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The relationship between CAP and competition policy – Does EU competition law apply to agriculture ?

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Mr.Chairman, Ladies and Gentlemen,

Let me first express my gratitude to our host - COGECA - for giving me the opportunity to share with you some thoughts concerning the European Commission's antitrust policy in the agricultural field.

I am all the more pleased to discuss the topic with you as it is, in fact, the first time I have ever been invited to talk about the relationship between agriculture and EU competition law. So, you can imagine my delight to find that COGECA has organised a seminar fully dedicated to competition law and policy.

Both competition policy and the Common Agricultural Policy play a prominent role in the Commission's overall policy making. These policies, which find their basis in the EU Treaty, have often been deemed to be irreconcilable. However, I believe this is plainly wrong. In fact, as the Court of Justice recently confirmed in its *Milk Marque* judgement of September 2003, *"the maintenance of effective competition on the market for agricultural products is one of the objectives of the common agricultural policy"*.

On the one hand, no one can deny the particular position of agricultural markets. The CAP involves all sorts of constraints, such as environmental, on regional cohesion and rural development, which are however not necessarily specific to agriculture. Further, the agriculture marketplace is undergoing significant change, as a result, for instance, of globalisation and technological innovations.

On the other hand, no one can deny that agriculture is an economic activity. For the purpose of competition rules, an "undertaking" – the word used in the Treaty – covers "any entity engaged in an economic activity, regardless of its legal status". The Court of Justice has further decided that "any activity consisting in offering goods and services on a given market is an economic activity". In that sense, agriculture is certainly an economic activity. There is therefore no doubt that farmers are undertakings to whom, as to any undertaking, competition rules may be applied; and no doubt either that associations of farmers – like cooperatives - are associations of undertakings, whose behaviour may be caught by EU competition rules.

As you know, EU competition rules applied to "undertakings" contain three pillars. Two concern behaviours of undertakings: i.e. Article 81, which prohibits restrictive agreements, and Article 82, which prohibits abuses of dominant positions. The third pillar concerns mergers. I will not touch upon the question of State aids today**,** but rather limit my comments to the rules applicable to operators active in the markets. What I would like to do with you today is to go through these three pillars and see to what extent they apply in the agricultural sector and, beyond this, to agricultural co-operatives. Are there – or should there be – any specific rules? I will finally formulate a few remarks about the competitive context which the Commission should create in the agricultural sector.

1. Classic antitrust rules

But let us come first to the classic antitrust rules, Article 81 and 82..

a. General principles

Back in 1962 the Council decided the extent to which competition rules apply to production and trade of agricultural products. The Council has done so in a Regulation known as “Regulation 26”. In fact, that Regulation is very simple: Article 1 sets a principle and Article 2 sets out the exceptions.

The principle lies in one sentence which I could summarise even more succinctly as follows: Articles 81 and 82 do apply to agricultural products as defined with reference to Annex 1 of the Treaty. Interestingly, the principle only refers to certain types of activities (production and trade) and makes no distinction between the types of undertakings involved. So whether these activities are carried out by individual farmers, co-operatives or any type of firm or association is irrelevant.

Let me now move on to the specific provisions of Article 81 and Article 82 and their applicability to the agricultural sector.

b. Article 81

As I said, the principle is clear and its scope is broad: Article 81, which prohibits agreements between undertakings which have as their object or effect to restrict competition, does apply to the agricultural sector.

There are however 3 exceptions, which are laid down in Article 2 of Regulation 26.

May I recall from the start that the three exceptions only apply to Annex I products and not to any other products, even those ancillary to the production of products covered by Annex I. Let us look now at the three exceptions briefly in turn.

i. National market organisation

The first exception excludes the application of Article 81 in relation to agreements, decisions and practices, which form an integral part of national market organisations. There is not much to say about this exception since, as you are aware, over time most national market organisations have been replaced by common market organisations.

ii. Objectives of Article 33

The second exception – and more frequently used, or at least referred to by parties before the Commission – concerns agreements, decisions and practices which “are necessary for the attainment of the objectives” of the CAP. These objectives include “a fair standard of living for the agricultural community” and market stabilisation.

The scope of this exception is, however, also limited.

- First, the only eligible restrictive arrangements are those which are necessary to attain all the objectives of the CAP or, if those objectives should prove divergent, where the Commission is able to reconcile them so as to enable the derogation to apply.
- Second, it is not enough to pretend that there exists a link between the agreement and these objectives of the CAP. The text requires that the agreement is “necessary”, which is a very strong link.

- Third, an agreement will not be covered by the exception if other less restrictive means exist to attain the same objectives. It is a proportionality test.
- Fourth, the objectives of the CAP are generally adequately provided for by the arrangements made in the common market organisations – this is precisely why Common market organisations have been established. As a result, it is unlikely that any additional private action, which would otherwise be contrary to Article 81, is required to achieve the goals of the CAP.

Of course, the assessment of the application of this exception has to be done on a case by case basis. But in general, the more restrictive the agreement is, the more difficult it is to expect the application of this second exception. The Commission's recent decision in the French beef case, adopted in April 2003, offers a good example of this. The case related to a price fixing agreement and a suspension of imports from other Member States, which are two basic antitrust infringements, specifically referred to in Article 81. The Commission concluded that such an agreement could not be regarded as necessary to achieve the objectives of the CAP, even in the context of the BSE crisis.

iii. Particular care for co-operatives

Let me turn now to the last exception, which is more directly relevant to co-operatives. This exception indeed relates to agreements between farmers, associations of farmers 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. Such activities are traditionally those carried out by co-operatives of farmers. However, it should be noted that this provision is far from a blanket exemption for farmers' co-operatives, for several reasons.

- the exception only applies in case of arrangements involving exclusively farmers or association of farmers: so, for example, an agreement between associations of farmers and farmers' co-operatives with associations of slaughterhouses cannot benefit from the exception, as the Commission recently confirmed in its French beef decision.
- the exception only applies to such agreements between farmers or associations of farmers "belonging to a single Member State".
- the arrangements may not involve an obligation to charge identical prices. This essentially implies that traditional price fixing cartels will be prohibited. On the other hand, it is not intended to prevent farmers who sell their products via the co-operative from receiving pro rata the same price for their products.
- the arrangements shall not exclude competition.
- the arrangements may not jeopardise any of the goals of the Common Agricultural Policy.

iv. Other exceptions in specific CMOs

To be complete, I should add that Regulation 26 does not contain all the exceptions which may be applied in the agricultural sector. Some Common market organisations, like those dealing with "fruit and vegetables" or "wine", contain specific provisions on "interbranch organisations". Agreements entered into by such organisations are outside the scope of Article 81, under certain conditions. First, only agreements which deal with the topics listed in the said CMOs are covered by the exception.

Second, the CMOs contain a list of agreements which “in any case” will not be exempted from Article 81. This list includes, for instance, price-fixing and market partitioning arrangements or discriminatory agreements. Third, the exception implies, in procedural terms, a prior notification to the Commission.

v. Procedural matters

I will be brief on this, which may appear to be a subject of interest only to lawyers. I feel it is important however to underline that the Commission has the sole power to decide on the application of the exceptions I have discussed until now. It therefore belongs to the parties concerned to come and consult the Commission. This will remain the rule after May 2004, when the modernisation process enters into force.

What is the result of all this? Unless one of the above exceptions applies, but I have already said that they seldom do, the traditional competition rules apply to agricultural products and to actors on the agricultural market, such as co-operatives. However, I would like to emphasise that that does not mean that the particularities of agricultural markets will not be taken into account. It is simply that they are taken into account as the particularities of every other market is taken into account in the Commission’s assessment, on a case by case basis.

c. Art. 82: abuse of dominant position

Article 82 does not call for as many comments as Article 81. The reason is very simple. Council Regulation 26 lays down a principle – i.e. Article 82 applies to agricultural production and trade. But unlike what I said about Article 81, Regulation 26 does not provide for any exception for that type of business.

The general rules on abuse of dominant position therefore apply in that sector as they apply in every other sector.

Of course, a conduct can be held to be abusive only if the economic entity holds a dominant position in a substantial part of the Common market. Needless to say, it is unlikely that a single farmer or minor co-operatives will ever hold a dominant position. They have nothing to fear, obviously, from the provisions of Article 82. However, one cannot exclude that major co-operatives, such as the ones we find in northern Europe, are dominant. To that end, I cannot think of any better source of information than the COGECA website! It appears from your website that some co-operatives hold national market shares between 64 to 90%. One can fear that, with such market shares, co-operatives may hold a dominant position.

This reflects the key importance of market definition. For that reason, the Commission has published a notice, which explains how it will define markets for the purpose of competition rules. I will get back to this in a moment, when I speak about merger rules.

Should the Commission – or competition authorities in general – care about dominant co-operatives? They certainly should. Associations of farmers, of any legal type, including co-operatives, are to be welcomed in that they grant individual farmers some additional power on the market, as compared to the often significant size of companies in the agro-food industry. Such forms of co-operation between farmers have precisely been welcomed by the Commission: as I said a moment ago, Regulation 26 indeed contains a specific exception for farmers' associations, such as co-operatives. .

However, when such forms of co-operation become so strong on the market that market power is in the hands of – say – one co-operative, I can see no reason why competition rules should not apply if such a co-operative abuses its dominance.

2. Mergers

Merger control in the EU is based on the merger regulation of 1989. This regulation neither contains an exception for agricultural activities, nor does it contain any exception based on the nature of the undertakings involved in mergers.

However, as you know, EU merger control is only triggered when certain turnover thresholds are reached, and these are rather high. This excludes most – but not all – mergers in the agricultural sector.

A merger can only be declared incompatible if it creates or strengthens a dominant position. It is therefore of key importance to define the relevant markets, both in terms of product and in geographic terms.

Such an analysis can only be done on a case by case basis, taking into account every single relevant element.

To illustrate this point, I would like to use as an example the Danish Crown merger decision in 1998. In that case, the Commission carried out a detailed analysis of all relevant markets. It concluded, inter alia, that the product market was that for live pigs for slaughtering in Denmark.

Indeed, the investigation confirmed that the killing lines in a slaughterhouse differ for each species as they cannot be changed within a reasonable time span and without incurring significant costs. In addition, farmers themselves cannot switch production from the breeding of one species of animal to another.

Regarding the geographic market, the Commission's investigations led to the conclusion that the market was not wider than Denmark. Among the factors used, I could refer to the fact that slaughterpigs are hardly ever transported over long distances; further, the investigation carried out by the Commission showed the existence of only marginal exchange (imports and exports) from and to Denmark.

I do not want to mention here every argument used by the Commission. I simply want to make the point that markets are defined as they actually function, and not the way the parties would like them to be in theory. Or not even the way the Commission would like them to be: one could think that, in 2003, markets are at least European wide. But in the real world, this is often not the case.

3. CMOs and competition

I would like to make a few final remarks. Up to now, I have gone through the various rules which companies – in whatever form – that are active in the agricultural sector should not infringe. However, I believe that the Commission should also do its homework and introduce more competition in the Common market organisations.

In that sense, the recent reform presented by the Commission and adopted by the Council confirms a trend towards a more open and competitive agricultural marketplace. In particular, the traditional price mechanisms are given a lessened role and a greater flexibility is given through market prices.

However, some market organisations have remained outside of this reform. One of these is the sugar CMO, which has long been criticised – including by the European Court of Justice already back in 1975 – and yet has escaped every reform of the CAP. If we look at it from a competition perspective – and I am convinced that you will not be surprised that this is the perspective I have in mind - the sugar CMO itself generates a low level of competition, due to its direct and indirect consequences.

a. Direct impact

- Since it is based on quotas, the CMO limits the development capacities of the most competitive EU producers, imposes production quotas to substitutable products (sweeteners) and creates entry barriers for potential newcomers. Further, since quotas are allocated per Member State, the CMO inherently leads to low market integration and favours market partitioning.
- In terms of prices, this CMO is based on the principle that sugar beet should be produced in every Member State, including those where it is not naturally efficient to grow beets. As a result, the intervention price in the EU had to be set at a high level, in order to cover the costs of the least competitive producers. Such a high price level is fixed to the detriment of consumers.
- Finally, the rules on trade with third countries largely protect the EU market from any competition by third-country producers.

b. Indirect impact

Beyond this, the sugar CMO is subject to various criticisms due to the low level of competition it generates between sugar manufacturers. As you know, in cartel cases, the Commission usually challenges market sharing agreements and price fixing arrangements. The sugar CMO rules are such that they favour such a situation, without the need for parties to collude.

As a result of all this, despite the high level of the intervention price, it appears that the EU market price has constantly remained higher, to the detriment of consumers.

As my Colleague Franz Fischler said a few weeks ago, "*the time has come to consider how we can make the present EU sugar sector more market oriented*"[1]. I fully agree. In a sense, it is not really worth applying competition rules to undertakings in the agricultural sector if, at the same time, EU institutions maintain CMOs that create uncompetitive market conditions. For that reason, the Commission has launched a debate a few weeks ago, in its communication to the Council and the European Parliament at the end of September 2003 which covers inter alia sugar. This will be further discussed in the near future.

Conclusion

Mr Chairman, Ladies and Gentlemen,

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.

[1] See press release IP/03/1286 of 23.09.2003, available on the Commission's Internet website.

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.

In this context, to pretend that agriculture and, more particularly, agricultural cooperatives are, as a matter of principle, not subject to EU competition rules (and, incidentally, national competition rules) would be plainly wrong. The mere fact that the COGECA has organised a seminar fully dedicated to that question confirms, as if it were needed, that you are well aware of it.

However, this by no means implies that the particularities of agricultural markets or operators active on such markets are not taken into account. They are taken into consideration on a case by case basis, as is done in every competition assessment.

Some of the topics I have briefly discussed will be addressed in more details by other speakers this afternoon and will be enriched by national examples. I wish you a full and active discussion and I thank you for your attention.