, the Court tried, if not to temper, then at least not to excite criticism of the Commission's doctrine that the CAP is simply a derogation from competition law and not a policy pursuing its own objectives and with a specific legislative framework. The Court agrees with the Commission that these texts should be interpreted strictly: according to the European High Court even the provisions contained in the implementing texts of the CAP should be interpreted restrictively and in compliance with the principle of proportionality. Thus the practices of recognised producer organisations should not 'go beyond what is strictly necessary in order to achieve one or more of the objectives assigned to the PO or APO at issue under the rules governing the common organisation of the market concerned' (paragraph 49).

In conclusion, the Advocate General and the Court of Justice formulated similar answers to the two questions put by the French Court of Cassation based on the primacy of the CAP over the competition rules:

- The agreements, decisions or practices of producer organisations, associations of producer organisations and professional organisations may, even if they are not covered by any of the general derogations provided for by the regulations in force (Article 2 of Council Regulations 26/62, 1184/2006, Article 176 of Regulation (EC) No 1234/2007), escape the prohibition on restrictive agreements laid down in Article 101(1) TFEU where it is established that that behaviour, first, is necessary or permitted for the accomplishment of the task assigned to the producer organisation, association of producer organisations or professional organisation in actual charge of marketing the products concerned, and, second, has been adopted in the context of and in accordance with the regulations on the common organisation of the markets concerned.

- Only agreements, decisions or practices internal to a single organisation or association are exempt from competition law; external agreements between several POs or APOs go beyond what is necessary for the performance of the tasks entrusted to them by the legislator and would therefore be subject to competition law.

2.2. The Omnibus Regulation

Ultimately, the Court of Justice, relying on the positive law in force prior to Regulation (EU) No 1308/2013, clearly and firmly recalled that the tasks and objectives assigned to POs and APOs by CAP legislation, in this case those of the fruit and vegetables sector, authorise these structures to adopt all the internal decisions necessary for their implementation; these decisions, precisely because of the principle of primacy of the CAP over the competition rules laid down by the Treaty (Article 42), are excluded from the application of Article 101(1). While the legislative provisions relating to the CAP are to be strictly interpreted, they are by definition exempt from any appreciation and reading through the lens of the law and the logic of competition.

This hermeneutic line drawn by the Court has had an impact on the legislative process for the revision of Regulation (EU) No 1308/2013 and has in a sense materialised in Regulation (EU) No 2017/2393 of 13 December 2017.

Looking more closely, the innovations introduced both in Article 152 on producer organisations (2.2.1) and in Article 209(2.2.2) on the exceptions to Articles 101 and 102, actually express a real (but precarious) compromise between the divergent positions of the Commission and the European Parliament.

It must be emphasised here that, as regards the right of POs and APOs to bargain collectively for and on behalf of their members, including regarding price fixing, introduced in 2013 in Articles 169, 170 and 171, the Commission had remained faithful to the paradigm of Article 101(3). According to the logic of Article 101(3), after economic assessment, the efficiency gains must compensate, counterbalance, the competition restrictions[68].

In these provisions, the benefit of the derogation is thus entirely based on a submission of the CAP objectives to the competitive logic and the demonstration of pro-competitive effects of these agreements. They are assessed in terms of the 'substantial efficiency gains test': the derogation granted to POs in the practice of collective bargaining is only permissible if the pursuit of the objectives of the CAP makes it possible to 'lead to significant efficiencies so that activities of the PO overall contribute to the fulfilment of the CAP objectives'. Far from recognising the primacy of the objectives of the CAP, these texts and the guidelines (see above) neutralise the agricultural specificity and the principle of favour granted to producer associations: the consideration of the contribution to achieving the CAP objectives is conditional on achieving substantial efficiency gains. In other words, the CAP and the derogations from Article 101 TFEU are 'correctives' to the inadequacies of free trade and competition rules. The reasoning is therefore totally contrary to Article 42 TFEU, which sees the exceptional application of the competition rules to agriculture as an instrument for achieving the objectives of Article 39.

[68] Article 101(3) provides: However, the provisions of paragraph 1 may be declared inapplicable to agreements 'which contribute to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which do not: (a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives, (b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question'. See on this point, Droit européen de la concurrence, Ententes et abus de position dominantes, C. Prieto and D. Bosco, p.521 and following.

2.2.1. Amendments to Article 152

The extension of collective bargaining, including on pricing for all sectors, is one of the main innovations of the Omnibus Regulation. Parliament wanted to go beyond the collective bargaining hypotheses of Articles 169, 170 and 171 and eliminate the uncertainties hanging over the producer organisations, as they run the risk of intervention by national antitrust authorities (see above).

This goal was achieved in the Omnibus Regulation but at the cost of substantial change to the general rules on producer organisations, Article 152 of Regulation (EU) No 1308/2013.

The new version of paragraph 1 of Article 152 radically modifies the original text mainly because its provisions for POs also apply to APOs (Article 152(1b)): 'For the purposes of this Article, references to producer organisations shall also include associations of producer organisations recognised under Article 156(1) if such associations meet the requirements set out in paragraph 1 of this Article'. Furthermore, paragraph 1(b), which originally limited itself to specifying that POs are constituted on the initiative of the producers, also conditions recognition for the exercise of at least one of the listed activities.

In the original version of Article 152, recognition was conditioned by the exercise of one or more 'specific aims' set forth in the text and freely chosen by producer organisations. However, in the new version of Article 152, the 'basis', the foundation, of recognition is constituted by the activities actually carried out by the organisations in favour of the whole agri-food chain, on the questionable model built on the old Articles 169, 170, 171. This is a contamination or confusion between the criterion of 'merit' of recognition traditionally based solely on the choice of objectives pursued, and the criterion introduced in 2013 for Articles 169, 170, 171 that have nevertheless been repealed, assessing the actions of producer organisations in the light of the economic efficiency and functioning of the entire agri-food sector.

Of the 8 activities listed in Article 152(1)(b), the first 7, although in a different order, are identical to those in former Article 169(1), 1st sentence letter (a). To these 7 activities, point viii of Article 152(1)(b) adds a new generic one: 'any other joint service activities pursuing one of the objectives listed in point (c) of this paragraph'.

Confirming the reversal between activities to be exercised – presented previously – and the statutory objectives, Article 152(1)(c) lists the purposes which producer organisations may choose for recognition: these coincide perfectly with those of the previous version of Article 152(1)(c).

The scope of the amendment to Article 152(1) can only be measured by reading the new paragraph 1(a) of Article 152.

The first sentence of the text identifies the activities that any recognised PO may exercise within the meaning of paragraph 1 in derogation of Article 101 TFEU: 'By way of derogation from Article 101(1) TFEU, a producer organisation recognised under paragraph 1 of this Article may plan production, optimise the production costs, place on the market and negotiate contracts for the supply of agricultural products, on behalf of its members for all or part of their total production'.

Article 152 then, brings in major innovations.

In the first place, the explicit reference to the derogation of Article 101 is not only singular but totally useless since we are dealing with a CAP provision. Such a reference can only strengthen the position advocated by the Commission and correlatively weaken the solution

adopted by the Court of Justice, following Advocate General Wahl, in the recent Endives case. This reference to Article 101 TFEU suggests that the principle in this area is the primacy of competition rules and that the tasks of POs are therefore only exceptions to the prohibition of agreements, decisions and concerted practices (thus taking up the position supported by the Commission in the Endives case in particular).

Secondly, the Article 152 derogation provides organisations with the possibility to 'plan production, optimise the production costs, place on the market and negotiate contracts for the supply of agricultural products, on behalf of its members for all or part of their total production'.

It is clear that this provision, paragraph 1(a), is paradoxical. On the one hand, it extends to all recognised POs and APOs, in all sectors, the possibility of collectively negotiating contracts, including in terms of prices, going beyond the now repealed Articles 169, 170 and 171[69]. On the other hand, the text subordinates all POs and APOs to these same conditions, including those whose object is to 'plan production, optimise the production costs, place on the market' and those whose object is 'to bargain collectively in the name and on behalf of their members'. In other words, the text reserves the same treatment for commercial producer organisations (marketing cooperatives) and normative producer organisations (bargaining cooperatives). Once again, it should be recalled that, under previous regulations and until Regulation (EU) No 1308/2013, these activities of planning production, optimising production costs and placing on the market were authorised unconditionally provided that they corresponded to the statutory purpose of the organisations. The Article 152 currently in force, as amended by Omnibus Regulation (EU) No 2017/2393, is therefore in contradiction with the Decision of the Court of Justice stating that the missions of the organisations defined by the CAP legislation are by definition exempt from competition law.

In other words, far from extending the scope of the POs, by referring to these activities the new Article 152 significantly restricts them[70],

The legislative solution adopted remains questionable and even erroneous. To the extent that the legislator considers it necessary for a PO to be recognised that it must indicate the purpose it intends to pursue among the activities mentioned in paragraph 1(b) points i, ii and iii of Article 152, it is surprising that the implementation of these missions by the POs is considered as a simple exception to Article 101, namely, falling under the principle of the application of the competition rules.

The conditions laid down in paragraph 1(a), second sentence, are in substance those of Articles 169, 170 and 171 relating to collective bargaining; it also includes the ambiguous reference - previously studied - to the producer organisations to which the ownership of the members' production is transferred, which by definition have no need to bargain collectively in the name and on behalf of their members!

Finally, the new paragraph 1(c) maintains the possibility of intervention by the national competition authorities or the European Commission concerning one or more of the activities referred to in paragraph 1(a) where they consider it necessary 'in order to prevent competition from being excluded' or if they consider 'that the objectives set out in Article 39 TFEU are jeopardised'[71].

---

[69] Remember that these texts set quantitative conditions.

[70] Even if the ambiguities of Articles 169, 170, 171 have been removed. In this regard, see the recent analysis by the French Competition Authority in the opinion on the agricultural sector of 4 May 2018, Notice 19-A-04, especially paragraph 26, http://www.autoritedelaconcurrence.fr/pdf/view/18a04.pdf.

[71] This intervention had already been provided for by Regulation (EU) No 1308/2013 to Articles 169, 170 and 171 repealed by the Omnibus Regulation.

Another fundamental innovation is located on line 4 of paragraph 1(b) of Article 152. It provides that: 'The decisions referred to in this paragraph (i.e. those of the national competition authorities or the Commission) earlier than the date of their notification to the undertakings concerned.' This provision echoes the logic expressed in recital 52 of the Omnibus Regulation in particularly clear terms: 'Until the adoption of the decision of the competition authority, the activities carried out by producer organisations should be considered legal.' This means that, in the presence of all the legal conditions required by Article 152, POs and APOs can carry out their missions with complete peace of mind. The decisions adopted by the national authorities or the Commission cannot have a retroactive effect and call into question the validity of the decisions and practices carried out before the notification of the competition authorities; the decisions of the authorities only have effect for the future[72]. The text thus creates a presumption of validity of the decisions of POs and APOs until the competition authority decides otherwise and demonstrates that competition is excluded or the objectives of the CAP are jeopardised. The Omnibus Regulation thus brings more legal certainty to professional organisations although the presumed presumption terms are not expressly written in the text.

2.2.2. Amendments to Article 209

Amendments have also been made in Part IV regarding the competition rules in Article 209 of the Regulation. As a second exception hypothesis, Article 209 contains a derogation from Article 101(1) TFEU for agreements, decisions and practices between farmers, associations of farmers and associations of such associations. This provision is also applicable to POs and APOs recognised under Articles 152 et seq., but only for activities not covered by the provisions of the CAP related to recognition (see above 5.2.1).

The text of this Article 209 remained more or less the same except for paragraph 2 in which the Omnibus Regulation introduced an important modification. While the 1st sentence repeats that 'Agreements, decisions and concerted practices which fulfil the conditions referred to in paragraph 1 are not prohibited and no prior decision to this end is required', the second sentence reintroduces the possibility for farmers' associations, or associations of such associations, or producer organisations recognised under Article 152 or Article 161 of this Regulation, or associations of producer organisations recognised under Article 156 of this Regulation, to request an opinion from the Commission on the compatibility of those agreements, decisions and concerted practices with the objectives set out in Article 39 TFEU[73].

This provision is unclear in its wording because it puts non-recognised associations and recognised associations on the same level on the basis of the CMO Regulation, therefore placing them outside the scope of Article 101 TFEU. It should be made clear that Article 209 of the CMO Regulation only applies to recognised organisations for agreements and decisions that are not part of their legal mandates authorised by the CAP.

This new provision certainly helps to ensure greater legal certainty for producer organisations and their associations as to the validity of their actions, but it may also cause some astonishment as it marks a return to the exclusive competence of the Commission (excluding the national

[72] The text states that: 'The national competition authority referred to in Article 5 of Regulation (EC) No 1/2003 may decide in individual cases that, for the future, one or more of the activities referred to in the first subparagraph of paragraph 1(a) are to be modified, discontinued or not take place at all if it considers that this is necessary in order to prevent competition from being excluded or if it considers that the objectives set out in Article 39 TFEU are jeopardised'.

[73] The text continues: 'The Commission shall deal with requests for opinions promptly and shall send the applicant its opinion within four months of receipt of a complete request. The Commission may, at its own initiative or at the request of a Member State, change the content of an opinion, in particular if the applicant has provided inaccurate information or misused the opinion'.

antitrust authorities). This exclusive competence, which derives from a philosophy that seeks to enhance and strengthen the role of the Commission, is, however, at odds with the Commission's own orientation, which is gradually aligning the treatment of agriculture with reference to competition with that of other sectors and drawing on national competition authorities.

In conclusion, it can be said that the primacy of the CAP over the competition rules has been reaffirmed by the recent case law of the Court of Justice and the Omnibus Regulation.

The extension of collective bargaining to all productions represents a remarkable step forward and a true legal translation into the market organisation rules of taking into account the asymmetry of economic power within the agri-food chain and the need to strengthen the role of collective organisations to achieve the objectives of Article 39 TFEU, including the objective of a decent income for producers. This abandonment of the 'price taboo' in collective bargaining should enable producer organisations to play their role fully as key players in the CAP and the regulation of agricultural trade relations within an agri-food chain where buyers, namely the industrial processors and large retailers, are still more concentrated. Far from contradicting the market oriented orientation of agricultural policy, these provisions bring agricultural legislation into line with this development: they tend to counterbalance the structural imbalance between primary agricultural producers and their buyers and thus establish conditions of competition with a view to achieving the objectives of the CAP. They must also address the challenges that are facing and will be faced by agriculture: food security, climate, environmental and social expectations of European consumers. Strengthening the position of farmers in the agri-food sector is likely to facilitate the maintenance and development of a plurality of farmers and agricultures, that are resilient and innovative in a context of open markets and increased economic, geopolitical and climatic uncertainties.

The progress introduced by the Omnibus Regulation should be clarified and consolidated.

For the sake of clarity, Article 152 should clearly distinguish the arrangements for concentration of supply between recognised producer organisations: only non-commercial organisations are authorised to bargain collectively in the name and on behalf of the farmer members of the organisation, as commercial organisations operate in the market as a single enterprise. The reference to transfer of ownership creates confusion between these two types of organisations.

Moreover, in order to strengthen the position of farmers, to counterbalance their asymmetry of information and bargaining power, Article 209 of the Regulation on exceptions to Article 101 TFEU should not contain any prohibition on price fixing clauses. The price taboo should also be dropped here, following the model of North American law, and the practising of common prices should be authorised ex-ante subject to ex-post control by the competition authorities. The French Competition Authority itself pointed out in the Endives case that the fixing of minimum prices had an insignificant impact on retail prices precisely because of the bargaining power of the buyers in the sector. In addition, many studies[74] have shown that such a strengthening of the bargaining power of primary producers does not lead to an increase in retail prices for the final consumer. On the contrary, it allows for a different distribution of margins and a better sharing of value between the various actors in the chain, better value sharing being one of the objectives of the Omnibus Regulation set out in Article 172(a). The strengthening of bargaining power is also a guarantee of a better balance between the different stakeholders making up interbranch organisations.

[74] See the aforementioned study of the American Antitrust Association and references cited.

Moreover, prohibition is not only the expression of the pre-eminence of the common law competition rules but also of a competition model based on a conception of pricing that excludes positive or negative externalities [75]and defines consumer well-being, first and foremost, by obtaining the lowest prices. The complete abandonment of the horizontal price taboo for primary agricultural production is likely to contribute to achieving the CAP objectives and bring substantive law into line with the principle of primacy of the CAP.

Strengthening the position of farmers in the agri-food chain can only be envisaged through the - useful and necessary - fight against unfair trading practices. Improving the position of farmers requires clarification and consolidation of the progress made by the Omnibus Regulation.

[75] The low income of farmers, the disappearance of many farmers, etc. can be regarded as negative externalities; the achievement of the CAP objectives, maintenance of a plural agriculture, environmental and social improvement of the conditions of production can, for example, be analysed as positive externalities. This is how the price in fair trade is understood, see C. Del Cont, commerce équitable et développement durable, Rivista di diritto alimentare, 2010/3, and French Competition Authority Opinion 06-A-07 of 22 March 2006 on Fair Trade, in particular paragraphs 58, 92, 95, 97.

3. LEGISLATIVE PROPOSALS FOR THE POST-2020 CAP

MAIN CONCLUSIONS

- The European Commission's legislative proposal for the CAP reform by 2020 contains no provisions on the conditions for the application of competition rules to agriculture or the concentration of supply (COM (2018) 394);
- The asymmetry of bargaining power within the agri-food chain is apprehended exclusively in a micro-legal way through the prism of unfair commercial practices between farmers and their buyers in the proposal for a directive (COM (2018) 173);
- Studying the legislative proposals makes it possible to highlight a clear divergence of approach between the Commission and Parliament as regards the reinforcement of the position of farmers in the agri-food sector and the legal means to be implemented.

On 29 November 2017, a few days after the Endives judgment by the Court of Justice[76], the European Commission presented the 'The Future of Food and Farming' Communication[77], thus initiating the legislative process of the next post-2020 CAP reform.

Drawing lessons from the public consultation 'Modernising and simplifying the CAP' conducted at the beginning of 2017, the Commission sets out the main challenges that European agriculture will face in the future and that it will have to respond to: environmental challenges and climate change, food security, and the challenge of simplifying the CAP[78].

It highlights the contribution of the agricultural sector to the priorities identified by President Junker and the Sustainable Development Goals (SDGs); it also indicates the priorities of the forthcoming reform. The Commission proposes a new CAP based on 'A new delivery model and a simpler CAP'[79]. This new CAP should, according to the Commission, better reflect the diversity of agriculture in the European Union and reduce the administrative burden on CAP beneficiaries. The Union should set the basic parameters of the CAP. Member States, for their part, should bear greater responsibility for implementing the agricultural policy objectives set out in Article 39 TFEU and the new environmental and climate objectives[80]. This (re)distribution of roles between the Union and the Member States has been strongly criticised both by the elected representatives of the European Parliament and by Member States who see it as a renationalisation of the CAP and a risk of distortion of competition between Member States[81].

Conscious of the vulnerability of farmers, their asymmetry of economic power in the agri-food chain, and the need to ensure they have a decent standard of living, the Commission recalls the

[76] Decision cited above.
[77] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, The Future of Food and Farming, COM (2017) 713 final of 29 November 2017, https://ec.europa.eu/transparency/regdoc/rep/1/2017/EN/COM-2017-713-F1-EN-MAIN-PART-1.PDF.
[78] Public consultation, Modernising and simplifying the CAP, https://ec.europa.eu/agriculture/consultations/cap-modernising/2017_en.
[79] See above Communication.
[80] Ibid. point 2 of the Communication. This point has raised many questions and criticisms from both farmers' unions and politicians in the Member States who see a renationalisation of the CAP in this new model. European Parliament Resolution of 30 May 2018 on the future of food and farming (2018/2037(INI)); European Parliament Resolution of 19 April 2018 on the Annual Report on Competition Policy, (2017/2191(INI)).
[81] See for example the report of the French Parliament on this point, http://www.senat.fr/seances/s201806/s20180606/st20180606000.html.

need to promote resilient agriculture by strengthening their bargaining power and hence their position in the agri-food chain. It should be emphasised, however, that this statement is not accompanied by any concrete proposal to amend and/or reinforce the provisions of Regulation (EU) No 1308/2013 on the common market organisation and the concentration of supply.

The legislative proposal presented on 1 June 2018 for the post-2020[82] CAP reform is in every respect a continuation of the Commission Communication of 17 November 2017. The Commission confirms the objectives set in the communication and the 'New delivery model for the CAP' favouring a results-based approach and enhanced subsidiarity, leaving Member States the responsibility for defining how to implement the strategic choices defined at European Union level[83]. It should be recalled that the objective of fair income for farmers and the need to strengthen their position in the agri-food chain are specific objectives around which the new CAP should be articulated[84]. However, the Commission does not propose any operational measure to achieve these objectives; the question of incomes is addressed through the sole prism of the distribution of aid and their targeting of small and medium-sized farms and disadvantaged rural areas subject to specific constraints. The proposal for an 'amending regulation' (COM (2018) 394 final) to amend Regulation CMO (EU) No 1308/2013 is completely silent on this issue. Provisions on the concentration of supply [85]and the application of the competition rules[86] to the marketing of agricultural products remain unchanged. The only changes proposed concern specific products such as sugar [87]and the wine sector[88].

In fact, the proposed status quo is hardly surprising and had already been announced in the Commission statements annexed to the Omnibus Regulation of 13 December 2017: 'As the changes to the Commission's original proposal taken together result in a significant change to the legal framework, the Commission notes with concern that some of the new provisions in favour of producers' organisations might have the effect of endangering the viability and wellbeing of small farmers and the interest of the consumers. The Commission confirms its commitment to maintain effective competition in the agricultural sector, and give full effect to the objectives of the CAP laid down in Article 39 of the Treaty on the Functioning of the European Union. In this context, the Commission notes that the amendments agreed by the co-legislators foresee only a very limited role for both the Commission and the national competition authorities to act to preserve effective competition'[89].

---

[82] The legislative reform proposal consists of 3 regulations: Proposal establishing rules on support for strategic plans to be drawn up by Member States under the Common Agricultural Policy (CAP Strategic Plans) and financed by the European Agricultural Guarantee Fund (EAGF) and by the European Agricultural Fund for Rural Development (EAFRD) and repealing Regulation (EU) No 1305/2013 of the European Parliament and of the Council and Regulation (EU) No 1307/2013 of the European Parliament and of the Council, COM(2018) 392 final; Proposal for a Regulation of the European Parliament and of the Council on the financing, management and monitoring of the common agricultural policy and repealing Regulation (EU) No 1306/2013, COM(2018) 393 final; Proposal for a Regulation of the European Parliament and of the Council amending Regulations (EU) No 1308/2013 establishing a common organisation of the markets in agricultural products, (EU) No 1151/2012 on quality schemes for agricultural products and foodstuffs, (EU) No 251/2014 on the definition, description, presentation, labelling and the protection of geographical indications of aromatised wine products, (EU) No 228/2013 laying down specific measures for agriculture in the outermost regions of the Union and (EU) No 229/2013 laying down specific measures for agriculture in favour of the smaller Aegean islands, COM(2018) 394 final, https://eur-lex.europa.eu/resource.html?uri=cellar:6cb59a1e-6580-11e8-ab9c-01aa75ed71a1.0003.03/DOC_1&format=PDF.

[83] See the explanatory memorandum to the legislative proposal, COM(2018) 394 final, especially p.2.

[84] Ibid, p.12: '(a) Support viable farm income and resilience across the EU territory to enhance food security; (c) Improve farmers' position in the value chain'. -

[85] Articles 148 to 162 of Regulation (EU) No 1308/2013

[86] Articles 206 to 210 of Regulation (EU) No 1308/2010

[87] It is proposed that Articles 124, 127 to 144, the obsolete provisions on the sugar production regulatory system which expired at the end of the marketing campaign in 2016/2017, and Articles 196 to 204 be deleted.

[88] Article 145.

[89] P.49 of Regulation (EU) No 2017/2393 of 13 December 2013 (OJEU L350/15, 29.12.2017), cited above.

The Commission considers that the progress made in the Omnibus Regulation is largely sufficient – and even excessive[90] – for achieving the goal of fair income and strengthening the bargaining power of producers and their associations. Indeed, it is clear from reading the statements that the Commission considers that any clarification or modification of the methods of concentration of supply and cooperation between producers could only be provided by the decision-making practice of European and/or national competition authorities or by implementing regulations or delegated acts and not by legislation in the context of the forthcoming CAP reform[91]. In other words, through the statements annexed to Omnibus Regulation (EU) No 2393/2017, the Commission suggested that it would oppose any legislative proposal for consolidation and clarification of the Omnibus Regulation in the context of the reform of the CAP post-2020.

This absence of a proposal concerning the concentration of supply and the application of the competition rules contrasts sharply with the resolutions adopted by the European Parliament that instead insist on the need to clarify and consolidate the rules of application of competition law to the production and marketing of agricultural products from the Omnibus Regulation[92] and, in general, the need to strengthen the position of farmers in the agri-food chain in the CAP post-2020[93].

In fact, the Commission's true legislative proposal on the position of farmers in the agri-food chain is a proposal that is formally external to the CAP reform proposal. It concerns the proposal for a directive of 12 April 2018 on unfair commercial practices in business-to-business relations in the food supply chain[94]. The proposal, which aims to combat unfair practices that may occur throughout the food chain and suffered mainly by farmers, is part of the movement of development from agricultural policy towards market oriented agriculture and the weakening of agricultural specificity. It is presented in the explanatory memorandum as an instrument for achieving the objective of fair income for farmers:' the directive 'aims at contributing to a fair standard of living for the agricultural community, an objective of the common agricultural policy under Article 39 TFEU'[95].

The purpose of this chapter is to analyse the legislative proposals relating to the application of the competition rules to farmers and their associations and to strengthening their position within the agri-food chain.

The following will be studied:

- the proposal for an 'amending regulation' (3.1);
- the proposal for a directive of the European Parliament and the Council on unfair commercial practices in business-to-business relations in the food supply chain (3.2).

We will focus on highlighting the points of agreement or disagreement of these Commission proposals with the European Parliament's resolutions.

---

[90] 'The Commission notes with concern that some of the new provisions in favour of producers' organisations might have the effect of endangering the viability and wellbeing of small farmers and the interest of the consumers,' ibid.

[91] Ibid.

[92] See the European Parliament Resolution on the future of food and farming of 30 May 2018 (2018/2037 (INI)); the European Parliament Resolution on the annual report on competition policy of 19 April 2018, (2017/2191(INI)) especially recitals 95 to 110; the European Parliament Resolution on CAP tools to reduce price volatility on agricultural markets of 14 December 2016 (2016/2034(INI)).

[93] See the draft report of the European Parliament and the Council on unfair commercial practices in business-to-business relations in the food supply chain of 19 June 2018, Rapporteur P. De Castro, 2018/0082(COD).

[94] Proposal for a directive of the European Parliament and the Council on unfair commercial practices in business-to-business relations in the food supply chain of 12 April 2018, COM(2018)173 final.

[95] Explanatory memorandum to the above proposal, p.3 and 5.

3.1. Proposed amending Regulation COM(2018)394 final[96]

The proposed Regulation amending Regulation (EU) No 1308/2013 presented on 1 June includes changes which do not upset the general architecture of the common market organisation (3.1.1.). The substantial modifications desired and expected by the European Parliament and the world of agriculture to consolidate and clarify the progress made under the Omnibus Regulation are totally absent from the legislative proposal (3.1.2.).

3.1.1. Proposed changes

- Some minor changes to obsolete definitions or references have been made to the introductory part (Recital 5 and Articles 3 to 6)[97].
- The provisions on sectoral aid and aid schemes have been amended (Recitals 3 and 7 and Articles 22 to 60). Articles 29 to 60 have been deleted because of the new organisation of the CAP: sectoral programmes should be integrated into each Member State's strategic plans. These sectoral programme provisions, incorporated in the proposed COM(2018) 392 Regulation, remain largely unchanged[98].
- Some changes relate to the wine sector. Paragraph 1 of Article 63 has been amended to provide Member States with more flexibility in determining new vine planting authorisations (Recital 8 and Article 63)[99]; other changes concern varieties of wine grapes that can be planted (Recital 9 and Article 81(2)), certificates of compliance for import (Recital 11 and Article 90 (3)), and finally controls and sanctions for non-compliance with marketing conditions (Recital 29 and the new Article 90(a)). The amendments to Article 145 to adapt wine production to the new demands of consumers also need to be added[100].
- Many changes have been introduced for marketing and geographical indications (Articles 93 to 123). The aim is to simplify the system, make it more understandable for the consumer, and reduce management and administration costs. Articles 93, 94, 96, 97, 103, 119, 120 and 122 have simply been amended; Articles 98, 99 and 106 have been fully modified; Articles 111 and 124 have been deleted and a new Article 116(a) has been created[101].
- The provisions specific to the sugar sector that have become obsolete due to the disappearance of quotas have been removed (Articles 124, 127 to 144). Articles 196 to 204 on export refunds have also been deleted; this is a measure to bring European law into line with WTO law, in particular with the Nairobi Ministerial Conference adopted on 15 December 2015[102].
- Article 225 on the Commission's obligation to draw up reports on milk and milk products, certain programmes for schools and the application of the competition rules to agriculture has been deleted[103]. It should be emphasised that the removal of this reporting obligation, in particular as regards the application of the competition rules to agriculture, is contrary to Parliament's expectations. In the past, Parliament has repeatedly called for reports, particularly in the area of competition.
- Finally, Article 226 on the use of the reserve in the event of a crisis has also been deleted[104]. In the new CAP, this question should be dealt with under the 'Horizontal

[96] Proposal for a Regulation of 1 June 2018.
[97] Article 6 removes obsolete marketing dates.
[98] See Articles 42 to 63 of the proposed Regulation.
[99] See the new Article 63(1).
[100] See Recitals 20 and 21.
[101] See recitals 12 to 21.
[102] See the declaration and related documents on agriculture, WT/MIN(15)/DEC, https://www.wto.org/english/thewto_e/minist_e/mc10_e/mindecision_e.htm.
[103] See recital 28.
[104] See Recitals 30 and 38.

Regulation' on the financing, management and monitoring of agricultural policy, COM(2018) 393 final.

3.1.2. Changes not proposed

Despite the expectations expressed by the agricultural community and Parliament after the Communication of 17 November 2017, the Commission has not included any proposal to amend the agricultural competition rules or the provisions on the concentration of supply in the legislative proposal.

As we noted above, the fact that these changes have not been proposed is in accordance with the declarations annexed to the Omnibus Regulation. The Commission considers that the regulation of commercial agricultural relations should mainly be ensured by common law instruments such as competition law and contract law and not by strengthening the agricultural exception in the marketing of products throughout the agri-food chain. While these statements may have been surprising in terms of their form[105], their substance is not however new at all. It reflects a philosophy, a doctrine, on the CAP and the interpretation of Article 42 TFEU, which has been identifiable for several years both in the Commission's decision-making practice and legislative work[106].

The legislative progress in strengthening the position of farmers and their professional organisations in trade relations with the downstream chain (see Chapter 2 above) has come out of proposals from Parliament. During the legislative debate on the Omnibus Regulation, the Commission did not put forward any changes to Parliament and the Council in this respect. The amendments to Regulation (EU) No 1308/2013 that were discussed and adopted were put forward by way of parliamentary amendments[107]. Similarly, in the previous CAP reform process 2014-2020, the Commission did not make any proposals on the bargaining power of farmers and the competition rules[108]. Indeed, as part of a market oriented agriculture approach, the Commission considered and still considers today that farmers must increase their competitiveness to strengthen their position in the food chain and create market cartels, which may jeopardise the achievement of certain objectives of Article 39 of the Treaty such as productivity growth and low prices for the end consumer. In other words, the strengthening of bargaining power and the achievement of the objective of remunerative prices for producers must be achieved by means of this market oriented approach, through the development of joint activities and the achievement of economies of scale for the purchase of inputs, storage and retail, and not through agreements on prices, on quantities or through the exchange of information constituting unlawful agreements within the meaning of Article 101 of the Treaty. These joint activities (which are the responsibility of the producer organisations) should allow producers to reduce their production costs and improve their margins and thus increase their competitiveness while strengthening their bargaining power with buyers. This approach resulted in the introduction, in Regulation (EU) No 1308/2013 of derogations to Article 101 TFEU for the

[105] Mention has even been made of an actual declaration of war by the Commission against Parliament, see A. Iannarelli, Dal caso "indivia" al regolamento Omnibus n.2393 del 13 dicembre 2017: le istituzioni europee à la guerre tra la PAC e la concorrenza? in Rivista Diritto agroalimentare 2018, p. 109.

[106] On the decision-making practice of the Commission and the restrictive interpretation of agricultural specificity, see Chapter 1 above. See also, EU competition framework: specific rules for the food chain in the new CAP, p. to 22, report cited above.

[107] See, for example, the opinion of the Committee on Agriculture and Rural Development of 15 May 2017 on the proposal for a regulation of the European Parliament and of the Council on the financial rules applicable to the general budget of the Union and amending Regulation (EC) No 2012/2002, Regulations (EU) No 1296/2013, (EU) No 1301/2013, (EU) No 1303/2013, (EU) No 1304/2013, (EU) No 1305/2013, (EU) No 1306/2013, (EU) No 1307/2013, (EU) No 1308/2013, (EU) No 1309/2013, (EU) No 1316/2013, (EU) No 223/2014, (EU) No 283/2014, (EU) No 652/2014 of the European Parliament and of the Council and Decision No 541/2014/EU of the European Parliament and of the Council (COM (2016) 0605 - C8-0372 / 2016 - 2016/0282 (COD)), Rapporteur A. Dess, 2016/0282 (COD).

[108] Ibid.

olive oil, beef and cereals sectors [109]as part of a pro-competitive perspective[110]. Collective bargaining, with or without transfer of ownership and even at identical prices, carried out by producer organisations in these sectors could benefit from an exemption to Article 101 provided that the PO carried out other collective missions likely to generate significant gains (significant efficiencies).

This is not Parliament's approach. For several years, especially since the last reform of the CAP 2014-2020, Parliament, noting the growing weakness of producers in the food chain, has consistently asserted the need for a legislative framework:

- guaranteeing effective primacy of the CAP objectives over competition policy in accordance with the provisions of Article 42 of the Treaty;
- enabling the specificity of agriculture and the structural weakness of the producers to be taken into consideration faced with increasingly concentrated industrial processors and retailers;
- clarifying the responsibilities of producer organisations with regard to price regulation and market stabilisation (questions that were at the heart of the Endives case);
- providing producers and their associations with sufficient legal certainty as to the application of the competition rules;
- helping to achieve the objective of fair income for producers.

Thus in its Resolution of 30 May 2018[111], Parliament reminds the Commission that Article 39 of the Treaty defines 'Fair income for producers' [112]as one of the objectives of the CAP and insists on the need to strengthen the position of primary producers in the food supply chain[113] as part of the continuity of the contributions of the Omnibus Regulation (EU) No 2393/2017. It emphasises that, while, in accordance with the objectives of Article 39 TFEU and the exception referred to in Article 42 TFEU, the Omnibus Regulation clarified the legal relationship between the provisions of the single CMO and the competition rules and created new collective opportunities to strengthen the bargaining position of farmers in the food supply chain, these provisions need to be consolidated and strengthened in the future CAP[114]. Parliament calls on

[109] Articles 169, 170 and 170 of Regulation (EU) No 1308/2013, these sectoral provisions were abolished by the Omnibus Regulation (EU) No 2017/2393.
See on this point Commission Guidelines on the application of the specific rules set out in Articles 169, 170 and 171 of the CMO Regulation on the olive oil, beef and veal and arable crops sectors, (2015/C 431/01), OJ C431/1 of 22 December 2015. See also A. Iannarelli, Agricoltura e concorrenza o concorrenza e agricoltura? Gli artt. 169, 170 e 171 del Reg. n. 1308/2013 e il progetto di guidelines presentato dalla Commissione, in Riv. dir. agr. n. 1, 2015, p. 11.

[110] Ibid. see also Chauvet P, Parera A, Renckens A, Agriculture, food and competition law: moving the borders, Journal of european competition law and practice, 2014, Vol. 5, No. 5, p.304-313 and especially p.310.

[111] European Parliament Resolution of 30 May 2018 on the future of food and farming (2018/2037 (INI)), Rapporteur A. Dorfman, http://www.europarl.europa.eu/sides/getDoc.do? pubRef = - // EP // TEXT TA P8-TA-2018-0224 0 DOC XML V0 // FR & language = EN.

[112] Recital 39.

[113] Recital 132 of the European Parliament Resolution of 30 May 2018 on the future of food and agriculture: 'insists on the importance of strengthening the position of primary producers within the food supply chain, in particular by guaranteeing a fair distribution of the added value between producers, processors and the retail sector, by introducing the financial resources and incentives required to support the creation and development of economic organisations, both vertical and horizontal, such as producer organisations, including cooperatives, and their associations and inter-branch organisations, by establishing harmonised minimum standards to combat unfair and abusive trade practices along the food supply chain and by strengthening transparency in the markets and through crisis prevention tools'.

[114] Recital 133 of the European Parliament Resolution of 30 May 2018 on the future of food and agriculture: 'stresses that in accordance with the objectives of Article 39 TFEU and the exception referred to in Article 42 TFEU, the Omnibus Regulation has clarified the legal relationship between the provisions of the single CMO and EU competition rules and introduced new collective possibilities for farmers to enhance their bargaining power within the food supply chain; believes that these provisions are essential in the framework of the future CAP and should be improved further'.

the Commission to 'clarify and update, where necessary, the rules for producer organisations and interbranch organisations, particularly as regards competition policy, including with a view to the measures and agreements of interbranch organisations, in order to meet societal demand'[115]. Recital 96 of the Resolution of 19 April 2018 on the annual report on the Union's competition policy also calls for a clarification of the competition rules in the future CAP[116].

In general, Parliament calls for a CAP orientation that is not exclusively market-oriented and based on the competitiveness of agricultural products and is now focused on other CAP objectives such as the living standards of farmers[117].

Parliament has repeatedly stressed the need to draw all the legal consequences of the special status granted to the agricultural sector, in particular as regards the application of the competition rules[118]. Parliament has put forward bold proposals on competition that contradict the approach developed by the Commission, particularly with regard to prices.

Basing itself on the bipolarity of the interests protected in Article 39 TFEU, Parliament recalled both that the CAP aims to ensure a fair standard of living for the population in the agricultural sector and that 'competition policy must defend both the interests of agricultural producers and consumers'[119]; the notion of 'fair price' not only being considered as the lowest possible price for the consumer but also as a price ensuring fair remuneration[120]. In order to achieve this goal, Parliament proposed the strengthening of collective bargaining 'including the possibility of blocking prices at a level corresponding to the costs of production during a given period'[121] and 'the possibility of agreeing minimum prices'.[122] This is a real questioning of the 'price taboo', a reversal of the doctrine of the Commission and national price competition authorities with regard to pricing[123].

It should also be pointed out that such a power to determine common selling prices and/or minimum prices for all products at first sales by producers and their associations would operate a clear rapprochement between European legislation and North American legislation: indeed, since 1922, in the United States the Capper Volstead Act has allowed farmers and their associations to set common prices by derogation from antitrust law to counterbalance their asymmetry of bargaining power in the agri-food chain[124].

---

[115] Recital 136 of the European Parliament Resolution of 30 May 2018 on the future of food and agriculture.

[116] Recital 96 of the Resolution of 19 April 2018 (2014/2191 (INI)).

[117] Recital 148 of the European Parliament Resolution of 30 May 2018 on the future of food and agriculture: 'takes the view that the requirements of international trade and the WTO have had a very significant bearing on the series of revisions to the CAP which have been carried out since the 1990s; considers that these revisions have made European agricultural products and the European agri-food sector more competitive, but that they have also undermined large sections of the agricultural sector by exposing them to the instability of world markets; takes the view that it is now time, as the Commission Communication on the Future of Farming and Food in Europe suggests, to focus more on other CAP objectives, such as farmers' living standards and matters concerning health, employment, the environment and climate'.

[118] Recital 78 of the European Parliament Resolution of 14 February 2017 on the annual report of the European Union's competition policy (2016/2100 (INI))

[119] Recital 95 of the Resolution of 19 April 2018 cited above.

[120] Recital 96 of the Resolution of 19 April 2018 cited above.

[121] Recital 30 of the European Parliament Resolution of 14 December 2016 on CAP tools to reduce price volatility on agricultural markets (2016/2034 (INI)).

[122] Recital 86 of the Resolution of 14 February 2017 cited above.

[123] On case law and the position of the competition authorities with regard to pricing and the references cited above. See in particular the ECN Report (European Competition Network), Report on competition law enforcement and market monitoring in the food sector, May 2012, http://ec;europa.eu/competion/ecn/food_report_en.pdf. Also the recent post Omnibus analysis by the French Competition Authority, Opinion 18-A-04 of 3 May 2018 relating to the agricultural sector, especially paragraph 93, http://www.autoritedelaconcurrence.fr/pdf/avis/18a04.pdf as well as the 2012 thematic study on agriculture, in particular p. 90, http://www.autoritedelaconcurrence.fr/doc/etude_thema_2012.pdf.

[124] On the American experience, paragraph 2.2 and the references cited.

3.2. The proposal for a directive of the European Parliament and the Council on unfair commercial practices in business-to-business relations in the food supply chain

On 12 April 2018, the Commission presented the proposal for a directive on unfair commercial practices in business-to-business relationships in the food supply chain (3.2.1). On 18 June 2018, Parliament's Committee on Agriculture and Rural Development (COMAGRI) made a number of amendments to this draft which are in line with its proposals for strengthening the bargaining power of farmers (3.2.2)[125].

3.2.1. Commission proposals

Context and objectives:

This proposal had been anticipated. It follows several communications and reports published on unfair practices implemented throughout the food chain and of which farmers, the weak link in this chain, are most often the victims[126].

The Commission has been reflecting on this issue since 2009. Unfair trading practices develop in vertical business relations along the supply chain at the expense of the most vulnerable economic operators because of the asymmetry of economic power that characterises these trading relations; downstream operators, industrial processors and retailers are increasingly concentrated and therefore have increasing purchasing power. This behaviour, which comes about in the bilateral contractual relationships between suppliers and buyers, results in a significant imbalance in the rights and obligations of the parties without there being any objective justification for this imbalance. This may, for example, include late payment deadlines, unilateral reductions in contractual quantities of perishable goods, or being forced to take back unsold goods or the provision of rebates without consideration[127]. Such behaviour has negative effects on contractors who are direct victims of these practices, and, indirectly, on the entire supply chain[128]. These practices are considered as one of the main causes of the poor distribution of value along the chain or even of confiscation of value at the expense of agricultural producers upstream[129].

The proposal comes in a context of the increased concentration of downstream operators in the chain, which is reflected in new rapprochements between retailers or in agreements between distributors and the digital platform[130].

---

[125] Draft report of the European Parliament on the proposal for a directive of the European Parliament and of the Council on unfair commercial practices in business-to-business relations in the food supply chain of 18 June 2018, 2018/0082(COD), Rapporteur P. De Castro.

[126] See the Agricultural Markets Task Force report, Improving market outcomes, Enhancing the position of farmers in the supply chain, November 2016 and references cited, https://ec.europa.eu/agriculture/sites/agriculture/files/agri-markets-task-force/improving-markets-outcomes_en.pdf.

[127] A number of unfair commercial practices have been identified in the various reports prepared by the Commission. See in particular the Improving market outcomes report cited above, paragraph 88. Also European Commission Report on unfair business-to-business trading practices in the food supply chain, 29 January 2016; European Commission Communication on Tackling unfair trading practices in the business-to-business food supply chain, 15 July 2014, p. 3.

[128] Ibid.

[129] Ibid.

[130] See the French Competition Authority press release on recent rapprochements between European brands or between Monoprix and Amazon, http://www.autoritedelaconcurrence.fr/user/standard.php?lang=fr&id_rub=683&id_article=3225.

It responds to the combined demands of Parliament[131] and agricultural producers to put a common minimum standard into place to punish unfair commercial practices.

This is a minimum harmonisation directive leaving Member States the option of integrating minimum protection into their domestic legal order in accordance with the principle of subsidiarity, but it must be stressed that many countries already have legislation that is often more restrictive than the proposed text[132].
The proposal is resolutely aligned with a 'a much more market-oriented agricultural policy than in the past' calling for protection against unfair commercial practices 'especially for agricultural producers and their organisations'[133]. Article 39 of the Treaty, especially the objective of ensuring a fair standard of living for farmers, is one of the legal bases of the text (with the principle of subsidiarity and proportionality); the protection concerns not only farmers and their associations but also downstream operators in the chain, as long as they meet the definition of micro, small or medium-sized enterprises within the meaning of Commission Recommendation 2003/361/EC[134].

The fundamental points of the proposal[135]:

Article 2 is devoted to definitions:

The buyer, economic operator downstream from agricultural primary production, is defined as: 'any natural or legal person established in the Union who buys food products by way of trade. The term 'buyer' may include a group of such natural and legal persons'.

The supplier may be 'any agricultural producer or any natural or legal person, irrespective of their place of establishment, who sells food products. The term "supplier" may include a group of such agricultural producers or such natural and legal persons, including producer organisations and associations of producer organisations'.

Article 3 establishes a list of practices considered unfair by distinguishing between 2 main categories of practices: prohibited practices per se and practices prohibited in the absence of agreement of clear will of the parties or 'grey clauses'.

Thus Article 3(1) prohibits per se unfair trade practices such as buyers:

- exceeding a payment period of 30 days to pay suppliers of perishable foodstuffs;
- cancelling orders for perishable goods with little[136] advance notice;
- unilaterally and retroactively changing the clauses of a supply contract relating to frequency, timing, volume of supplies, deliveries, quality standards or prices.

On the other hand, the contractual practices set out in Article 3(2) are prohibited and regarded as unfair only if they have not been agreed in clear and unambiguous terms when the contract was concluded.

[131] European Parliament Resolution of 7 June 2016 on unfair trading practices in the food supply chain (2015/2065(INI)), in particular Recital 28. See also European Parliament Resolution of 14 December 2016 on CAP tools to reduce price volatility on agricultural markets (2016/2034 (INI)).
[132] On the existing legislation and the position of the different Member States, see the aforementioned Agricultural Markets Task Force report and the OECD report, Competition Issues in the Food Chain Industry, 2013. Some States question the very principle of such legislation because they have more binding common law or special law provisions in their domestic legal systems, see the OECD report, in particular the German report p.170.
[133] Recital 4 of the proposal for a directive.
[134] Commission Recommendation 2003/361/EC of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises, OJ L 124, 20 May 2003, p.36.
[135] Only the provisions directly related to the purpose of this report are covered here: procedural provisions such as relations between national authorities will not be considered.
[136] Defined in Article 2(e) as food which will become unfit for human consumption unless it is stored, processed, packaged or otherwise preserved to prevent it from becoming unfit for human consumption.

The following practices are therefore likely to be lawful when they are expressly and clearly provided at the time of conclusion of the contract:

- returning unsold food to a supplier,
- charging the supplier for the storage, display or stocking of foodstuffs,
- charging the supplier for the promotion of the foodstuffs sold by the buyer;
- charging the supplier for the marketing of the foodstuffs sold by the buyer.

This provision, which only seeks to sanction unilateral contractual changes to supply contracts by the buyer, is not without ambiguity because it does not take into account the asymmetry of bargaining power between buyer and supplier that characterises the supply chain. Indeed, such clauses may have been agreed and accepted by the supplier who is in a weak position. Based on the contractual freedom of the parties[137], this provision ignores the structural imbalance which is at the very heart of the Directive[138].

- Article 4 requires Member States to designate a public authority with responsibility to enforce the prohibition of unfair commercial practices. The powers of these authorities are defined in Article 6.

- Article 5 concerns complaints and their confidentiality, a point that stakeholders consider essential given the asymmetry of economic power and the fear of commercial retaliation (fear effect) on the part of the buyer in a position of purchasing power.

Any supplier, natural or legal person, within the meaning of Article 2 should be able to lodge a complaint with the competent authority and request confidentiality of his/her identity.

3.2.2. The amendment proposals from Parliament's Committee on Agriculture and Rural Development

The report supports the legislative proposal considering that it is important to harmonise the twenty national laws and adopting minimum standards providing solutions for farmers who suffer unfair treatment from the most powerful operators in the food chain.

The rapporteur proposes a number of amendments in order to make the text more effective.

First and foremost, it should be noted that the report proposes that the term food chain be changed and that the expression agricultural and food chain be adopted. This change is quite logical and coherent: on the one hand, primary agricultural production is the starting point of the food supply and production chain; on the other hand, since the stated objective of the text is the protection of farmers, it is important that the term 'farming' be reintroduced. In addition, describing the supply chain as the agricultural and food chain and not the food chain demonstrates that the sector's problems are not to be apprehended exclusively from the point of view of downstream operators (industrial processors and retailers) but also from that of primary production[139].

The report then proposes a series of amendments whose purpose is always to strengthen the protection of primary farm suppliers against unfair practices.

[137] Recital 12.
[138] See explanatory memorandum and Recitals 5 and 9.
[139] This same sectoral approach governs the CAP 2020 reform proposal entitled 'The future of food and farming', in which the regulation of the sector is apprehended from the downstream of the chain and not from primary production.

Firstly, it is proposed that the scope of application be extended to all agricultural products listed in Annex I of the Treaty, since unfair practices also concern producers who sell unprocessed and non-human products, such as cut flowers or animal feed (amendment to Article 1(1)).

It is then proposed that the personal application (ratione personae) be broadened by modifying supplier and buyer definitions.

As regards the proposed definition of supplier, it includes suppliers who are not micro, small or medium-sized companies within the meaning of the aforementioned Recommendation 2003/361/EC and the reference to this recommendation is deleted. This amendment aims to protect farmers and their organisations whose size often exceeds that of micro, small or medium-sized companies. In addition, the definition now applies to sellers who sell agricultural products and foodstuffs (Article 2(b)).

As regards the definition of buyer (Article 2(a)), the amendment includes operators who, although established outside the European Union, buy and sell on the European market. This is to prevent these buyers from escaping the application of the directive. In addition, the new definition of buyer includes the provision of related services, processing, distribution and retailing of agricultural and food products.

The report introduces a definition of unfair commercial practice to Article 2 on the model of the definition given in the Council conclusions of 12 December 2016[140]. The new Article 2(a) is worded as follows:
'unfair trading practices means practices that:

- grossly deviate from good and fair commercial conduct, are in contrary to good faith and fair dealing and are unilaterally imposed by a buyer on a supplier.
- impose or attempt to impose an unjustified and disproportionate transfer of a buyer's economic risk to the supplier; or
- impose or attempt to impose a significant imbalance of rights and obligations on the supplier in the commercial relationship before, during or after the contract'.

A definition of economic dependence (Article 2(1) – a new point (c)(a) is also added to Article 2: 'economic dependence is a power relationship between a supplier and a buyer with unequal bargaining power, due to which the supplier depends on the buyer because of the importance of the deliveries to the buyer in terms of quantity, the buyer's reputation, its market share or the absence of sufficient alternative sales possibilities'.

The concept of economic dependence is introduced in Article 3(2) relative to the 'grey' clauses or prohibited practices in the absence of agreement of clear will of the parties: clauses are prohibited if they were not agreed in clear terms at the conclusion of the contract and are unambiguous 'or if they are the result of the economic dependence of the supplier on the buyer, which enabled the buyer to impose those terms'. It is necessary to specify that economic dependence hinders the exercise of the contractual freedom of the supplier.

The new Article 3(a) relates to contractual relations within the meaning of Articles 148 and 168 of CMO Regulation (EU) No 1308/2013: 'A supplier may require that any delivery of its agricultural and food products to a buyer be the subject of a written contract between the parties and/or the subject of a written offer for a contract from the first purchaser'.

[140] Conclusions cited above.

The amendment thus offers the possibility for any supplier within the meaning of the directive (whether farmer or not) to require written contracts to increase legal certainty and the transparency of trade relations.

Other amendments concern more particularly the procedure and extension of the right to act to representative associations of suppliers, producer organisations or supplier organisations and their associations (Article 5(2)), or national enforcement authority obligations (Article § and new 6(a)).

The proposal for a directive is a useful legal instrument for harmonising the existing legislation in the 20 countries of the Union.

Subject to the introduction of the amendments proposed by Parliament, and in particular the reference to the situation of economic dependence of suppliers, the text could limit the frequency of unfair behaviour in contractual relations and punish contractual abuses. It should be emphasised, however, that the fight against unfair practices is not an instrument that can strengthen farmers' bargaining power vis-à-vis their buyers, processors and distributors. Unfair practices only concern bilateral contractual relations between suppliers and sellers for a specific transaction, i.e. micro-economic and micro-legal relations. In other words, the fight against unfair practices cannot enable farmers to counterbalance the purchasing power of downstream operators in the supply chain, which is the result of a structural asymmetry between upstream and downstream, with the downstream of the chain becoming ever more concentrated. In bilateral contractual relations, unfair commercial practices can have a marginal impact on relative abuses of economic power but in no way alter the economic balance of power. Unfair behaviour is not the cause of the asymmetry of economic power but the consequence of this structural imbalance: unfair practices are the consequences of structural imbalance and insufficient concentration of supply. This legislation, like all national legislation on the subject[141], is not primarily intended to protect the functioning or structure of the market. Recital 9 of Regulation (EC) No 1/2003 clearly specifies the distinction between competition law and unfair practices law, which primarily targets a different objective to that of anti-competitive practices law. By ensuring contractual fairness in vertical relationships, unfair practices legislation exercises a complementary function, accessory to anti-competitive practices law (cartels and abuse of dominant position) and the control of concentrations and provisions of the CAP relating to the common market organisation.

The fight against unfair commercial practices must not and cannot replace an ex-ante control of industry and retail concentration and a consolidation of the mechanisms of concentration of supply.

To achieve the objectives of strengthening the position of farmers and equitable income, it is important to:

- control the ex-ante concentration of downstream operators in the chain in accordance with European and national competition laws;
- and consolidate the capacity to concentrate supply from farmers and their organisations within the framework of the CAP and in particular of the CMO.

[141] See the above-mentioned OECD Report on the diversity of national laws.

4. RECOMMENDATIONS

MAIN CONCLUSIONS

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

In line with the above analysis on the conditions of application of the competition rules to the production and marketing of agricultural products in the framework of the CAP and more specifically in the CMO Regulation (EU) No 1308/2013 as amended by the Omnibus Regulation (EU) No 2017/2393 of 17 December 2017, and with a view to achieving the following objectives:

- ensure a fair standard of living for the farming community, stabilise markets and ensure reasonable prices for deliveries to consumers;
- strengthen the position of primary producers in the agri-food supply chain and counterbalance the growing asymmetry of economic power between the upstream and downstream of the agri-food chain;
- clarify and consolidate the possibilities of organisation and collective bargaining, established by the Omnibus Regulation (EU) No 2017/2393, helping farmers in the face of the hyper purchasing power of their buyers, industrial processors and mass retailers;
- clarify and update the competition rules relating to associations and producer organisations and their responsibilities in order to guarantee a real effectiveness of the primacy of the CAP over competition policy and to provide greater legal certainty for farmers and their associations;
- prevent and punish the occurrence of unfair commercial practices in commercial relations within the agri-food chain between farmers and their buyers.

The report proposes the following recommendations.

4.1. Recommendations concerning the Single CMO Regulation (EU) No 1308/2013 as amended by the Omnibus Regulation (EU) No 2393/2017

The recommendations concerning Regulation (EU) No 1308/2013 are intended to consolidate and clarify the achievements and progress of the Endives Case of 14 November 2017 and the Omnibus Regulation (EU) No 2017/2393 with a view to strengthening the position of farmers in the agri-food chain.

4.1.1. With regard to Article 152

4.1.1.1. With regard to Article 152(1)(a) deletion of the reference to Article 101 TFEU and transfer of ownership

The practices and decisions that enter into the responsibilities and objectives of the organisations defined by the CAP are, as Advocate General Wahl and the Court of Justice in the Endives case have recalled, not necessarily excluded from the application of the competition rules and in particular from Article 101 TFEU; 'it is an exclusion from that application, arising from the need to carry out the responsibilities assigned to the actors of the CMOs'[142]. The introductory phrase referring to Article 101 TFEU should therefore be deleted.

In addition, collective bargaining in the name and on behalf of farmers who are members of an organisation only concerns non-commercial structures without transfer of ownership, bargaining cooperatives; commercial POs, marketing cooperatives, who sell the production of their members of which they have become owners are not concerned by collective bargaining since they act as a single entity. The reference to the transfer of ownership should therefore be deleted.

New drafting of Article 152(1)(a):
A producer organisation recognised under paragraph 1 of this Article may plan production, optimise production costs, place on the market and negotiate contracts for the supply of agricultural products, on behalf of its members, for all or part of their total production provided one or more of the activities referred to in point (b)(i) to (vii) of paragraph 1 is genuinely exercised, thus contributing to the fulfilment of the objectives set out in Article 39 TFEU.

The activity of collective bargaining referred to in the first subparagraph may take place:

a) provided that the producer organisation concentrates supply and places the products of its members on the market without transfer of ownership to the producer organisation;
b) whether or not the price negotiated is the same as regards the aggregate production of some or all of the members;
c) provided that the producers concerned are not members of any other producer organisation as regards the products covered by the activities referred to in the first subparagraph;
d) provided that the agricultural product is not covered by an obligation to deliver arising from the farmer's membership of a cooperative, which is not itself a member of the producer organisations concerned, in accordance with the conditions set out in the cooperative's statutes or the rules and decisions provided for in or derived from those statutes.

However, Member States may derogate from the condition set out in point (d) of the second subparagraph in duly justified cases where producer members hold two distinct production units located in different geographical areas.

[142] Paragraph 51 of the above conclusions.

4.1.1.2. With regard to Article 152(1)(b): No change

4.1.1.3. With regard to Article 152(1)(c)

In order to ensure greater legal certainty for producer organisations and their associations and to avoid the risk of a retroactive reconsideration of the practices and decisions implemented, it should be made clear that the decisions of the European and national competition authorities shall only have effect for the future.

Redrafting: The national competition authority referred to in Article 5 of Regulation (EC) No 1/2003 may decide in individual cases that, for the future, one or more of the activities referred to in the first subparagraph of paragraph 1(a) are to be modified, discontinued or not take place at all if it considers that this is necessary in order to prevent competition from being excluded or if it considers that the objectives set out in Article 39 TFEU are jeopardised.

For negotiations covering more than one Member State, the decision referred to in the first subparagraph of this paragraph shall be taken by the Commission without applying the procedure referred to in Article 229(2) or (3).

When acting under the first subparagraph of this paragraph, the national competition authority shall inform the Commission in writing before or without delay after initiating the first formal measure of the investigation and shall notify the Commission of the decisions without delay after their adoption.

The decisions referred to in this paragraph shall not apply earlier than the date of their notification to the undertakings concerned and shall only have effect for the future.

4.1.2. With regard to Article 149 and contractual relations

For the sake of consistency and for reasons identical to those set out above for Article 152, Article 149(2)(a) on contractual negotiations in the milk and milk products sector should be amended: ‘whether or not there is a transfer of ownership of raw milk from producers to the producer organisation’.

New drafting of Article 149(2)(a): Provided that the producer organisation concentrates supply and places the products of its members on the market without transfer of ownership to the producer organisation.

4.1.3. With regard to exceptions to the application of Article 101(1) of Article 209

Considering that in accordance with Article 42 TFEU and Article 206 of Regulation (EU) No 1308/2013 and the case-law of the Court of Justice recalled in the Endives Case of 14 November 2017, that the agreements and practices implemented to achieve the responsibilities and objectives assigned by the CAP to recognised organisations are not bound by the prohibition of agreements, decisions and concerted practices in Article 101(1) TFEU;

Considering that farmers are the weakest links in the food chain, that their increasingly concentrated industrial processors and mass retailer purchasers have hyper purchasing power;

Considering that since 1922 the United States has allowed farmers and their associations to charge identical prices in order to counterbalance the asymmetry of economic power characterising the food chain and to strengthen the bargaining power of farmers, Article 209 should be changed as set out below.

4.1.3.1. With regard to Article 209(1), 2nd sentence

As the Court's case-law in the Endives case recalled, the agreements and practices implemented to achieve the responsibilities and objectives assigned by the CAP to recognised organisations escape the prohibition of agreements, decisions and concerted practices in Article 101(1) TFEU. It should be made clear that Article 209(1) shall only apply to agreements, decisions and concerted practices of producer organisations recognised under Article 152 or Article 161 of this Regulation, or associations of producer organisations recognised under Article 156 of this Regulation in so far as they relate to activities distinct from their responsibilities and objectives as defined in Articles 152(1), 161(1) and 156(1) respectively.

New drafting of Article 209(1), 2nd sentence:
Article 101(1) TFEU shall not apply to agreements, decisions and concerted practices of farmers, farmers' associations, or associations of such associations which concern the production or sale of agricultural products or the use of joint facilities for the storage, treatment or processing of agricultural products, unless the objectives set out in Article 39 TFEU are jeopardised or competition is excluded.

Article 101(1) shall not apply either to agreements, decisions and concerted practices of producer organisations recognised under Article 152 or Article 161 of this Regulation, or associations of producer organisations recognised under Article 156 of this Regulation in so far as they relate to activities distinct from their responsibilities and objectives as defined in Articles 152(1), 161(1) and 156(1), unless the objectives set out in Article 39 TFEU are jeopardised or competition is excluded.

4.1.3.2. With regard to Article 209(1), third sentence relating to the prohibition of price-fixing clauses

The possibility of collective bargaining including prices was introduced by Regulation (EU) No 2393/2017 and represents an important step forward in strengthening the position of farmers in the food chain. The current Article 209 considers price fixing clauses as agreements, decisions and concerted practices due to their purpose and therefore as 'black clauses' that do not qualify for exemption[143]: 'agreements and decisions which include the obligation to charge a fixed price' are excluded from the scope of Article 209(1).

Maintaining the prohibition of identical price fixing clauses in Article 209 is now difficult to understand and justify. Indeed, this prohibition was fully justified when public intervention on prices was one of the essential instruments of the CAP; the prohibition of price fixing clauses made it possible to avoid any risk of calling into question the Community intervention system on prices through such agreements. The abandonment of price support mechanisms and the development of market-oriented agriculture should lead to the abandonment of this ex-ante prohibition. This prohibition ignores the asymmetry of economic power that characterises the agri-food sector in which farmers are weak links (price takers). It also ignores the current movement of concentration of buyers, industrial processors and mass retailers that are consolidating their hyper purchasing power and hence the structural imbalance that characterises the food chain. The removal of the prohibition is, on the other hand, likely to render more effective the legislative measures already adopted with regard to the concentration of supply and the mechanisms of apportionment of value within the meaning of Article 172(a) of the Regulation. Authorisation of these clauses is likely to compensate for the asymmetry of information and economic power, to strengthen the bargaining power of producers and ultimately to limit the decline in farmers' incomes, or even to improve these

[143] See on this point the various decisions of the Endives case analysed in this report and the references cited. Also Regulation (EU) No 330/2010 of 20 April 2010 on the application of Article 100(3) TFEU mentioned above.

incomes. Moreover, as many studies have shown, the negotiation of common prices by farmers does not have the effect of raising prices for the final consumer[144]. Moreover, this would introduce a provision into European law similar to US antitrust law which has admitted such a possibility since the introduction of the Capper Volstead Act in 1922 (see above and references cited).

New drafting of Article 209(1), third sentence: the third sentence has been deleted.

4.1.3.3. With regard to Article 209(2), first sentence

This text establishes a presumption of compliance with Article 101(1) TFEU of the agreements and practices referred to in this Article but does not use the precise legal term. For the sake of legal certainty and clarity, it should be made clear that these practices and agreements are 'presumed' to be in accordance with Article 101(1) TFEU.

New drafting of Article 209(2), first sentence: Agreements, decisions and concerted practices which fulfil the conditions referred to in paragraph 1 of this Article are presumed to comply with Article 101(1) TFEU, and no prior decision is required for this purpose.

4.1.3.4. With regard to Article 209(2), fourth sentence

The term 'exemptions' has been deleted and replaced by exceptions in accordance with the title of Article 209 which has remained unchanged since 2013. This is a formal amendment that already exists in the other language versions of Regulation (EU) No 1308/2013. The purpose of the amendment is to avoid possible contradictory interpretations and to enhance legal certainty.

New drafting of Article 209(2), fourth sentence: The party claiming the benefit of the exceptions provided in paragraph 1 of this Article shall bear the burden of proving that the conditions of that paragraph are fulfilled.

4.1.4. With regard to Article 222 concerning periods of severe market imbalances

Considering that interbranch organisations include economic operators located in the various segments of the food chain.

Considering that within these operators some have real purchasing power and economic power superior to that of producers, and that the conclusion of agreements and decisions referred to in this Article could lead to an unfair sharing of value to the detriment of the weakest operators, i.e. agricultural producers upstream of the chain and final consumers downstream.

Considering that a better functioning of the agri-food chain presupposes in the first place a strengthening of the position of farmers, Article 222 could be modified.

Amendment to Article 222(1): terms 'interbranch organisations' have been deleted.

New drafting of Article 222(1): 'During periods of severe imbalance in markets, the Commission may adopt implementing acts to the effect that Article 101(1) TFEU is not to apply to agreements and decisions of farmers, farmers' associations, or associations of such associations, or recognised producer organisations, associations of recognised producer organisations in any of the sectors referred to in Article 1(2) of this Regulation, provided that such agreements and decisions do not undermine the proper functioning of the internal market,

[144] See the Report of the American Antitrust Association, cited above.

strictly aim to stabilise the sector concerned and fall under one or more of the following categories:'.

4.2. Recommendations with regard to the proposal for a directive on unfair commercial practices in business-to-business relationships in the food supply chain

The proposal for a directive is a supplementary, ancillary text of the provisions of the CMO Regulation aimed at strengthening the bargaining power and position of farmers in the food chain and of existing national provisions in certain Member States. This minimum harmonisation text may make it possible to limit the frequency of unfair commercial practices in bilateral commercial relations between supplier and buyer, i.e. at the micro-legal and micro-economic level. It may also help to better punish these unfair behaviours.

In order to increase the efficiency and effectiveness of the text, a certain number of changes[145] could be adopted.

4.2.1. With regard to the term 'food chain' in the directive

Considering that the supply chain includes all primary agricultural production operators up to distribution to the final consumer, that agricultural production is the first and a necessary element of the whole supply chain, the aspect of agriculture should be added to the title and provisions of the directive. The term 'food supply chain' should be replaced by the term 'agricultural and food supply chain' or agri-food supply chain.

Proposed change:
The term 'food chain' should be replaced by the term 'agricultural and food supply chain' or 'agri-food supply chain'.

4.2.2. With regard to the products concerned

Considering that unfair commercial practices may also affect agricultural producers who sell unprocessed agricultural products that are not intended for human consumption such as cut flowers and animal feed, the scope of the text should be extended to all products listed in Annex I to the Treaty. In general, the word 'foodstuffs' should be replaced by 'agricultural products and foodstuffs'.

Proposed change for the whole text: Replace the term 'foodstuffs' with 'agricultural products and foodstuffs'.

4.2.3. With regard to the definition of suppliers in Article 1:

Considering that the purpose of the text is to protect farmers and their organisations at the same time, considering that the size of these organisations often exceeds that of SMEs, it is appropriate to extend the scope of the text to suppliers who are not SMEs.

New drafting of Article 1(2):
This Directive applies to certain unfair commercial practices relating to the sale of agricultural products and foodstuffs by a supplier to a buyer.

[145] Largely adopting those proposed in the European Parliament's COMAGRI draft report, cited above (COM (COM(2018)0173-C8-0139/2018-2018/0082(COD)); however, the recommendations made by the rapporteurs only concern the main provisions relating to the purpose of the report and the strengthening of the bargaining power of producers.

Recital 7 should be amended by deleting the reference to the definition of micro, small and medium-sized enterprises in the Annex to Commission Recommendation 2003/361/ EC, the reference to small and medium-sized enterprises and the reference to small and medium-sized suppliers.

4.2.4. With regard to the general definition of unfair commercial practices

Member States must have a general definition of unfair commercial practices based on recognised and accepted principles within the Union in order to identify practices that go beyond those defined by the text. In accordance with the definition proposed by the Council in its conclusions of 12 December 2016 (cited above), the text should provide a general definition of unfair practices.

New drafting proposed by Parliament's report: Article 2(1)(a) new.
'unfair commercial practice' means any practice that:

- grossly deviates from good commercial conduct, is contrary to good faith and fair dealing and is unilaterally imposed by one trading partner on another;
- imposes or attempts to impose an unjustified and disproportionate transfer of a buyer's economic risk to the supplier; or
- imposes or attempts to impose a significant imbalance of rights and obligations on the supplier in the commercial relationship before, during or after the contract.

4.2.5. With regard to the definition of buyer, Article 2(1)(a)

In order to ensure that operators established outside the Union, but who buy and sell products on the European market, are not exempt from the application of the Directive, the definition of buyer should be completed.

New drafting proposed by Parliament's report: Article 2(1)(a):
'"buyer" means any natural or legal person, irrespective of that person's place of establishment, who buys agricultural and food products by way of trade, for processing, distribution or retail, and/or provides services related to those products, in the Union. The term "buyer" also includes a group of such natural and legal persons'.

4.2.6. With regard to the economic dependence of suppliers on their buyers

In order to better take into account the vulnerability of suppliers and the asymmetry of bargaining power with their buyers, in a context of increased concentration and the conclusion of commercial alliances between retailers and digital platforms, the text could introduce the notion of economic dependence.

Proposed amendment to Article 2(1)(c)(a) new:
Economic dependence is characterised by an unbalanced power relationship between a supplier and a buyer, resulting in particular from the bargaining power of the buyer and in which the supplier depends on the buyer because of the importance of the deliveries to the buyer in terms of quantity, the buyer's reputation, its market share or the absence of sufficient alternative sales possibilities.

A situation of economic dependence is particularly characterised, within the meaning of the previous paragraph, when the supplier does not have an alternative to such commercial relations, likely to be implemented within a reasonable time and under reasonable conditions.

Proposed amendment to Article 3(2) on the definition of grey clauses:
For the sake of consistency with the previous point, the clauses listed in Article 3(2) should also be prohibited when the supplier is in a situation of economic dependency.

New drafting of Article 3(2): Member States shall ensure that the following trading practices are prohibited:

- if they are not agreed in clear and unambiguous terms at the conclusion of the supply agreement,
- if the supplier is in a situation of economic dependence vis-à-vis the buyer,
- if these clauses give the buyer a manifestly excessive advantage.

4.2.7. With regard to the possibility for Member States to prohibit any other unfair practice

Considering that this Directive is a minimum harmonisation directive and that some Member States already have national legislation or may wish to develop more ambitious legislation, it should be made clear that Member States may prohibit any other unfair practices and consequently amend Article 3(2).

New drafting, introduction of a paragraph 2(a):
Member States may prohibit any other unfair trading practice in relation to commercial relationships between a supplier and a buyer within the meaning of this Directive.

4.2.8. With regard to strengthening the efficiency and effectiveness of the text in general

In order to strengthen the text's efficiency and effectiveness, it is important to:

- to open the right of action to professional organisations and associations representing suppliers;
- to provide that the competent authority must open an investigation within sixty days from the date of referral and close it within 6 months of the referral;
- when an infringement is found, the authority must order the buyer to stop the unfair practice.

BIBLIOGRAPHY

Studies and papers

- Adornato F., 2010, Agricoltura, politiche agricole ed. istituzionicomunitarie: un equilibrio mobile, Rivista di dirittoagrario, 2, 261-284.
- Adorno, Theodor W., 1998, Critical Models: Interventions and Catchwords, New York, Columbia University Press.
- Alcoff, Linda, Hames-García, Michael, Mohanty, Satya P., and Moya, Paula M. L. (eds.), 2006, Identity Politics Reconsidered, New York, Palgrave Macmillan.
- Bosco D. et Prieto C., 2013, Droit européen de la concurrence. Ententes et abus de position dominante, Bruylant, France.
- Carney B., Haines D. and King S.P.,2015, Farmers cooperative and competition: Who wins, who loses and why, Monash Business School Discussion, Department of Economics, ISSN 1441-5429, Discussion Paper 51/15.
- Chalmers and Monti (directed by), 2008, European Union Law Updating Supplement, Cambridge, 153.
- Chauve P., Parera A. And Renckens A., 2014, Agriculture, Food and Competition Law: Moving the Borders, Journal of European Competition Law & Practice, Vol. 5, No. 5, 304-313.
- Courivaud H., 2005, La politique agricole commune est-elle soluble dans la concurrence? - Lecture critique de la décision « viandes bovines françaises » (Commission, 2 April 2003), Revue contrats, concurrence, consommation, 1.
- De Cockborne J., 1988, Les régles communautaires de concurrence applicables aux entreprises dans le domaine agricole in Rev. trim dr. europ, 1988, p.306 note 59.
- Del Cont C. and Pironon V., 2010, L'affaire de la viande bovine irlandaise, Revue Lamy concurrence, 4.
- Del Cont C. et Bodiguel L., 2017, Le droit de l'agriculture face à l'injonction d'une agriculture durable, Environnement et développement durable dans les politiques de l'Union européenne, PUR, pp. 179-189.
- Del Cont C., 2010, Commerce équitable et développement durable, Rivista di diritto alimentare, 3.
- Del Cont C., 2016, « Affaire Endives » suite et bientôt fin : la Cour de cassation saisit la Cour de Justice de l'Union européenne, Réflexions sur l'arrêt du 8 décembre 2015, Rivista di diritto agrario 2016/2.
- Del Cont C., 2016, L'arrêt de la Cour d'appel de Paris du 14 mai 2014, « l'affaire endives » : quels enseignements pour l'avenir de la relation spéciale entre agriculture et concurrence?, Rivista di diritto agrario 2015/2.
- Del Cont C., 2017, La contractualisation des relations commerciales agricoles : brèves réflexions sur la prise en considération de la spécificité agricole, Mélanges en l'honneur de François Collart Dutilleul, Ed. Dalloz, France.
- Del Cont C., 2017, Les relations commerciales agricoles dans le droit français : Entre affirmation et effacement de la spécificité agricole, L'agricoltura dopo il trattato di Lisbona, Ed. Caccucci, Bari, 191-208.
- Deutscher E. etMakris S., 2016, Exploring the Ordolibera lParadigm: the Competition-Democracy Nexus, Competition L.R., vol. 11, n. 2, pp. 181-214.
- Gencarelli F., 2009, Aiuti comunitari e aiuti di Stato, in Diritto e giur. agr. alim. e dell'ambiente, 375.
- Gencarelli F., 2009, Gli aiuti di Stato in agricoltura, in Riv. dir. agr., I, 23.

- Iannarelli A. et Del Cont C., 2017, Il caso «indivia» alla Corte di giustizia. Atto primo: le conclusioni dell'avv. generale tra diritto regolativo europeo e diritto privato comune,Riv. dir. agr., I, 366.
- Iannarelli A., 1997, Il regime della concorrenza nel settore agricolo tra mercato unico europeo e globalizzazione dell'economia, in Riv. dir. agr., I, 416.
- Iannarelli A., 2011, La concorrenza e l'agricoltura nell'attuale esperienza europea: una relazione "speciale", in Profili giuridici del sistema agro-alimentare tra ascesa e crisi della globalizzazione, ed.Cacucci, Bari, 13-89.
- Iannarelli A., 2012, Contractual Frameworks and Inter-firm Co-operation in the Agricultural Sector, Uniform law review, vol. XVII, p. 247-262, ISSN: 1124-3694.
- Iannarelli A., 2012, La strutturazione giuridica dei mercati nel sistema agroalimentare e l'art 62 della legge 24 marzo 2012 n. 27: un pasticcio italiano in salsa francese, in Rivista di Diritto Agrario, vol. 4, p. 545-597, ISSN: 0391-8696.
- Iannarelli A., 2012,Competition law and European agricultural and food law, European Food Law. p. 71-90, PADOVA:CEDAM, ISBN: 978-88-13- 30835-3
- Iannarelli A., 2016,Profili giuridici del sistema agro-alimentare e agro-industriale Soggetti e concorrenza, Caccuci editore, Bari, 260.
- Iannarelli A., 2018, Dal caso "indivia" al regolamento Omnibus n.2393 del 13 dicembre 2017: le istituzioni europeeà la guerre tra la PAC e la concorrenza? Rivista di diritto agroalimentare, p. 109ss.
- Iannarelli A.,2015, Agricoltura e concorrenza o concorrenza e agricoltura? Gli artt. 169, 170 e 171 del Reg. n. 1308/2013 e il progetto di guidelines presentato dalla Commissione, in Riv. dir. agr. n. 1, 2015, p. 11.
- Jesse, Johnson, Marion, and Manchester, 1982, Interpreting and Enforcing Section of the Capper-Volstead Act, in American Journal of Agricultural Economy, p. 431.
- Kahn L., 2017, Amazon's Antitrust Paradox, in 126 Yale L.J., p. 710.
- Monti M., 2003, The relationship between CAP and competition policy – Does EU competition law apply to agriculture?,COGECA Conference Helsinki Fair Trade, 13 November 2003, Speech/03/537.
- Ondeck & Clair, 2009, Justice Department and Private plaintiffs take aim at Capper-Volstead Act's protections for agriculture, Antitrust and Trade Regulation Report, 11 June 2009 (http://www.bna.com).
- Perron D., 2009, French, Milk Interbranch Agreement, La production laitière et les ententes, Droit rural n° 370, Février, étude 2.
- Riley A., 2007, The EU Reform Treaty and the Competition Protocol: Undermining EC Competition Law, in 28 European Competition L.R., 703.
- Saker Woeste, 1998, The farmer's benevolent trust, University of North Carolina Press.
- Symposium in Brussels on 8 November 2007, 2008, Concurrences, Revue des droits de la concurrence, n° 1.
- Talbot C., 2016, Ordoliberalism and Balancing Competition Goals in the Development of the European Union, in 61 The Antitrust Bulletin, 264 and following.
- Van Caenegem W., Taylor M., Cleary J. and Marshall B, 2018, Collective Bargaining in the Agricultural Sector, University of Sidney Law School research paper 18/20.
- Vogel L., 2005, Les règlements d'exemption «nouvelle génération», Revue Contrat, concurrence, consommation, n° 141.

Reports

- DG COMP, June 2016, An overview of European competition rules applying in the agricultural sector.
- Frederick, Antitrust Status of Farmer Cooperatives: the story of Capper Volstead Act, USDA Cooperative information report, No 59.
- Ger van der Sangen (Tilburg University), 2012, Support for Farmers' Cooperatives; EU synthesis and comparative analysis report Legal Aspects, November 2012.
- Working group chaired by Guy Canivet and Frédéric Jenny, 2018, Pour une réforme du droit de la concurrence, Le club des juristes (ad hoc committee), January 2018.
- J.Bizet, Le rôle des organisations de producteurs dans la négotiation du prix du lait, Raport to the French Senate, 27.07.2012.
- OECD, 2005, Competition and Regulation in Agriculture: Monopsony Buying and Joint Selling, DAF/COMP(2005)44, 187 and following.
- OECD, 2013, Competition Issues in the Food Chain Industry, p. 131.
- OFT, 2011, How competition law applies to co-operation between farming businesses: Frequently asked questions, Published 1 November 2011.
- French report for the CEDR (Comité européen de droit rural), 2017, Rapport de la Commission 1 Agriculture et concurrence, published online http://www.cedr.fr.
- Report on fair revenues for farmers: A better functioning food supply chain in Europe, José Bové (Rapporteur), Committee on Agriculture and Rural Development (2009/2237(INI).
- Report by Del Cont C., Bodiguel L. e Iannarelli A., 2012,EU Competition Framework: Specific Rules For The Food Chain In The New Cap, Directorate General for Internal Policies Policy Department B: Structural And Cohesion Policies, Agriculture And Rural Development, IP/B/AGRI/CEI/2011-097/E012/SC1, May 2012, EP 474.541.
- Report by Van Herck K, Assessing efficiencies generated by agricultural Producer Organisations Report by Kristine, 2014, Publications Office of the European Union, June 2014 ISBN 978-92-79-39284-9 doi 10.2763/76733.
- The Agricultural Markets Task Force (AMTF), improving market outcomes enhancing the position of farmers in the supply chain, Report of the Agricultural Markets Task Force Brussels, November 2016.

Commission Decisions

- Cass. Com., 12 septembre 2018, arrêt n°754, pourvoi H14-19.589, https://www.courdecassation.fr/jurisprudence_2/arrets_publies_2986/chambre_sociale_3168/2018_8506/1233_12_40140.html (Judgment in Endives case)
- Commission Decision 73/109/EEC of 2 January 1973 relating to proceedings under Articles 85 and 86 of the EEC Treaty (IV/26.918 - European sugar industry).
- Commission Decision of 14 December 1998 relating to a proceeding pursuant to Article 85 of the EEC Treaty (IV/35.280 - Sicasov).
- Commission Decision of 15 December 2009 relating to support measures implemented by Spain in the agricultural sector following the increase in fuel prices (2010/473/EU).
- Commission Decision of 18 December 1987 relating to a proceeding pursuant to Article 85 of the EEC Treaty (IV/31.735 - New potatoes).
- Commission Decision of 2 April 2003 relating to a proceeding pursuant to Article 81 of the EC Treaty (Case COMP/C.38.279/F3 — French beef).
- Commission Decision of 20 October 2004 relating to a proceeding under Article 81(1) of the EC Treaty (Case COMP/C.38.238/B.2 - Raw tobacco - Spain.

- Commission Decision of 21 September 1978 relating to a proceeding under Article 85 of the EEC Treaty (IV/28.824 - Breeders' rights - maize seed).
- Commission Decision of 7 December 1984 relating to a proceeding under Article 85 of the EEC Treaty (IV/28.930 - Milchförderungsfonds).

European Court of Justice Judgments

- Judgment of the Court (Fifth Chamber), 19 September 2013, Panellinios Sindesmos Viomikhanion Metapoiisis Kapnou v Ipourgos Ikonomias kai Ikonomikon and Ipourgos Agrotikis Anaptixis kai Trofimon, Request for a preliminary ruling from the Simvoulio tis Epikratias, Reference for a preliminary ruling - Assessment of validity - Common Agricultural Policy - Regulation (EC) No 1782/2003 - Additional payment for specific types of farming and quality production - Discretion granted to the Member States - Discrimination - Articles 32 EC and 34 EC (in Case C□373/11).
- Judgment of the Court (Plenary session) of 9 September 2003,The Queen v The Competition Commission, Secretary of State for Trade and Industry and The Director General of Fair Trading, ex parte Milk Marque Ltd and National Farmers' Union (in Case C-137/00).
- Judgment of the Court (Grand Chamber) of 14 November 2017,

  Reference for a preliminary ruling - Common Agricultural Policy - Article 42 TFEU - Regulation (EC) No 2200/96 - Regulation (EC) No 1182/2007 - Regulation (EC) No 1234/2007 - Anticompetitive practices - Article 101 TFEU - Regulation No 26 - Regulation (EC) No 1184/2006 - Producer organisations - Associations of producer organisations - Responsibilities of those organisations and associations - Practice of fixing minimum sale prices - Practice of concertation on quantities placed on the market - Practice of exchanges of strategic information - French endive market (in Case C-671/15.
- Judgment of the Court (Third Chamber), 11 September 2014, Groupement des cartes bancaires (CB) v European Commission. Appeal — Competition — Agreements, decisions and concerted practices — Article 81(1) EC — Payment cards system in France — Decision by an association of undertakings — Issuing market — Pricing measures applicable to 'new entrants' — Membership fee, mechanism for 'regulating the acquiring function' and 'dormant member "wake-up"' mechanism — Concept of restriction of competition 'by object' — Examination of the degree of harm to competition (in Case C□67/13 P.).
- Judgment of the Court (Third Chamber),of 20 November 2008,Competition Authority v Beef Industry Development Society Ltd, Barry Brothers (Carrigmore) Meats Ltd.(in Case C-209/07).
- Judgment of the Court of 10 December 1974, Mr Charmasson v Minister for Economic Affairs and Finance, (Reference for a preliminary ruling: Conseil d'Etat - France) 'National organisation and common organisation of the agricultural market' (Case 48-74).
- Judgment of the Court of 12 December 1995, Hendrik Evert Dijkstra v Friesland (Frico Domo) Coöperatie BA and Cornelis van Roessel and others v De coöperatieve vereniging Zuivelcoöperatie Campina Melkunie VA and Willem de Bie and others v De Coöperatieve Zuivelcoöperatie Campina Melkunie BA. References for a preliminary ruling: Gerechtshof Leeuwarden and Arrondissements rechtbank's-Hertogenbosch-Pays-Bas. Competition - Statutes of dairy cooperative associations - Fee payable on withdrawal or expulsion - Interpretation of Article 2 of Regulation No 26 (Joined cases C-319/93, C-40/94 and C-224/94).
- Judgment of the Court, of 12 December 1995, H. G. Oude Luttikhuis and others v Verenigde Coöperatieve Melkindustrie Coberco BA (in Case C-399/93).
- Judgment of the Court, of 15 May 1975, Nederlandse Verenigingvoor fruit en groentenimporthandel, Nederlandse Bond van grossiers in zuidvruchten en andergeïmporteerd fruit Frubo v Commission of the European Communities and Vereniging de Fruitunie (Case 71-74).

- Judgment of the Court of 16 December 1975, Case 40/73, Cooperative Vereniging Suiker Unie (in joined cases to 48 to 50, 54 to 56, 111, 113 AND 114-73).
- Judgment of the Court of 29 October 1980, Maizena GmbH v Council of the European Communities, - Isoglucose - Production quotas (in Case 139/79).
- Judgment of the Court of 3 December 1987, reference to the Court under Article 177 of the EEC Treaty by the Saintes Court of First Instance (Charente-Maritime) for a preliminary ruling in the proceedings before said court between the Bureau national interprofessionnel du cognac, in Cognac, and Yves Aubert, in Saint-Porchaise, a preliminary ruling on the compatibility of certain measures for quotas for the marketing and storage of alcohol with Article 85 of the EEC Treaty (in Case 136/86).
- Judgment of the Court of 5 October 1994, Federal Republic of Germany v Council of the European Union, - Bananas - Common organisation of the markets - Import regime (in Case C-280/93).
- Judgment of the Court of 8 June 1982, L.C. Nungesser KG and Kurt Eisele v Commission of the European Communities (in Case 258/78).
- Judgment of the Court of 9 September 2003, Consorzioindustrie Fiammiferi(CIF) and Autorità Garante della Concorrenza e del Mercato (in Case C-198/01).
- Judgment of the Court (Second Chamber, Extended Composition), of 14 May 1997, Florimex BV and Vereniging van Groothandelaren in Bloemkwekerijproduktencontre Commission of the European Communities (in Joined cases T-70/92 and T-71/92).
- Judgment of the Court (Eighth Chamber), of 14 March 2013, Dole Food Company, Inc. and Dole Germany OHG v European Commission. Competition — Agreements, decisions and concerted practices — Market in bananas — Decision finding an infringement of Article 81 EC — Concept of a concerted practice having an anti-competitive object — Information exchange system — Duty to state reasons — Rights of the defence — Guidelines on the method of setting fines — Gravity of the infringement (in Case T-588/08).
- Judgment of the Court (First Chamber) of 13 December 2006, Fédération nationale de la coopération bétail et viande (FNCBV) and Fédération nationale des syndicats d'exploitants agricoles (FNSEA) and Others v Commission of the European Communities (in Joined cases T-217/03 and T-245/03).
- Judgment of the Court of First Instance (Seventh Chamber) of 30 September 2009, French Republic v Commission of the European Communities. EAGGF - Guarantee Section - Expenditure excluded from Community financing - Fruit and vegetables - Conditions for recognition of producers' organisations (in Case T-432/07).

North American Decisions

- United States of America, Plaintiff, v. Maryland Cooperative Milk Producers, Inc., and Maryland and Virginia Milk Producers Association, Inc., Defendants. No. 992-55. United States District Court District of Columbia. October 16, 1956 [145 F. Supp. 151 (D.C. 1956)].
- US Court of Appeals for the Ninth Circuit, Treasure Valley Potato Bargaining Association et al., plaintiffs-appellants, v. Ore-ida Foods, Inc. and J. R. Simplot Company, Defendants-appellees. treasure Valley Potato Bargaining Association ,plaintiff-cross-appellee, v. Ore-ida Foods, Inc., Defendant-cross-appellant treasure Valley Potato Bargaining Association, plaintiff-cross-appellee, v. J. R. Simplot Company, Defendant-cross-appellant, 497 F.2d 203 (9th Cir. 1974 April 11, 1974

Opinions and decisions by the French Competition Authority

- French Competition Authority, Decision No 12-D-08 of 6 March 2012,relating to practices implemented in the sector for the marketing and production of endives.
- Opinion No 06-A-07, of 22 March 2006, by the French Competition Authority, relating to the assessment of functioning modalities of the fair trade sector in France, on the basis of the competition rules, p.58, 92, 95, 97.
- Opinion No 09-A-48, of 2 October 2009, by the French Competition Authority, relating to the functioning of the dairy sector.
- Opinion No 18-A-04, of 3 May 2018, by the French Competition Authority, relating to the farming sector.

European legislation

- Council Regulation (EC) No 1/2003 of 16 December 2002, on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [Official Journal L 1, of 04.01.2003].
- Council Regulation (EC) No 1184/2006 of 24 July 2006, applying certain rules of competition to the production of, and trade in, agricultural products [Official Journal L 214 of 04.08.2006].
- Council Regulation (EC) No 361/2008 of 14 May 2008, amending Regulation (EC) No 1234/2007 establishing a common organisation of agricultural markets and on specific provisions for certain agricultural products (Single CMO Regulation) [Official Journal L 121, of 7.5.2008].
- Council Regulation (EC) No 491/2009 of 25 May 2009, amending Regulation (EC) No 1234/2007 establishing a common organisation of agricultural markets and on specific provisions for certain agricultural products (Single CMO Regulation) [Official Journal L 154, 06/17/2009].
- Regulation (EU) No 1305/2013 of the European Parliament and of the Council of 17 December 2013, on support for rural development by the European Agricultural Fund for Rural Development (EAFRD) and repealing Council Regulation (EC) No 1698/2005 [Official Journal L 347/487, of 20.12.2013].
- Regulation (EU) No 1308/2013 of the European Parliament and of the Council of 17 December 2013, establishing a common organisation of the markets in agricultural products and repealing Council Regulations (EEC) No 922/72, (EEC) No 234/79, (EC) No 1037/2001 and (EC) No 1234/2007 [Official Journal L 347, 20.12.2013].
- Regulation (EU) No 2017/2393 of 13 December 2017, amending Regulations (EU) No 1305/2013 on support for rural development by the European Agricultural Fund for Rural Development (EAFRD), (EU) No 1306/2013 on the financing, management and monitoring of the common agricultural policy, (EU) No 1307/2013 establishing rules for direct payments to farmers under support schemes within the framework of the common agricultural policy, (EU) No 1308/2013 establishing a common organisation of the markets in agricultural products and (EU) No 652/2014 laying down provisions for the management of expenditure relating to the food chain, animal health and animal welfare, and relating to plant health and plant reproductive material [Official Journal L 350/15, of 29.12.2017].
- Regulation (EU) No 261/2012 of the European Parliament and of the Council of 14 March 2012, amending Council Regulation (EC) No 1234/2007 as regards contractual relations in the milk and milk products sector [Official Journal L 94, 30.03.2012].
- Regulation (EU) No 330/2010 of the Commission of 20 April 2010, on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices [Official Journal L 102/1, 23.4.2010].

- Commission Regulation (EEC) No 2276/92 of 4 August 1992, laying down detailed rules for the application of Article 21 of Council Regulation (EEC) No 1035/72 on the common organisation of the market in fruit and vegetables[Official Journal L 220/22, of 5.8.92].
- Commission Delegated Regulation (EU) 2017/891 of 13 March 2017, supplementing Regulation (EU) No 1308/2013 of the European Parliament and of the Council with regard to the fruit and vegetables and processed fruit and vegetables sectors and supplementing Regulation (EU) No 1306/2013 of the European Parliament and of the Council with regard to penalties to be applied in those sectors and amending Commission Implementing Regulation (EU) No 543/2011 [Official Journal L 138/4 of 25.5.2017].
- Commission Delegated Regulation (EU) 499/2014 of 11 March 2014, supplementing Regulations (EU) No 1308/2013 of the European Parliament and of the Council and Regulation (EU) No 1306/2013 of the European Parliament and of the Council by amending Commission Implementing Regulation (EU) No 543/2011 relating to the fruit and vegetables and processed fruit and vegetables sectors [Official Journal L 145/5, of 16.5.2014].
- Commission Implementing Regulation (EU) No 543/2011 of 7 June 2011, laying down detailed rules for the application of Council Regulation (EC) No 1234/2007 in respect of the fruit and vegetables and processed fruit and vegetables sectors [Official Journal L 157/1 of 15.6.2011).
- Council Regulation (EC) No 1257/1999 of 17 May 1999, on support for rural development from the European Agricultural Guidance and Guarantee Fund (EAGGF) and amending and repealing certain regulations [Official Journal L 160/80 of 26.6.1999].
- Council Regulation (EC) No 2200/96 of 28 October 1996, on the common organisation of the market in fruit and vegetables [Official Journal L 297/1 of 21.11.96].
- Council Regulation (EC) No 952/97, of 20 May 1997, on producer groups and associations thereof [Official Journal L 142/30, of 2. 6. 97].
- Regulation (EEC) No 1035/72 of the Council of 18 May 1972, on the common organisation of the market in fruit and vegetables [Official Journal No L 118/1 of 20.5.72].
- Regulation (EEC) No 1360/78, of the Council of 19 June 1978, on producer groups and associations thereof [Official Journal L 166/ 1 of 23.6.78].
- Council Regulation No 26/62 of 4 April 1962, applying certain rules of competition to production of and trade in agricultural products [Official Journal No B 30 of 20.04.1962].
- Council Regulation (EC) No 1234/2007 of 22 October 2007, establishing a common organisation of agricultural markets and on specific provisions for certain agricultural products (Single CMO Regulation), [Official Journal L 299, 16.11.2007].

European Commission Communications

- Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 2008, Food prices in Europe, COM(2008) 821 final, 9.12.2008.
- The Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, The CAP towards 2020: meeting the food, natural resources and territorial challenges of the future, European Commission, 2010, COM (2010) 672, 18.11.2010.
- Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, The Future of Food and Farming, 2017,COM(2017) 713 final, 29.11.2017.
- Communication from the Commission on the cooperation between the Commission and the courts of the EU Member States in the application of Articles 81 and 82 of the EC, 2004/C 101/04, 27.4.2004.

- Communication from the Commission, Europe 2020 A strategy for smart, sustainable and inclusive growth, 2010, COM(2010) 2020 final, 3.03.2010.
- Communication from the Commission, Guidelines on the application of the specific rules set out in Articles 169, 170 and 171 of the CMO Regulation concerning the olive oil, beef and veal, and arable crops sectors (2015/C 431/01) of 22.12.2015.

Resolutions of the European Parliament

- European Parliament Resolution of 23 June 2011, on the CAP towards 2020: meeting the food, natural resources and territorial challenges of the future, (2011/2015(INI) [Official Journal C390 E/49, of 18.12.2012].
- European Parliament Resolution of 7 June 2016 on unfair trading practices in the food supply chain (2015/2065(INI) [Official Journal 583.763, of 08.06.16].
- European Parliament Resolution of 8 July 2010, on the future of the Common Agricultural Policy after 2013(2009/2236(INI) [Official Journal C 351 E/103, of 2.12.2011].
- Resolution of the Heads of the European Competition Authorities, 21 December 2012, The Reform of the Common Agricultural Policy.

Commission proposals

- European Commission, 2018, Proposal for a Directive of the European Parliament and of the Council on unfair trading practices in business-to-business relationships in the food supply chain, COM(2018) 173 final.
- European Commission, 2018, Proposal to amend Regulation (EU) No 1308/2013 on the common market organisation and other regulations, COM (2018) 394 final.
- European Commission, 2011, Proposal for a Council Regulation (EU) of 12 October 2011, determining measures on fixing certain aids and refunds related to the common organisation of the markets in agricultural products,COM (2011) 629 final.

French legislation

- Art. L. 631-24 Rural and forestry code, 2012.
- Decree No 2012-512 of the French Ministry of Agriculture, Fisheries and Food of 19 April 2012, relating to the economic organisation of the cow's milk sector [OJFR No 0094 of 20 April 2012 page 7108 text No. 24].

Websites

- http://ec.europa.eu/agriculture/
- http://www.europarl.europa.eu/

In the framework of the next reform of the CAP post 2020, the Commission proposed a new Regulation in COM(2018)394 of 1 June 2018 on the common market organisation amending Regulation (EU) No 1308/2013 of 13 December 2013 (amended by Regulation (EU) No 2017/2393 of 13 December 2017). This draft regulation does not however cover questions on the relationship between the CAP and competition; the proposal does not contain any provisions concerning the responsibilities of professional and interbranch organisations and the possible conditions of their submission to the competition rules. The recent Omnibus Regulation (EU) No 2017/2393 has made changes to the legal framework for the application of the competition rules to the agreements and practices of farmers and their associations. However, this new legislative framework is not yet entirely consistent and, in the light of the Court of Justice judgment handed down on 14 November 2017 in the Endive case, the progress ought to be consolidated and clarified in order to guarantee the real effectiveness of these provisions and greater legal certainty for operators.
This study analyses the development of the relationship between the CAP and the competition rules and highlights the need to take corrective action with respect to current farming legislation to ensure that the CAP has primacy over the competition rules and the implementation of the objectives set out in Article 39 of the Treaty.

EP 617.497
IP/B/AGRI/IC/2018-078

Print ISBN 978-92-846-4285-4 | doi:10.2861/168750 | QA- 05-18-047-EN-C
PDF ISBN 978-92-846-4284-7 | doi:10.2861/350099 | QA- 05-18-047-EN-N