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Mario Monti

European Commissioner for Competition policy

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

COGECA Conference

Helsinki Fair Trade, 13 November 2003

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.

Classic antitrust rules

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

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.

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.

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.

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.

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.

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.

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

As of January 2004, several previous agricultural and food control authorities will merge and be replaced by a new food inspection authority (*Mattilsynet*). The aim of the new authority is, among others, to secure food safety by ensuring a healthy, sustainable food production chain.

2.3 Agricultural Policy Instruments

In order to achieve the aims of agricultural policies, a number of agricultural policy instruments have been employed. This includes purely economic instruments, as well as laws and regulations, such as the ones mentioned above.

2.3.1 Border Protection and Market Price Support

For many years, Norwegian authorities have employed strong import restrictions, pursuant to existing laws. Due to the import restrictions, farmers are getting higher prices than world market prices, and domestic production is larger than it otherwise would have been. This price difference is often referred to as *market price support*. According to the OECD, Norwegian market price support amounted to approximately NOK 9.4 billion in 2002. As a result of the Norwegian border protection, not only producer prices, but also consumer prices are considerably higher in Norway than in our neighboring countries.

As a result of the GATT/WTO agreement in agriculture, which came into effect on 1 January 1995, Norway had to convert its quantitative import restrictions to tariff-based import restrictions. Since imported goods still often had clearly higher prices than Norwegian produce (when including tariffs), Norwegian production has so far not experienced strong competition from imports, with the exception of several processed agricultural goods. However, the latter is not directly a result of the WTO agricultural agreement, but rather of the bilateral agreement between Norway and the EU regarding price equalization for non-Annex 1 products. These products are called «RÅK» products in Norway (Norwegian: *Råvarepris kompensasjon*). This is discussed in detail in Chapter 8.

2.3.2 Price Systems

In spring 1995, the parties of the Norwegian agricultural negotiations agreed on a new price system, based primarily on the existing system of negotiated prices (Administrasjonsdepartementet, 1995). A system of target prices was established for the following products: milk and milk products, beef, mutton, pork, poultry, eggs, apples, pears, potatoes and certain vegetables. This implies that both the government and the agricultural unions considered it an advantage to have some control of the domestic prices, independent of price changes in the world market. The changes in the price system were mainly based on the desire for a more competitive domestic market, in addition to simplifying existing price systems. *The target prices are defined as the average annual prices agricultural producers are permitted to obtain, given balanced market conditions and under current import restrictions.*

If the obtained market prices exceed the target prices by more than 10 per cent for two consecutive weeks (8 per cent for dairy products and 12 per cent for fruits and vegetables), measures are implemented in order to lower prices back to the target level. In this case, administrative tariff reductions for a limited period of time are initiated. These tariff reductions can also be used when the price development causes the average price for the contract year to exceed the target price. The tariff reductions are administered by the Norwegian Agricultural Authority (previously the Norwegian Grain Corporation). In the given cases, the Norwegian Agricultural Authority has lowered the tariff rate in question to equal the difference between the product's target price and the current world market price.

For cereals and oil seed, there was earlier a system of «compulsory purchase» and guaranteed base prices to the producer (with price reductions in the case of overproduction). In the Report to the *Storting* no. 19 (1999–2000), the Ministry of Agriculture suggested to substitute state compulsory purchase with a target price system including an import system based on tariff quotas (i.e., quotas with lower tariff rates than the maximum tariff rates). This has been implemented, and the Norwegian Agricultural Purchasing and Marketing Co-operation (Felleskjøpet) is now responsible for market regulation.

For other agricultural products than those with target prices, the price level in Norway will be determined by price developments on the world market, current tariff rates and the domestic market balance.

During the past 3–4 years, there has been a significant increase in cross-border shopping, i.e., Norwegians travelling to Sweden to buy food products such as meat and cheese. One of the major issues of the new White Paper on agriculture was that the new target prices should be kept low enough so that the price difference between Norway and the EU (including the neighboring countries Denmark and Sweden) does not increase when Agenda 2000 is implemented. Important goals are thus to keep Norwegian food prices under control, to enable market balance and to maintain the competitiveness of the Norwegian food industry (Landbruksdepartementet, 1999, p. 24). The effect of the price policy implied by Agenda 2000 on Norwegian agriculture has been calculated to be about NOK 1 billion. As a start, the government proposed to reduce target prices by NOK 600–700 million already in connection with the agricultural negotiations in spring 2000. The farmers were to be compensated by tax allowances of up to NOK 36,000 per farm.

The agricultural negotiations in 2000 resulted in a reduction of target prices for milk, beef, pork, poultry, eggs and cereal/flour. The total reductions amounted to NOK 900 million. However, since the wholesale prices for meat and eggs were considerably under target price level, the actual effect of the target price reductions can be estimated to about NOK 300 million.

The agricultural negotiations in 2001 resulted in a NOK 300 million increase of target prices. Target prices were increased again in 2002, by NOK 475 million. The increase included all products, except Norwegian bread flour, for which target prices were reduced in the 2002. The 2003 negotiations ended with a NOK 200 million increase of target prices. The target prices went up for beef, milk, potatoes, vegetables and fruit, but fell slightly for grain. See Chapter 3 for more details.

As of 1 July 2001, the value added tax on foods was reduced from 24 per cent to 12 per cent, i.e., to the same level as in Sweden. This measure was mainly introduced in order to reduce consumer food prices and thus the extent of Norwegian border trade in Sweden and Denmark. Even though consumer prices did fall by about 9 %, as expected, cross-border shopping is still increasing.

2.3.3 Market Regulation Measures

Markedsføring

Agricultural production is a biological process, and is thus characterized by seasonal variations. In certain periods, supply and demand of agricultural products will not be in balance. The rapid increase of productivity in agriculture, coupled with a relatively high level of subsidies, has led to problems of overproduction, which in turn has put a pressure on prices. Various market regulation measures have been implemented in order to secure a steady supply of agricultural products at stable prices. Furthermore, regulatory measures are necessary in order to prevent previously produced goods from directly depressing prices. Such regulatory measures include export, storage, domestic transfer of produce from areas of surplus to areas of deficiency and domestic discount sales. Other measures aim at stimulating the production and marketing of quality products, using quality grading and pricing systems, information and extension.

Based on the conversion of import restrictions from a quantitative to a tariff-based system, the parties in the agricultural negotiations agreed on certain changes in spring of 1995. Market regulation measures are now less ambitious than earlier. Farmers and their organizations must now take more responsibility for the avoidance of overproduction and subsequent price cuts, and therewith for the general economic development in agriculture, thus reducing society's responsibility. Other organizations than the agricultural cooperatives shall increasingly participate in the formulation of regulations.

The agricultural cooperatives are now responsible for market regulation within their respective sectors. In the recently published White Paper, the agricultural cooperatives are positively referred to for their importance in securing active farming throughout the entire country and their vital role in the market regulation of major agricultural goods. It is not desirable to establish new state market regulating agencies, e.g., such as the EU's intervention system.

These market regulation measures are to a large extent financed by marketing fees imposed on agricultural products, paid by the producers, pursuant to the Marketing Act (*Omsetningsloven*). In addition to the marketing fees, some funds are allocated to market regulation via the Agricultural Agreement. The fees are determined by the Government, on recommendation of the Norwegian Agricultural Marketing Board (*Omsetningsrådet*). The Marketing Board also decides on the allocation of the funds available for market regulation measures. However, the collection of marketing fees and the administrative follow-up of the regulatory agencies is assigned to the Norwegian Agricultural Authority.

There has been some disagreement regarding the composition of the Marketing Board in the past years. One issue has been whether or not it is reasonable that the farmers' and agricultural organizations should have the majority of the Board. In

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the new White Paper on agriculture, the Ministry of Agriculture proposed to uphold the majority of farmer/sector representatives, since the marketing fees are paid by the farmers themselves. However, it was also suggested to enlarge the Board. As of 1 January 2002, the Agricultural Marketing Board consists of 19 members; earlier there were 15. The four new members are one representative from each of the following organizations: the Federation of Norwegian Agricultural Cooperatives, the Norwegian Agricultural and Purchasing Cooperation, Norkorn, and one joint representative for the food-processing industry (including associations for the meat-processing, the fruit and vegetable wholesale, the poultry and the dairy industries). The farmers' organizations still have the majority on the marketing board.

As a result of the WTO's agricultural agreement, the use of export as a regulating mechanism has to be limited. This greatly reduces the possibilities for regulatory exports of cheese, butter, beef, pork and eggs. It also makes it more difficult for farmers and their (cooperative) organizations to achieve the target prices negotiated in the agricultural negotiations. It is therefore even more important than before to avoid overproduction.

Export should therefore be increasingly based on real profit. In this regard, the EEA agreement has some importance, since it secures duty-free export of a total of 8700 metric tons of cauliflower, broccoli, Chinese cabbage, cherries, sweet cherries, plums and strawberries from Norway to the EU during the Norwegian growing season. A few attempts of such export have been made since the EEA agreement came into force on 1 January 1994. These have shown that profitable export of these products is possible, however, only if they meet high quality standards. So far, the quotas have only partially been utilized.

Regulation of the dairy sector

The dairy sector is the most regulated sector of Norwegian agriculture. Production quotas have been in use since 1983. In addition, there has been extensive regulation of dairy plant profitability. The «National Dairy Equalization Fund», established in the period between the two World Wars, ensured that all dairy cooperatives should have equal income possibilities.

The Agricultural Agreement for 1995/96 stated that the «The National Dairy Equalization Fund» should be transformed and simplified. In addition, dairy operations independent of TINE Norwegian Dairies (dairy sector cooperative) should be made possible, under equal conditions.

The new market system for dairy products was put into effect on 1 July 1997. It replaced, among others, the previous Dairy Equalization Fund, and its administration was at first moved to the secretariat of the Marketing Board (from 1 July 1997), and later to the Norwegian Agricultural Authority (1 July 2000).

The overall marketing system for dairy products includes:

- Price equalization between various uses of milk and dairy product markets
- Market regulation within the dairy sector
- Milk price support via the Agricultural Agreement
- Price equalization related to milk usage

- Milk quota system

There are three main reasons for the marketing system's goal of price equalization. It is a system for:

- Officially determined price differentiation between various milk uses and markets, enabling a higher overall price to be obtained in the market, and thus higher producer prices than otherwise would have been possible.
- Geographical equalization related to the transport of milk and dairy products.
- Establishing competition within the dairy sector, to a certain degree independent of whether or not the market players have access to their own milk supplies from producers.

Price equalization is based on the Agricultural Agreement's price regulations. Even though the price equalization scheme was changed in July 1997, it was to a considerable extent still based on the conditions and data of the old Dairy Equalization Fund. From 1997 to 2000, the Agricultural Agreement's prices were based on the sale of certain processed dairy products («representative goods») from dairy to retailer. In order to determine the current value of milk as a commodity, certain assumptions on production costs of various dairy products, profitability, etc. had to be made. The commodity values that thus were calculated, formed the basis for the prices which the market players in the sector without (a sufficient amount of) their own milk actually were to pay. Since the milk's commodity value varies with its use, which is in accordance with the scheme's objective, fees and subsidies are used to adjust the different commodity prices in relation to an average price for milk as a commodity. In other words, an above-average commodity value would result in the imposition of a fee, whereas a below-average value forms the basis for subsidy payments. All dairy companies are paid the same fee and subsidy rates for the same products.

However, the real effects of price equalization were (and are) dependent on how much the administrative assumptions correspond with the actual sales prices, discounts, production costs, profit conditions, etc. For most of the time since the transition in 1997, there have been disagreements about whether or not «the map and the terrain agree» in this point. It must be noted that whereas the dairy cooperatives account for approximately 98–99 per cent of the primary milk purchases, most of the remaining milk-processing companies depend on buying milk on the conditions of the marketing scheme.

As early as 1999, the parties of the agricultural negotiations agreed to appoint a working committee in order to evaluate the way in which the milk marketing scheme had functioned since 1997. From 1 July 2000, the price regulations of the Agricultural Agreement were changed from applying to representative goods to concerning commodity values for various groups of dairy products. The formal price regulations were thus moved down to the measuring points for the determination of fees and subsidies. Except for that, the scheme is still more or less the same as previously described. Instead of making calculations and assumptions for various groups of dairy

products, the administrative authorities now have to establish and enforce systems for making sure that the scheme functions according to its intentions.

The price equalization system also takes the effect of geographical differences into consideration. Examples hereof include transport subsidies for transport of milk from the producers to the dairies and distribution of liquid dairy products from dairy plants to the market. The highest transport subsidies are granted to those dairies with the greatest distance between them and the producers and/or the market.

The present system intends to create equal conditions for competition, by imposing the same equalization fees and subsidies on all market players. However, this can create problems for newly established companies. This could be seen after the introduction of a special subsidy for small liquid milk dairies in the agricultural negotiations in 2000. In spite of the special subsidy, the «Q-Dairies» (one of the non-cooperative liquid milk dairies) had considerable difficulties in achieving profitability. The subsidy for the existing small liquid milk dairies has been increased and was temporarily in effect until 1 July 2003. It now amounts to NOK 0.75 per liter for a processed volume of up to 5 million liters milk, and NOK 0.80 per liter for volumes between 5 and 10 million liters. The scheme is funded via the national budget and has been backdated to 1 June 1999.

Already from 1997 to 2000, capital costs were taken into consideration in product costing, but this was not specifically dealt with in connection with the transition of the agricultural negotiations' dairy price regulations in 2000. As part of their assessment of the price equalization for the second half of 2000, the Norwegian Agricultural Authority (SLF) decided on 6 July 2001 that the standard capital costs should be calculated differently than in TINE's (Norwegian Dairies) current product costing.

As a result of the work of a committee appointed by the parties to the agricultural negotiations in 2001, the price equalization regulations and SLF's rules were changed, effective from 1 January 2002. The negotiating parties wanted the committee to evaluate the follow-up of the responsibilities resting with the market regulator with regard to implementing the Agricultural Agreement and the currently applicable price regulations in the dairy sector. The regulations were changed, resulting in the termination of the monthly notification of commodity prices by the market regulator. This implied that the equalization fees and subsidies were no longer based on the agreed target prices, but rather on quarterly forecasts issued by the market regulator of expected commodity prices in the various product groups. The semi-annual assessments of the scheme were continued as a basis for determining any ex post adjustments of the rates that have been applied.

This change gave the market regulator greater flexibility with regard to the pricing within the framework of the Agricultural Agreement. It confirms an important principle in the price and market regulation system, namely that the regulator's price at the time of quotation and plans regarding price developments are open to the public. The other market players thus have more access to the plans of the market regulator, and its assessment of future developments.

In connection with the transition of the marketing scheme in 1997, the formal and actual framework for the market regulation of milk and dairy products was also changed. Even though dairy products were covered by the Marketing Act, market

regulation was previously mainly carried out via internal allocations within the dairy cooperative and within the framework of the National Dairy Equalization Fund. The marketing fee for milk has «always» been NOK 0.01 per liter.

From 1 July 1997, the formal responsibility for the market regulation of dairy products was assigned to the Marketing Board, just like for other agricultural products. The marketing fee for milk, which was paid by the producers, has thereafter varied between NOK 0.01 and 0.24 per liter. This does not imply that the expenses for market regulation have increased, but that the costs have been made more visible after the Marketing Board became responsible for administering the scheme. On the contrary, there has actually been a marked decrease in costs associated with market regulation as a result of improved production management (i.e., via the milk quota trade).

The concrete measures pertaining to market regulation are still carried out by TINE Norwegian Dairies, who has been given the role as the market regulator. This also implies that the dairy cooperatives are obliged to deliver milk to other producers of dairy products.

When a (non-cooperative) company establishes facilities for tapping liquid dairy products, TINE, as market regulator, shall supplement the independent dairy with a volume equal to that which the new dairy receives from its own suppliers, for a period of 3 years. The obligation to supply raw material during this establishing phase is to be limited to the estimated normal supply by the company's own producers. In connection with the TINE merger, the Norwegian Competition Authority required that TINE must supply its competitors with as much milk as these request. This decision is effective until a new marketing scheme has been established.

TINE is obliged to supply milk to independent dairies producing other products (than liquid milk) according to further defined criteria. During the past few years this «compulsory delivery» has been debated, especially with regard to the cheese producer Synnøve Finden. In connection with the company's plans to open a large, new cheese factory, TINE asked the Marketing Board in autumn 1998 to change the regulation, and to introduce a limit on compulsory delivery. The explanation for TINE's request was that the additional production capacity, considering the rather limited domestic market, would lead to a reduction of TINE's own capacity and output with regard to the product(s) in question. In March 1999, the Marketing Board decided, by majority vote, to limit compulsory delivery to 17.5 million liters per plant during a transitional phase of 3 years. Synnøve Finden appealed against this decision. The Ministry of Agriculture thereupon set the limit for compulsory delivery to 40 million liters per plant.

On assignment from the Ministry of Agriculture, NILF presented a report in July 2002 on the conditions needed to establish competition in the Norwegian dairy market, with specific focus on the liquid milk sector. Based on the report and the comments submitted on it, the Ministry of Agriculture has continued its work on developing a new marketing scheme. The aim was to introduce the new scheme on 1 July 2003. However, in spring 2003, the Ministry of Agriculture announced that its implementation will be postponed until 1 January 2004, due to several unsolved issues and relatively substantial disagreement on main elements of the new market-

ing scheme. Thus, the parties agreed to extend some of the temporary subsidies for independent liquid milk dairies that have their own suppliers (Q-Dairies) until 21.12.2003.

Milk quotas

Cow and goat milk production has been controlled by producer quotas since 1983. Via the agricultural negotiations in 1996, the *Storting* decided to introduce a redistribution system for milk quotas in the form of a controlled quota trade. The idea of the scheme was to enable a greater degree of flexibility in the quota system and to stimulate a certain degree of structural rationalization in the dairy sector.

The first round of quota trade took place in spring 1997. Cow milk quotas could be bought and sold within nine different regions. The demand for purchasing quotas proved to greatly exceed the supply of quotas for sale. The next round of quota trade was then carried out in 1998. As part of the efforts to reduce the production of cow milk, it was decided in the 1998 agricultural negotiations that half of the sold quotas should be withdrawn and not offered for sale. However, milk consumption continued to decline, cheese consumption stagnated and the possibilities for subsidized cheese exports were also greatly reduced from 2000 as a result of the WTO agreements. It was therefore decided in the agricultural negotiations in 1999 that all milk quotas sold that year should be withdrawn. The result was that 630 dairy farmers sold a total of 32 million liters, a figure much lower than had been hoped for with regard to the prevailing market situation.

In autumn 1999 it was therefore decided to conduct an extraordinary purchasing round. The price per liter quota was raised by NOK 2.0, and the registration deadline was 15 January 2000. The costs of the quota purchase were to be covered by the Agricultural Agreement. This time, the result was that more than 1 200 dairy farmers sold their quotas, which amounted to approximately 70 million liters of milk. In the ordinary purchasing round in 2000, quotas amounting to about 24 million liters of milk were sold and withdrawn. In 2001, quotas amounting to 54 million liters were purchased, of which about 35 million liters were re-sold, and roughly 20 million liters were withdrawn by the State

In the agricultural negotiations in 2001, the allocations for purchasing milk quotas were significantly reduced, from NOK 77.1 million in 2001 to NOK 20 million in 2002. The following year, the negotiations resulted in zero funding for the State's purchase and withdrawal of milk quotas, i.e., all of the purchased quotas were to be re-sold to active farmers. The result was a turnover of about 35 million liters of quotas in 2002.

The recent quotas withdrawals have contributed to a total reduction in the annual milk output of about 300 million liters. Thus, about 1500 million liters of milk are being produced annually, and the dairy market has become much more balanced. However, due to the continued decline in liquid milk consumption, future prospects are far from rosy. Also, the ongoing WTO negotiations are looming on the horizon, with a threat of further restrictions on the use of export subsidies and thus reduced possibilities for cheese exports.

In the agricultural negotiations in 2001, the parties agreed to evaluate a scheme enabling direct trade of milk quotas between dairy producers. Based on this study, the State and the Norwegian Farmers' Union the following year agreed on a new system for milk quota trade, in which part of the quotas are sold on the private market. When selling milk quotas, a farm's entire quota must be sold within the same county, and 30 % of the quota must be sold on the private market. The administrative quota price for the State's quota purchases is fixed at NOK 3.50 per liter, whereas its price on the open market is determined by the market itself. This new milk quota trade scheme will be effective from the 2003 quota year (Landbruksdepartementet, 2002). The effects of the new quota trade remain to be seen.

2.3.4 Direct Support

In addition to import protection (market price support), Norwegian farmers receive considerable support directly via the national budget in the form of numerous subsidy programs. In 2002, the direct support amounted to nearly NOK 11.5 billion. The various support measures can be divided into:

- Direct support
 - product-specific support (e.g. price subsidies on agricultural products)
 - non-product-specific support (e.g. headage or acreage-based production subsidies and various social support schemes)
- Investment support
- Indirect support via research, education and extension services

The direct support measures contribute to achieving the goals described in Chapter 2.2. The subsidies are therefore partially differentiated according to production, geographical region and farm size. Smaller farms have to a large degree received relatively more support than larger farms.

Price and production subsidies

Some of the subsidies are paid directly to the farmers, whereas the price subsidies, such as the base- and regional deficiency payments for meat and milk, are relayed by the marketing cooperatives and organizations. Of the various support programmes, budgetprice support, acreage and headage support programmes and investment support schemes are economically most important for Norwegian agriculture. This applies mainly to the production of milk, beef and mutton, but also to grain and a number of certain horticultural products. Other productions, not contributing as much to the production of public goods, and which only play a minor role for the socio-economic structures in rural areas, receive considerably less budget support. This mainly applies to the production of poultry, pork and eggs. To a greater extent, these farmers have to base their income on market prices, and are thus highly dependent on the market price support connected to the import restrictions.

During the past 14–15 years, agricultural policy has aimed at reducing price subsidies, and increasing the level of non-product-specific support, not depending on production volume, but rather on acreage and herd sizes. These measures are
(Continues page 21)

Feature 2: Agriculture and the Environment

By: Nils Øyvind Bergset

In recent years there has been increasing focus on agriculture's importance for and effects on our natural environment. The Report to the Storting no. 19 (1999–2000) establishes guidelines for agriculture's environmental policy. In the Report, it is stated that «According to the Government, future environmental challenges for agriculture lie in the sustainable management of our natural resources, and in increasing the awareness for the production and management of agriculture's environmental good», and further: «Adaptation to production methods increasingly based on recycling is a central strategy in this process. This implies that nutrient losses from agricultural systems shall be reduced, and the input of substances harmful to the environment in the production chain shall be minimized.»

These goals have been quantified by various parameters, as presented in reports published by the Ministries of Agriculture and the Environment, as well as Statistics Norway (SSB). Such environmental indicators include: soil tillage, erosion, fertilizer consumption and use of pesticides. In this article, the development of these indicators will be presented.

Erosion and runoff

Arable cropland is most prone to runoff and erosion. The share of cropland of all cultivated land in Norway gradually increased to about 50 % in the mid-1990s, but has decreased to about 44 % since. This decline is linked to the increase in total farmland area, but also to the slight decrease in the cereal production acreage. The increased total farmland area is due to the increased grassland acreage.

The introduction of low-risk tillage methods is essential for reducing runoff and erosion. Autumn tillage (e.g., plowing) exposes erosion-prone areas to a higher runoff risk. Thus, one important measure is a transition to more spring tillage on arable cropland. Autumn-ploughed cropland was significantly reduced in the early 1990s, from about 82 % to about 55 %. In the early 2000s, there was again a decreasing trend, down to about 45 %. Growing winter grain is considered to reduce runoff more effectively than autumn plowing. The cultivation of winter grain peaked in the late 1990s, and declined again in 2000/01. Winter grain was increasingly grown due to favorable prices for the crop, but there will always be fluctuations due to annual variations in the weather.

Fertilizers

Proper fertilizer use, i.e., agreement between nutrient supply and nutrient uptake, is vital if one is to avoid nutrient runoff. Important measures include improved fertilizer types, better nutrient management planning and correct choice of application dates. From 1985 to 2002, the use of mineral fertilizers was reduced from about 600 kg/ha to about 460 kg/ha, a reduction of about 23 %. This trend can be explained by reduced application of phosphorus fertilizers and the general use of fertilizers with a higher nitrogen percentage.

The total amount of nitrogen (N) and phosphorus (P) applied in mineral fertilizers and livestock manure is also an important indicator. The application of total effective N increased until the mid-1990s, and decreased slightly thereafter. The total figures were about 130,000 ton in 1989/90 and 135,000 ton effective N in 1999/2000. The distribution between manure-N and mineral fertilizer-N did not change much. The supply of P

and focus primarily on (low) prices. Other concepts include stores with a much greater product variety, a better selection of fruits and vegetables, meat, fish, etc. At present, stores based on the discount concept account for approximately 50 per cent of the Norwegian food retail market.

The food service industry (kiosks, gas stations, etc.) represents an increasing share of the food, beverage and tobacco trade. This sector is thus included in Figure 5.4.

5.3 Production, Marketing and Consumption of Selected Agricultural Commodities

In the following figures (Figures 5.2–5.4) the development of consumption and production of some important agricultural commodities is shown. The total and per capita consumption are calculated at the wholesale level. The actual consumption is lower due to losses during distribution, marketing and at the consumer level. The figures are also presented in the Appendix Tables 7–10.

5.3.1 Milk and Dairy Products

The total consumption of milk has been declining for a number of years. However, the trend started to level out in 2002. Even though the overall consumption of dairy products has decreased, the consumption of different products show varying trends. Liquid milk consumption declined most, from 771 million liters in 1982 to 553 million liters in 2002. Butter consumption also declined, whereas sales of yogurt and cheese have steadily increased. The declining consumption of liquid milk and butter can be explained by competition from other products, increasing focus on food and health and changing eating habits. Since liquid milk gives the highest profits, the negative consumption trend has adverse economic effects for the Norwegian dairy farmers.

Due to decreasing consumption, there has been a goal to reduce milk production. In 2002, actual dairy deliveries amounted to 1,505 million liters, a decline of 279 million liters from 1992, and an even greater decline compared to the 1980s. However, the decline in 2002 was less than in previous years, and the trend seems to have turned. For 2003, a slight increase of about 17 million liters is expected. The total estimated dairy deliveries for 2003 is thus 1522 million liters.

Milk production was reduced by such measures as milk quota sales, i.e., the State's purchase of milk quotas from voluntary sales. Of the 34.7 million quota liters sold to the State in 2002, nearly all (34.1 million liters) were re-sold. This illustrates the improvement in the dairy market. Besides declining consumption, quota withdrawals were also made because of the WTO agreement, which limits Norway's use of export subsidies for cheese and butter.

The market for milk and dairy products in Norway is dominated by TINE Norwegian Dairies (dairy cooperative). This applies above all to primary sales, but also to the milk-processing industry, although to a somewhat lesser degree. Other producers of processed dairy products include Synnøve Finden Meierier AS and Kavli, who produce cheese based on raw materials bought from TINE Norwegian Dairies. In order to enable some competition in the dairy sector, the cooperative dairies

are obliged to deliver milk to other producers of non-liquid dairy products. The Q-meieriene, a private dairy group consisting of two regional dairies, produce liquid milk and yogurt from milk they purchase from their own suppliers. However, their production is not very significant, compared to TINE's turnover.

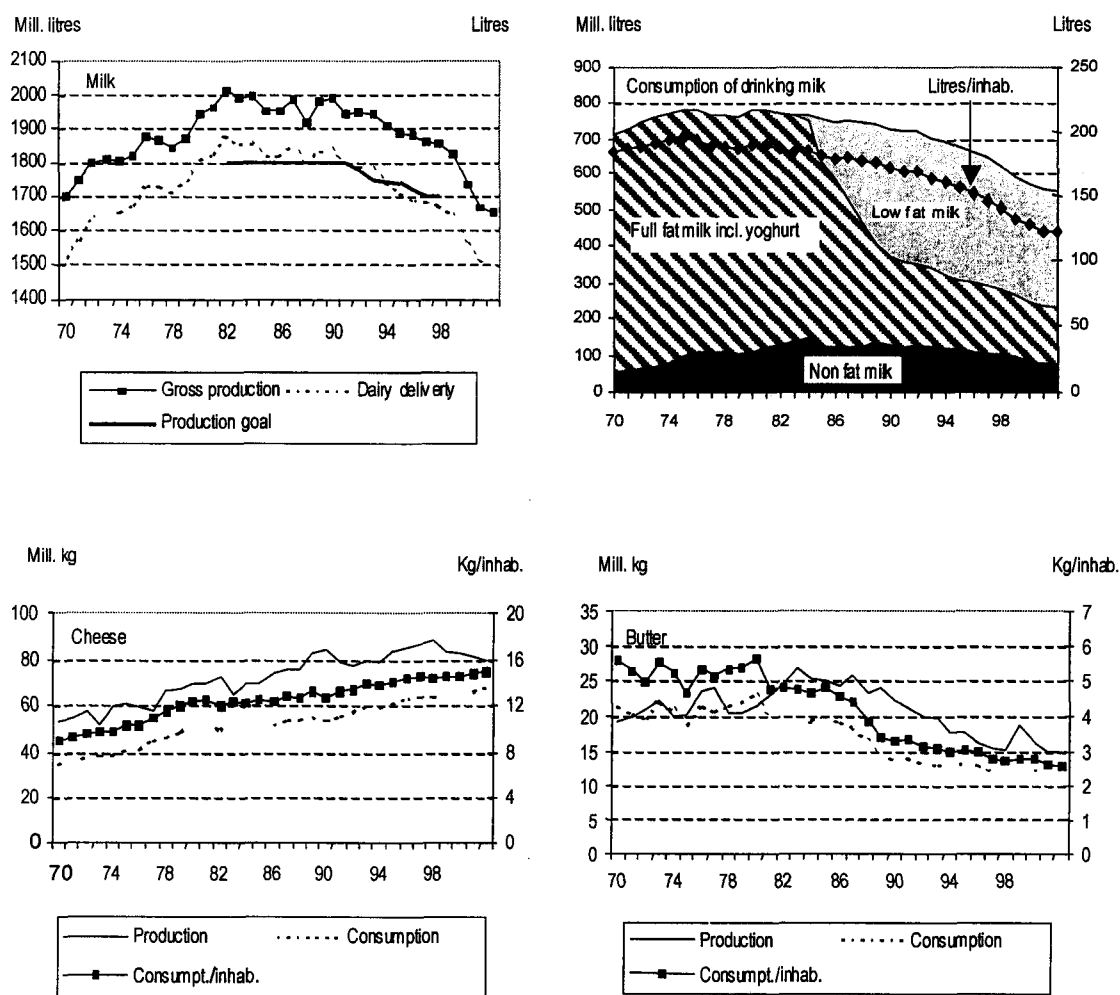


Figure 5.2 Production and consumption of milk and dairy products, 1970–2002

Source: Sosial- og helsedirektoratet (Directorate for Health and Social Affairs) (2003) Budsjettnemnda for jordbruket (Budget Committee for Agriculture) (2002)

TINE Norwegian Dairies

TINE Norwegian Dairies is owned by nearly 20,000 dairy farmers. In 2002, the TINE dairies were re-organized as one corporation, with five regional subsidiaries.

The Norwegian Milk Producers' Association (NML), which was responsible for the dairy farmers' economic and social conditions, as well as administrating the dairy sector's price equalization scheme, was merged with TINE Norwegian Dairies in 1998.

This was done following the transfer of the price equalization scheme to the Agricultural Marketing Board's secretariat, with the introduction of the new milk mar-

keting scheme in 1997. NML's remaining responsibilities were transferred to TINE Norwegian Dairies.

TINE Norwegian Dairies is the marketing and market regulating organization, whereas the individual dairy companies are the production units. All of TINE Norwegian Dairies' dairy products are produced and sold under the brand name TINE. The establishment of the TINE brand is part of the strategy aimed at meeting future competition and increasing the consumers' brand loyalty.

Due to the introduction of the new marketing scheme for milk in 1997, thus enabling competition within the dairy sector, TINE Norwegian Dairies lost some of its previous areas of responsibility. Whereas the price equalization scheme was transferred to the Agricultural Marketing Board's secretariat (Agricultural Authority from 1 July 2000), the administration of market regulation measures was transferred to the Marketing Board. However, the actual market regulation is still carried out by the dairy cooperatives, e.g., by production for export and storage and the transport of milk from areas of surplus to areas with a milk deficit.

In 2002, NILF evaluated the possibility of a new milk marketing scheme that would enable increased competition in the dairy market. The background for the report were conflicts that had troubled the current marketing scheme. In spring 2003, the introduction of the new scheme was postponed until 1 January 2004. The new marketing scheme is being designed by the Ministry of Agriculture, in cooperation with the parties to the agricultural negotiations and other relevant parties. (For more information on NILF's proposal for a new marketing scheme, see Chapter 2.3.2.)

Since most milk production in Norway has been canalized to mountain and fjord districts, often located quite far from the major population centers, it is necessary to transport large quantities of milk to these areas. Fresh dairy products such as liquid milk, cream, etc. are distributed via wholesale dairies, whereas less perishable products such as cheese, butter, powdered milk, whey cheese, etc. are distributed via one of the two main storage facilities in Klepp (near Stavanger) and Heimdal (near Trondheim).

5.3.2 Meat and Eggs

In contrast to milk, the consumption of meat has been steadily increasing. In 2002, it reached a historical high of about 270,000 metric tons. The total production for sales in the same year was about 261,000 tons. For 2003, the production of meat and poultry was estimated to be about the same as in 2002, whereas consumption was estimated to increase to nearly 273,000 tons. The difference between total consumption and domestically produced meat is accounted for by imports. The gap between domestic production and consumption will vary. Thus, there may be an overproduction of Norwegian meat in some years, and a shortage in others.

This is reflected in the import-export statistics. According to the national foreign trade statistics, more meat was exported than imported in 1997 and 1999, whereas imports exceeded exports in 1998, 2000, 2001 and 2002. Some imports occur at reduced tariff rates, due to Norway's commitments as part of the WTO agreements. Norway has also opened for imports from the least developed countries (LDCs) (which are entitled to a certain quota of non-tariff export to Norway).

Unclassified

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Organisation for Economic Co-operation and Development

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COMPETITION COMMITTEE

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**COMPETITION AND REGULATION IN AGRICULTURE: MONOPSONY BUYING AND JOINT
SELLING.**

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FOREWORD

This document comprises proceedings in the original languages of a Roundtable on Monopsony Buying and Joint Selling in Agriculture which was held by Working Party N°2 of the Competition Committee in June 2004.

It is published under the responsibility of the Secretary General of the OECD to bring information on this topic to the attention of a wider audience.

This compilation is one of a series of publications entitled "Competition Policy Roundtables".

PRÉFACE

Ce document rassemble la documentation dans la langue d'origine dans laquelle elle a été soumise, relative à une table ronde sur la Concurrence et Réglementation dans le Secteur de L'agriculture : Achat en Situation de Monopsonie et Vente en Commun, qui s'est tenue en juin 2004 dans le cadre du Groupe de Travail N°2 du Comité de la Concurrence.

Il est publié sous la responsabilité du Secrétaire général de l'OCDE, afin de porter à la connaissance d'un large public les éléments d'information qui ont été réunis à cette occasion.

Cette compilation fait partie de la série intitulée « Les tables rondes sur la politique de la concurrence ».

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EXECUTIVE SUMMARY

By the Secretariat

In the light of the written submission, the background note and the oral discussion, the following points emerge:

- (1) *Joint activity by agro-food producers can have a number of beneficial effects, including achieving economies of scale and scope, reducing costs of transactions, forming and maintaining a "brand", conducting advertising and conducting research. When farmer cooperatives exist to sell output and involve a small percentage of total output, they have the potential to serve pro-competitive purposes and to increase efficiency.*

Unbranded products often have little advertising in comparison to branded and processed foods, largely because few mechanisms exist for sharing the costs of advertising among all the farmers who would benefit from that advertising. Cooperatives that exist for the purpose of advertising and research may need to be highly inclusive in order to prevent a free-rider problem. Joint fund-raising for the purpose of advertising can beneficially enhance consumer information and demand. While broad fund-raising may be necessary for advertising and research, highly inclusive cooperatives do not generally need to oversee sales of farm output.

- (2) *Joint activity can generate significant harm to consumers when the joint activity focuses on price-setting or quantity-setting and there is relatively little competition from close substitutes. In these cases, the joint activity can constitute cartel behaviour. Highly inclusive farmer cooperatives generate higher prices for farm products when total quantities of marketed output are limited or some output is redirected. For such co-operatives to succeed in limiting quantity there is typically a mechanism for ensuring that all quantity produced is accounted for and that "excess" production does not reach the market. These monitoring mechanisms are comparable to those of cartels. At times, the government is involved with such monitoring, despite the harm to consumers from the high prices that result from limiting production.*

At certain times, quantity restrictions may be necessary because otherwise producers over-harvest or over-use common areas, as has occurred with fisheries. However, the problem of harvesting from a common resource does not typically arise in crop-based farming where land is not shared. Even in fisheries, quantity limitations can prove problematic when they are not overseen by a neutral third party, as with a recent case of price-fixing that involved shrimp fishermen and traders in the Netherlands, Denmark and Germany. In general, however, quantity restrictions will lead to high prices for consumers and the extra profits from such restrictions will be converted into asset values rather than farmer income.

- (3) *Beneficiaries of liberalisation have not only included consumers, who may experience lower prices, but also farmers.*

In Australia, when competition between grain traders developed in one state, some farmers moved their grain into this state in order to take advantage of dealing with competing grain traders

who could obtain better prices either domestically or for export. As single export desks have been eliminated, many farmers have found that they receive higher prices for their grain and customised orders are increasingly attractive.

Single marketing organisations often encourage standardisation even though there are niche markets that some farmers wish to fill. In New Zealand, a single seller of apples ultimately was partially deregulated and, after this, farmers pushed for a total deregulation. Prior to deregulation, growers who wanted to differentiate their products (by producing organic apples, kosher apples or branding) were limited in their abilities to do so.

17 Not only farmers can benefit from liberalisation. Consumer benefits from liberalisation can be substantial, as the Australian milk liberalisation showed when it led to a substantial decline in milk prices. Milk prices fell substantially even after including a levy on sales of drinkable milk that produced funds for providing dairy farmers with transition payments should they choose to leave dairy production.

- (4) *Buyer power is a common concern of competition agencies examining the agricultural sector. Buyer power can generate harm to consumers, but this is unlikely except in the presence of selling market power by the buyer. Aggressive negotiations by buyers are to be expected and are most likely to yield lower prices among competing downstream retailers.*

For certain products, a small group of buyers account for a high percentage of purchasing from farmers. While farmers often face increasingly specific terms for production and may feel the necessity to sign long-term contracts with buyers, such developments are common in many sectors. At times, buyers may rig bids, so that they pay a lower price for output than they otherwise would. Such bid-rigging is harmful to consumers and would be punished under most competition laws. Under a consumer welfare standard, buyer power against farmers would be most problematic when there is buyer power downstream as well, otherwise the competition between buyers will prevent them from reaping undue gains. It is questionable whether enterprises with purchasing power would benefit dynamically from marginalizing their suppliers and purchasing below the cost of production over a long time period.

One of the pieces of evidence that is commonly cited by farmers as evidence of buyer power is that there is an asymmetric price response of retail products to farmgate price changes. This means, for example, that when there is a supply shortage that raises farmgate prices, the increase is immediately passed on to consumers, while when there is a decrease in farmgate prices, the expected decrease in retail prices appears gradually and results in high profits to intermediaries during the period in which prices are unusually high. While there is substantial evidence of price asymmetry, it is not clear that this arises from buyer power. An alternative explanation is that such asymmetry arises from different search patterns by consumers when they face increasing prices compared to decreasing prices. In particular, they may search more aggressively for alternative suppliers when prices increase, but less aggressively when prices are stable or slowly decreasing.

- (5) *While the setting of standards by producers is generally beneficial for consumers and helps to ensure quality, certain types of standards can result in the limiting output. In such cases, standards setting may serve anti-competitive purposes and merit review by a competition authority.*

Farm products are often experience goods (quality known after consumption) or credence goods (quality not identified even with consumption, as with organic foods). For such goods,

trustworthy signals are important for maintaining consumer confidence. In absence of such signals, low-quality production will reduce willingness of consumer to purchase the product, and thus reduce the incentive of high-quality producers to maintain quality.

Generally setting of quality standards by producers can be beneficial, as it can help to enhance the quality of products available to the consumer. "Brand" type consortia and denomination of origin are valuable mechanisms for maintaining incentives for quality production. These are particularly common in France and Italy, but exist for farm products in many OECD countries. When inter-brand competition is vigorous, as with small cheese and wine denominations, it may not be harmful for such denominations to fix quantities of output.

Standards that become increasingly stringent as quantity produced increases are particularly likely to have an anti-competitive effect. For example, standards governing orange production have, in the past, become stricter over "minimum size" at times of high production, thus having the effect of limiting oranges sold through fresh outlets apparently for the benefit of producers against the benefit to consumers. Standards that establish different grades of quality are less likely to create competitive harm than standards that establish a minimum size because the minimum size standards can be used to limit total output reaching the fresh market, while establishing a gradation mechanism between different sizes does not limit the output reaching the fresh market.

- (6) *Buyer-established standards do not have any obvious anti-competitive effects, as a general matter, and buyer-established standards are increasingly common across many areas of economic activity.*

Buyer-established standards increase product consistency which has value both to consumers and buyers. While private standards created by buyers are playing an increasing role in many sectors, including the agro-food sector, there is no obvious harm to consumers from such standards. In particular, buyers may wish to ensure that they do not sell low-quality products, as this may damage their reputations with their consumers. So there are reasons to believe that such standards will benefit consumers.

- (7) *Competition authorities have a beneficial role to play in the agro-food sector. There are three most common areas of activity: prosecuting bid-rigging among buyers, challenging anti-competitive mergers and advocating against over-inclusive selling co-operatives as well as potentially prosecuting price-fixing by producers.*

In recent years, competition authorities have been active in bringing cases against bid-rigging, have challenged mergers among downstream buyers such as grain elevator operators and have prosecuted certain producer joint-activity organisations.

- (8) *Elimination of competition law exemptions for the agro-food sector would increase the role of markets and generally benefit consumers.*

Antitrust exemptions for the agricultural sector are not necessary. Joint-activity organisations that involve a small percentage of output or that result in the creation of brands can provide substantial benefits to consumers and as a result, such joint activity would not generally be illegal under many antitrust laws. In contrast, joint-activity organisations that have mandatory membership and engage in output restricting or redirecting activity likely harm consumers and do not promote the public interest. Only in exceptional cases would such activities enhance the public interest, so they do not merit a broad exemption.

RÉSUMÉ

Par le Secrétariat

Les contributions écrites, la note d'information et les discussions ont permis de mettre en évidence les points suivants :

- (1) *Les activités communes des producteurs dans le secteur agroalimentaire peuvent avoir un certain nombre d'effets bénéfiques, dont la réalisation d'économies d'échelle et de gamme, la réduction des coûts de transaction, la création et la préservation d'une « marque », le lancement de campagnes de publicité et l'organisation de recherches. Lorsqu'elles sont créées pour écouler la production et qu'elles ne représentent qu'un faible pourcentage de la production totale, les coopératives agricoles peuvent favoriser la concurrence et permettre d'augmenter l'efficacité.*

Les produits sans marque font en général l'objet de peu de publicité par rapport aux produits de marque et aux produits transformés, en raison essentiellement du faible nombre de mécanismes permettant de partager les coûts de la publicité entre l'ensemble des exploitants agricoles qui en bénéficieraient. Les coopératives créées afin de faire de la publicité et de mener des recherches doivent regrouper un grand nombre de producteurs pour éviter les problèmes de parasitage. La collecte commune de fonds aux fins de publicité peut favoriser l'information et la demande des consommateurs. Si une large mobilisation de fonds est sans doute nécessaire pour entreprendre des activités de publicité et de recherche, les coopératives qui regroupent un grand nombre de producteurs ne sont d'ordinaire pas tenues de superviser la vente de la production agricole.

- (2) *L'activité commune peut être très nocive pour le consommateur lorsqu'elle porte principalement sur la fixation des prix ou des quantités et que la concurrence de produits de substitution proches est relativement faible. En pareil cas, elle peut s'apparenter à une entente. Les coopératives regroupant de nombreux producteurs permettent souvent d'obtenir des prix plus élevés pour les produits agricoles lorsque les quantités totales de produits commercialisés sont limitées ou que la production est en partie réorientée. Pour que ces coopératives puissent limiter les quantités, il existe en règle générale un mécanisme tel que toutes les quantités produites sont prises en compte et que la production « excédentaire » n'arrive pas sur le marché. Ce mécanisme de contrôle est comparable à celui des ententes. Il arrive quelquefois que les pouvoirs publics soient associés à ces contrôles malgré l'effet préjudiciable qu'exercent sur les consommateurs des prix élevés résultant d'une limitation de la production.*

Des restrictions quantitatives peuvent être parfois nécessaires, faute de quoi les producteurs surexploient des zones communes, comme on l'a vu dans le secteur de la pêche. Toutefois, le problème de l'exploitation d'une ressource commune ne se pose d'ordinaire pas pour les cultures lorsque les terres ne sont pas partagées. Même dans la pêche, les limitations quantitatives peuvent poser des problèmes si elles ne sont pas supervisées par un tiers neutre, comme l'a récemment montré un cas d'entente sur les prix entre pêcheurs et marchands de crevettes aux Pays-Bas, au Danemark et en Allemagne. D'une manière générale cependant, ces restrictions renchérissent les prix pour les consommateurs et les bénéfices supplémentaires qui en résultent sont transformés en actifs et non en revenus pour les exploitants.

- (3) *La libéralisation a profité non seulement aux consommateurs, qui voient parfois les prix baisser, mais aussi aux exploitants agricoles.*

En Australie, où la concurrence entre négociants en céréales s'est développée dans un Etat, certains exploitants agricoles ont écoulé leurs céréales dans cet Etat pour pouvoir traiter avec des négociants concurrents susceptibles d'offrir des prix plus avantageux sur le marché intérieur ou à l'exportation.

A la suite de la suppression des bureaux d'exportation uniques, de nombreux exploitants agricoles ont constaté que leurs céréales se vendaient plus cher et que les commandes individualisées étaient de plus en plus attrayantes.

Les organismes de commercialisation uniques encouragent souvent l'uniformisation même s'il existe des créneaux que certains exploitants souhaitent investir. En Nouvelle-Zélande, un monopole de vente de pommes a en fin de compte fait l'objet d'une déréglementation partielle, après quoi les exploitants agricoles ont demandé une déréglementation totale. Auparavant, les pomiculteurs qui souhaitaient différencier leurs produits (en produisant des pommes biologiques, des pommes casher ou des pommes de marque) n'en avaient guère la possibilité.

Les exploitants agricoles ne sont pas les seuls à pouvoir bénéficier de la libéralisation. Les avantages que les consommateurs en tirent peuvent aussi être importants, comme l'a montré la libéralisation du secteur laitier en Australie, qui s'est traduite par une baisse notable des prix. Le prix du lait a sensiblement baissé, et ce même après le prélèvement d'une taxe sur les ventes de lait de consommation destinée à financer des paiements de reconversion aux producteurs laitiers qui décident de quitter le secteur.

- (4) *Le pouvoir des acheteurs est une préoccupation courante des organismes chargés de la concurrence qui se penchent sur le secteur agricole. Il peut avoir des effets dommageables sur le consommateur mais uniquement si l'acheteur exerce une position dominante sur le marché de la distribution. Il faut s'attendre à ce que les acheteurs négocient âprement, ce qui conduira très probablement à des prix plus bas parmi les détaillants en aval qui se font concurrence.*

Pour certains produits, un groupe restreint d'acheteurs représente un fort pourcentage des achats aux agriculteurs. Si ceux-ci se trouvent souvent face à des conditions de production de plus en plus particulières et peuvent ressentir le besoin de signer des contrats à long terme avec les acheteurs, cette évolution est courante dans de nombreux secteurs. Il arrive que les acheteurs s'entendent de manière à payer un prix inférieur à celui qu'ils acquitteraient autrement. Ces soumissions concertées sont préjudiciables aux consommateurs et sanctionnées par la plupart des lois sur la concurrence. Dans l'optique du bien-être du consommateur, le pouvoir que les acheteurs exercent sur les exploitants agricoles est particulièrement défavorable si les acheteurs sont aussi puissants en aval ; s'il n'en est pas ainsi, la concurrence entre les acheteurs empêchera ceux-ci de faire des bénéfices excessifs. On peut se demander si les entreprises ayant un pouvoir d'acheteur gagneraient véritablement à marginaliser leurs fournisseurs et à acheter en dessous du coût de production sur une longue période.

Un élément souvent avancé par les exploitants agricoles pour faire la preuve de la puissance des acheteurs est l'asymétrie des réactions des prix de détail aux variations des prix départ exploitation. En d'autres termes, si par exemple une pénurie de l'offre fait monter les prix départ exploitation, cette hausse est immédiatement répercutée sur le consommateur, alors qu'en cas de baisse des prix départ exploitation la diminution attendue des prix de détail est progressive et se traduit par une augmentation des bénéfices des intermédiaires pendant la période où les prix sont

anormalement élevés. Si tout prouve à l'évidence qu'il existe une asymétrie des prix, il n'est pas certain qu'elle résulte du pouvoir de l'acheteur. Elle peut aussi bien s'expliquer par des comportements variables des consommateurs suivant qu'ils sont confrontés à une hausse ou à une baisse des prix. Il se peut en particulier qu'ils recherchent plus activement d'autres fournisseurs lorsque les prix augmentent, mais qu'ils fassent preuve de moins d'ardeur lorsque les prix sont stables ou baissent lentement.

- (5) *Si la fixation de normes par les producteurs profite généralement aux consommateurs et contribue à garantir la qualité, certains types de normes peuvent entraîner une limitation de la production. En pareil cas, les normes peuvent avoir un objectif anticoncurrentiel et mériter d'être réexaminées par un organisme chargé de la concurrence.*

Les produits agricoles sont souvent des biens d'expérience (dont la qualité est connue après qu'on les a consommés) ou des biens de confiance (dont il n'est pas possible d'identifier la qualité même après consommation : c'est le cas des aliments biologiques). S'agissant de ces biens, il importe de donner des indications fiables pour ne pas perdre la confiance des consommateurs. Faute d'indications de ce type, une production de qualité médiocre n'incitera guère le consommateur à acheter le produit, et les producteurs de qualité seront moins enclins à maintenir la qualité.

La fixation de normes de qualité par les producteurs est d'ordinaire bénéfique, car elle permet d'améliorer la qualité des produits offerts aux consommateurs. Les groupements de marque et les dénominations d'origine sont des mécanismes utiles pour maintenir les incitations à une production de qualité. Ils sont particulièrement courants en France et en Italie mais existent pour les produits agricoles dans de nombreux pays de l'OCDE. Si la concurrence entre marques est forte, comme dans le cas des petites appellations de fromages et de vins, il n'est sans doute pas nocif pour ces appellations de fixer des quantités de production.

Les normes qui deviennent de plus en plus rigoureuses à mesure que la quantité produite augmente sont particulièrement susceptibles d'avoir un effet anticoncurrentiel. Ainsi, dans le passé, les normes régissant la production d'oranges ont été renforcées pour ce qui est du « calibre minimum » en cas de forte production, d'où une limitation des ventes d'oranges sur le marché des produits frais, apparemment au profit des producteurs et au détriment des consommateurs. Les normes qui fixent différentes qualités risquent moins d'être dommageables à la concurrence que celles qui fixent un calibre minimum, car ces dernières peuvent servir à limiter la production totale qui arrive sur le marché du frais alors que la mise en place d'un mécanisme de gradation entre les différents calibres ne limite pas cette production.

- (6) *Les normes fixées par les acheteurs n'ont pas en règle générale d'effets anticoncurrentiels visibles et sont de plus en plus fréquentes dans de nombreux secteurs de l'activité économique.*

Les normes fixées par les acheteurs permettent de rendre les produits plus homogènes, ce qui présente un intérêt à la fois pour les consommateurs et pour les acheteurs. Si les normes individuelles créées par les acheteurs jouent un rôle croissant dans de nombreux secteurs, y compris dans l'agroalimentaire, rien ne prouve qu'elles portent préjudice aux consommateurs. En particulier, les acheteurs peuvent souhaiter s'assurer ainsi de ne pas vendre de produits de qualité médiocre, ce qui risquerait de porter atteinte à leur réputation auprès de leurs consommateurs. Il y a donc lieu de penser que ces normes seront profitables aux consommateurs.

- (7) *Les autorités de la concurrence ont un rôle bénéfique à jouer dans le secteur agroalimentaire, en particulier dans les trois grands domaines suivants: saisir la justice en cas d'ententes entre*

acheteurs, contester les fusions anticoncurrentielle, lutter contre les coopératives de vente regroupant de trop nombreux producteurs et engager éventuellement des poursuites en cas d'entente sur les prix entre producteurs.

Ces dernières années, les autorités de la concurrence ont saisi les tribunaux dans les cas d'ententes, contesté des fusions entre les acheteurs en aval, notamment les exploitants de silos à grains, et engagé des poursuites contre certaines organisations de producteurs menant des activités communes.

- (8) *La suppression des exemptions au droit de la concurrence dont bénéficie le secteur agroalimentaire renforcerait le rôle des marchés et profiterait d'une manière générale au consommateur.*

Il est inutile de prévoir des exemptions au droit de la concurrence pour le secteur agricole. Les organisations menant des activités communes qui couvrent un faible pourcentage de la production ou qui sont à l'origine de la création de marques peuvent être très profitables au consommateur ; c'est pourquoi, dans de nombreux pays, les activités communes ne sont généralement pas jugées contraires au droit de la concurrence. Par contre, les organisations menant des activités communes auxquelles il est obligatoire d'adhérer et qui restreignent la production ou réorientent l'activité risquent de porter préjudice au consommateur et ne favorisent pas l'intérêt public. Ces activités ne contribueraient à l'intérêt général que dans des cas exceptionnels, de sorte qu'elles ne méritent pas une large exemption.

BACKGROUND NOTE

1. Introduction

Agricultural policy has often developed without concern for principles of competition policy. Historically, agricultural policies have been primarily devoted to improving the welfare of agricultural producers, because of political imperatives and social values.¹ One way that policymakers have sought to increase producer welfare has been through regulations that sometimes have anti-competitive effects and that sometimes raise domestic consumer prices, limit quantities sold and impact quality standards. Partly because many regulations governing producers of agricultural products actually have anti-competitive effects, agricultural producers are often explicitly exempted from competition laws.² These exemptions are much broader in the agricultural sector than in any other sector. In some circumstances, producers have even used the exemptions to form cartels, with the cartels on occasion being enforced by governments. The consumer and social welfare losses from such arrangements can be large.

Increasingly, ministries and courts recognize that, when evaluating potential policies and regulations, the public interest should be taken into account in addition to other policy objectives, such as improving farmer welfare.³ The public interest includes consumer welfare considerations. As a practical matter, the importance of including the public interest in the cost-benefit analysis for policies is that policies designed solely to help one group (such as producers) may frequently damage the interests of other groups (such as consumers). A complete economic analysis of regulatory effects of agricultural policies should take consumer effects into account. This point is acknowledged in many laws.⁴

Antitrust exemptions can either have real effects by providing protection to anticompetitive activities, such as cartels, or have no effects, because the activities covered are not, in fact, anticompetitive. On the one hand, when exemptions provide real protection to producers engaged in anti-competitive activities, affected consumers are typically made worse off. Ironically, even when the antitrust exemptions have had real effects, the long-term effect of antitrust exemptions has not always benefited farmers because entry reduced returns to protected activities or the value of "excess" returns was incorporated into farmland prices. On the other hand, in many cases exemptions may exist but producers do not pursue anti-competitive activities. In many circumstances, the cooperative activities that farmers have pursued, for example, enhance efficiency and do not harm competition. In either case, there is little reason to maintain a broad competition law exemption for farmers.

As an alternative, the agricultural sector can be treated with the same carefully-tailored, case-specific competition analysis that is considered appropriate in many other sectors. If farmers seek guidance about what sorts of activities are permissible, government policy statements can clarify those types of conduct that would be considered in the public interest and clearly permissible as well as those types of conduct that would be considered harmful.

While farmers often benefit from antitrust law exemptions, they are often strong advocates of using antitrust laws to take action against increasingly concentrated buyers and retailers.⁵ There are sometimes foundations to these farmer concerns. It is true that buyers of certain products are often quite concentrated in OECD countries, especially meatpackers. Moreover, retailers are increasingly concentrated in many OECD countries, with a relatively small number of supermarket chains accounting for the vast majority of end-consumer product purchases. Both buyers and retailers are increasingly influencing the process of production, with the result that farmers feel that not only are their margins being reduced but their independence to govern their own commercial activity is more limited than in the recent past. On occasion, price-fixing among buyers has been found and prosecuted in many OECD jurisdictions. Given the

difficulty of identifying local price-fixing agreements, there may be more price-fixing activity by agricultural buyers than has been prosecuted. Clearly, careful attention to potential buying-side problems is merited. Existing competition laws (including anti-cartel laws) with high penalties are normally considered sufficient for pursuing such anti-competitive behavior. While significant efforts should be taken to identify and punish wrongdoing, great care should be taken to avoid punishing behavior that has efficiency-enhancing characteristics and that renders agricultural products more affordable to intermediate or end-consumers.

In this note, two primary topics are considered. The first is different types of producer joint-activities and their competitive effects. Some of these activities are identified as likely harmful to competition and some are identified as likely not harmful. The second is monopsony-buying concerns and the effects such monopsony could have on farmers and consumers. Some monopsony-buying concerns may have merit while others likely do not.

This note is intended to address a relatively narrow topic at the intersection of competition policy, regulation, and the agricultural sector. It is not meant to provide a complete survey of all relevant laws, regulations, and research in this area, but to serve as an introduction to the main topics. There are a number of other issues that could affect competition, such as optimal methods for providing support to farmers. These are not the subject of the current inquiry, nor are WTO and international trade issues. The domestic topics addressed here already cover a broad range of complicated issues.

2. Key economic characteristics of agricultural products

Before beginning to analyze the competition issues, it is important to identify some of those economic and social features of the agricultural system that may be especially important and help to explain some of the distinctive regulatory solutions that have been adopted by agriculture policy. Not all agricultural products are characterized by these features, but the features are often present and influence the thinking of many policymakers. Note that, while some of the objectives of agricultural policy may ostensibly be “non-economic,” the policies typically have identifiable economic impacts and require the use of economic resources. (Winter (1988)) Overall, farming is an economic activity. (Monti (2003))

2.1 Consumer information problems

Consumers often have significant difficulty in assessing whether they are buying high or low-quality goods. In economics, a *search* good is one whose quality is known prior to consumption, an *experience* good is one whose quality is known after consumption, and a *credence* good is one whose quality cannot be identified with consumption, but whose history affects some consumers’ attitudes towards the good. (Organic foods, for example, are credence goods.) Food is often an experience or credence good, meaning that consumers cannot assess the products attributes fully prior to consumption. (Nelson (1970)) One strawberry may look and smell very much like another strawberry. But this does not mean they will have the same taste.⁶ For experience goods, consumers may be deterred from purchasing the goods unless there are signals of quality. In the absence of such signals, high quality producers will have negative externalities from low-quality production, because the low-quality production will reduce consumer willingness to consume the high-quality product.

The existence of broadly-accepted quality signals can prevent the reduction of quality that can arise in “lemons” models. (See Akertof (1970).) Signals take a variety of forms for food items, including branding, setting minimum quality standards by producers, setting minimum quality standards by purchasers, and retailer evaluation, in which retailers are trusted to act as a tester of quality (with consumers reducing purchases from retailers who do not ensure high quality.) An alternative to quality signaling is the

unconstrained use of commodity markets, in which different, objective “grades” of quality receive different payments, so that low-graded items sell for less.⁷

Both the skills of consumers in assessing quality prior to use and the cost of assessment are important for determining the appropriate quality-signaling mechanism, as are the uniformity (or heterogeneity) of consumer preferences. Assessment skills may be greater for large purchasers, such as processors who are able to assess the relevant qualities of goods at lower per-unit cost than other consumers. Despite this sophistication in assessment, the desire for consistency of input drives some processors to specify very precisely what product they want and how it shall be raised and certified, rather than rely on techniques of evaluation.

Quality standards can either increase or reduce social welfare, depending largely on whether farmers must incur significant costs to increase quality of output. Leland (1979) showed that minimum quality standards can improve social welfare when there is no indication to consumers that producers have undertaken costly effort. In such situations, limiting the ability to market low-effort output makes the higher-effort output, which may be sought by consumers, more profitable. Chambers and Weiss (1992) show that when the problem is one of consumers discriminating between good and bad producers but producer quality is not costly, minimum quality standards can be harmful, because they make it more difficult to identify the bad producers. Quality standards are an increasingly important area of agri-food activity and, in practice, their effects are complex. Increasingly, standards are being set by broad coalitions. (See OECD (2003).)

If consumer tastes are homogeneous, a unique quality standard for a product may be most appropriate, whereas if consumer tastes are highly heterogeneous, a unique quality standard is less likely desirable because it reduces the variety of choices available to the diverse consumers. Often, low quality produce that may not be appropriate for the fresh produce market (such as beans with unsightly sores) may be appropriate for some kind of processed food, such as soup stock or canned beans. In many countries, legislation exists that sets minimum standards on fruits and vegetables sold in retail markets.

2.2 *Localised risk*

One distinctive feature of many agricultural products is the variability of production, given the same inputs. Crop yields, for example, are notoriously prone to variations in weather and water supply that cannot be reliably predicted in advance of the planting season. This creates a risk that a region’s output of a given product will be significantly lower in some years than others. Moreover, this risk is localized, given that crops are often traded over a broad territory and that weather effects can be highly local. Thus while one region’s output may be lower in one year than another, there is no guarantee that aggregate output of the product will be lower at the same time. If aggregate output always varied in conjunction with regional outputs, the product’s price would increase when output fell, partially or more than completely making up for the decline in a region’s output with higher prices.

2.3 *Transport*

Transport can be quite expensive for certain bulky, heavy, and perishable items, especially those that require refrigeration, such as milk. The difficulties inherent in long-distance transport of milk mean that in large countries, such as Australia and the U.S., there are many localized fresh liquid milk markets. When the transport cost is larger than the difference in cost between producing the product in the most efficient and least efficient areas, the product may be produced in areas that are not the most productively efficient. In contrast, products such as almonds that are relatively long-life, storable and high price (compared to weight) may have much broader geographic markets for the purposes of competition analysis. The ability to store a product can smooth out short-run production problems and permit transport over great distances.

For certain products, the cost of fast transport is easily made up by sales values. Tropical fruits and some vegetables are sometimes flown great distances to their destinations.

2.4 Differentiation

Unlike branded products, basic agricultural commodities are often homogeneous between producers. This means that, in absence of cartels, profits will be relatively low, with sales prices at levels just high enough to cover the marginal production costs (including opportunity costs of the land) of the marginal producer. Undifferentiated markets with inelastic demand create high profits for cartel operation compared to markets with other characteristics.

Increasingly, products are becoming differentiated; even products that were once considered bulk commodities, such as grains. More traditional differentiated products include those of the same general type (such as lamb chops) that may have very different qualitative features. For example, Welsh lamb may have a very rich flavor compared with lamb from another location. Some farmers have better land for raising tomatoes than others, and may raise tastier products as a result. Qualitative features are often difficult to identify by small-quantity end-users, especially given that the lamb in an end-consumers store may come from one producer on one day, and another producer on another day.

While some goods may seem undifferentiated to small consumers, large quantity purchasers (intermediate companies such as salty corn-chip producers) may have very specific requirements for their grains. Such purchasers may enter into contracts in which they determine the exact type of seed that will be used, its fertilizers, the product's moisture content and size on delivery, the volume to be delivered and the dates of delivery. These intermediate companies may implement detailed quality standards to enhance their product's consistency, but farmers can perceive the end-result as a dedicated supplier contract that provides them with no freedom to run their farming operation. Such contracts do, however, provide the benefit of reducing price risks, in that prices may be stipulated with increases or decreases based on various quality criteria.

2.5 Advertising and positioning

Food products can be subject to major advertising campaigns. Some unbranded products, such as milk or cheese, may have national advertising campaigns. But these are the unusual cases. Most undifferentiated agricultural products, such as corn, do not have major advertising campaigns because the producers are not joined in an organization that would fund advertising and no individual producer receives sufficient direct benefits to compensate the costs of advertising. Even large producer organizations may experience free-riding behavior when advertising is involved.

While raw foods often do not receive significant advertising, branded foods often have high levels of advertising. Advertising clearly has benefits to the advertisers, otherwise they would not engage in such expensive activities. These high levels of advertising can, in turn, help to generate higher levels of return for the brand owners. The benefits of advertising to a firm include (1) convincing consumers to try a product they have not tried (2) changing consumer perceptions of products, including signaling product quality⁸ (3) providing information to consumers about product characteristics (4) providing information to consumers about product prices and (5) developing unconscious mental associations about a product. Advertising may have the potential to permanently change consumer preferences from their initial state. In this context, the lack of advertising for unbranded products may mean that consumer preferences are naturally driven towards branded (and advertised) products.

2.6 *Consumer heterogeneity*

Consumer preferences about food vary considerably from one country to another and within a country. The nature of these preferences extends not only to preferences for one food to another, but includes preferences about taste, freshness, and credence values, such as organic content, animal welfare, and source of purchase (such as supermarket vs. local specialty retailer). Consumer variation within a given country is important because the more variation there is in preferences, the less appropriate simple quality standards may be. For example, when consumers who seek organic goods have different preferences over plant and animal treatment, it may be appropriate to have several different organic standards with reliable organizations enforcing each one. Government determination of uniform food standards may not always be the best way of satisfying consumer preferences. At the same time, there is some risk that competing private standards may create confusion.

3. **Producer joint-activity organisations (co-operatives, marketing orders, market organizations)**

“Joint-activity” organisations organize joint activity by independent sellers and would include both farmer-run cooperatives and government-operated joint sales organisations and rules, such as marketing orders and market organizations as well as collective bargaining organizations. Farmer “joint-activity” organizations on the selling side take a variety of forms, some of which would not be expected to create any anti-competitive harm, while others could create market power and limit supply or raise prices. Joint activity does not require that farmers sell their product through a central selling organization, such as a cooperative, but can involve other sorts of joint activity, such as limitations on supply, ingredients, or quality. Small farmer co-operatives that affect a limited percentage of the production of a given product within an appropriately-defined geographic area likely do not have any ability to influence prices or terms of competition and are unlikely to generate price increases. In contrast, large co-operatives, or mandatory membership organizations, whether run by the state or other entities, may have the ability to affect the terms of competition and could ultimately raise prices for consumers.

“Joint-activity” organizations often benefit from antitrust law exemptions that prevent cartel charges, as long as the organisations act appropriately. Joint-activity organisations are often independent of the government but at other times are endorsed by government and include mandatory membership for all producers of the relevant product in the relevant area.

3.1 *Co-operatives not endorsed by state*

Farmer cooperatives have a variety of different purposes. At times, they are related to purchasing (such as seed-buying cooperatives that are established in order to benefit from quantity discounts), at times they are related to farming production (such as cooperatives that share and maintain specialty machinery), and at times they are related to selling and processing of output. In this note, the primary matter of concern is cooperatives that are established related to selling.

Selling co-operatives are often organised by type of product. The functions they perform vary, and may include joint marketing of a product, overseeing product advertising and collecting a mandatory fee from farmers to support advertising and marketing expenses, and developing and enforcing standards about production processes and quality.

When cooperatives have significant effects on total output quantity, sales channels pursued, or wholesale prices, and when they could prevent or damage the operations of potential competitors, cooperatives do not have wholly innocuous effects. It is possible to assess effects by weighing efficiency gains and other pro-competitive effects that are achieved through cooperative action against potentially

anti-competitive effects. Factors to consider for the analysis of the competitive effects of a cooperative include:

- Percentage of appropriately defined market included within cooperative
- Exclusivity of producers to cooperative or limitations on outside contracting
- Whether incentives of different participants diverge, making anti-competitive agreements difficult
- Whether efficiencies can be achieved in a less anti-competitive manner

Cooperatives that contain a small percentage of production capacity are generally not likely to pose *substantial anti-competitive concerns*.⁹ Cartel activities such as output limitation are particularly difficult to pursue when cooperatives do not involve all members and cannot observe all market trading to ensure that market allocation agreements would be pursued. While most cooperatives are small and would not pose antitrust concerns, some cooperatives have been set up that do include a large percentage of productive capacity¹⁰ In such situations, “one cannot exclude that major co-operatives, such as the ones...in northern Europe, are dominant.” (Monti (2003)) When cooperatives are highly inclusive, they may have the potential to engage in anti-competitive activities, though non-participation may reduce the ability to engage in anti-competitive conduct. Largely in order to limit the impacts of non-participation, joint-activity organizations have been established for certain agricultural products by many OECD members in which all producers are required to belong and enforcement of cartel-style agreements is provided through state-endorsed monitoring and legal action. State-enforced cooperative agreements are discussed below.

Cooperatives may require that farmers sell their product only through the cooperative. Such requirements are not necessarily anticompetitive. Especially when cooperatives need to ensure quantities to make adequate investment in capital assets, such as storage or processing, some kind of guaranteed volume may be necessary, e.g. for loan guarantees. At the same time, when a highly inclusive cooperative that has already achieved most economies of scale demands exclusive rights to sell a farmer’s product, this can *limit effective entry and limit the ability of consumers to obtain product from other sources*.

Anticompetitive outcomes are less likely when farmers have divergent financial interests, as may arise when farmers produce different varieties of crops with different optimal end uses. For example, Valencia oranges may be most suitable to processing, while navel oranges are most suitable to fresh sales. This means that the two sets of producers have different financial incentives, especially as a joint cooperative may divert fresh navel oranges to processing uses, in order to raise the price of fresh oranges, but with an effect of reducing prices for processed oranges. Divergence of interest does not ensure that anti-competitive outcomes will not occur, but suggests that anti-competitive outcomes will be more difficult to achieve than when interests are convergent.

One reason for establishing cooperatives is to achieve efficiencies. But efficiencies can often be achieved without joint price-setting or joint-output limits. For example, producers may argue that in order to justify a risky financial investment, they must share potential profits between themselves, ensured by a mechanism of joint price-setting or quantity-setting. However, if such risky financial investments are made elsewhere without joint quantity-setting or price-setting, then the investment may not require the combinations over anti-competitive activity. The least anti-competitive means of ensuring that efficiencies are achieved is preferred.

3.2 *Marketing orders, agencies, or organisations endorsed by state*

A marketing order, or market organization, may govern the pricing, supply, and other terms for a given product. The supply rules may apply for specific users under various geographic limits. Marketing orders may establish quantity restrictions, type of output restrictions, minimum purchase prices or arrangements for determining an appropriate price. They may be viewed as regulated price/quantity mechanisms, when they govern most output of a specific type. Such rules have existed and continue to exist in a number of OECD countries. Were non-farmers to form such organizations, their activities would frequently be considered illegal. Farmers could benefit in at least some respects from the elimination of the mandatory government control inherent in government-endorsed marketing orders.¹¹

Reasons for the existence of joint activity organizations vary and include: market stabilization, raising farmer incomes, achieving economies of scale, governing quality standards, providing farmers with control over their products, sharing risk, and avoiding free-rider problems (especially from marketing of a trade name or appellation). Sometimes these organizations control a trademark (or appellation). When this occurs, there is often a geographic limit on the area of production of a product. These geographic boundaries limit the number of producers and the amount that can be produced while, on the other hand, providing higher than usual profits that yield an incentive to maintain the product at a high quality and promote the product.

“Joint activity” organizations endorsed by federal or state government have existed in a number of different OECD countries, including Australia (milk), Canada (Farm Products Agencies Act, R.S., 1985, c. F-4, s. 1; 1993, c. 3, s. 2.), the European Union (Article 34 of Treaty Establishing European Community), and the U.S. (Agricultural Marketing Adjustment Act of 1937, 7 U.S.C. § 601-74). “Marketing orders and marketing agreements are designed to help stabilize market conditions for fruit and vegetable products. The programs allow farms to collectively work to solve marketing problems. Industries voluntarily enter into these programs and choose to have federal oversight of certain aspects of their operations.” (USDA (2004))

The conditions for creation of a marketing order vary from jurisdiction to jurisdiction. Not all jurisdictions state the criteria explicitly, but in general they must receive significant producer support. For example, in the U.S., “For a marketing order to be implemented, it ultimately must be approved by at least two-thirds of those growers voting in a referendum, or by growers producing at least two-thirds of the volume of the commodity represented in a referendum. USDA encourages a showing of broad support for an order prior to holding a formal hearing.” While marketing orders are proposed by producers, “the USDA’s Agricultural Marketing Service oversees the programs to ensure that orders and agreements operate in the public interest and within legal bounds.” (USDA (2004))

The ways that joint-activity organizations operate when they are endorsed by governments varies. The 1999 Italian Competition Authority Annual Report describes some of the conditions for the sugar common market organization in the European Union. “In order to ensure continuity and profitability of production, the European Union, which is world’s leading sugar exporter, set up a Common Market Organization (CMO) in 1968. This, in keeping with the Common Agricultural Policy, provides agricultural producers with profitable price levels and guaranteed outlets. In the beet and sugar sector there is, however, a quantity limit to the guarantee system. This is established by setting a production ceiling shared out pro-rata among the member states; each member state then divides out its share to the sugar companies operating in its territory.

Cultivation contracts between sugar companies and growers are the principal means of vertical integration between agriculture and the industry. Through these contracts, the industry is assured of raw material supplies and an optimal use of plant through predetermined production schedules, while the

agricultural side enjoys advance guarantees both of placing its beet crop, and of prices. In most European countries, in a set period of the year – usually before the cultivation contracts are drawn up – it is common practice to conduct a collective negotiation between all the sugar factories and all the farming associations. This results in the so-called inter-professional agreement, which in effect regulates all the operations needed for the smooth functioning of the beet and sugar sector.”

The evaluation of the competitive effects of “joint activity” organizations requires a consideration of both the functions and inclusiveness of the organization. In the rest of this section, pro-competitive, anti-competitive and ambiguous reasons for activity are considered, along with how inclusive such organizations need to be.

3.3 *Pro-competitive reasons joint activities*

There are four main reasons for cooperative action that are broadly pro-competitive:

- Achieving economies of scale and scope
- Forming and maintaining a “brand”, such as an appellation
- Conducting advertising
- Conducting research

The first aids the achievement of productive efficiencies, while the others deal with various areas in which lack of co-ordination and lack of consumer information may lead to market failure. Co-ordination may help to improve performance in these areas but the degree of necessary coordination varies. On the one extreme, achieving economies of scale and scope will rarely require participation by all producers. At the other extreme, to avoid “free-rider” problems, shared advertising will most likely require participation of substantially all of the producers.

If an organization pursues one of these objectives and does not involve more participation than is necessary nor other activities besides these objectives, that does not necessarily mean that its behavior is pro-competitive, but only that its behavior is likely pro-competitive.

3.3.1 *Economies of scale and scope*

Achieving economies of scale and scope is particularly important when producers are small and there is a potential for reducing costs. Such economies may be particularly important for transport, storage, sharing of equipment, and purchasing. But one would rarely expect that the achievement of such economies would require all producers to belong to the joint organization that would seek such economies. More generally, one would rarely expect that coordination of price and quantity would be essential to the achievement of such economies. As a result, highly inclusive joint organizations are likely not necessary for the achievement of economies of scale and scope.

3.3.2 *Forming a brand, such as an appellation*

Many countries have particular regions that are known for producing agricultural goods of a certain type or quality. For example, Italian Prosciutto di Parma (ham), from the Parma region of Italy, is well-known and has a high-quality reputation. In fact, Prosciutto di Parma is a protected appellation in many countries, meaning that no product can be sold as Prosciutto di Parma unless it was produced under the rules of the Consortium of Prosciutto di Parma. Other forms of ham may taste similar, but regions outside

the Parma region that follow the Prosciutto di Parma appellation rules cannot label their ham as Prosciutto di Parma.¹² Appellations help to provide farmers of a region with an incentive to invest in developing a product and maintaining that product's reputation of quality.

The presence of geographical words does not necessarily mean that a product is protected under appellation rules or that one country accepts another's appellations. For example, "Swiss cheese" is a generic descriptor in English that describes a certain kind of hard cheese, rather than cheese from Switzerland.

Certain appellations are protected marks in certain territories under a variety of different rules.¹³ In the European Union, for example, as of September 2003, there were 603 food products that had been granted official protection. (See Lee and Rund (2003).)

According to the European Commission, "Considering the saturation of markets, the strategic importance of product differentiation becomes paramount for rural areas. The specific qualities linked to natural and human factors... offer rural businesses the possibility to position their products on market segments with higher added-value. These added values are essential to compensate for higher production costs."¹⁴

The designations of appellations are typically decided under international agreements and not all countries are signatories to all agreements. The decisions that countries make about when to implement appellations agreements are complex, product-specific, and difficult to generalize.

One important factor in appellation decisions is the extent to which not implementing (or implementing) an appellation causes consumer confusion. Consumers have limited information about products that they find in stores. Labeling is one of the best mechanisms for improving their information. If a name is used that makes consumers think they are receiving a product from a certain region when in fact the product is not from that region, consumers may be misled. On the other hand, if appellation rules are applied to a name that consumers consider as "generic" – such as Swiss cheese in English – and not associated with the production of a particular locality, consumers may be limited to the product of a given locality simply because they do not know the close substitutes for the given name that they use as generic. In that case, the appellation product will derive rents that arise not from high quality reputation but instead from consumer ignorance.¹⁵ There may be reasons to maintain different rules for appellations in different countries, depending on the expected effect of an enforced appellation on consumers, given the consumer associations with different names.

Appellations are often governed by local committees of producers. Generally, such committees are engaged in pro-competitive activities with their quality enhancement and monitoring work. Appellations committees do not necessarily always acting in a pro-competitive manner, however. At times, they set production quotas and have been accused of anti-competitive activities.

For example, the Italian Competition Authority brought cases in 1998 against the Consortia of Parma ham producers, the consortia of San Daniele ham producers, and the consortia of Gorgonzola cheese producers for fixing quantities of output for their members.¹⁶ The ham cases are discussed briefly in box 1 below.

One important issue in these cases is the extent to which competition within a consortium should be mandated. When brands within an appellation are recognized by consumers, as with different wineries in the St. Emilion of Bordeaux appellation, the consortium need not focus on pricing or output extensively, because each producer has an individual incentive to maintain quality and output and free-rider problems are limited, as consumers expect variation within the appellation. But when there are no well-known

brands within an appellation, there is a possibility that producers might free-ride on the reputation of the appellation by over-producing and reducing the profits of other members (and thus reducing the rewards for creating the initial reputation.) The Italian competition authority has taken the position in these cases that maintaining intra-consortium competition is important. The view that constraints on output are anti-competitive could be extended to the view that artificial constraints on inputs that have the effect of limiting output are also anticompetitive. Thus delicate issues of assuring strong incentives to innovate and maintain quality must be balanced against the desire for active competition between producers who are not commonly owned.

Box 1. Box 1. Consorzio del prosciutto di Parma-Consorzio del prosciutto di San Daniele

"In January 1999 the (Italian Competition) Authority rejected the application by the Parma and San Daniele ham consortia for an extension of the authorization of production agreements they had been granted until 31 December 1998 under Article 4 of Law no. 287/1990.

"In examining the application, the Authority found that the conditions obtaining at the time the original authorization was issued no longer existed. In June 1996 Commission Regulation (EC) no. 1107/96, which registered Prosciutto di Parma and Prosciutto di S. Daniele as protected denominations of origin, came into force. For products with a protected designation of origin, production and related controls are governed by Council Regulation no. (EEC) 2081/92 on the protection of geographical Indications and designations of origin for agricultural products. In giving its reasons for not extending the authorization, the Authority noted that fixing the quantities to be produced was both unnecessary and inappropriate with respect to the declared objective of ensuring that the production of hams with a protected designation of origin conformed with the prescribed methods, since this task is now performed by bodies designated under Italian and Community law."

Source: 1998 Annual Report of Italian Competition Authority

3.3.3 Advertising

Mandatory membership in a cooperative can be pro-competitive, especially when the membership is expected to contribute to payments for common advertising for a given product. In some OECD countries, milk advertising is supported by organizations that effectively tax their membership a small amount to cover advertising costs. If low-nutritional-value branded foods are allowed to advertise, and this advertising diverts purchases away from higher nutritional value foods, public policy can quite reasonably promote common advertising expenses of healthful foods.

While marketing organizations may permit common advertising, they do not always do so and it is rarely their primary activity. Data on advertising activities by cooperatives is difficult to obtain. But under the U.S. marketing order scheme, some information is reported about each marketing order. Of the 30 active orders as of May 5, 2004, 15 permit joint advertising and 13 are known to maintain some level of common advertising. Market failures associated with common advertising do not appear to be the primary activity of marketing order organizations, but may be a significant factor.

3.3.4 Research and development

Like advertising, research and development is often a public good, in the sense that users of R&D cannot be fully excluded by the innovator and one person's use of the innovation does not typically prevent another person's use of the innovation. In these circumstances, the incentives for private innovation will often be lower than the public benefits from innovation, so there is a market failure. In order to increase the incentives for innovation, the formation of large groups of the likely beneficiaries, who may pay a levy for R&D, is one solution to funding. Another is for government to directly fund R&D. A third is for external private development and investment. Given the broad constraints on government funding, private sector alternatives may be desirable. Much like advertising, when a private sector alternative is formed, a very inclusive membership organization may be appropriate, in order to avoid "free-rider" problems. In fact, a

number of marketing order organizations do pursue R&D activity, although government funding for agricultural R&D is probably much greater in magnitude than marketing order funding.

3.4 *Anti-competitive joint activity*

A number of anti-competitive reasons for joint activity exist. These include

- Restricting output
- Raising prices

These two purposes are closely related, as output restrictions are often a part of "market stabilization" and typically lead to higher prices. While it is possible that in some circumstances, these anti-competitive reasons for joint activity are not problematic because of large counterbalancing efficiencies, in general they will result in lower total and consumer welfare. That is, although they may benefit producers, they will likely hurt consumers more.

3.4.1 *Restricting output to at least some marketing channels*

Output restrictions are one of the basic tools of monopolists and cartels for increasing profits. In the agricultural sector, output restrictions have been implemented in a number of different ways. For example, joint activity organizations in some member countries have controlled total quantity produced of certain products. In other cases, output for certain sales channels has been controlled, by means of percentage allocation rules that permit farmers to sell only a certain percentage of their output to the "profitable" channel (such as fresh fruit). Sometimes, output controls of one product have also required output controls on other related products, in order to eliminate possibilities of substitution. When producers jointly agree on aggregate output, or allocate output between inelastic and elastic purchasing segments, prices can rise significantly.

Box 2. Box 2. California-Arizona orange producers

A documented example of grower cartelization arises with the California-Arizona orange industry.

Observing the success of the lemon growers, the orange growers of California and Arizona attempted to establish an agreement regulating production in 1932. This agreement succeeded in raising prices briefly by 20%, but a number of non-participating growers with high shipments to the fresh fruit market quickly made the agreement inoperative.

The Agricultural Adjustment Act of 1933 and the Agricultural Marketing Act of 1937 permitted the majority of producers of an agricultural commodity to agree to form a marketing coalition that could determine, for all producers, the amount of product sold for different uses, rate of flow of the product onto the market and minimum quality standards for that product. The coalition could impose price posting and inspection programs for agricultural commodities. Producers who oversupplied could face substantial penalties. With the benefit of antitrust immunity, the Navel and Valencia orange producers formed cartels that governed the distribution of their oranges for fresh orange sales and processing sales, initially a joint cartel, and then after 1952, separate cartels for each kind of orange. The orange marketing orders allowed the administrative committees to set how much of the crop would be sold in the fresh form, the timing of shipments to the fresh domestic orange market, and the minimum size of oranges.

One of the administrative committees contends that the stability provided by the marketing order made fresh oranges "available to consumers at a cost which is free from the inefficiencies of non-orderly marketing." (Valencia Orange Administrative Committee, Annual Report of Operations under Federal Marketing Order 22, at 2 (1978-79)) However, an analysis of the effect of marketing orders suggests the reverse. Normally, in seasons of optimal growing conditions, a higher percentage of fruit would be of a quality appropriate for consumers of fresh fruit. However, the practice of the administrative committees has been to reduce the percentage of the fruit that goes to the fresh market in good seasons below the percentage allowed in bad seasons, largely by pro-rata limits as well as through quality limits on the size of oranges. The effect of such limitations is to keep prices high. In fact, while "85-90 percent of Navels and 65-80 percent of Valencias are of sufficient quality to be marketed in fresh form, fewer than 70 percent of Navels and 45 percent of Valencias typically reached the fresh market between the 1960-61 and 1980-81 seasons." (Shepard (1986)) More fruit was directed to processing than quality would suggest.

Why would the administrative committees pursue such strategies? The main reason is that fresh fruit consumers had very inelastic demand while processors have much more elastic demands. As a result, limiting production in the fresh fruit segment raises revenues for fresh fruit much more than switching that production over to processing lowers revenues. The price differences are substantial between the Navel and Valencia oranges sold for fresh consumption and those sold for processing. Navel oranges averaged \$3.30 per carton for 1960-1980, but on-tree prices of -\$0.18 per carton for processing. Valencia oranges averaged \$1.54 per carton for fresh and \$0.23 on-tree for processing. (A negative on-tree price would be possible because the cost of picking, packing and delivering the oranges to market would exceed the market price.) These price differences arise because Valencia oranges are less desirable for fresh fruit consumers than Navel oranges, but more desirable for processors. The distribution rules have raised prices for fresh fruit but substantially lowered them for processed fruit. The likely reason that the administrative committees require the sale of unprofitable fruit is that it feels all output must be controlled and accounted for in order to ensure that unauthorized fruit would not be distributed for illicit fresh sales. The best way to ensure farmers do not engage in illicit sales is to create observable transactions that account for their fruit. Even if the observable transactions for processing are unprofitable, they may increase the certainty of higher prices for fresh fruit sales and maintain the stability of the cartel.

Ironically, the effect of the cartelization of the orange industry may not have achieved all the objectives of the growers. While in the short-run, the effects of the cartel were primarily linked to raising prices for fresh fruit sales and lowering the prices for processed sales, the long-run impact of the greater than normal returns was increased entry into orange growing. That is, artificially high prices led to increases in capacity that made increased diversions to the processing market necessary. These increased diversions reached a level such that prices for Navel oranges for processing were actually unprofitable to farmers. These increased diversions led to much lower returns for growers in the market-allocation program. "Negative on-tree prices for processed fruit and increasing diversion to processing drove average returns from \$4.00 per box in the early 1960s to less than \$1.00." (Shepard, 1986)

"That government-enforced price discrimination has actually conveyed few long-term benefits to the industry is entirely consistent with economic theory. The marketing orders have clearly permitted fruit to be diverted away from the inelastic fresh market in a way that could not be sustained without regulation. While this has the immediate effect of raising and stabilizing grower returns, unrestricted market entry has assured that average returns cannot in the long run exceed levels sustainable in a competitive environment. Instead, by stabilizing average prices, the marketing orders have reduced grower risk and, with it, long-run grower returns. More importantly, high initial fresh-market prices under the orders have been balanced by abnormally low processing orange prices, so that the conspicuous long-run effect of federal regulation has been a legacy of pronounced disequilibrium in the processing sector and misallocation of resources toward orange production." (Shepard (1986)) In his econometric simulation of the Navel and Valencia marketing orders, Shepard (1986) predicts that long-run returns to farmers would actually be about 20 percent higher if competitive forces were allowed to allocate oranges between the fresh and processed markets.

The two marketing orders ceased activity in 1994.

(Source: Shepard, 1986)

3.4.2 *Raising transaction prices*

Sometimes, when controlling output has been difficult, agreements have been formed to raise transaction prices. For example, in October 2001, an agreement was signed in France between six federations, four of which represented cattle farmers and two of which represented cattle slaughter houses. After violent action of French farmers intercepting and destroying shipments of beef from outside of France, the slaughterhouses agreed to both limit imports from outside of France and adopt a "price scale" that raised the price they paid for French cattle. The agreement led to a 10-15% increase in prices for slaughterhouse prices of meat. (See recital 40 of European Commission (2003).)

The results of eliminations of price/output rules can be substantial and beneficial to consumers, while at the same time providing farmers with income stabilization payments supported by taxes that are introduced on the deregulated product. For example, in Australia, after milk deregulation, net prices to consumers fell on average, even including a tax payment that was used to subsidize dairy farmer incomes after the deregulation. For a description of the Australian experience with milk deregulation, see Box 3.

Box 3. Box 3. Australian milk deregulation

On July 1, 2000, Australia deregulated the dairy sector throughout the country. Prior to this time, farmgate prices for drinking milk were set by State Governments. Drinking milk accounted for only 18 percent of milk production annually. The rest of milk output was devoted to production of dairy goods such as cheese and butter where payments were determined by the international market and averaged less than half the drinking milk price.

The milk industry changed quickly after July 1, 2000. The Australian Competition and Consumer Commission (ACCC) undertook to monitor prices and profits of intermediaries in the period before and after the liberalization, in response to concerns that milk processors and retailers would be the primary beneficiaries, and the consumers would receive only marginal savings.

The ACCC performed its review six months after the regulatory change, in order to provide a speedy assessment of the results. The review found that milk prices to consumers fell substantially, supermarkets quickly established national retail prices for milk, retailer margins fell, and processor margins fell as well. Thus the concerns that consumers would not benefit from the deregulation were unfounded.

One major national supermarket chain announced that it would distribute two-year supply contracts, after the de-regulation. The opportunity to win these contracts set off aggressive bidding between the processors for the contracts. Once the chain obtained its contracts, it announced national prices on its own-brand fresh milk for the 1-, 2- and 3-litre packages. The chain chose a national marketing strategy of setting low prices for milk that were intended to drive increased traffic to their stores rather than to increase its revenue from milk.

Supermarket prices for plain milk fell by 22 cents per litre across all pack sizes and brands from the June quarter to the December quarter of 2000. Prices for reduced-fat and low-fat milk also fell, though to a lesser degree. Convenience stores also lowered their prices for 2-litre pack of plain milk, in response to lower supermarket prices. Price reductions for 1-litre containers from convenience stores were much less pronounced. The variation in prices between states fell considerably after deregulation. The development of plain milk prices is illustrated below.

Average national prices for 2-litre containers of plain milk for 2000, by type of retail outlet

Quarter 00	Supermarket (generic label)	Supermarket (branded)	Convenience stores
	AUD/unit	AUD/unit	AUD/unit
March	2.50	2.68	n/a
June	2.54	2.72	2.79
September	2.30	2.60	2.75
December	2.16	2.38	2.69

Source: ACCC (2001) (xvii) and ADC

While retail prices declined, retail margins also declined. In supermarkets, the retail margin on a litre declined by 19 percent, more than the decline in wholesale prices.¹⁷ In convenience stores, sales volumes declined by about 24 percent as consumers switched to buying their milk from less expensive supermarkets. The average net profit margins of Australian milk processors decreased by 12-18 percent after deregulation. Farmers received lower farmgate prices for drinking milk. In order to supplement farmer income, an assistance program was implemented at the same time as deregulation, to provide either payments to dairy farmers over an 8-year period or a tax-free exit payment. These payments were financed by a levy of 11 cents per litre on most drinkable milk products.¹⁸

Calculating the effects of the reforms for consumers, "Savings from sales of supermarket milk to Australian consumers are expected to conservatively realize around \$118 million on a full year basis."

3.5 Mixed pro- or anti-competitive joint selling activity

The primary area of joint activity that can have both pro-competitive and anti-competitive effects is quality standard-setting. Quality standards may have positive effects, although they can be abused for anti-competitive ends, especially if the quality standards are adjusted by producers from one season to another in such a way as to restrict output.

3.5.1 *Supplier-established standards*

Suppliers can set standards for output in such a way that consumer confidence in quality of a product is raised and more consumers choose to consume the product.

In practice, producers sometimes maintain minimum quality standards to benefit themselves rather than to benefit consumers. Quality standards are likely designed for producer benefit when increased supply of the product leads to stricter quality standards that reduce saleable output for a given use. For example, a product may be produced in greater quantity when the weather is good and at the same time, a greater percentage of the product may be high quality. In such a circumstance, if quality standards (such as fruit size) are adjusted in a good season so that the quantity of "marketable" product is lower than it would have been under the prior standard, the effect of the variable standard is to reduce output to the consumer market. Arguments that the objective of such standard variation are to maintain a constant supply to the end-consumer market are misleading: consumers do not necessarily benefit from such a constant supply.¹⁹

3.6 *Long-run effects*

The long-run effects of "joint-activity" organizations that succeed in raising prices often do not enhance producer welfare in the long-run. This is because, while anti-competitive rules often limit the extent to which output can be used for its highest value uses, they do not prevent farmers from entering the market to produce the given output. If returns are high in any area of economic activity without entry constraints, entry will occur until returns fall to a lower level. This type of entry response has been observed for many products, including the California-Arizona oranges, as described in Box 2. These oranges had both fresh and processed uses. The result of the marketing orders was that while prices for fresh oranges were maintained at a high level, prices for processed oranges actually became negative in some cases and farmers found an increasing percentage of their production devoted to the low-value uses, as total output expanded. The average returns of orange farmers thus fell considerably during the lifetime of the orange marketing orders. If entry is limited, for example, because of limited land that is available for production as with certain geographic appellations, then the price of land will rise so that returns will not be exceptional.

Other forms of farmer aid, such as direct payments, do not create the same kind of artificial incentives to produce as cartels.

4. **Monopsony buying**

Buyers of agricultural products are increasingly concentrated both for processing and retailing. (OECD, 2001) Regulations and law play a large role in determining the structure and nature of competition in buying agricultural products in many OECD countries. In some countries, the level of concentration among processors and purchasers of agricultural products has increased significantly in recent years. For instance, in the UK, the top 4 grocery chains will have about 90% of the one-stop shopping grocery store market. In the US, there are now 4 meatpacking firms that have about 80% of the market. This concentration frequently arises from mergers and is often publicly justified by efficiencies. Certainly, there are significant economies of scale and of scope in many processing and retailing operations. But farmers have often argued that monopsony purchasing power has been used against them to lower their returns and increase the risks in their farming activities. Some researchers argue that weak enforcement of antitrust laws are responsible for an undue concentration of retailing and purchasing and that antitrust laws should be enforced more strictly against their buyers than against other combinations. (Carstensen (2004) and Taylor (2004)) Other researchers argue that as profit margins decline, increasing concentration is inevitable, in order to spread fixed costs and remain competitive. (Sutton (2003))

Farmers often feel that their increasingly difficult economic situation is driven both by their lack of economic power and by increasing market power of large purchasing and sales organizations. At times, farmers may be correct that financial difficulties arise from powerful bargaining positions of buyers. Buyers do sometimes engage in concerted action to keep prices below a level that would be determined in a competitive market. The level of such concerted action in the agriculture sector is not known with any certainty. Often, as with many other sectors of antitrust law enforcement, official complaints to authorities are not made as individual producers often fear that they may be delisted from their major buyer and “blacklisted” by other competitors. (Competition Commission (2000)) While many different sorts of claims are made, at least informally, few are appropriately documented with economically convincing evidence. Given that a number of the behaviors have innocent as well as anti-competitive interpretations, the need for careful analysis is paramount.

Many of the examples of the types of behavior by buyers that are claimed as anti-competitive are far from unique to the agricultural sector. A previous roundtable has generally discussed buyer power of multi-product retailers. (See OECD (1999).) In the agri-food sector, buyers may insist on a certain seed-type being used for grains, or a certain breed-line of chick for poultry farmers. In the past, farmers did not receive such specific instructions. But increasingly, farmers are not selling to a broad market but are directly linked to specific buyers. This places farmers in a more dependent supply relation than in the past. That is, after signing a contract and dedicating their facilities to production for a specific producer, farmers cannot easily disengage from a given producer. While this may not be satisfying to farmers, it is increasingly common in many areas of production, such as industrial production, that suppliers dedicate various portions of their output to specific buyers. Such dedication has the benefit of increasing uniformity and controlling quality for the buyer (and for the consumers who are the buyer’s end-consumers).

4.1 Monopsony and monopoly analysis

One of the claims sometimes made is that monopsony power should be treated differently from monopoly power. (See Cartensen (2004).) Farmers may argue that while having four or five sellers may be sufficient to generate adequate levels of competition in supply markets, having such a limited number of major buyers is unduly limiting for agricultural sellers. Is this correct? Or should market power for buying be treated in much the same way, and using the same antitrust enforcement tools, as market power for selling?

Cartensen (2004) argues that lower market shares may suffice for anti-competitive harm to occur in buyer power cases. But this argument is actually based on the idea that low national concentration figures can mask high concentration for localized buyers. As Schwartz (2004) argues, “this observation merely states that one must be careful in properly identifying the relevant geographic market...But this caveat applies equally when gauging seller market power.” (pp. 5-6)

Cartensen (2004) argues that as buying firms increasingly sign contracts in which payments to producers are based on prices observed in public spot markets, they increasingly have incentives to lower the prices obtained in spot markets, because those lower prices will reduce the expense of their contracts. While such contracting structures may create incentives for buyers not to pay high spot prices, similar incentives are created by Most Favored Nations (MFN) contracts. MFN contracts guarantee that sellers must give a certain buyer the best price they use (or that buyers must give sellers the best price they use). Thus MFN agreements can be either supplier limiting or buyer limiting. Such contracts reduce the willingness of one party to change prices for transactions that account for a small part of their output. Note that competition cases have been litigated in at least some jurisdictions over MFN agreements, without any special “buyer power” rules.

4.2 Mergers of processors and retailers

Mergers to form concentrated processing and retailing organizations may be motivated by productive efficiencies that arise from such processes or they may be motivated by the desire to exercise monopsony power. "A casual observer might believe that, if a merger lower the price the merged firm pays for its inputs, consumers will necessarily benefit. The logic seems to be that because the input producer is paying less, the input purchaser's customers should expect to pay less also. But that is not necessarily the case. Input prices can fall for two entirely different reasons, one of which arises from a true economic efficiency that will tend to result in lower prices for final consumers. The other, in contrast, represents an efficiency-reducing exercise of market power that will reduce economic welfare, lower prices for suppliers, and may well result in higher prices charged to final consumers." (Pate (2003))

In the EU, as in much of the rest of the OECD, grocery retailer concentration has increased notably in many countries over the last decade, as shown in Table 1. Different definitions of the relevant market can lead to even higher assessments of concentration than those in the table. For example, based on the UK Competition Commission's extensive report on UK supermarkets (Competition Commission (2000)) and a recent merger, the five-firm concentration ratio for one-stop shopping grocery outlets is above 90% in the UK as of 2004.

Table 1. Table 1.Five-firm Concentration (%) In Grocery and Daily Goods Retailing for EU member states (1993-1999)

Country	1993	1996	1999
Austria	54.2	58.6	60.2
Belgium+Luxembourg	60.2	61.6	60.9
Denmark	54.2	59.5	56.4
Finland	93.5	89.1	68.4
France	47.5	50.6	56.3
Germany	45.1	45.4	44.1
Greece	10.9	25.8	26.8
Ireland	62.6	64.2	58.3
Italy	10.9	11.8	17.6
Netherlands	52.5	50.4	56.2
Portugal	36.5	55.7	63.2
Spain	21.6	32.1	40.3
Sweden	79.3	77.9	78.2
UK	50.2	56.2	63.0

Source: Estimates based on data from Corporate Intelligence on Retailing's European Retail Handbook, as reported in Paul Dobeon (2002)

As mentioned earlier, concentration is also high among processors in some OECD countries, particularly meatpackers. In the U.S., for example, the top 4 meatpackers account for 80% of slaughtered cattle. (Pate (2003)) While reliable statistics are somewhat difficult to find, increasingly meatpackers are raising their own livestock and turning to the market for a smaller and smaller percentage of their supply. Through ownership, joint ventures, and contracts, meatpackers own or control roughly 50% of their slaughter supply in the U.S.. (Taylor (2004))

Competition authorities have sometimes taken action against retail concentration mergers and have carefully examined meatpacker mergers. "For example the European Commission prohibited the proposed merger between Kesko and Tuko in Finland which would have offered the combined enterprise a national market share of 60%. In the case of Rewe's acquisition of Julius Meinel in Austria, store divestments were instructed in regions where the combined enterprise would control 65% or more of sales. However, for other mergers that have had a significant concentrating effect at the aggregate EU level, notably

Metro/Makro and Carrefour/Promodes, these have been allowed by the EC to proceed relatively unhindered. Similarly, national competition authorities have generally shown little appetite for blocking or limiting greater retail concentrations.” (Dobson (2002))

4.3 *Excess profits for purchasers*

One concern among producers is that purchasers squeeze producer profits to low levels, and then make high profits on their products. Certainly, suppliers feel more price pressure from the very large purchasers than from others. The UK Competition Commission supermarket study found that whether suppliers were large or small, they did give larger discounts to the large supermarket chains than to most other buyers. These differences could not be fully explained by efficiencies, such as those that arise from full truck load deliveries and central warehousing. (Competition Commission (2000), p. 432)

The Competition Commission study did not receive equally extensive data on supplier prices as on retail prices, so was not able to fully evaluate supplier prices. But the study did find that, while suppliers appeared to be making net losses on some products, the supplier prices obtained from the main supermarket chains were broadly similar. None of the large retailers were doing consistently better than others in terms of supplier prices. In terms of excess profits, the study found that retailer margins for the studied agricultural products such as lettuce, apples, eggs, lamb, and chicken appeared similar to those of other products “suggesting that suppliers’ losses were not caused by excessive profit-taking on the part of retailers.”²⁰ (Competition Commission (2000), p. 448)

Box 4. Box 4. UK Supermarket Study

In response to complaints by suppliers, including farmers, about abuse of buyer power and from reports of higher prices in UK supermarkets than in other supermarkets, the UK Competition Commission carried out an extensive study of the supermarket industry in the UK. (Competition Commission (2000)) The questions asked included whether market power was being abused, whether prices were higher in the UK, and whether profits were higher in the UK. The Competition Commission requested extensive information, including internal documents and data from the UK supermarkets, as well as data from external sources and from surveys conducted by the Competition Commission itself.

Among other conclusions, the study found that:

- Even at a national level, the concentration of supermarket ownership was quite high. At local levels, concentration could be even higher, and in a number of locations, the study suggested that supermarkets operated in monopoly or duopoly conditions.
- Prices of groceries were higher in the UK than in Germany, France and the Netherlands, especially in the category of own-store brands, but also for identical branded products. “Great Britain grocery prices were between 12 and 16 per cent higher than a weighted average of prices in France, Germany and the Netherlands in the second half of 1999.”
- Profitability was slightly higher for the major UK supermarket chains, though not much higher than elsewhere. One reason that retail prices would be notably higher while profits less so is that operating costs may be higher in the UK than elsewhere, both for staff and land. High land prices, in particular, mean that the high wholesale-retail product margin is not sufficient to establish the existence of broad anti-competitive activity.
- The main parties (major supermarket chains) performed price-checking most aggressively on a limited number of reference items to which consumers pay the most attention. These core comparative items may experience the most aggressive pricing, while other items are much less the focus of consumer concern and can have significantly higher margins.

While data was imperfect, “in most cases there was a fairly rapid and reasonably complete transmission of short-term cost changes from wholesale to retail level.” (p 93) When price reductions had not been passed through, the

Competition Commission was satisfied that "there had been cost increases elsewhere in the supply chain." (p. 92) The Competition Commission did "not rule out the existence of short-term asymmetry." (p 260)

- External reports suggested that the price margin between farm-gate and retail meat prices had increased for beef, lamb and pork between 1995 and 1998. One explanation was the increased processing charges as a result of regulations and limits on uses of animal parts arising from the BSE crisis.
- External reports suggested that farm-gate price increases were more quickly passed on than farm-gate price decreases. The evidence of this was strongest for pork.

4.4 Buyer price-fixing

The existence of coordination between buyers that leads the buyers to set a price that is below the competitive level or to allocate producers between them can occur in auction settings as well as in individual negotiations. Such activity is a form of buyer-cartel operation and is illegal under most competition law regimes.

While price-fixing has occurred and been prosecuted with a number of feed additives, such as lysine and vitamins, it has been found less frequently on the buying side. However, competition authorities do prosecute bid rigging on a regular basis and have found and prosecuted bid rigging in the agricultural sector.²¹

4.5 Asymmetric price-cost response

One common claim made by farmers and their representatives is that purchasers do not share the profits from agricultural sales equitably. One alleged abuse of market power by purchasers is that retail prices do not follow wholesale prices closely. In particular, a common view is that when wholesale prices fall, retail prices are much slower to fall, but when wholesale prices increase, retail prices increase immediately in response. Thus when there are cost increases, the retailers maintain their margin, but when there are cost decreases, retailers earn a very high return on sales, while farmers see little of this benefit. Some researchers suggest that that the non-simultaneous movement is an indicator of market power imbalances. (Taylor (2004)) The broadest study of the phenomenon, covering both agricultural and non-agricultural products, finds no correlation with asymmetry and competition. (Peltzman (2000)) Little satisfactory empirical analysis of these claims exists for agricultural products, apart from general verification of the existence of asymmetric responses. However, a rigorous method for approaching the analysis of asymmetric response questions has recently been proposed by Lewis (2004). This approach was applied to the retail gasoline market, but could equally well be applied to agricultural products. There are three main theories of asymmetric response.

One theory is that price coordination is normally difficult, "but that firms are able to use past prices as a "focal price" at which to collude." (Lewis (2004)) When wholesale costs increase, the increase must immediately be passed on by retailers, otherwise their sales would be unprofitable. In contrast, when wholesale prices fall, collusion is easier because it simply involves not changing existing prices. (See Borenstein, Cameron & Gilbert (1997).)

A second theory of asymmetric response is the "variable uncertainty" theory. Consumer search patterns change with their assessment of volatility. When uncertainty about the level of wholesale costs increases, consumers cannot evaluate whether a changed retail price is unique to a particular retailer or market-wide. Being risk averse, they search less when there is uncertainty and competitive profits increase. In such a model, an asymmetry in adjustment speed arises because, when there is a wholesale cost increase, retail prices will rise both because of higher costs and higher margins. However, when there is a wholesale price decrease, the higher margins will counteract the tendency of falling costs, so that prices

will rise fast and fall slowly. (See Benabou and Gertner (1993).) Note that this is not a theory of collusion, but of uncertainty leading to higher margins, rather than collusion leading to higher margins.

A third theory of asymmetric response is the “reference price” theory. (Lewis (2004)) In this theory, consumers form expectations of retail prices based on the retail prices they have experienced in the past. Firms set their prices differently depending on how much search activity they expect. When actual retail prices at a given outlet are higher than expected, consumers will search actively, because they expect the gains from searching to be high. This active search will ensure that margins are low. In contrast, when prices are at a slightly lower level than consumers expect, the returns to searching will be lower, and consumers will search less aggressively for alternative sales outlets. Thus when wholesale costs fall, firms may lower their prices slightly, to reduce search, but they will not lower them dramatically, because since consumers are not searching aggressively, the retailers will not attract many new consumers as a result of a lower price. Thus prices will fall slowly in response to cost decreases, but rise quickly in response to cost increases. This is not a theory of collusion but of search behavior based around reference prices.

Each of these theories has distinct and empirically testable implications for pricing and cost dynamics. The implications are summarized in the table.

Table 2. Table 2. Predictions for empirical tests

	“Variable uncertainty” search model	“Focal price” collusion model	“Reference price” search model
When are profit margins high?	When prices are rising and falling	When prices are falling	When prices are falling
When do prices respond to cost changes?	At all times	Mainly when margins are low	Mainly when margins are low
How and when do retailers reduce prices?	Gradually and in unison	Suddenly and at different times	Gradually and in unison

Source: Adapted from Lewis (2004)

Testing these theories empirically in the retail gasoline market, Lewis (2004) finds that “margins are high when prices are falling and low when prices are rising. Prices respond much more slowly to both positive and negative cost shocks when profit margins are high.” These results are consistent with the “reference price” theory, but contradict some of the implications of the “focal price” theory and of the “variable uncertainty” theory. Thus evidence in the retail gasoline sector suggests that consumer search dynamics are primarily responsible for the asymmetry in price responses between cost increases and decreases rather than abuse of “market power.”

While there is not yet significant direct evidence on the source of possible asymmetries in price responses to agricultural cost increases and decreases, the existence of such asymmetries would not, on its own, be sufficient to imply to that purchasers of agricultural products are abusing market power when retail prices fall slowly in response to a farm-gate price decrease.²²

4.6 Vertical integration and risk shifting

As buyers seek to increase uniformity and consistency of their inputs and end product, they increasingly demand that producers use certain production methods. This creates the potential for expropriation of investments (Williamson (1985)) to the extent that producers make relationship-specific investments for a given buyer. In such circumstances, long-term contracts may be needed to provide confidence to investors, and if contracts cannot provide sufficient protection to investors, than full vertical integration may occur.²³ For meat processing, in particular, forms of vertical integration are increasingly common. Some observers estimate that as much as 50% of slaughter needs are now covered by long-run

vertical relations (including contracts) between meatpackers and the animal raising supplier. (Taylor (2004))

The implication of this integration is that the open market is used as an increasingly smaller source of supply for meatpacking. If demand is low, meatpackers supply from internally-controlled sources, and only if demand is high do they turn to the public market. Producers who choose to dedicate themselves to the open market face increased levels of fluctuation in demand and higher risk.

Suppliers to the open market sometimes claim that the increased risk they face is a result of market power of meatpackers. The risk does not come from market power but from increased vertical integration, and the vertical integration does not imply concentration or market power. Suppliers face the choice between either becoming captive suppliers to meatpackers or facing high risk in open markets. Neither choice is appealing for many producers. But vertical integration, which lies at the core of the issue, is a natural outcome of problems with "arms-length" contracting, increased requirements for uniformity and consistency, and the need for assured supply by suppliers. There is nothing inherently anti-competitive about vertical integration, the desire for increased consistency, or supply assurance.

4.7 Buyer-established standards

Buyers are increasingly introducing standards of their own, whether as individual buyers or through coalitions of buyers. (OECD (2003)) Introduction of quality standards, whether by producers or intermediate entities such as retailers or processors, is one way to improve processor and consumer information. The introduction of standards by individual buyers is less likely to pose anti-competitive problems than the introduction of standards by all producers.

Buyers can impose quality standards on the products they purchase that leave producers with some percentage of their product that is not saleable to those buyers. To the extent that large buyers with high quality standards constitute a greater share of farm sales, producers find disposing of product that does not meet the given standards more and more difficult.

As discussed earlier, standards imposed by farmers can solve externality problems created by a lack of consumer information but can also be abused, in certain circumstance, with anti-competitive effects (as with the changes in minimum sizes for fresh marketed oranges or the limitations on total quantity of output advocated by the Parma and San Danieli ham appellations). Buyer-established standards are less likely to be anti-competitive. When buyers demand product of a certain quality, this can reflect a passed-through desire of their customers for someone to undertake a quality-monitoring exercise with respect to food or it can reflect requirements of processing machinery. Retailers maintain their reputations for quality by refusing to sell low-quality products.

Other purchasers of products, such as processed food producers, are often the preferred outlet for selling food that is not deemed suitable for fresh sale. But processors will not accept all types of output. For example, there are minimal non-fresh sales alternatives for damaged lettuce.

5. Conclusion

This note has explored a number of competition-related regulatory issues for both joint-activity organizations of agricultural producers and for buyer activities in the agricultural sector. This overview is not meant to summarize all the issues related to competition, but is necessarily limited. It is focused on domestic, not international, agricultural policies and regulations. There are many factors that influence agricultural policies, including social attitudes and regional development. One factor that has, up until recently, been relatively ignored has been competition policy. Overall, competition policy can play a

greater role in the development of agricultural policies and regulations. One of the best ways to increase its role would be to eliminate antitrust exemptions for agricultural activities.

Broadly speaking, farmer cooperatives that involve a small percentage of output are likely to be pro-competitive, as are small appellations that constitute a modest percentage of output within a general product category. Such types of joint activity can lead to lower costs for farmers and help farmers to establish "brands" that can avoid quality deterioration arising from consumer difficulties in assessing quality. These effects are pro-competitive and thus, under most competition law, would not be illegal. Consequently, these sorts of activities do not require antitrust exemptions.

More inclusive organizations, especially joint-activity organizations that have mandatory membership, sometimes are focused just on maintaining quality, but often also engage in output restricting or redirecting activity that raises prices for many consumers. When such organizations engage in output restricting and redirecting activity, they distort markets and do not promote the public interest. The impact of many "market stabilization" policies is to restrict and redirect output. Only in exceptional cases would such activities enhance the public interest.


To the extent that the harm to the public interest is greater than the benefit to producers from such antitrust exemptions, the antitrust exemptions for farmers damage social welfare.

- Pro-competitive reasons for joint activity include:
 - Achieving economies of scale and scope
 - Forming and maintaining a "brand"
 - Conducting advertising
 - Conducting research
- Anti-competitive reasons for joint activity include:
 - Restricting output to at least some marketing channels
 - Raising prices
- Government sometimes plays a role in both organizing and enforcing the anti-competitive activities in the agricultural sector. When the harm to the public interest, including consumers, is greater than the benefits to farmers, such government activity is comparable to cartel maintenance. Government promotion of harmful agricultural cartels should be eliminated.

At the same time, there is an increasing danger that purchasers of agricultural products will engage in anti-competitive activities against farmers. While many of the buyer activities that concern farmers are natural evolutions of corporate activity, some buyer activities, particularly mergers, can create high levels of concentration among purchasers that can harm producers and can lead to increased likelihood of price-fixing by buyers. To avoid such outcomes, competition agencies must remain highly vigilant with respect to both mergers and potential price-fixing activities.

- Monopsony buying problems can be addressed using the same basic antitrust tools of market definition and competitive effects analysis that are used for addressing monopoly buying

problems. Thus no special antitrust laws or enforcement rules relating to monopsony buying are necessary.

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- Mergers of retailers and processors must be carefully analyzed, with particular care taken to identify the appropriate geographic market of competition. In many cases, because of transportation and storage expenses for products, geographic markets for purchasing farm output can be relatively local. In contrast, post-processing distribution markets may be much broader.
 - The existence of asymmetric price responses to cost increases and cost decreases does not necessarily imply market power by purchasers, but can very well arise from different consumer search behaviors in response to price increases and price decreases.
 - Increasingly stringent standards are set by buyers that impact the production processes of farmers. These standards are likely a reflection of consumer desires for consistency and quality. Such standards can lead to vertical integration. To the extent that vertical integration leads to "corporate" farming, consumers may be interested in including information about raising methods on labels and verified by independent organizations, especially organic products or livestock.

NOTES

- 1 The objective of improving the income of farmers is sometimes explicit. For example, the Treaty Establishing the European Community (2002) (2002/C 325/01) states that the objectives of agricultural policy shall include ensuring "a fair standard of living for the agricultural community, in particular by increasing the individual earnings of persons engaged in agriculture."
- 2 Article 36 of the Consolidated Treaty of the European Union states that "The provisions of the chapter relating to rules on competition shall apply to production of and trade in agricultural products only to the extent determined by the Council within the framework of Article 37(2) and (3) and in accordance with the procedure laid down therein, account being taken of the objectives set out in Article 33." In the U.S., the Capper-Volstead Act (Public-No. 146-67th Congress) states that "That 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, handling, and marketing in interstate and foreign commerce, such products of persons so engaged."
- 3 See Comments of the Department of Justice, October 30 1991, "Navel Oranges grown in Arizona and Designated part of California; proposed weekly levels of volume regulation for the 1991-1992 season", Docket No. FV-91-408PR before US Department of Agriculture. The Agricultural Marketing Agreement Act of 1937 (AMAA) "expressly directs the Secretary [of Agriculture] to temper the objective of enhancing grower income with the requirement that the interests of consumers also be taken into account...In order to protect consumers, the rate of adjustments in prices [to achieve parity] must be compatible with the "public interest." 7 U.S.C. § 602(2). Competitive considerations, including the efficient allocation of resources, generally are considered to be an important element of the public interest standard." (pp. 5-6)
- 4 For example, in Canada's Farm Products Agencies Act, §21, "The objects of an agency are (a) to promote a strong, efficient and competitive production and marketing industry for the regulated product or products in relation to which it may exercise its powers; and (b) to have due regard to the interests of producers and consumers of the regulated product or products." (Emphasis added.) The Consolidated Treaty on the European Union states, in Title II, Article 33, that one of the objectives of the Common Agricultural Policy is "to ensure that supplies reach consumers at reasonable prices." In the U.S., the AMAA, 7 U.S.C. § 602, declares the intent of Congress includes protection of consumer interest against prices above those intended by Congress. The Capper-Volstead Act requires the Secretary of Agriculture to act to restrain cooperatives to the "extent that the price of any agricultural product is unduly enhanced by reason thereof."
- 5 In fact, farmer complaints are partly responsible for the passage of antitrust laws. For example, Libcap (1992) suggests that the Sherman Act of 1890 arose primarily from agricultural producer concerns. Interestingly, the primary backers were from states with large agricultural production interests, not the states with major population centers where the consumer interests would have dominated.
- 6 Clearly, though, for some goods, external signals such as feel, smell and look can serve as powerful indications of quality, so consumers often search for these "organoleptic" characteristics. The more that well-known external signals fully indicate the qualities of a good, the less serious the consumer information problems are.
- 7 Unconstrained commodity markets are possible when quality is cheaply and accurately assessed using objective measurement tools.

- 8 See Milgrom and Roberts (1986).
- 9 “[I]t is unlikely that a single farmer or minor co-operatives will ever hold a dominant position.” (Monti (2003))
- 10 “It appears...that some co-operatives hold national market shares between 64 to 90%.” (Monti (2003))
- 11 Graeme Samuel (1998) identifies at least four benefits that arise from the reform of “compulsory” cooperative marketing organizations: 1) It gives farmers the freedom to choose how, when, how much and to whom they sell their crops. 2) It is likely to reduce the share of a farmer’s returns soaked up in administration costs. 3) Farmers will have greater control over their production, marketing and risk management decisions. 4) It provides greater incentives and opportunities for individual farmers and rural communities to undertake more innovative marketing and to invest in higher-value post-farm products.
- 12 In fact, the recent European Court Judgment on non-Parma controlled slicing of Parma ham for packaging (ECJ (2003)) found that if part of the appellation includes slicing and packaging, then packaging can be performed only at the place of origin, as long as the PDO-supporting regulation requires that, thus preventing supermarkets from reducing costs by slicing and packaging themselves.
- 13 Geographic Indicators (GIs) under the WTO TRIPS agreement (Section 3 of Part I, Articles 22-24), the Lisbon Agreement, and the European Protected Designation of Origin (PDO); Protected Geographic Indication (PGI); and Traditional Specialty Guaranteed (TSG) rules (EC Council Regulations No. 2081/92 of July 14, 1992, on protection of geographic indications and the designations of agricultural product origins and 2082/92 from July 14, 1992, on the specific character of agricultural products and foodstuffs.)
- 14 <http://europa.eu.int/comm/research/agro/fair/en/fr0306.html>
- 15 When comparable products are permitted to use terms such as “like Swiss cheese” in the label, the harm from making a generic name a geographic indicator is somewhat reduced.
- 16 The consortia are respectively called the Consorzio del prosciutto san danielle, consorzio del prosciutto di parma, Consorzio per la tutela del formaggio gorgonzola.
- 17 After the report was published, processors expressed concerns that rebates they were giving to the supermarkets might mean that supermarkets actually increased their margins on milk. After review of the relevant figures, the ACCC found that such payments had largely been taken into account and, to the extent they were not, the finding still stood that supermarket margins on milk had fallen. (ACCC,2001b, “ACCC Confirms Finding of Milk Monitoring Report”, Press Release, ACCC.
- 18 The average price for UHT milk increased about 10 cents per litre after deregulation. The reasons for this were that UHT farm-gate regulated prices were lower than the prices for fresh milk uses. With the introduction of the dairy adjustment levy of 11 cents, this price increase was expected. Sales of UHT milk fell immediately after deregulation as a result of fresh milk coming closer in price to UHT milk.
- 19 If consumers do benefit, it is likely in an indirect way.
- 20 Note that studies of excess profits that are product-specific are made difficult by the multi-product pricing of supermarkets, in which they set low margins on certain products and high margins on others.
- 21 The U.S. Department of Justice, for example, successfully prosecuted cattle buyers in Nebraska for “bid-rigging in connection with the procurement of cattle...Both individuals pled guilty and were fined and ordered to make restitution to the victims.” (Pate (2003))

- 22 Interestingly, it is not clear that the equilibrium prices are ever reached, as the shocks have durable effects in both consumer goods and producer goods markets. (Peltzman (2000))
- 23 For the purpose of this note, vertical integration includes full vertical integration, with ownership and control of production assets, as well as “weak” integration, embodied by separate ownership at different stages of production, with long-run contracts between them.

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EUROPEAN COMMISSION

The status of agriculture under EC law in general and under EC competition law in particular, is specific. This is reflected by the fact that the establishment of a common agricultural policy is listed among the most important objectives of the European Union (Article 3 (c) of the EC Treaty), alongside the creation of a system ensuring that competition is not distorted (Article 3(g)). These objectives are therefore on an equal footing. It does not mean that they are necessarily in contradiction. The CAP has certainly contributed to the development of competition in the sector of agriculture within the European Community by replacing national markets with Community wide markets and national marketing organisations by common market organisations. It is also true that a certain number of rules which are aimed at stabilising markets or ensuring minimum revenues to farmers could be seen as limiting the full extent of the competition process in agricultural markets. In any case, the fact that agricultural markets in the European Union are regulated does not mean that agriculture is exempted from the application of EC competition law. As will be shown in this paper, EC competition law is in fact largely applicable to this sector, and the Commission has a policy of actively implementing it.

I. Buyer power (monopsony)

There are very few cases of alleged abuses of buying power under Article 82 EC,¹ and apparently none involving the power of large retailers or processors with respect to farmers. The analysis of such cases under Article 82 EC would raise the generally difficult question of proving unfair prices. In fact, the issue of buying power under EC competition law has mostly been raised in the context of merger control.

In two cases at least, the Commission implicitly considered the possible effects on farmers of buying power by a merger. These were the *Danish Crown/Vestjyske Slagterier* case² and the *Danish Crown/ Steff Houlberg* case,³ which concerned mergers between Danish slaughterhouses. In the first case, the Commission concluded that the transaction, as initially planned, would lead to the creation of a dominant position on the Danish market for the purchase of live pigs for slaughtering. Interestingly, the Commission declared that it was not concerned about the possibility that the merged parties might extract monopsonistic profits from its suppliers, but only because the parties were cooperatives and the suppliers were their members. Such profits would have been shared out back to the farmers-members in the form of bonuses. It can be assumed that the issue of monopsonistic profits extracted from farmers would have been raised in that case by the Commission if the merging processors had been normal firms. If the problem of monopsonic exploitation was not addressed, the Commission did consider the issue of the reduction of the choice of farmers for the sale of their pigs: after the mergers, farmers dissatisfied with the commercial strategy or the level of profits of their co-operatives would no longer have the alternative of joining a competing cooperative. These competitive concerns were solved through remedies.

Turning now to a more general discussion of buying power under EC competition law, it must be said that the emphasis paid in the *Danish Crown* case on the direct effect of buying power on the supplier is the first step in the analysis. In fact, the Commission is concerned about the impact of the enhanced buying power of the merged entity on companies supplying that group because, as the Commission focuses on consumer welfare, it generally considers the indirect effect that this buying power might have on the consumers in the downstream market. For instance, in *Rewe/Meinl*,⁴ and *Carrefour Promodes*,⁵ which concerned the mergers of large retailers, the Commission developed the "spiral theory". According to this theory, a company which obtains a leading position in a procurement may enter a spiral whereby the improved terms negotiated in purchasing markets enable the company to win large share of downstream market, enabling it to negotiate better terms in the procurement market and so on, leading in the end, to the

elimination of competitors in the downstream market. This effect will depend on the position of the merged group with respect to its competitors in the downstream market, and on whether these competitors can get similar terms of supply or find that their costs are raised.

II. Producer "joint activity" organisations (co-operatives, market organisation)

Before analysing the type of practices of cooperatives and farmers' organisations, it is necessary to describe the extent to which EC competition law is applicable to the agricultural sector.

The general principles concerning the application of competition law to joint activity organizations.

Article 36 of the EC Treaty explicitly grants the Council the power to determine the extent to which EC rules on competition would apply to the production and trade in agricultural products. The Council used this power by adopting Regulation 26 of 1962⁶. In its article 1, the Regulation establishes the principle that competition rules are generally applicable to the agricultural sector,⁷ unless the three exceptions laid down in its Article 2 are applicable.

Therefore, EC competition law is fully applicable to joint activity organisations, unless they fulfil one of the exceptions contained in Article 2 of Regulation 26/1962. These exceptions are the following:

- The first exception of Article 2 paragraph 1 excludes the application of Article 81 in relation to agreements, decisions and practices which form an integral part of a national market organisation. This exception is very limited since most national market organisations have been replaced by common market organisations. This exception has been applied only once by the Commission, to the French market organisation of potatoes.⁸ In that case, the French legislator gave producer groups the power to adjust price levels of new potatoes and bring the production and marketing of potatoes into line with market requirements. The Commission considered that the agreements and decisions taken by these private producer groups satisfied the criteria of the exception, since the constitution of these groups and their decisions and agreements were placed under the direct control of the French authorities.
- The second exception to the application of article 81 concerns agreements, decisions and practices which are "necessary for the attainment of the objectives set out in article 33' (i.e. the objectives of the Common Agricultural Policy⁹). The Commission has adopted a restrictive interpretation of this exception, which is fulfilled only if the parties could demonstrate that the application of Article 81 EC in a specific case would actually run counter to the objectives of the CAP. In fact, the objectives of the CAP are generally adequately provided for by the arrangements made in the common market organisations. As a result, it is unlikely that any additional private action, which would be contrary to Article 81, can be found to achieve the goals of the CAP.
- The third and final exception is of particular interest to the questions raised in this working group since it provides that Article 81 does not apply to agreements, decisions and practices of either farmers, farmers' associations or associations of farmers' associations, which belong to a single member State. This provision is not a blanket exemption for farmers' cooperation, since it also provides that the arrangements may not involve an obligation to charge identical prices and that the Commission must also be satisfied that the arrangements do not exclude competition, and may not jeopardise any of the goals of the CAP.

It should be emphasised that none of these exceptions concern Article 82 EC. A producers' organisation in a dominant position will therefore be fully subject to this provision.

To be exhaustive on the question of the application of EC competition rules to producers' organisations, it should be mentioned that Regulation 26 does not contain all the exceptions which may be applied to producers' organisations. A certain number of Common market organisations, like for instance the one dealing with fruit and vegetable¹⁰ contain certain provisions on "interbranch organisations and agreements", i.e. agreements between producers, processors and traders of the agricultural products concerned. Such agreements are also exempted from the application of Article 81 EC. However, these exemptions are subject to conditions that very much limit their scope. First, only agreements the objectives of which are listed in the said CMOs are covered by the exemptions. These objectives include for instance the coordination of research and market studies, the promotion of conservation and environmentally sound production, the adjustment of products to market requirements and consumer tastes. It must be underlined that such objectives rarely cause a threat to competition. Second, these CMOs contain a list of agreements which in any case will not be exempted from Article 81 EC. This list includes for instance price-fixing and market partitioning arrangements, or discriminatory agreements. It is likely therefore that this type of exemptions concerns agreements that would not raise issues under Article 81 EC anyway.

Having outlined when EC competition law is applicable to cooperatives and producers' organisations, it is necessary to determine which of their activities may be exempted from the application of EC competition rules, or may, on the contrary be found to be in breach of these rules.

Joint selling

These cooperatives, the members of which are mostly micro-enterprises perform a certain number of tasks in the collective interest of their members. They carry out joint purchases, some R&D, but their most important activity consists in the joint sales of the products supplied by their individual members.

Commercialisation agreements may raise some concern about possible price-fixing activity.¹¹ However, arrangements whereby farmers selling through a co-operative receive proportionally the same realised price for 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 26 or to be found compatible with Article 81 EC. In fact, a certain number of judgements of the European Court of Justice and decisions of the Commission have confirmed that under certain conditions, cooperative joint selling activities do not fall under EC competition rules. In *Oude v. Verenigde Cooperatieve Melkindustrie*,¹² the European Court of Justice had to assess the compatibility with competition rules of the statutes of a milk processing cooperative which obliged its members to sell all their production to it, and to pay a fee when withdrawing from it. In that judgement, the Court recognised that cooperatives encourage modernisation and rationalisation in the agricultural sector and improve efficiency. For these reasons, it concluded that the restrictions imposed on the members of the cooperative could fall outside Article 81 of the EC Treaty, if they were necessary to ensure that the cooperative functions properly and in particular that it has a sufficiently wide commercial base and a certain stability in its membership.¹³ This judgement implicitly recognised that joint selling activities may not be restrictive of competition.

However, neither the Court nor the Commission have given a blanket exemption to joint selling cooperatives. Again in the *Oude* case, the Court observed that these restrictions imposed on the members of a cooperative could have the effect of restricting competition, if a number of similar cooperatives enjoyed a strong competitive position and implemented similar restrictive clauses, thereby hindering access to that market by other competing traders. In that case, the exemption laid down in Article 2(1) of Regulation 26 would only apply if this cumulative effect had not the effect of excluding competition or jeopardising the objectives of the CAP. Interestingly, the Court noted that these restrictions imposed on the members of cooperatives may indeed jeopardise one of the objectives of the CAP, namely that of increasing individual earning in the agricultural sector, since farmers active in that sector would not be able

to benefit from competition in purchase prices for their products from different processors or dealers.¹⁴ The Commission adopted a similar position in the *Campina* case,¹⁵ which again concerned an obligation for farmers to deliver their entire milk production to their cooperative, and the existence of a resignation fee. The Commission concluded that this exclusive supply obligation could benefit from the special exemption for cooperatives laid down in Article 2(1) of Regulation 26 because *Campina*, the cooperative in question, was not in a dominant position. However, it concluded that the resignation fee, which had the effect of compelling members for an indefinite period to deliver their entire production to *Campina*, was caught by Article 81 EC and could not benefit from the exemption laid down in Regulation 26, since it had the effect of jeopardising the objectives of the CAP.

To conclude on this point, one can say that the joint selling activities of cooperatives are generally viewed positively under EC law. This is in part the result of the exemption in favour of cooperatives expressly mentioned in Regulation 26. This is also the result of the fact that, in the own words of the European Court of Justice, cooperatives can have a pro-competitive role by rationalising the sales of farmers which are usually micro-enterprises with little commercialisation facilities. In that case, they do not raise any concern under EC competition rules at all. However, when a cooperative is in a dominant position, or when the cumulative effect of cooperative exclusive dealing arrangements restrict competition on the market, then the exemptions laid down in Regulation 26 cannot be applicable, and EC competition law will apply. This leads to the conclusion that the exemptions foreseen in Regulation 26 are of limited effect, and generally cover arrangements and activities that in any case would not raise any competition concerns under EC law.

Price fixing and other cartel-like activities

The relatively positive stance of the Commission and the European Court towards cooperatives does not extend to cartel like practices of cooperatives and associations of farmers. Agreements between such associations to fix minimum prices or allocate quantities are unlikely to benefit from the exemptions laid down in Regulation 26 and will normally be caught by Article 81 EC. For instance, in the *Meldac* case,¹⁶ the Commission investigated a horizontal agreement between cooperatives, firms and associations of milk producers which introduced a quota system, consultation on prices and mechanisms to restrict imports from other Member States. None of the exemptions foreseen in Article 2 of Regulation 26 were applicable. In particular, the third type of exemption concerning cooperatives or associations of cooperatives was not applicable since one of the parties to the agreement was a private firm. Even if this agreement had been concluded between farmers' associations only, it would probably not have benefited from this exemption, since these types of arrangements tend to exclude competition and jeopardise the objectives of the CAP. All the parties were found to be in breach of Article 81 EC and were fined.

Similarly, agreements between producers or associations of producers on the one hand, and dealers or processors or associations thereof on the other will generally be caught under Article 81 EC, unless they can benefit from the limited exemption laid down in certain common market organisations and described above. The Commission has always been firm with this type of arrangements: in the *Cauliflower* case,¹⁷ as early as 1978, the Commission concluded that an agreement between cauliflower producers' associations and dealers limiting the right of dealers to obtain supplies from other sources could not be exempted and was caught under Article 81 EC. Much more recently, and more significantly, in 2003, the Commission investigated an agreement between French federations of cattle farmers on the one hand and federations representing cattle slaughterers, by which the cattle slaughterers undertook to pay a minimum purchase price for beef, and suspend imports of beef into France.¹⁸ The Commission concluded that this agreement could not benefit from the exemptions laid down in Article 2 of Regulation 26. In particular, even in the context of the serious crisis that the beef sector was experiencing at the time, such an agreement fixing minimum prices could not be seen as necessary to attain the objectives of the CAP, such as the stabilisation of markets (Article 33(1)(c) of the EC Treaty). As a result, the parties to the agreement were found to have

breached Article 81 EC and were imposed significant fines.¹⁹ It may also be interesting to mention that the Commission is currently investigating alleged price fixing agreements involving producers and processors of another agricultural product in certain Member States, thereby showing its willingness to track cartel-like practices in the agricultural sector.

III. Competition advocacy

It is clear that agricultural markets in the European Union market are highly regulated under the common market organisations which include minimum intervention prices, quotas, tariff protection. Some of these rules could be perceived as having the effect of limiting full competition between economic actors. However, in the context of the progressive renewal of CMOs, the European Commission is endeavouring to make them more market oriented. This role can be two-fold.

First, the Commission is generally in favour of the removing from CMOs provisions that tend to limit the proper functioning of markets. For instance, it is currently putting forward proposals to reform the CMO for sugar by removing such competition limiting provisions as national quotas. These national quotas, one of the few remaining ones in CMOs, tend to partition markets along national lines and therefore prevent competition between competitors from different Member States.²⁰

Secondly, and that is an area in which DG Competition, thanks to its experience and expertise, has a more specific role to play, the European Commission is trying to avoid provisions in new CMOs that could encourage firms to engage in anticompetitive practices. For instance, DG Competition noted in the course of one its investigations that the provisions of a CMO that aimed at promoting quality by basing the premium on the market price of the product (since price is supposed to reflect quality) was in fact encouraging producers to collude in order to determine the premium they would receive. This provision was removed by the Commission. Similarly, in relation to a case in which the Dutch competition authority found that organisations of fishermen and wholesalers were fixing minimum prices for shrimps and infringing Article 81 EC, the Commission plans to introduce a provision in the CMO for fishery products that would limit the possibility for producers' organisations to conclude national and international agreements. This provision should ensure that cartels between too powerful producers' organisations do not emerge.

NOTES

- 1 Article 82 of the EC Treaty prohibits abuses of dominant position that affect trade between Member States.
- 2 Commission decision of 9 March 1999, case M.1313, not yet reported.
- 3 Commission decision of 14 February 2002, case M. 2662, not yet reported. This case raised similar issues as the Danish Crown/Vestjyske Slagterier, but the part of the merger that concerned Danish markets only (including the effect of the transaction on the purchase of pigs from farmers) was referred to the Danish authorities.
- 4 Commission decision of , case M.1221, OJ 1999 L 274/1.
- 5 Commission decision of 25 January 2000, case M.1684, not yet reported.
- 6 Regulation 26/1662 concerning the application of competition rules to the agricultural sector. OJ B of 20 April 1962, p. 993-994.
- 7 Defined as the agricultural products listed in Annex I to the EC Treaty.
- 8 Commission decision, New Potatoes, OJ 1988 L 59/25.
- 9 These objectives are to increase agricultural productivity, to ensure fair standards of living for the agricultural community, to stabilise markets, to assure availability of supplies, and to ensure that supplies reach consumers at reasonable prices.
- 10 Council Regulation (EC) n° 2200/96 of 28 October 1996 on the common organisation of the market in fruit and vegetables, Articles 19 and 20. OJ 1996 L 297/1.
- 11 The general position of the Commission concerning commercialisation agreements is set out in its guidelines on the applicability of Article 81 of the EC Treaty to horizontal cooperation agreements. OJ 2001 C 3/2.
- 12 Judgement of the Court of 12 December 1995, Case C- 399/93, [1995] ECR I-4515, § 12.
- 13 *Idem*, § 14
- 14 *Idem*, §§ 27 and 28.
- 15 XX1st Report on Competition Policy, pp 66-67.
- 16 Commission decision of 26 November 1986, Meldoc, OJ 1986 L 348/50.
- 17 Commission decision of 2 December 1977, OJ 1978 L 21/23. See also Case 71/74, Frubo v. Commission [1975] ECR 563.
- 18 Commission decision of 2 April 2003, French beef, OJ 2003 L 209/12.



Forskrift om unntak for samarbeid mv. innen landbruk og fiske

Fastsatt av Arbeids- og administrasjonsdepartementet x. y 2004 med hjemmel i lov av x. y 2004 om konkurranse mellom foretak og kontroll med foretakssammenslutninger (konkurranseloven) § 3 annet ledd.

§ 1. Formål

Formålet med denne forskriften er å angi når forbudene i konkurranseloven §§ 10 og 11 ikke får anvendelse på omsetning og produksjon av landbruks- og fiskeriprodukter.

§ 2. Unntak for produksjon og omsetning som er regulert i lov, forskrift eller i avtale mellom staten og næringsorganisasjoner

Konkurranseloven §§ 10 og 11 kommer ikke til anvendelse på avtaler, beslutninger, samordnet opptreden mellom, eller ensidige handlinger foretatt av, primærprodusenter eller deres organisasjoner som er i samsvar med:

- a. lov eller forskrift som regulerer produksjon eller omsetning av landbruks- og fiskeriprodukter, eller
- b. avtale mellom staten og næringsorganisasjoner som regulerer produksjon eller omsetning av landbruks- og fiskeriprodukter

Produksjon og omsetning skal i denne sammenheng også omfatte forskning og utvikling, foredling, distribusjon, markedsføring og andre tiltak for å bringe produktet frem til markedet.

§ 3. Plikt til å påvise hjemmel

På forespørsel fra konkurransemyndighetene plikter enhver som vil påberope seg unntaket i § 2 å redegjøre for hvilken lov, forskrift eller avtale som nevnt over, som regulerer forholdet.

Merknader til de enkelte bestemmelser i forskrift om unntak for visse former for samarbeid innen landbruk og fiske

I forskriften er betegnelsen "landbruk" er en samlebetegnelse for jordbruk, skogbruk og reindrift, og "fiskeri" er en samlebetegnelse for fiskeri og havbruk.

Til § 1 Formål

Formålet med forskriften er å oppfylle pålegget i konkurranseloven § 3 annet ledd om å ved forskrift fastsette de unntak fra §§ 10 og 11 som er nødvendige for å gjennomføre landbruks- og fiskeripolitikken. I forskriften er det tatt utgangspunkt i gjeldende landbruks- og fiskeripolitikk. Det følger av konkurranseloven § 4 at Kongen kan gi nærmere regler om den innbyrdes avgrensning mellom konkurranseloven og sektorlovgivning.

Denne unntaksforskriften kommer bare til anvendelse der samtlige vilkår i konkurranseloven §§ 10 og 11 er oppfylt. De nevnte bestemmelser retter seg eksempelvis bare mot utøvelse av ervervsvirksomhet. For en nærmere beskrivelse av vilkårene i §§ 10 og 11, vises det til særmerknadene til konkurranseloven.¹

Til § 2 Unntak for produksjon og omsetning som er regulert i lov, forskrift eller i avtale mellom staten og næringsorganisasjoner

Formuleringen «avtaler, beslutninger, samordnet opptreden mellom, eller ensidige handlinger foretatt av» er ment å omfatte alle tenkelige samarbeidsformer under § 10, samt ensidige handlinger som omfattes av § 11.

Med uttrykket «primærprodusenter» menes de som frembringer fiskeri- og landbruksprodukter og omsetter det på første hånd, eksempelvis fiskere og bønder. Avtakere av disse produktene omfattes ikke, med mindre avtakeren er en organisasjon for primærprodusentene. Det tenkes her først og fremst på landbrukssamvirkene og fiskesalgslagene. Når organisasjonene kjøper produkter fra

primærprodusentene for egen regning, er den videre (annenhånds-)omsetningen altså omfattet av unntaket. Formuleringen «primærprodusenter eller deres organisasjoner» er ment å omfatte de samme subjektene som var omfattet av § 3-8 i konkurranseloven av 1993.

Per 2004 er det bare Jordbruksavtalen som faller inn under alternativ b). Formuleringen er generell slik at dersom staten velger å inngå liknende avtaler med for eksempel aktørene i fiskerisektoren, vil også dette være omfattet.

Til § 3 Plikt til å påvise hjemmel

Det sentrale vurderingstema i forhold til ovennevnte forslag til forskrift, er hvorvidt aktiviteten er omfattet av og eventuelt i overensstemmelse med de aktuelle lover og forskrifter, eller de nevnte avtaler. En slik vurdering forutsetter inngående kjennskap til innholdet av norsk landbruks- og fiskeripolitikk. Ettersom aktørene i primærnæringene antas å ha best kjennskap til dette, må de foretak som opptre på en måte som i utgangspunktet er i strid med konkurranseloven §§ 10 og 11, på forespørsel fra Konkurransetilsynet påvise grunnlaget for at aktiviteten likevel er lovlig.

¹ Ot.prp. nr. 6 (2003–2004).