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**EU COMPETITION FRAMEWORK:  
SPECIFIC RULES FOR THE FOOD  
CHAIN IN THE NEW CAP**

**NOTE**





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NOTE

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

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DIRECTORATE GENERAL FOR INTERNAL POLICIES  
POLICY DEPARTMENT B: STRUCTURAL AND COHESION POLICIES

AGRICULTURE AND RURAL DEVELOPMENT

# EU COMPETITION FRAMEWORK: SPECIFIC RULES FOR THE FOOD CHAIN IN THE NEW CAP

NOTE

## Abstract

To implement the CAP reform 2013, the Commission proposes a new Regulation on the common organisation of agricultural markets, COM (2011) 626 of 12.10.2011, to replace Council Regulation (EC) No 1234/2007 (consolidated by Commission Regulation COM (2010) 799), aimed to strengthen the offer and the role of farmers' associations and interbranch organisations and to clarify the competition rules. The report analyses the legal framework in force concerning agricultural competition, and the conditions of application of antitrust law to agreements and practices of farmers and farmers' associations and interbranch organisations.

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## LIST OF ABBREVIATIONS

<b>Art.</b>	Article(s)
<b>CAP</b>	Common Agricultural Policy
<b>CJEU</b>	Court of Justice of the European Union
<b>CMO</b>	Common market organisation
<b>EC</b>	European Community
<b>EU</b>	European Union
<b>Reg.</b>	Regulation
<b>TFUE</b>	Treaty on the Functioning of the European Union



## EXECUTIVE SUMMARY

### Background

The sector of basic agricultural production has structural characteristics (inelasticity of demand and inelasticity of supply) which call for specific legal answers, distinct from those given to other economic sectors. This specificity of agriculture has been taken into consideration since the Treaty of Rome in its Article 42: *«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 43(2) and in accordance with the procedure laid down therein, account being taken of the objectives set out in Article 39»*.

But the Council Regulation No 26/62 of 4 April 1962 applying certain rules of competition to production of and trade in agricultural products, keystone of the competition framework for agriculture, overturns the *«philosophy»* of Article 42. Since then, the competition legal framework for agriculture is built on the *«principle-exceptions»* paradigm. The successive texts, like Regulation No 1184/2006 or regulations on the common organisation of markets, have maintained the same model. Competition law is thus applicable in principle to the production of and trade in agricultural products and retains only a few exceptions.

A new CAP reform must take place in 2013. To implement this reform a new regulation on the common organisation of agricultural markets: *«Single CMO Regulation»* COM (2011) 626 of 12.10.2011, was introduced in order to replace Council Regulation (EC) No 1234/2007 (consolidated by Commission Regulation COM (2010) 799). The stated objective is to strengthen the offer and the role of farmers' associations and interbranch organisations, and to clarify the rules on competition applicable to agreements and practices of these organisations.

### Aim

The aim of the present study *«EU competition framework: specific rules for the food chain in the new CAP»* is to provide a comprehensive analysis of the relations between the CAP and the competition policy both in the current legal framework and in the framework proposed by the Commission in the proposal for a new single CMO Regulation (COM (2011) 626 final/2) in order to put forward recommendations for decision makers.

More specifically the study is focused on:

- the legislative and case-law framework in force: the study will examine in particular the conditions of application of antitrust law (Article 101 of the Treaty regarding undertakings) to agreements and practices of farmers and of producer organisations and interbranch organisations;
- the provisions of the proposal regarding the conditions of application of antitrust law in the new CMO Regulation;
- the provisions concerning the procedure of examination of the agreements and practices of producer organisations and interbranch organisations;
- the provisions regarding the recognition and the representativeness of professional or interbranch organisations;
- the provisions regarding contractual relations in the milk sector.

The methodology used comprises a threefold methodological approach.

- An analytical approach: to examine both the legal competition framework for agriculture in place and the new CMO proposal (Recitals 85, 86, 88, 89, 90, 91, 93, 120, 121, 122 and 123, and Articles 104 to 116 and 143 to 145).
- A critical approach: to assess the consistency of the proposal and in particular to determine if it may rebalance the food chain and make farmers' and producers' organisations into real actors of the regulation.
- A prospective approach: to express proposals and recommendations in order to give agriculture a regulatory framework taking into account the specificities of this sector, and improve the coherence and the application of the texts that apply to agriculture.

## Key findings

The analysis of the proposal (COM (2011) 626 final/2) points out a certain number of contradictions between the objectives stated and the provisions proposed.

The study also shows that the proposed regulatory framework CMO Regulation (COM (2011) 626 final/2) is a continuation of the "principle-exceptions" scheme. To introduce substantial changes in the competition framework and to restore the substance of Article 42, Regulation No 1184/2006 should be made consistent with the CMO Regulation.

Therefore, the note recommends changes reflecting the state of substantive law (principle-exception scheme) and the need to strengthen the effectiveness of exceptions. The note also suggests new wordings of some provisions in order to attain the objectives stated in the explanatory memorandum and in the recitals of the proposal.

The main recommendations are:

- **to introduce a presumption of compatibility of the horizontal agreements included in Article 144:** the agreements, decisions and practices of farmers, farmers' associations or producer organisations mentioned in this provision should be presumed to pursue the attainment of the objectives of Article 39 of the Treaty;
- **to develop at the same time an exemption regulation on vertical interbranch agreements:** practices and interbranch agreements (Article 145) will be presumed to be compatible with competition rules and necessary to achieve the CAP objectives;
- **to remove the prohibition of dominant position mentioned in Article 106d), as well as the price fixing prohibition;**
- **to extend the provisions of the Regulation (EU) No 261/2012 (consistent with art.104 of the Proposal COM (2011) 626 final/2) concerning the obligation of written contract in milk sector to all sectors covered by Annex I.**

## INTRODUCTION

### KEY FINDINGS

- **The development of modern agriculture has revealed that the sector of basic agricultural production has structural characteristics (inelasticity of demand and inelasticity of supply) which call for specific legal answers, distinct from those given to other economic sectors.**
- **The reduction of protectionism of prices should not lead to the ignoring of the specificities of the sector when applying Competition law.**
- **In order to respect the specificity of the agricultural sector, its central role in terms of meeting food needs, protecting the environment and preserving territories, the competition policy applied to agriculture should reflect this specificity instead of erasing it.**

To address the delicate issue of the relationship between agriculture and competition, it is necessary to start from a preliminary consideration which, though present in the EU institutions since their origin, may be forgotten. Indeed, the development of modern agriculture has revealed that **the sector of basic agricultural production has structural characteristics (inelasticity of demand and inelasticity of supply) which call for specific legal answers, distinct from those given to other economic sectors.**

For decades, the answer was to create a protectionist system both at European and national level to promote national productions and to support prices of basic agricultural products. At the same time, agricultural policy has sought to avoid imbalances in the Union by instituting a policy of administered prices and by asserting the primacy of competition policy on agricultural policy.

The gradual decline of protectionism based on administered prices has not eliminated the structural characteristics of agricultural markets. **The reduction of protectionism of prices should not lead to the ignoring of the specificities of the sector when applying Competition law.** This would deny the agricultural particularism relative to other sectors, i.e. denying the specificity of the sector, as it has always been recognised by the Treaty. This would favour *de facto* the other sectors at the expense of the primary sector, which remains the weakest sector.

The current trends of the Common Agricultural Policy (CAP), which are to rely on market forces and to avoid protectionism, imply instead a greater consideration of the structural weaknesses of the sector by competition policy. Ultimately, the special regime of competition concerning agriculture should be deepened and developed. However, the policy pursued in recent years, contrary to the founding paradigms of the Treaty, tends at the same time to reduce agricultural protectionism (through the leaving of the policy of administered prices) and to treat agriculture as other economic sectors by subjecting it to competition policy.

**In order to respect the specificity of the agricultural sector, its central role in terms of meeting food needs, protecting the environment and preserving territories, the competition policy applied to agriculture should reflect this specificity instead of erasing it.** This fundamental issue is the basis of current legislative changes, like the legislative proposal which is the main object of this report.

A new CAP reform must take place in 2013 and come into force in 2014. To implement this reform, the Commission proposes, among other legislative measures<sup>1</sup>, a new regulation on the common organisation of agricultural markets: «*Single CMO Regulation*» COM (2011) 626 of 12.10.2011, to replace Council Regulation (EC) No 1234/2007 (consolidated by Commission Regulation COM (2010) 799). The stated objective is to strengthen the offer and the role of farmers' associations and interbranch organisations, and to clarify the rules on competition applicable to agreements and practices of these organisations.

The purpose of this briefing note in a first step is to analyse the legislative and case-law framework in force concerning agricultural competition. Specifically, the study will examine the conditions of application of antitrust law (Article 101 of the Treaty) to agreements and practices of farmers and of producer and interbranch organisations. In a second step, the note will analyse the Recitals 85, 86, 88, 89, 90, 91, 93, 120, 121, 122 and 123, and Articles 104 to 116 and 143 to 145 of the proposal COM (2010) 626. On one hand, the aim will be to examine the contributions of the proposal against the law in force, primarily Regulations No 1184/2006 and No 1234/2007. On the other hand, the aim will be to question the effectiveness of those provisions regarding the objectives pursued. Are the proposed provisions likely to strengthen the economic power and the regulatory role of farmers within sectors and to create a competition framework for agriculture taking into account the specificity of agriculture? In other words, the note will examine whether the proposed regulatory framework is a continuation of the "principle-exceptions" scheme or conversely whether the proposal is in line with the original philosophy of the Article 42 of the Treaty. Finally, in a third step, a number of recommendations and proposals will be made.

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<sup>1</sup> COM (2010) 672, 18.11.2010 ([http://ec.europa.eu/agriculture/cap-post-2013/communication/index\\_en.htm](http://ec.europa.eu/agriculture/cap-post-2013/communication/index_en.htm)).

# 1. COMPETITION POLICY AND COMMON AGRICULTURAL POLICY

## KEY FINDINGS

- **Competition law is applicable in principle to the production of and trade in agricultural products and retains only a few exceptions regarding antitrust and undertakings.**
- **The specific regime of the agricultural sector is even more limited because the Commission and the ECJ are making a rigorous and restrictive application of it.**
- **This application of competition law to the agricultural sector does not take into account the specificity of agriculture nor the changes in this sector in recent decades.**

The Article 42 of the Treaty 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 43(2) and in accordance with the procedure laid down therein, account being taken of the objectives set out in Article 39* ». Under the text, the specificity of agriculture and the social function of the CAP should be considered in the application of competition rules, by articulating and even by reconciling two major Community policies: Competition Policy and the CAP. But the Council Regulation No 26/62 of 4 April 1962 applying certain rules of competition to production of and trade in agricultural products<sup>2</sup>, keystone of the competition framework for agriculture, overturns the «philosophy» of Article 42<sup>3</sup>. **Competition law is then applicable in principle to the production of and trade in agricultural products and retains only a few exceptions regarding antitrust and undertakings.** Since 1962, the competition legal framework for agriculture is built on this «*principle-exceptions*» paradigm. The successive texts, like Regulation No 1184/2006 or regulations on the common organisation of markets<sup>4</sup>, have maintained the same model. The decisional practices of the Commission and the Court of Justice are based on this logic.

## 1.1. Competition and agriculture: the legal framework

The protection of competition has represented and keeps representing a fundamental pillar (see protocol 27 of the Treaty and Articles 119 and 120 TFEU) of the EU legal experience.

The antitrust discipline exists since the origins of the Treaty of Rome, establishing the European Community, through the current Articles 101 and 102 TFEU (former Articles 85 and 86 EEC). The first of these Articles prohibits “as incompatible with the internal market all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the

<sup>2</sup> OJ B 30 of 20.04.1962.

<sup>3</sup> Note that the Reg. No 26/62 also changed the balance of competence between the Commission and the Community legislature in the field of agricultural competition in favour of the Commission; see for example, Recitals 5 and 6.

<sup>4</sup> Council Reg. (EC) No 1184/2006 of 24 July 2006 applying certain rules of competition to the production of, and trade in, agricultural products, OJ 4.08.2006; Council Regulation (EC) No 1234/2007 of 22 October 2007 establishing a common organisation of agricultural markets and on specific provisions for certain agricultural products (Single CMO Regulation), OJ of 16.11.2007.

internal market". The second states that "*any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States*". The competition rules are applicable to all the sectors of the economy including agriculture (Article 42 TFEU).

But in the Treaty, the relationship between agriculture, more specifically the CAP, and (the discipline aimed at the protection of) competition shows an initial peculiarity within the Treaty of Rome. The introduction of agriculture in the 1957 Treaty of Rome could not but entail the necessity by the Community to formulate on a European level an agricultural policy supportive of agriculture aimed at prevailing over and replacing the national policies: there should have been a transition from the single countries' agricultural protectionisms to one on a European level in order to encourage the development of the primary sector in the single countries. Hence the special treatment reserved to agriculture in the Treaty of Rome, as an economic field receiving both an actual economic policy of public intervention, and a peculiar treatment with regard to the implementation of the discipline of the entire title of the treaty concerning the competition rules, i.e. Articles 101 and 102 and subsequent Articles 107 – 109 concerning State aids. In fact, the Article 42 TCE stated – and the actual Article 42 TFEU still 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 European Parliament and the Council within the framework of Article 43(2) and in accordance with the procedure laid down therein, account being taken of the objectives set out in Article 39*". The aim was to allow the EU legislator to determine to what extent competition rules are applicable to agriculture. In other words, the EU legislator can adapt competition rules to the specificities and the unique needs of agriculture. The EU legislator has made very moderate use of competences of Article 42. Actually, it has adopted only one regulation based on this text: Council Regulation No 6/62. Therefore, a number of agreements receive preferential treatment when they do not exclude competition nor jeopardise the CAP objectives.

At present, the provisions introduced in 1962 with such regulation, and aimed since the beginning only to products included in annex I of the Treaty (see Court Judgment 21 March 1981 in Case 61/80 and Court of First Instance Judgment 2 July 1992 in Case T-61/89), have been transfused both in Articles 175 and 176 of Regulation 1234 of 2007 (Single CMO Regulation), and in Regulation No 1184/2006 applying certain rules of competition to the production of, and trade in, agricultural products, which currently acts as the system of "*closure*" discipline, as it applies to agricultural products not subject to Regulation No 1234/2007.

Therefore, in the European legal system, the agricultural sector does not represent a "no competition space", but competition can be sacrificed or curbed in view of the pursuit of the CAP's underlying political goals, just as still defined in Article 39 TFEU. Advocate general Stix-Hackl, in his opinion in *Case C-137/00*, p. 42, has recalled «*the tension between agricultural policy and competition law*». In its turn, Court Judgment 5 October 1994 in *Case C-280/93 Germany v. Council of the European Union*, with regard to both the institution of a system of undistorted competition and the establishment of a CAP has reminded (paragraphs 60-61) that "***the authors of the Treaty were aware that the simultaneous pursuit of those two objectives might, at certain times and in certain circumstances, prove difficult***"; hence "*the priority of the agricultural policy over the objectives of the Treaty in the field of competition and the power of the Council to decide to what extent the competition rules are to be applied in the agricultural sector*". This does not rule out, of course, always according to the Court Judgment, decision 9 September 2003 in *Case C-137/00 Commission v. Milk Marque Ltd National Farmers' Union*, p. 57. that "*the maintenance of effective competition on the market for agricultural*



*products is one of the objectives of the CAP and the common organisation of the relevant markets".*

The Court (*Case C-505/07, Compañía Española de Comercialización de Aceite SA, ECJ, 1st October 2009, p.52*) has considered that, through Article 36 EC (42 TFEU) and Council Regulation 26/62, the EU legislator has managed to reconcile the CAP objectives with competition policy. In the European legal system, competition is not independent of agricultural policy. It is a fundamental manifestation and an essential part of it<sup>5</sup>.

## 1.2. Competition rules and agricultural products: the exemptions

The Council has put aside the reservation contained in Article 42 TFEU. More specifically, it has decided the application of the discipline on competition also with regard to the production and marketing of agricultural products, but only with reference to agreements, decisions and concerted practices pursuant to Article 101, par. 1, and to the case referred to in Article 102. The exception relates only to Article 101 TFEU; Article 102, on the abuse of dominant position, as well as the merger regulations, applies in the agricultural sector just like in any other sector. As for the discipline on State aids, the intervention has been more cautious<sup>6</sup>.

**The application of the antitrust discipline also to the production and marketing of agricultural products in the above mentioned terms poses some exceptions regarding only undertakings.** In fact, the regulations establish that Article 101 does not apply in three situations:

- (1) restrictive practices which "*form an integral part of a national market organisation*";
- (2) restrictive practices which "*are necessary for the attainment of the objectives set out in Article [33 now 39 TFEU] of the Treaty*";
- (3) restrictive practices between farmers, farmers' associations or associations of such associations "*belonging to a single Member State which concern the production or sale of agricultural products [...], and under which there is no obligation to charge identical prices, unless the Commission finds that competition is thereby excluded or that the objectives of Article [33 now 39] of the Treaty are jeopardised*".

The first two exceptions (1) and (2) established respectively in Article 176, par. 1, of Regulation No 1234/2007 and in Article 2, par. 1, of Regulation No 1184/2006, have to be associated. In referring to any agreement or arrangement made regarding agricultural products included in annex I of the Treaty, both take inspiration from the wide notion of agriculture pursuant to Article 39 of the same Treaty. More precisely, in order for these exceptions to apply, it is necessary and sufficient that such agreements and arrangements concern one or more of the products qualified as agricultural by the legislator. Therefore, the qualification and nature of the economic parties of such arrangements, practices and agreements remain irrelevant: they could even be economic operators placed along the agricultural products chain and other than strictly farmers. Court Judgment 27 October 2010 in *Case T- 25/05* has stressed that (paragraph 122) "*the concept of an undertaking covers any entity engaged in an economic activity, regardless of its legal status and the*

<sup>5</sup> See Jannarelli A., *La concorrenza e l'agricoltura nell'attuale esperienza europea: una relazione "speciale"*, in *Profili giuridici del sistema agro-alimentare tra ascesa e crisi della globalizzazione*, ed. Cacucci, Bari, 2011, 13-89.

<sup>6</sup> See on this subject Gencarelli F., *Gli aiuti di Stato in agricoltura*, in *Riv. dir. agr.*, I, 2009, 23ss; on the more recent developments, with particular reference to the narrow notion of agriculture adopted with regard to State aids, see Gencarelli F., *Aiuti comunitari e aiuti di Stato*, in *Diritto e giur. agr. e dell'ambiente*, 2009, 375ss.

*way in which it is financed...". The judgment has also mentioned (paragraph 123) that "the case-law has also specified that, in the same context, the concept of an undertaking must be understood as designating an economic unit even if in law that economic unit consists of several persons, natural or legal".*

### **1.2.1. Exception concerning restrictive practices which "form an integral part of a national market organisation"**

This exception has proved to be applicable only temporarily and anyhow appears more and more residual. As a matter of fact, over the decades, the national disciplines already in place for the various production sectors have been gradually wiped out by the Community legislation aimed at establishing common market organisations and, therefore, at replacing the conflicting national disciplines<sup>7</sup>.

### **1.2.2. Exception concerning restrictive practices which "are necessary for the attainment of the objectives set out in Article [33 now 39 TFEU] of the Treaty"**

According to Article 2 paragraph 1 (first sentence) of Regulation 1184/2006, «*Article 81(1) of the Treaty shall not apply to such of the agreements, decisions and practices referred to in Article 1 of this Regulation ... or are necessary for attainment of the objectives set out in Article 33 of the Treaty*». **The application of this exception has been significantly curtailed by the restrictive interpretation given by the Commission and the European Court of Justice<sup>8</sup>**. In fact, both have placed on the operators interested in proving the validity of their agreement a burden of proof which is very difficult to respect. Indeed, in order for the exception to apply, the operators involved in the agreements or arrangements have to prove that:

- 1) the agreement, in order to be necessary, has to represent the only way to actually ensure the achievement of the CAP objectives stated in Article 39 TFEU.
- 2) the agreement must be able to achieve all the objectives stated in Article 33 and not only some of them (see *Cases C-399/93 Oude Luttikhuis 23 et seq.; T-70/92 and T-71/92 Florimex and VGB v Commission 152*. See also, for example, Commission Decision 1999/6/EC of 14 December 1998 relating to a proceeding under Article 85 of the Treaty (IV/35.280 - Sicasov)).

More precisely, Commission Decision of 20 October 2004 relating to a proceeding under Article 81(1) of the EC Treaty (*Case COMP/C.38.238/B.2 Raw Tobacco Spain*) has clarified that "*the exception at ... is applicable only if the agreement in question promotes the attainment of all the objectives of Article 39 of the Treaty or, at the very least, if those objectives were to appear divergent, only if the Commission is in a position to reconcile them in such a way as to permit application of the exception*".

Besides, the Court established in the Frubo case (*Case 71-74, Commission of the European Communities and Vereniging de Fruitunie, ECJ, 15 May 1975*) that when the applicants have not shown in what respect their agreement can be necessary for the attainment of the first two objectives set out in Article 39 of the Treaty, the exception is inapplicable. Furthermore, when a product is mentioned in Annex I and falls under a Common Market

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<sup>7</sup> In decisions concerning national market organisations, the Commission controlled that the practices were consistent with the CAP objectives (Article 39 of the Treaty), that they neither excluded competition nor imposed minimum prices. See for example *Judgment of the Court of 10 December 1974. - M. Charmasson v Minister for Economic Affairs and Finance. Case 48-74*; Commission Decision 88/109/EEC of 18 December 1987 relating to a proceeding under Article 85 of the EEC Treaty (IV/31.735 - New potatoes).

<sup>8</sup> It is the role of the Commission, under the control of the ECJ (Article.2 p.2), to verify that these agreements are necessary to achieve the CAP objectives.

Organisation, the Court and the Commission consider that the regulation is intended to implement exhaustively the objectives of Article 39. Consequently, agreements and practices that are not included in the CMO regulation do not fall within the scope of the exception. (Commission Decision 73/109/EEC of 2 January 1973 relating to proceedings under Articles 85 and 86 of the EEC Treaty, IV/26 918 - European sugar industry, Official Journal L 140, 26/05/1973; *Case 71-74, Commission of the European Communities and Vereniging de Fruitunie, ECJ, 15 May 1975*; Commission Decision 2003/600/EC of 2 April 2003 relating to a proceeding pursuant to Article 81 of the EC Treaty (Case COMP/C.38.279/F3 – French beef) (OJ 2003 L 209, p. 12)). The Commission has never recognised the applicability of this exception so far.

### **1.2.3. Exception contained in Article 176, par. 1, second sentence, of Regulation No 1234/2007 and in Article 2, par. 1, second sentence, of Regulation No 1184/2006**

*"Article 81(1) shall not apply to agreements, decisions and practices of farmers, farmers' associations, or associations of such associations belonging to a single Member State which concern the production or sale of agricultural products or the use of joint facilities for the storage, treatment or processing of agricultural products, and under which there is no obligation to charge identical prices, unless the Commission finds that competition is thereby excluded or that the objectives of Article 33 of the Treaty are jeopardised".*

This exception is now recognized as an **autonomous case of exception**. According to the Court judgment 12 December 1995 in Joined cases *C-319/93, C-40/94, C-224/94* (par.20): *"To interpret the second sentence as having no independent meaning would run squarely counter to the wishes of the legislature, inasmuch as it would result in more stringent conditions being applied to agreements which are to be made more flexible, since they would have to fulfil the conditions laid down in both the first and second sentences. Moreover, the Commission could scarcely find that an agreement jeopardized the objectives of Article 39 of the Treaty if, by virtue of the derogation set out in the first sentence, it had already been established that that agreement or decision was necessary for the attainment of those objectives".*

**This third case represents in the European experience the most significant and general derogation to the application of the antitrust discipline to arrangements and agreements, including the associations and the associations of associations, provided that farmers only are the protagonists thereof.**

In the European discipline (**Article 176, par.1, second sentence, of Regulation No 1234/2007 and Article 2, par. 1, second sentence, of Regulation No 1184/2006**), the agreements between parties exempt from the antitrust discipline can concern the production or sale of agricultural products or the use of joint facilities for the storage, treatment or processing of agricultural products. **The only ban on agreements existing in the European discipline (but not in the North-American one<sup>9</sup>)** concerns the obligation to charge identical prices. This seems to confirm the instrumental role assigned to the discipline on competition with regard to the CAP which, traditionally, has been based on the fixing of administrative prices for the agricultural products by the European authorities: however, it is evident that this limitation is destined to lose its own meaning should the future agricultural policy renounce the interventions on the agricultural product prices altogether.

<sup>9</sup> See *infra*. For a comparison between US and European antitrust discipline in agriculture, see Jannarelli (2011), cited.

The exceptional derogation to the application of antitrust discipline pursuant to Article 101, par. 1, as in lett. (c), now illustrated, finds, in its turn, a limit in two specific situations:

- the first situation concerns the case in which, due to agreements between farmers, the total exclusion of competition occurs: in truth, this would very unlikely actually happen. It could concern monopolies.
- the second situation concerns the case in which the agreement is such as to counter the achievement of the agricultural policy objectives pursuant to Article 33 of the same Treaty.

In both cases, the assessment is up to the Commission. In particular, Article 176, par. 2, of Regulation No 1234/2007 as well as Article 2, par. 2, of Regulation No 1184/2006 have established that *"after consulting the Member States and hearing the undertakings or associations of undertakings concerned and any other natural or legal person that it considers appropriate, the Commission shall have sole power, subject to review by the Court of Justice, to determine, by a decision which shall be published, which agreements, decisions and practices fulfil the conditions specified in paragraph 1"*<sup>10</sup>.

Such agreements are presumed valid so long as the Commission has not found that they exclude competition or jeopardise the Treaty objectives.

This third exception recaptures the content of the **only derogation** to the antitrust discipline established for the agricultural sector in the North-American legislation by the 1922 Capper Volstead Act (see Frederick, 2002 and Saker Woeste, 1998; Jannarelli, 1997, 443; for the future of Capper Volstead Act see Ondeck & Clair, 2009). The North-American discipline regarding the exception to the application of the Sherman Act, states 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. Such associations may have marketing agencies in common; and such associations and their members may make the necessary contracts and agreements - to give effect to such purposes. In order to be able to benefit from the exception, the Capper Volstead Act also requires that *"such associations are operated for the mutual benefit of the members thereof, as such producers, and conform to one or both of the following requirements: First, that no member of the association is allowed more than one vote because of the amount of stock or membership capital he may own therein; second, that the association does not pay dividends on stock or membership capital in excess of 8 per cent per annum; and, in any case, third, that the association shall not deal in the products of non-members to an amount greater in value than such as are handled by it for members"*.*

Such privilege does not apply *"if the Secretary of Agriculture shall have reason to believe that any such association monopolizes or restrains trade in interstate or foreign commerce to such an extent that the price of any agricultural product is unduly enhanced by reason"*<sup>11</sup>.

Therefore, US competition law does not prohibit the obligation to charge identical prices whereas EU competition law prohibits and penalises this type of practices.

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<sup>10</sup> On this point, for further studies, see Jannarelli A., *Il regime della concorrenza nel settore agricolo tra mercato unico europeo e globalizzazione dell'economia*, in Riv. dir. agr. 1997, I, 416ss.

<sup>11</sup> Jesse, Johnson, Marion, and Manchester, *Interpreting and Enforcing Section "the Capper-Volstead Act"*, in Amer.J.Agr. Econ. 1982, 431ss.

### 1.3. The exemption of Article 101§3 of the TFUE

Practices that do not meet the conditions for exemption under Regulation 1184/2006 (Article 2) or under Regulation 1234/2007, may qualify for exemption under Article 101§3<sup>12</sup>. When agreements are imputed to undertakings from the agricultural or the food sector on the basis of Article 101§1, the applicability of the exemption of Article 101§3 has to be sought<sup>13</sup>. Thus, undertakings have to demonstrate that their practices and agreements satisfy the four conditions mentioned in paragraph 3. They may invoke some contextual elements to support their request. In theory, paragraph 3 of Article 101 establishes some **applicability conditions** wider than those of Article 2§1 of Regulation 1184. Indeed, Article 2§1 refers exclusively to CAP objectives mentioned in Article 39 TFEU, which are interpreted very closely. On the basis of Article 101§3, the Commission may find that the conditions to apply the exception are met. In practice, the Commission and the ECJ (like with the exemptions in Article 2 of Regulation 1184/2006) check whether the agreements are necessary, if the consumer interest is preserved, and whether the agreement leaves sufficient competition. (Commission decision 78/823/EEC of 21 September 1978 relating to a proceeding under Article 85 of the EEC Treaty (IV/28.824 - Breeders' rights - maize seed); *Case 258/78, Judgment of the Court of 8 June 1982, L.C. Nungesser KG and Kurt Eisele v Commission of the European Communities, JCP E 1984, I, 13389, obs. G. Bonet et J.B. Blaise*; Commission Decision 88/109/EEC of 18 December 1987 relating to a proceeding under Article 85 of the EEC Treaty (IV/31.735 - New potatoes); *Case 136/86, Judgment of the Court of 3 December 1987. - Bureau national interprofessionnel du cognac v Yves Aubert*; Commission Decision 1999/6/EC of 14 December 1998 relating to a proceeding under Article 85 of the EC Treaty (IV/35.280 - Sicasov) (notified under document number C(1998) 3452).

**Price-fixing agreements and agreements limiting or controlling production are excluded from Article 101§3, as with the other exceptions.** (*Case C-123/83, Judgment of the ECJ of 30 January 1985, BNIC/Clair*). These agreements and practices have as their "object" the restriction of competition. They are prohibited regardless of their actual or potential effects on the market. This reasoning was followed in "French beef" and "Irish beef" cases. (Commission Decision 2003/600/EC of 2 April 2003 relating to a proceeding pursuant to Article 81 of the EC Treaty (*Case COMP/C.38.279/F3 – French beef*) (OJ 2003 L 209, p.12); confirmed by joined *Cases T-217/03 and T-245/03 FNCBV and Others v Commission [2006] ECR II-4987*; *Case C-209/07, judgment of the ECJ of 20th November 2008, Competition Authority c/ Beef Industry Development Society Ltd, Barry Brothers (Carrigmore) Meats Ltd*). Concerted practices aiming to reduce production capacity and to fix prices are understood without taking into account the agricultural context or the particular situation of economic crisis<sup>14</sup>. The exemption of Article 101§3 is interpreted as restrictive as any agricultural exemption. This confirms a trend of the

<sup>12</sup> Article 101§3: «The provisions of paragraph 1 may, however, be declared inapplicable in the case of:  
- any agreement or category of agreements between undertakings, any decision or category of decisions by associations of undertakings,  
- any concerted practice or category of concerted practices, which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:  
(a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;  
(b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question».

<sup>13</sup> See Commission Decision 85/76/EEC of 7 December 1984 relating to a proceeding under Article 85 of the EEC Treaty (IV/28.930 - Milchförderungsfonds).

<sup>14</sup> Courivaud H., La politique agricole commune est-elle soluble dans la concurrence? - Lecture critique de la décision «viandes bovines françaises» (Commission, 2 avril 2003), *Revue contrats, concurrence, consommation*, 2005/1 ; Del Cont C. and Pironon V., L'affaire de la viande bovine irlandaise, *Revue Lamy concurrence*, 2010/4.

Commission. Indeed, the Commission aims to erase the sectoral specificities in the field of the exemption<sup>15</sup> and to give precedence to the objective of undistorted competition over the CAP objectives. A similar trend can be noted in the decisions of the French Competition Authority. (See for example the recent decision 12-D-08 Production and marketing of chicory, ADLC 6 March 2012.)

#### 1.4. The implementation of rules on competition and agricultural food sector

**The European antitrust discipline is called to operate only in case of events which could affect negatively the trade between Member States. Therefore the European law and national laws on antitrust are applied in parallel:** restrictive practices only affecting the national market are subject to national laws "*inspired by considerations peculiar to each of them*". Hence, very recently, Court Judgment 1 October 2009 case *C-505/07, Compañía Española de Comercialización de Aceite SA.*, in the wake of the previous Judgment 9 September 2003 *C-137/00, Milk Marque and National Farmers' Union*)<sup>16</sup>.

**But the influence in practice of the community law is much wider so as to admit possible conflicts with the national antitrust authorities.** For the specific discipline of agriculture, the Court of Justice has confirmed the possibility of a decentralized application of it, except for the exclusive competence of the Commission (see the above decisions).

Concerning the application of the European antitrust discipline also with regard to the antitrust discipline prescribed for agriculture, the Court of justice has clarified that the national courts may well decide directly, but only if: 1) it is not a case which can be traced back to the violation of Article 81, par. 1; or 2) there are no doubts on the inapplicability of the exemption pursuant to the third above-mentioned case. In cases of uncertainty, the national court must request a European Commission intervention: hence, Judgment 12 December 1995 in *Joined Cases C-319/93, C-40/94 and C-224/94* as well as Judgment 12 December 1995 in *Case C-399/93*.

The Community jurisprudence has also clarified that where the national competition authorities act in the area governed by the common organisation of the market for the sector in question, they are under an obligation to refrain from adopting any measure which might undermine or create exceptions to that common organisation (*Milk Marque and National Farmers' Union*, paragraph 94 (Court Judgment 1 October 2009 in *Case C-505/07, Compañía Española de Comercialización de Aceite SA.*, par. 55). Indeed, the growing attention of national antitrust authorities with regard to the respect of European law has strengthened the righteous functioning of an actual network between the Commission and the Court of Justice on one side and the national authorities on the other. Thus, in conditions of possible tension, the social groups concerned are more and more aware that the way to go is the legislative or political rather than that based on a forced interpretation.

Furthermore, "*as regards cases coming within the scope ratione materiae not only of Article 81(1) EC, but also of national competition law, the national authorities cannot take decisions which conflict with those of the Commission, or create the risk of such a conflict*" (see, Court Judgment 1 October 2009 in *Case C-505/07, Compañía Española de Comercialización de Aceite SA.*, par. 56).

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<sup>15</sup> Concerning block exemptions regulations. See Vogel L.; *Les règlements d'exemption «nouvelle génération»*, *Revue Contrat, concurrence, consommation*, 2005, n°141.

<sup>16</sup> Jannarelli (1997), 416, cited.

Thus, in conditions of possible tension, only a legislative intervention could change the interpretation of the Commission and of the ECJ.

## 1.5. Competition law and interbranch agreements and organisations

**In the European legislation there are also some provisions prescribed for particular situations with regard to the competition policy and implementation of the European agricultural policy.** This is the case of interbranch agreements and organizations relating to certain productive sectors and aiming at coordinating the relationships between various operators in the food and agricultural chain: farmers, processors, distributors and retailers. Those cover part or all of the supply chain and they can potentially play useful roles in research, improvement of quality, promotion and spreading of best practice in production and processing methods. Without specific disciplinary interventions, they fall under Article 176 par. 1 of Regulation No 1234/2007 and to Article 2 par. 1 of Regulation No 1184/2006.

The Community has always been very reluctant to make interventions of a general nature. According to the Court Judgment 30 January 1985 in *Case C-123/83 Bureau National Interprofessionnel du Cognac (BNIC)/Clair*, [1985], "an agreement made by two groups of traders, such as the wine-growers and dealers, must be regarded as an agreement between undertakings or associations of undertakings. The fact that those groups meet within an organization such as the board does not remove their agreement from the scope of Article 85 of the Treaty"<sup>17</sup>. In this particular case, the application of Regulation No 26/1962 had been ruled out because cognac is not included among the products of annex I. Anyhow, on that occasion, the Court has observed that "For the purposes of Article 85(1) it is unnecessary to take account of the actual effects of an agreement where its object is to restrict, prevent or distort competition. By its very nature, agreement fixing a minimum price for a product which is submitted to the public authorities for the purpose of obtaining approval for that minimum price, so that it becomes binding on all traders of the market in question, is intended to distort competition on that market".

The normative provision of their validity with regard to the antitrust discipline is considered entirely exceptional as derogation to the respect of free competition. Therefore disciplinary interventions are admitted with caution and when they appear certainly relevant to the objectives of the CAP. Some examples of those disciplinary interventions: the common market organisations operating in the **tobacco** sector and in the **olive oil** and table olives sector pursuant to Article 123, par. 1, lett. a) of Regulation No 1234/2007, as well as interbranch organisations which the Member States can voluntarily recognize in the sector of **fruits and vegetables** Article 176 of Regulation No 1234/2007 and in the **wine** sector pursuant to the same Article 123, par. 3, of Regulation No 1234/2007.

The control of by the Commission is not only precautionary and rigorous; Article 176a, par. 5, of Regulation No 1234/2007 also establishes that "if, following expiry of the two-month period referred to in paragraph 2(b), the Commission finds that the conditions for applying paragraph 1 have not been met, it shall take a Decision declaring that Article 81(1) of the Treaty applies to the agreement, decision or concerted practice in question"<sup>18</sup>.

<sup>17</sup> See p. 20-22.

<sup>18</sup> It is the same for tobacco under art. 125l of Reg. No 1234/2007.

## 1.6. Critical conclusions

The study of the legislative framework related to free competition applied to the agricultural sector and of EU decision-making shows that agriculture is not an exempted area: competition rules do apply to the production of and the trade in agricultural products. Indeed, Article 42 of the Treaty provides that "rules on competition shall apply (to production of and trade in agricultural products) only to the extent determined by the Council". However, the Council has made only limited use of this prerogative. Council Regulation No 26/62 (now Council Regulation No 1184/2006) affirms a principle which is the application of competition rules to the agricultural sector. It provides only few exceptions regarding agreements prohibited by Article 101 TFEU. The specific regime of the agricultural sector is even more limited than the way the Commission and the ECJ are making a rigorous and restrictive application of it. Combined reading of texts and of decisions shows that the CAP objectives do not override the goal of free and undistorted competition. There is a hierarchy between competition policy and CAP contrary to what was stated in the *Maizena case*. It is interesting to highlight that U.S. law recognises more favourable exceptions concerning agricultural « *associationism* » and allows price agreements.

This calls for a number of remarks.

**This application of competition law to the agricultural sector does not take into account the specificity of agriculture nor the changes in this sector in recent decades.** It was understandable when agriculture was administered and characterised by interventionism and price support policy.

**It does not take into account other policies and objectives such as rural development, agricultural products quality policy, and the objective of sustainable development.** Although the CAP objectives of Article 39 TFEU are made in the same terms since 1962, they should be read in light of these other policies.

**It does not take into consideration economic crisis situations experienced by some sectors.** Unless special regulations, practices limiting production or setting minimum prices in times of crisis are not allowed (see the cases mentioned above "*French beef*" and "*Irish beef*").

**It ignores the imbalance between the different food chain operators despite this last statement being observed by the Commission.** The European Commission has remarked that "*the asymmetry of bargaining power between agricultural producers and the rest of the supply chain has kept producer margins in the agricultural sector under strong pressure. In response, agricultural producers have adopted a wide range of strategies, including the creation of producer groups and cooperatives, the development of contractual arrangements with processors and retailers, and the development of high-value-added quality products, for instance by participation in voluntary certification schemes. These schemes are useful for producers in rebalancing the asymmetry of bargaining power in the food supply chain as well as for consumers and the environment...*"<sup>19</sup>

**In practice the principle of favour for associations and agreements between producers or producers' organisations is assessed strictly.** The *per se* prohibition of price agreements makes it impossible either to counterbalance powerful upstream and downstream interests in the sector nor to ensure a fair income for producers. Such a prohibition can be explained by the fact that the CAP has traditionally been based on the

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<sup>19</sup> Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – Food prices in Europe, COM(2008) 821 final, 9.12.2008.



setting of prices administered by the Community authorities; this warned against any danger of disturbing the system of administered prices. Maintaining such a prohibition becomes more questionable regarding the end of price supports policy and the economic power of industries and retailers. Price fixing by farmers may ultimately profit the other operators in the sector, without having a negative effect on the final consumer (See the recent report of the American antitrust association, Transition report on competition policy, 2008). The prohibition may also be explained by the definition of «*consumer welfare*»: consumer interest is considered in the short term and defined exclusively as the enjoyment of low prices; there is no consideration of externalities as well as any long-term vision.

The primacy of competition policy on agricultural policy is also due to the growing influence exercised by the U.S. interpretative model on the subject of antitrust which is based on the efficiency principle and on promotion and protection of competition and not of competitors. The European Commission itself (2003, 17) states that "*the aim of Article 81 as a whole is to protect competition on the market with a view to promoting consumer welfare and an efficient allocation of resources*"<sup>20</sup>.

However, the European competition model remains the model based on social market economy<sup>21</sup>. In the Treaty of Lisbon, competition is a value of means and not of independent end. This model for competition accepts the principles and postulates of the free market and it also considers public interventions as important when necessary in order to remedy the market failures, so as to correct its socially most blameworthy outcomes. It considers the relationship between economy and politics and between competition and economic policy important, hence the State is called to play a role which is both constitutive and subsidiary of the economic freedom. **Even if this model will not make of agriculture an area without competition, it should allow better consideration of the agricultural specificities and should permit to farmers to be the actors of the food chain regulation in the CAP.**

<sup>20</sup> Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, point 17. About the influence of Law and Economics theories on European experience of competition law, see Van den Berg-Camesca, European competition law and economics, 2001 Intersia.

<sup>21</sup> Some decisions of the ECJ relied in the past on the old Article 3 of the Treaty to exclude the possibility for Member States to enact rules restricting competition. See for example case C-198/01, 9 September 2003, Consorzio industrie Fiammiferi (CIF). About the scenario after the Treaty of Lisbon, Riley, The EU Reform Treaty and the Competition Protocol: Undermining EC Competition Law, in 28 European Competition L.R. 2007, p.703ss; more recent, for an analysis of the new text; Work on a symposium held in Brussels on 8 November 2007 collected in Concurrences, Revue des droits de la concurrence 2008, n.1; Chalmers and Monti (directed by), European Union Law Updating Supplement, Cambridge 2008, 153ss.



## 2. THE REGULATION OF COMPETITION TOWARDS 2013: THE COMMISSION'S REFORM PROPOSALS CONCERNING THE SINGLE CMO

### KEY FINDINGS

- The main proposals focus on the strengthening of the organisation of sectors in all areas covered by Annex 1 of the Treaty and on the strengthening of contractual relations and competition rules.
- The changes stay minor despite the ambitious goals of the reform which aims to make of farmers the actors of the Regulation and to rebalance the sector to benefit farmers, by increasing their bargaining power against upstream and downstream strength. Changes to the state of the law raise questions about their effectiveness with regard to the ambitions formulated.

With a view to the CAP reform towards 2013, which should come into force on the 1<sup>st</sup> January 2014, the Commission has developed a set of legislative proposals<sup>22</sup>. Among these proposals, the Commission presents a new Regulation on the Common Organisation of agricultural markets («*Single CMO Regulation*» COM (2011) 626 of 12.10.2011), to replace Council Regulation (EC) No 1234/2007 (consolidated by Commission Regulation COM (2010) 799 of 10.09.2010)<sup>23</sup>.

These proposed amendments to the current regulatory framework are intended to better distribute the added-value, and to facilitate cooperation between producer organisations and interbranch organisations. More specifically, the explanatory memorandum and recitals (85, 86, 88, 89, 90, 91, 93, 120, 121, 122 and 123) have the following aims:

- Strengthening the role of sectors, producer organisations and interbranch organisations, by allowing the concentration of the supply chain and the promotion of new practices (85);
- Extending, harmonising and rationalising the existing sectoral rules (86);
- Consolidating contractual relations in the dairy sector to strengthen the bargaining power of milk producers vis-à-vis processors and to ensure a fair standard of living (91);
- Allowing Member States to make the use of written contracts compulsory (90);
- Delegating to the Commission, on the basis of Article 290 of the Treaty, the power to adopt certain acts taking into account the specificities of each sector (93);

<sup>22</sup> [http://ec.europa.eu/agriculture/cap-post-2013/legal-proposals/index\\_en.htm](http://ec.europa.eu/agriculture/cap-post-2013/legal-proposals/index_en.htm)

This legal proposal follows a series of discussions and debates led by the Community institutions (Commission, Parliament and Council) since 2010.

See Resolution T7-0286/2010 of 8 July 2010.

<http://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P7-TA-2010-0286>;

Communication from the Commission: Europe 2020 (COM (2010) 2020), 03.03.2010;

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:2020:FIN:EN:PDF>;

Communication of the Commission: the CAP towards 2020, COM (2010) 672, 18.11.2010; Resolution T7-0297/2011 of 23 June 2011.

<http://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P7-TA-2011-0297>.

<sup>23</sup> OJ L 299, 16.11.2007. The CMO has been amended several times, notably by Regulation (EC) No 361/2008 (OJ L 121, 7.5.2008) and Commission Regulation (EC) No 491/2009 (OJ L 154, 06/17/2009).

- Ensuring that competition rules apply only to the extent determined by the Union legislation in accordance with Article 42 of the Treaty (120);
- Ensuring that the application of Articles 101 and 102 of the Treaty to the production of, and trade in, agricultural products do not jeopardise the attainment of the objectives of the CAP (121);
- Providing for a "*special approach*" in applying competition rules to producer organisations and interbranch organisations (122 & 123);
- Providing for exceptions in certain situations to the prohibition of State aid granted by Member States (124).

The purpose of this chapter is to analyse the changes to the current legal framework by the proposed reform of the CMO (2.1.) and then to check whether these changes are likely to ensure the rebalancing of the food chain (2.2).

## 2.1. Reform proposals: Articles 104 to 116 and 143 to 145 of Commission proposal COM (2011) 626

The main proposals focus on the strengthening of the organisation of sectors in all areas covered by Annex 1 of the Treaty and on the strengthening of contractual relations and competition rules.

The provisions 112 and 113 regarding the **Adjustment of supply** remain largely unchanged from Regulation No 1234/2007 and do not have any significant effect from their contribution. Thus, they will not be studied.<sup>24</sup>

### 2.1.1. Contractual relations: Articles 104 and 105

**The requirement of a written contract: Article 104** «*Contractual relations in the milk and milk products sector*». The proposed «single CMO Regulation» 2011/626/final includes provisions concerning the dairy sector. The text establishes a written contract obligation before every delivery of raw milk by a farmer to any collector or processor (Art. 104.2). **The innovation concerns the obligation of written contract for each delivery.**

A similar provision can now be found in the new Article 185f of Council Regulation (EC) No 1234/2007 which has just been modified (as well as (2010) 799) by Regulation (EU) No 261/2012 of the European Parliament and of the Council of 14 March 2012 amending Council Regulation (EC) No 1234/2007 as regards contractual relations in the milk and milk products sector. As the point 2 is focused on the Proposal, we will refer to the dispositions of the Proposal COM (2011) 626/ final 2; but, as the law has just been changed, we will also refer to the dispositions of the Regulation No 1234/2007, as amended by Regulation (EU) No 261/2012.

The scope of this text is relatively limited because of its voluntary nature and its restricted field of application.

Indeed, **the writing requirement is optional and left to the discretion of Member States**. The reason to apply the subsidiarity principle is twofold: not only is there no agreement among states to develop framework legislation, but it is appropriate to do so

<sup>24</sup> Article 112 regarding «*measures to facilitate the adjustment of supply to market requirements*» is the same as Article 54 of Reg. No 1234/2007. It concerns the live plants, beef and veal, pigmeat, sheepmeat and goatmeat, eggs and poultrymeat sectors; Article 113 regarding «*marketing rules to improve and stabilise the operation of the common market in wines*». The proposal takes up the main points contained in Article 113c of Reg. No 1234/2007 (consolidated version of 2011). Paragraphs 2 and 3 concerning the obligation of transparency and of official publicitation by Member states are removed.

«given the diversity of situations across the EU in this context»<sup>25</sup>. In fact, if it seems difficult to achieve harmonisation of certain contractual rules, at least in agriculture, this should not be an excuse for provisions that could be sterile in practice.

Member States are thus masters of the decision. The Commission will not challenge this and can only intervene by means of implementing acts (except in the case of a reform proposal)<sup>26</sup>. There is only one limit to this freedom: the Union legislation, «in particular (concerning) the proper functioning of the internal market and the common market organisation» (paragraph 90), must be ensured. In other words, the Member States should not use the contract to impede the free movement of agricultural products, which results in any case from the EU accession.

Article 104 has a limited scope regarding its purpose. If the recital (90) seems to be open to a horizontal view of agricultural products, the reading of Regulation No 2011/626 restricts this scope immediately. Only the dairy sector is subject to operational provisions. Thus, a Member State may decide that *« every delivery of raw milk by a farmer to a processor of raw milk must be covered by a written contract between the parties »*; *in this case, the requirement of writing will be compulsory whatever the number of intermediaries: « if the delivery of raw milk is made through one or more collectors, each stage of the delivery must be covered by such a contract between the parties »*<sup>27</sup>. This restricted choice seems to be already confirmed by the state of Regulation (EU) No 261/2012 that has amended Regulation No 1234/2007.

The scope of Article 104 is limited in purpose (*rationae materiae*) as well as in time (*rationae temporis*). «As regards contractual relations in the milk and milk products sectors, the measures set out in this Regulation, are justified in the current economic circumstances of the dairy market and the structure of the supply chain». «They should therefore be applied for a sufficiently long duration (both before and after the abolition of milk quotas) to allow them to have full effect». «However, given their far-reaching nature, they should nevertheless be temporary in nature, and be subject to review». «The Commission should adopt reports on the development of the milk market, covering in particular potential incentives to encourage farmers to enter into joint production agreements, to be submitted by 30 June 2014 and 31 December 2018 respectively»<sup>28</sup>. This intention is confirmed by Article 158 on the reporting obligation of the Commission: «The Commission shall present a report to the European Parliament and to the Council: (b) by 30 June 2014 and also by 31 December 2018 on the development of the market situation in the milk and milk products sector and in particular on the operation of Articles 104 to 107

<sup>25</sup> Recital (90) «Given the diversity of situations across the Union, in the interests of subsidiarity, such a decision should remain with Member States. However, in the milk and milk products sector, to ensure appropriate minimum standards for such contracts and good functioning of the internal market and the common market organisation, some basic conditions for the use of such contracts should be laid down at the Union level»; Also in Recital 9 of the Regulation (EU) No 261/2012.

<sup>26</sup> This proposal is applicable only in the milk sector, Article 104.5: «In order to guarantee a uniform application of this Article, the Commission may, by means of implementing acts, adopt necessary measures. Those implementing acts shall be adopted in accordance with the examination procedure referred to in Article 162(2)»; same idea in Article 185f 6) of Regulation No 1234/2007, as amended by Regulation (EU) No 261/2012.

<sup>27</sup> Article 104.1. «If a Member State decides that every delivery of raw milk by a farmer to a processor of raw milk must be covered by a written contract between the parties, such contract shall fulfil the conditions laid down in paragraph 2. In the case described in the first subparagraph, the Member State concerned shall also decide that if the delivery of raw milk is made through one or more collectors, each stage of the delivery must be covered by such a contract between the parties. To this end, a "collector" means an undertaking which transports raw milk from a farmer or another collector to a processor of raw milk or another collector, where the ownership of the raw milk is transferred in each case»; same idea in Article 185f 1) of Regulation No 1234/2007, as amended by Regulation (EU) No 261/2012.

<sup>28</sup> Recital (149) COM (2011) 626 final. Similar choice has been already made in Regulation (EU) No 261/2012 (Recital 21).

and 145 in that sector covering, in particular, potential incentives to encourage farmers to enter into joint production agreements together with any appropriate proposals».

It should be emphasised that the text does not prohibit a Member State from going beyond the limited framework of the dairy sector and imposing a written contract for all or part of its agricultural products. However, the rules for the milk and milk products sector will not be mandatory.

## 2.1.2. Definition and recognition of producer organisations and interbranch organisations: Articles 106 to 111<sup>29</sup>

### 2.1.2.1. Concerning producer organisations: Articles 106, 107, 109 COM (2011) 626 final/2; Articles 209, 211, 212 COM (2010) 799

Producer organisations, also known as «*operators' organisations*» in the sector of olive oil and table olives, now bring together the producers belonging to all sectors listed in Annex 1 (Article 106a and 109 COM (2011) 626 final/2). This is the great change made by COM (2011) 626 final/2. Previously, only the sectors of hops, olive oil and table olives, fruit and vegetables intended for processing, milk and milk products<sup>30</sup>, silkworm (Art. 209, 212 COM (2010) 799), wine (Article 227 COM (2010) 799) and fruits and vegetables (213-222 COM (2010) 799) were covered. Nevertheless, it should be noted that Member States were already allowed, «*on the basis of national law*», to recognise producer organisations in all other sectors of Annex 1, except those recognised under the EU law (Article 211 COM (2010) 799). The difference between these two types of producer organisations resulted from the fact that only producer organisations, recognised by the EU regulation and authority, benefited from EU law.

***The recognition of producer organisations or producer associations*** remains the responsibility of Member States and is formed on the initiative of producers (Articles 106-107 COM (2011) 626 final/2, 209 and 211 COM (2010) 799). As before, it is conditioned, not only by belonging to the above sectors, but also by the mission entrusted to them and described by the EU law as «*aims*» of the producer organisations (see below). **A new condition to the recognition of producer organisations is compulsory: the prohibition to «*hold a dominant position on a given market unless this is necessary in pursuance of the objectives of Article 39 of the Treaty*».** (Article 106d). This new provision, surprising in view of the objective of actors' concentration displayed by the Commission and against the European Competition law, seems in contradiction with Article 111 regarding the extension of rules (see below).

***The mission of producer organisations or producer associations*** has not varied much (Articles 106-107 COM (2011) 626 final/2, 209 COM (2010) 799). It aims to develop rules and practices to discipline the market. This discipline can cover the quality and quantity of the product offer (Article 106i COM (2011) 626 final/2), the price stabilisation (Article 106iii) and the knowledge of market (Article 106iv). **The role of producer organisations can exceed this role of economic «*regulator*» to become a real economic operator. On one hand, they can serve as intermediaries for the sale of**

<sup>29</sup> **Methodological introduction:** The state of the Law and its development are analysed on the basis of two proposals for Reg.: COM (2011) 626 final/2 and COM (2010) 799. The choice to go directly to COM (2010) 799 is explained by the fact that this regulation is a synthesis of Reg. No 1234/2007 and other texts, particularly in the fruit and vegetables and wine sectors, left out in Reg. No 1234/2007 (see Recital 8, Reg. No 1234/2007). Note that the law shall be subject to subsequent provisions of application within the field of competence of the European Commission.

<sup>30</sup> See, in this area, the amendments to Reg. (EC) No 1234/2007 (Article 126 bis) and thus to COM (2010) 799 by Reg. (EU) No 261/2012 of the European Parliament and of the Council of 14 March 2012 amending Council Regulation (EC) No 1234/2007 as regards contractual relations in the milk and milk products sector. Special provisions on the bargaining power of producer organisations in the milk sector: Article 229 COM (2010) 799 (see below).

**agricultural products** (Article 106ii COM (2011) 626 final/2 and 126c of Regulation No 1234/2007, as amended by Regulation (EU) No 261/2012). On the other hand, they can serve as technical and financial support, in particular to adapt agricultural practices to environmental issues and sustainable development objective (Articles 106 iv v vi vii COM (2011) 626 final / 2). The only mission which is partly new is the promotion of sustainable agriculture that respects the environment.

It is important to insist on the bargaining power of producer organisations and producers' associations in the milk and milk products sector, concerning contracts for the delivery of raw milk by a farmer to a processor of raw milk, or to a collector, with or without transfer of ownership. This mission of producer organisations is already present in current law (Article 229 COM (2010) 799 and also in the new Article 126c of Regulation No 1234/2007, amended by Regulation (EU) No 261/2012). The proposal (2011) 626 final/2 maintains the principle (Recital 91) and the content (Article 105). One of the conditions to the implementation of this power of negotiation and transaction falls within the size of producer organisations: *«the total volume of raw milk covered by such negotiations by a particular producer organisation does not exceed: (i) 3.5% of total Union production, and (ii) 33% of the total national production of any particular Member State covered by such negotiations by that producer organisation, and (iii) 33% of the total combined national production of all the Member States covered by such negotiations by that producer organisation»*. One might wonder if the authorised size limit is compatible with the prohibition of dominance of producer organisations (see above), especially since it is expected that the competition authority, by way of derogation and even where the threshold of 33% is not exceeded, *«may decide in an individual case that the negotiation by the producer organisation may not take place if it considers that this is necessary in order to prevent competition being excluded or in order to avoid serious prejudice to SME processors of raw milk in its territory»* (Article 105§4; 126c 2c) of Regulation No 1234/2007, as amended by Regulation (EU) No 261/2012).

#### **2.1.2.2. Concerning interbranch organisations: Articles 108, 109, 111 COM (2011) 626 final/2; Articles 210, 212 COM (2010) 799**

**Interbranch organisations**, also known as *«operators' organisations»* in the sector of olive oil and table olives, now include *«representatives of economic activities linked to the production of, trade in, and/or processing of products»*, belonging to all sectors listed in Annex 1 (Articles 108.1 and 109 COM (2011) 626 final/2, 210 and 212 COM (2010) 799). This is the innovation brought by the proposal COM (2011) 626 final/2. Previously, only the sectors of olive oil and table olives, tobacco, fruits and vegetables, milk and milk products and the wine sector were covered (Articles 210, 223-226, 227, 228 COM (2010) 799). Nevertheless, it should be noted that Member States were already allowed, *«on the basis of national law»*, to recognise interbranch organisations in all other sectors of Annex 1, except those recognised under the EU law (Article 211 COM (2010) 799). The difference between these two types of interbranch organisations resulted from the fact that only interbranch organisations, recognised by the EU regulation and authority, benefited from EU law. Note that Article 211 refers only to the tobacco<sup>31</sup> and olive oil and table olives; the other sectors explicitly mentioned (fruit and vegetables, wine, milk) have special rules (fruit and vegetable sector: Article 223-226; wine sector: Article 227 COM (2010) 799).

**The recognition of interbranch organisations** remains the responsibility of Member States and is formed on the initiative of producers (Articles 108 COM (2011) 626 final/2, 210 COM (2010) 799). As before, it is conditioned, not only by belonging to the above sectors, but also by the mission entrusted to them and described by the EU law as *«aims»*

<sup>31</sup> This provision is particularly noticeable: Art. 228 COM (2010) 799.

of the interbranch organisations (see below). **Recognition is not explicitly linked to a minimum size for now**, while in the sectors of fruit and vegetables and wine, the interbranch organisations must still represent «*a significant share of the production of, trade in and/or processing*» (Articles 223 and 227b) COM (2010) 799). **However, the proposal COM (2011) 626 final/2 imposes a height requirement in the case of a request for extension** (see below). **Prohibition for producer organisations to hold a «dominant position» is not repeated here, which reveals a greater favour of the legislator towards interbranch organisations.** Note that the text of COM (2010) 799 provides recognition shall be granted by the Commission when «interbranch organisations referred to in paragraph 1 carry out their activities in the territories of several Member States» (Article 210) while proposal COM (2011) 626 final/2 does not solve this issue and refers to delegated acts of the Commission (Article 114c). The widespread recognition of interbranch organisations to all sectors has also led to the leaving out of some more specific conditions (eg., for fruits and vegetables, at least two specified provisions must be completed in accordance with Article 210.3c COM (2010) 799) or to melt down the mention of protected interests (eg., taking into account public health and the interests of consumers, Article 210.3c, 210.4c COM (2010) 799).

***The mission of interbranch organisations*** has not changed much (Article 108 COM (2011) 626 final/2; 210 COM (2010) 799). The Commission has essentially taken over the various objectives present in the texts concerning interbranch organisations currently recognised, and transposes them to all sectors with some adjustments. Only interbranch organisations in the sectors of olive oil and table olives and tobacco are assigned three specific aims from the ancient texts which, paradoxically, were of general application in the COM (2010) 799 (Article 108.2 COM (2011) 626 final/2; 210.1.c COM (2010) 799). **For all sectors (including olive oil, table olives and tobacco), the subject is to guide and discipline the market by providing greater market transparency, by improving contractual relations between operators, by acting on product quality and by promoting environmentally friendly agriculture.** The objective of transparency is quite ambitious as it relates in particular to the publication of data on prices, volumes and duration of contracts (108.1i), which has a direct impact on the content of contracts between different partners in the sector. The direct intervention of the interbranch organisation in the development of standard contracts, linked to the first objective described, gives the organisation a real regulatory power, as the contracts, if extended, will aim to spread to all concerned operators (see below). The research of quality is mainly oriented towards the desire to meet the new demands of consumers (108.1v, vii, x). Finally, interbranch organisations, like producer organisations, are destined to remain true initiators in the field of farmers' adaptation to environmental issues and sustainable development objective (108.1vi, viii, ix).

### **2.1.2.3. Concerning the extension: Articles 110-111 COM (2011) 626 final/2; 218-228 COM (2010) 799**

The extension of certain rules developed through interbranch organisations or producer organisations is maintained; its scope is extended. Article 110 COM (2011) 626 final/2 essentially repeats the provisions of Articles 218, 224, 227, and 228 COM (2010) 799, today applicable to interbranch organisations or producer organisations, mainly from the fruit and vegetables sector, but also from wine and tobacco sectors. These provisions become applicable to all the organisations, from all sectors recognised (Annex I).

***The conditions of the extension*** are the following: interbranch organisations, producer organisations or associations must have been previously recognised and should be representative in their economic areas (Article 110.1 COM (2011) 626 final/2). Therefore, the issue of representativeness arises only if an extension is requested. **The paradox**



**between the need to be representative and the obligation not to be dominant for the producer organisations only arises in this case.** Furthermore, the absence of obligation not to be dominant for interbranch organisations is real at the stage of recognition. But at the stage of extension, one could blame its size, given the content of the obligation of representativeness. **Under Article 110.3 COM (2011) 626 final / 2, this requirement refers to a set of thresholds on volumes and, eventually, on the operators concerned:** Interbranch organisations, producer organisations or associations «shall be deemed representative where, in the economic area or areas concerned of a Member State, (a) it accounts for, as a proportion of the volume of production or of trade in or of processing of the product or products concerned (see Article 224 COM (2010) 799): (i) for producer organisations in the fruit and vegetables sector, at least 60%, or (ii) in other cases, at least two thirds, and (b) it accounts for, in the case of producer organisations, more than 50% of the producers concerned (see Article 218.3 COM (2010) 799)».

**The object of the extension:** The extension applies to «some of the agreements, decisions or concerted practices agreed on within» interbranch organisations, producer organisations or associations» (Article 110.1 COM (2011) 626 final/2). **The rules «for which extension to other operators may be requested» are specified in Article 110.4.** They essentially reproduce those listed in Article 224.3 COM (2010) 799. The range is wide<sup>32</sup> and covers all fields of the missions of producer and interbranch organisations: market knowledge; discipline of production, packaging and marketing; improvement of product quality; and inclusion of environmental and health issues. There is a category of specific extension when the rule focuses on the financial contributions paid to the organisation. According to Article 111 COM (2011) 626 final/2, which incorporates the main existing rules (Articles 221, 226 for «fruits and vegetables» organisations and Article 228 for «tobacco» organisations, COM (2010) 799), a Member State «may decide that individuals or groups which are not members of the organisation but which benefit from those activities shall pay the organisation all or part of the financial contributions paid by its members». Two conditions are then set. On one hand, «the activities covered by those rules are in the general economic interest of persons whose activities relate to the products concerned». On the other hand, financial contributions must be «intended to cover costs directly incurred as a result of pursuing the activities in question».

**The limits of the extension:** The Commission sets substantial and general limits to the extension since it «shall not cause any damage to other operators», nor be distortive of competition or be otherwise «incompatible with Union or national rules in force». On the basis of Article 110.1 COM (2011) 626 final/2, the Commission imposes a «**rationae temporis**» limit as the extension has a limited duration (takes up the general idea under Articles. 218 and 224 COM (2010) 799) and a **geographical limit** since the organisations concerned must operate in one or more determined economic areas<sup>33</sup>.

<sup>32</sup> «The rules for which extension to other operators may be requested as provided in paragraph 1 shall have one of the following aims: (a) production and market reporting; (b) stricter production rules than those laid down in Union or national rules; (c) drawing up of standard contracts which are compatible with Union rules; (d) rules on marketing; (e) rules on protecting the environment; (f) measures to promote and exploit the potential of products; (g) measures to protect organic farming as well as designations of origin, quality labels and geographical indications; (h) research to add value to the products, in particular through new uses which do not pose a threat to public health; (i) studies to improve the quality of products; (j) research, in particular into methods of cultivation permitting reduced use of plant protection or animal health products and guaranteeing conservation of the soil and the environment; (k) definition of minimum qualities and definition of minimum standards of packing and presentation; (l) use of certified seed and monitoring of product quality.»

<sup>33</sup> Article 110.2 COM (2011) 626 final/2: «An "economic area" shall mean a geographical zone made up of adjoining or neighbouring production regions in which production and marketing conditions are homogeneous». Provisions from Art. 218 COM (2010) 799 are applicable to fruit and vegetables.

**Effects of the extension:** The extension makes mandatory some provisions to those who have not adhered to the organisations in which these provisions were discussed and decided. In other words, **the extension contradicts the privity of contracts** by imposing to "non-members", some rules that affect them but they have not accepted. It thus provides a temporary regulatory nature to private measures.

**The extension procedure:** Special rules concerning the notification to the Commission of decisions of extension and of possible repeal of the extended rules are included in the current texts (Articles 219, 220 and 225 for fruits and vegetables; 228 for tobacco). To date, it appears that the COM (2011) 626 final/2 refers these issues to the "delegated powers" of the Commission (Article 114f COM (2011) 626 final/2): *«the Commission shall be empowered to adopt delegated acts in accordance with Article 160 (...) on the following: (f) the extension of certain rules of the organisations provided for in Article 110 to non-members and the compulsory payment of subscriptions by non-members referred to in Article 111, including a list of the stricter production rules which may be extended under point (b) of the first subparagraph of Article 110(4), further requirements as regards representativeness, the economic areas concerned, including Commission scrutiny of their definition, minimum periods during which the rules shall apply before their extension, the persons or organisations to whom the rules or contributions may be applied, and the circumstances in which the Commission may require that the extension of rules or compulsory contributions shall be refused or withdrawn»*. It should be noted however that the proposal provides no specific procedure of extension in case of a crisis that would require urgent action.

### 2.1.3. Competition rules: Articles 143 to 145

**The principle, Article 143:** the applicability of competition rules (Articles 101 to 106 of the Treaty) to the production of, or trade in, agricultural products, subject to the exceptions set out in Articles 144 to 146. Echoing the wording of the proposal COM (2010) 799 (Article 283) and Regulation No 1234/2007 (Article 175), the Article 143 reaffirms the applicability on principle of Articles 101 to 106 of the Treaty and their implementation provisions to all agreements, decisions and practices referred to in Article 101(1) and Article 102 of the Treaty (cartels and abuses of dominant position) which relate to the production of, or trade in, agricultural products. This formulation has been adopted by the Community legislature since 1962 and stated in Article 1 of Regulation No 26/62 as well as in Article 1a of Regulation No 1184/2006. It is also interesting to note that the wording of Article 143, such as those that have taken place since Regulation No 26/62, does not follow the formula of Article 42§1 of the Treaty (ex. Art.36 TEC), under which *«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 European Parliament and the Council within the framework of Article 43(2) and in accordance with the procedure laid down therein, account being taken of the objectives set out in Article 39»*. The principle remains the same in the proposal confirming that the agricultural sector is not an exception and knows only strictly defined exceptions in Articles 144 and 145 of proposal COM (2011) 626.

**Exceptions, Articles 144 and 145:** these exceptions exist for horizontal agreements and concerted practices of associations of producer organisations (Art.144) and vertical agreements and concerted practices of interbranch organisations (Art.145). They help prevent the application of antitrust law (Article 101 of the Treaty) to certain agreements. For most of them, these texts reproduce the exceptions already in place and mentioned above in the 1st chapter.

**Article 144** provides the *«exceptions for the objectives of the CAP and farmers and their associations»*. This article is intended to replace Article 176 of Regulation No

1234/2007 by extending its scope. The first exception (Article 144§1, first sentence) is a general exception (see supra Chapter 1) and covers agreements «*which are necessary for the attainment of the objectives set out in Article 39 of the Treaty*». This general exception already existed in the Regulation No 1234/2007 in Article 176§1 and Regulation No 1184/2006 and was also in Article 284 of COM (2010) 799. The only innovation concerning this general exception is the deletion of reference to the national market organisations.

The second exception (Article 144§1, second sentence) concerns «*agreements, decisions and practices of farmers, farmers' associations, or associations of such associations, or producer organisations recognised under Article 106 of this Regulation, or associations of producer organisations recognised under Article 107 of this Regulation, which concern the production or sale of agricultural products or the use of joint facilities for the storage, treatment or processing of agricultural products, and under which there is no obligation to charge identical prices, unless competition is thereby excluded or the objectives of Article 39 of the Treaty are jeopardised*». This exception in favour of producers' associations is still present in Regulation No 1184/2006, Article 2§1, second sentence, Article 176§1, second sentence and also in COM (2010)799, Article 284 (see supra Chapter 1). The scope and application conditions are unchanged except for agreements «under which there is no obligation to charge identical prices, unless competition is thereby excluded or the objectives of Article 39 of the Treaty are jeopardised». However, it is important to underline a **major change** introduced by this text and resulting from the combined reading of Articles 144 and 106 of the proposal: **the exclusion of producer organisations that are in a dominant position**. Indeed, the text aims «the farmers, farmers' associations, or associations of such associations, or producer organisations recognised under Article 106». However, under Article 106 d), the recognition of such organisations is possible only if they «do not hold a dominant position on a given market unless this is necessary in pursuance of the objectives of Article 39 of the Treaty». This is a **per se prohibition of dominance** for such organisations. Concerning producer association, the prohibition to be in a dominant position did not exist before. There is no such prohibition in Regulation No 1184/2006, in the Single CMO Regulation No 1234/2007 or even in the proposal COM (2010) 799.

As before, the Commission has sole power to determine which agreements, decisions and practices fulfil the conditions specified.

**Article 145** states the exception for «**agreements and concerted practices of recognised interbranch organisations**». This exception for vertical agreements does not contain major innovation in relation to previous texts. It extends the exception of Regulation No 1234/2007 regarding fruits and vegetables to all sectors and mirrors Article 285 of the proposal COM (2010) 799.

Article 101 of the Treaty does not apply to agreements made by interbranch organisations as recognised under section 108 (see above). It is interesting to note that the conditions required (145§4)<sup>34</sup> to qualify for the exception are the conditions of ordinary law of Article 101§3 (see Chapter 1).

Unlike horizontal agreements of Article 144, these vertical agreements **must be notified** to the Commission which has a period of two months to check that the conditions are

<sup>34</sup> «May lead to the partitioning of markets within the Union in any form; may affect the sound operation of the market organisation; may create distortions of competition which are not essential to achieving the objectives of the CAP pursued by the interbranch organisation activity; entail the fixing of prices or the fixing of quotas; may create discrimination or eliminate competition in respect of a substantial proportion of the products in question».

met<sup>35</sup>. Regarding the procedure, interbranch agreements remain **outside the ordinary law** of exemptions by category and the "*new approach*" introduced by Regulation No 1/2003, which removed ex ante notifications<sup>36</sup>. Based on exemptions rules and guidelines, undertakings must assess the validity of their agreements under Competition law. Competition authorities may examine an agreement or a practice at any time and if deemed necessary.

## 2.2. Critical analysis of the proposal

The changes stay minor despite the ambitious goals of the reform which aims to make of farmers the actors of the Regulation and to rebalance the sector to benefit farmers, by increasing their bargaining power against upstream and downstream strength. **Changes to the state of the law raise questions about their effectiveness with regard to the ambitions formulated** (report on the CAP towards 2020, explanatory memorandum and recitals 85, 86, 88, 89, 90, 91, 93, 120, 121, 122 and 123, COM (2011) 626 final /2). In general, the proposal contains no provision to clarify the difficult question of interpretation of the objectives of Article 39 of the Treaty. However, the interpretation of these objectives and the existence of a hierarchy within these objectives is one of the difficulties raised in the application of Competition law in the "*agricultural*" field<sup>37</sup>. The proposed framework does not contain any keys to a better understanding of the CAP objectives, always formulated in identical terms despite changes. Nevertheless, one could legitimately expect in a new legal framework (whose objective is to adapt the legal framework to the changes in the CAP and to the challenges facing European agriculture) at least some keys to understand the objectives of Article 39 of the Treaty. These keys of understanding should remind one that the CAP objectives have to be read with particular reference to the rural development policy, the agricultural product quality policy, and the objectives of sustainable development and of integration of EU environmental law. Such a provision would be likely to provide operators more legal security; it would also manifest a desire for consistency between the various agricultural policies that contribute to achieve the CAP objectives; finally, it would express a willingness to take into account the specificities of farming. More specifically, these provisions call for a number of comments.

### 2.2.1. Regarding competition rules

**The proposal COM (2011) 626 final/2, Article 143, confirms the primacy of Competition policy on Agricultural policy:** *«save as otherwise provided for in this Regulation, Articles 101 to 106 of the Treaty and implementation provisions thereof shall, subject to Articles 144 to 146 of this Regulation, apply to all agreements, decisions and practices referred to in Article 101(1) and Article 102 of the Treaty which relate to the production of, or trade in, agricultural products»*. Competition rules apply, save as otherwise provided in the Regulation (Articles 144 and 145). This formulation is used by the Community legislature since the Regulation No 26/62. Maintaining such a formulation reinforces the conception of the relationship between Competition policy and Agricultural policy as established by the legislations and decisions adopted by the Commission since 1962 (see Chapter 1). This text does not suggest a less rigorous and restrictive application of exceptions provided for in Articles 144 and 145. Furthermore, it should be emphasised that provisions 106 to 108, regarding recognition of farmers' and interbranch organisations, restrict the scope of exceptions *rationae personae*. Indeed, only organisations recognised

<sup>35</sup> Article 145§2 states that «within two months of receipt of all the details required the Commission, by means of implementing acts, has not found that the agreements, decisions or concerted practices are incompatible with Union rules».

<sup>36</sup> Reg. (EC) No 1/2003, OJ L 1, 4.1.2003.

<sup>37</sup> See chapter 1, p. and the cases mentioned.

by the European Union are subject to Articles 144 and 145. But for decades (since Regulation No 6/62), agricultural associationism benefited from a favourable regime, at least in the texts: vertical or horizontal agricultural associations fell within the third exception to Regulation No 1184/2006, Art.2, Regulation No 1184/2006, Art.2 as well as Regulation No 1234/2007, Art.176 covered the agreements, decisions and practices of farmers, farmers' associations, or associations of such associations belonging to a single Member State. Now, unrecognised associations operating in the agricultural sector are therefore covered by the ordinary Competition law (Article 101§3 of the Treaty). The text expresses some suspicion with regard to agricultural associationism. This limit, provided to the scope of exceptions, confirms the trend observed previously (see Chapter 1): erasing the specificity of agriculture in favour of the ordinary Competition law. Once again, European law differs from U.S. law; the Capper Volstead Act<sup>38</sup> provides that any association of producers may benefit from preferential treatment, i.e. being outside the scope of antitrust law relating to agreements. The only requirement is to act in the interests of their members.

**Regarding the exceptions for the CAP objectives and farmers and their associations (Article 144)**, the text includes previous texts but introduces a new condition which limits the scope of the exception in §1, second sentence (« agreements, decisions and practices of farmers, farmers' associations, or associations of such associations, or producer organisations recognised under Article 106 of this Regulation, or associations of producer organisations recognised under Article 107 of this Regulation »). At first sight, agreements benefit from a principle of favouring because cases of exclusion of competition are rare; in fact, the organisations should be in a situation of monopoly. Indeed, the elimination of all competition is covered here, and not only a restriction or a distortion of it. The requirement of Article 144 is less strict than that of Article 101§1 of the Treaty<sup>39</sup>. One could deduce that the covered agreements have a very favourable regime of exception. Nevertheless, **a contradiction should be noted in the second line of Article 144 §1. The reference to Article 106 restricts, or even contradicts, the scope of this exception in favour of producer associations.** Indeed, Article 106 d) requires that producer organisations «*do not hold a dominant position on a given market unless this is necessary in pursuance of the objectives of Article 39 of the Treaty*». The text introduces a per se prohibition of the dominant position that does not exist in EU Competition law: Article 102 prohibits only the abuse of dominance and not the dominance itself. The prohibition of a dominant position for producer organisations is not justified in law. Competition law only sanctions the abuse of dominance. Consistently, the European Court of Justice considered that Article 102 of the Treaty applies only if three cumulative conditions are met: 1) an effect on trade between Member States, 2) the existence of a dominant position and 3) an abuse of this position (see *Case 30/87 ECJ, 4 may 1988, Corinne Bodson v SA Pompes funèbres des régions libérées*, p.22, 26, 30). Therefore, Competition law would be stricter for the agricultural sector than for the rest of the economy. The prohibition of dominance is also unnecessary: the abuses of producer organisations should in any event be sanctioned on the basis of Article 102. Such a prohibition is not only contrary to Competition law but also contrary to the CAP objectives: boosting the impact of producer organisations and their associations, concentrating supply, creating a counterbalancing power. Thus, the prohibition of dominance is not clear, while

<sup>38</sup> This text is a federal law of 1922, still in force and is the equivalent of Regulation No 26/62. It is considered as the Agriculture's Magna Carta. See Frederick, antitrust Status of Farmer Cooperatives: the story of Capper Volstead Act, USDA Cooperative information report, n°59; Jannarelli (2009), cited.

<sup>39</sup> «*The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market...* ».

other actors in the chain, like manufacturers and distributors, are concentrated and often in a dominant position on the market. Given the imbalance between producers on one side and the rest of the food chain, both upstream and downstream, on the other side, the concentration of supply is one means to achieve the CAP objectives. It should be underlined that the text (106d) provides in fine that « *unless this is necessary in pursuance of the objectives of Article 39 of the Treaty* ». In theory, organisations could show that their agreements are necessary in pursuance of the objectives of Article 39. But they bear the **burden of proof**. Under Article 144, it should be necessary to prove that all the objectives of Article 39 are pursued and that the dominant position is necessary to achieve those objectives. However, as it was noted previously, this evidence is difficult to establish (see Chapter 1).

It seems paradoxical to prohibit per se the dominant position of producer organisations while, at the same time, the structural concentration (merger of cooperatives) is promoted. **The prohibition of dominant position partly offsets the provisions favourable to producers' associationism.** Article 153§3, regarding State aids, sets out that « *Member States may make the granting of national payments conditional on farmers being members of a producer organisation recognised under Article 106* ». This text promotes the horizontal grouping of producers since it allows conditioning the state aid to membership of an organisation recognised under Article 106 of the proposal. But the reference to Article 106, i.e. the prohibition of dominance, contradicts this favour. In fact, if the prohibition of dominance was maintained, it would have the paradoxical effect to limit the grouping. A producer organisation may refuse membership of a producer to meet the requirements of Article 106. In other words, there is a risk of discrimination between producers in obtaining state aid. Producers, who cannot join an organisation because of the prohibition in Article 106, would be then excluded.

For all these reasons, it seems appropriate to **delete point d) of Article 106**. The removal of point d) of Article 106 would abolish a double contradiction: firstly, the contradiction between European Competition law (Article 102 of the Treaty) and Competition law applicable to producer organisations; secondly, the contradiction between the principle of favouring of Article 144§1 (second sentence) and Article 153§3, and Article 106. This would introduce greater consistency in the proposal. Once again, North American antitrust law is more favourable since agricultural associationism does not prohibit dominant position of producer organisations.

**Regarding «the agreements and concerted practices of recognised interbranch organisations»** (Article 145): Article 101(1) of the Treaty shall not apply to the agreements, decisions and concerted practices of interbranch organisations recognised under Article 108 and for the olive oil and table olive and tobacco sectors. Interbranch organisations (vertical) set out in Article 108 may qualify for the exception. The agreements that do not exercise any productive activities but only normative activities within the meaning of Article 108§2 are covered (co-ordinating production, drawing up standard forms of contract, exploiting to a fuller extent the potential of the products; improving knowledge and the transparency of production ...). Only the agreements that are likely to affect competition are excluded from the benefit of the exception (145§4); infringements of ordinary law to Article 101 of the Treaty are covered. The interbranch agreements (such as defined in Article 108) are valid as they do not affect competition (145§4)<sup>40</sup>. Indeed, the texts (Articles 108 and 145) do not refer to the dominant position.

<sup>40</sup> «(a) may lead to the partitioning of markets within the Union in any form; (b) may affect the sound operation of the market organisation; (c) may create distortions of competition which are not essential to achieving the objectives of the CAP pursued by the interbranch organisation activity; (d) entail the fixing of prices or the fixing of quotas; (e) may create discrimination or eliminate competition in respect of a substantial proportion of the products in question.»

But the organisations must be dominant to be considered as representative. The conditions for representativeness, laid down in Article 110, assume that interbranch organisations are in a dominant position; the filter of representativeness under Article 110 then forbids any prohibition of dominance. In fact, Article 110§3 states that «an organisation or association shall be deemed representative where, in the economic area or areas concerned of a Member State it accounts for producer organisations in the fruit and vegetables sector, at least 60%, or in other cases, at least two thirds, and it accounts for, in the case of producer organisations, more than 50% of the producers concerned».

Consequently, interbranch agreements benefit from a greater favour than horizontal agreements of producer organisations. There is then a contradiction between Article 144 and Article 145. Indeed, it is mainly the producers that are in a weak position in the food chain. The offer is atomistic and needs to be concentrated to counterbalance the economic power of the chain, both upstream and downstream.

In the texts, the «*special approach*» regarding farmers' or producers organisations mentioned in recitals 122<sup>41</sup> and 123<sup>42</sup> is only a derogation from the undertakings prohibition.

### 2.2.2. Regarding the prohibition of price fixing

For horizontal agreements as well as for vertical agreements, the proposal maintains the prohibition on price-fixing clauses (Articles 144§1 and 145§4 d). Price agreements are prohibited by ordinary antitrust law as they have as their object<sup>43</sup> the restriction of competition. Price-fixing clauses are in the list of *black clauses*, which bring the entire agreement outside the scope of the block exemption<sup>44</sup>. It is the same as regards agricultural exceptions since Regulation No 26/62 (prohibition is also included in Regulations No 1184/2006 and No 1234/2007). The ban on agricultural associationism to adopt decisions on prices was then consistent with the CAP. Indeed, the intervention on prices and the determination of administered prices were some of the main instruments of the CAP. Prohibition of price-fixing clauses had for legitimate objectives to eliminate any risk of disruption of the Community system of intervention price. But the keeping of the prohibition is more questionable today. Agricultural policy has gradually left the field of administered prices and intervention process gradually became "safety nets"<sup>45</sup>. Price formation is expected to depend on «*market forces*». It seems now not justified to ban, ex ante, agreements on prices. This ignores (as mentioned above, Chapter 1) the imbalance that characterise the food chain, like the weak bargaining power of farmers and their low incomes facing food and retail industries. Allowing organisations to spread information on prices, to define price levels and modes of pricing or even minimum prices would help to compensate for information asymmetry, to strengthen the bargaining power and to fight

<sup>41</sup> Recital 122: «A special approach should be allowed in the case of farmers' or producer organisations or their associations the objective of which is the joint production or marketing of agricultural products or the use of joint facilities, unless such joint action excludes competition or jeopardises the attainment of the objectives of Article 39 of the Treaty».

<sup>42</sup> Recital 123: «A special approach should be allowed as regards certain activities of interbranch organisations on the condition that they do not lead to the partitioning of markets, affect the sound operation of the CMO, distort or eliminate competition, entail the fixing of prices, or create discrimination».

<sup>43</sup> ECJ 16 December 1975, Case 40/73, *Cooperative Verneigging Suiker Unie*, Rec. CJCE 1663.

<sup>44</sup> See for example Reg. 330/2010, 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices.

<sup>45</sup> The CAP budget in 2010 (just over €56 millions) represented 45% of the total EU budget (more than €122 millions). However, only 7% of the CAP budget was dedicated to market interventions: 69% of these 7% were devoted to direct income support, 23,5% to rural development and 0,3% to other interventions, see *Rapport d'information pour le Sénat n° 102 (2010-2011) de MM. Jean BIZET, Jean-Paul EMORINE, Mmes Bernadette BOURZAI et Odette HERVIAUX, fait au nom de la commission des affaires européennes et de la commission de l'économie, du développement durable et de l'aménagement du territoire par le groupe de travail sur la réforme de la politique agricole commune*, Sénateurs, <http://www.senat.fr/rap/r10-102/r10-1020.html>.

against the decline of farmers' incomes. In a recent case, «*Endives*»<sup>46</sup>, the French competition authority has pointed out that the price-fixing agreement had a very limited impact on the market owing to the bargaining power of the retail grocery sector.

As shown by some studies<sup>47</sup>, strengthening the bargaining power of a producer does not necessarily lead to higher prices. It could lead to reduce the **profit margins** of other operators in the chain without negatively impacting the **final consumer**. The low price paid to producers does not guarantee a low price for the final consumer. It results mostly in increased profit margins for the other operators like manufacturers and retailers.

Price fixing has been deemed as a solution (among other ones, see below) in the crisis of the milk sector. The Commission has put this forward in the proposals COM (2010)728 final and in the proposal studied here (see also below, contractual relations). It provides contracts which would include the key aspects of price. Furthermore, to rebalance bargaining power, it is proposed to producer organisations to negotiate contract terms including price (Art 105 and Recital 91<sup>48</sup>). But in the recent Regulation (EU) No 261/2012 of the European Parliament and of the Council of 14 March 2012 amending Council Regulation (EC) No 1234/2007 as regards contractual relations in the milk and milk products sector, price fixing is still strictly prohibited (Article 177b)<sup>49</sup>.

**In the US system, price fixing is not prohibited *ex ante***; the benefit from the exception can be removed *ex post* by the Secretary of Agriculture, if he has some reason to believe that the price of any agricultural product is unduly enhanced<sup>50</sup>. This special regime is aimed to build a counterbalancing power in front of the other economics partners, industrials and distributors.

**In conclusion, keeping the prohibition is questionable in the current context. It is the expression of the primacy of ordinary Competition law, but also of a competition model**<sup>51</sup>. In this model, the price does not include externalities (positive or negative). It defines the consumer welfare primarily as the need to obtain low prices<sup>52</sup>. But price agreements can help to integrate externalities and meet consumer expectations: fair trade shows that price agreements can integrate externalities (like equitable remuneration of producers, improvement of the production system, and respect for economic and social rights...) and meet societal expectations of consumers<sup>53</sup>.

Allowing price-fixing clauses emerged as a means to rebalance the food chain and to achieve the CAP objectives, stated in Article 39 of the Treaty (including quality policy and

<sup>46</sup> Autorité de la concurrence, *Case 12-D-08, 6 March 2012, the chicory production and marketing sector*. The Autorité de la concurrence puts a stop to a price-fixing cartel between chicory growers and several of their professional bodies that have maintained minimum prices by various means for fourteen years. But it imposes moderate fines **to take into consideration the limited impact this price-fixing has had owing to the bargaining power of the retail grocery sector**.

<sup>47</sup> See the Report of the American antitrust association, cited.

<sup>48</sup> Recital 91: «*In order to ensure the rational development of production and thus a fair standard of living for dairy farmers, their bargaining power vis-à-vis processors should be strengthened which should result in a fairer distribution of value-added along the supply chain. Therefore, in order to attain these CAP objectives, a provision should be adopted pursuant to Articles 42 and 43(2) of the Treaty to allow producer organisations constituted by dairy farmers or their associations to negotiate contract terms, including price, for some or all of its members' production with a dairy*».

<sup>49</sup> Art. 177§4: «*Agreements, decisions and concerted practices shall in any case be declared incompatible with Union rules if they: (d) entail the fixing of prices*».

<sup>50</sup> See on this point Jesse, Johnson, Marion, and Manchester, *Interpreting and Enforcing Section of the Capper-Volstead Act*, in *American Journal of Agriculture and Economy*, 1982, 431ss.

<sup>51</sup> See Jannarelli (2011), cited, 16ss and the references cited in the article.

<sup>52</sup> The weak bargaining power can be considered as a negative externality; improvement of production conditions or environmental and societal quality can be regarded as positive externalities.

<sup>53</sup> See Del Cont C., *Commerce équitable et développement durable*, *Rivista di diritto alimentare*, 2010/3. See the french competition authority, *Opinion 06-A-07 dated 22 March 2006 relating to the examination, in terms of competition law, of the operating conditions of the fair trade sector in France*, spec. p.58, 92, 95, 97.



rural policy ...) and developed by the CMO. At the horizontal level, allowing price-fixing clauses strengthens the bargaining power of producers without structural concentration i.e. without reducing the number of operators which is coherent with the objectives of the rural development policy. Concerning interbranch vertical agreements, it would allow greater efficiency in the sector. Finally, the removal of the ex-ante prohibition does not preclude ex-post control of price agreements and of their compliance with the CAP objectives. In addition, interbranch agreements are subject to ex-ante control of the Commission. The agreements have to be notified and they may not be put into effect before the opinion of the Commission (Article 145§4).

### 2.2.3. Regarding contractual relations in the milk and milk products sector

**Regarding questions about the effectiveness of the device.** The proposed system, now stated by Regulation (EU) No 261/2012 of the European Parliament and of the Council of 14 March 2012 amending Council Regulation (EC) No 1234/2007 is the following: if a Member State exercises the option of the requirement of a written contract in the milk and milk products sector, some basic conditions<sup>54</sup> for the use of such contracts should be laid down regarding price payable, volume and duration of the contract<sup>55</sup>. **The price must be specified in the contract;** this indication may take two forms: the price could be static and set out in the contract or vary only on factors which are set out in the contract too. In other words, the price must be fixed or determinable. If the price is only determinable, the proposed Regulation is not clear; the price may vary on factors like the development of the market situation based on market indicators, the volume delivered and the quality or composition of the raw milk delivered, but it is not indicated that these elements should not depend on the will of one of the contractors. The notion of «*market indicators*» depends on particular realities and various sources... But, we must say that the new Article 185f 2ci) is clearer stating that the “price payable for the delivery, which shall (...) be calculated by combining various factors set out in the contract, which may include market indicators reflecting changes in market conditions, the volume delivered and the quality or composition of the raw milk delivered The volume must also be specified in the contract so as not to allow one of the contracting parties to vary its commitment unilaterally. But once again, the conditions for changing the volumes are not considered. Moreover, the good to be delivered is characterised only by its volume as the quality is not mentioned (except as an element of price variation). If, in the Proposal, the «*minimum standards*» seems relatively light and imprecise, the new Article 185f of Council Regulation (EC) No 1234/2007 amended by Regulation No 261/2012 specifies three new requirements that may be included in the proposal COM (2011) 626 final/ 2: iv) details regarding payment periods and procedures; v) arrangements for collecting or delivering raw milk, and vi) rules applicable in the event of *force majeure*. Thus, this reform provides a better legal framework for written contract.

<sup>54</sup> Recital (90) «*However, in the milk and milk products sector, to ensure appropriate minimum standards for such contracts and good functioning of the internal market and the common market organisation, some basic conditions for the use of such contracts should be laid down at the Union level. Since some dairy co-operatives may have rules with similar effect in their statutes, in the interests of simplicity they should be exempted from the requirement for a contract. In order to ensure that any such system is effective it should apply equally where intermediate parties collect milk from farmers to deliver to processors*»; see also Recital 10 of Regulation (EU) No 261/2012.

<sup>55</sup> Article 104.2.: «*The contract shall: (c) include, in particular, the following elements: (i) the price payable for the delivery, which shall: – be static and be set out in the contract, and/or – vary only on factors which are set out in the contract, in particular the development of the market situation based on market indicators, the volume delivered and the quality or composition of the raw milk delivered, (ii) the volume which may and/or shall be delivered and the timing of deliveries, and (iii) the duration of the contract, which may include an indefinite duration with termination clauses*» see also Article 185f 2) of Regulation No 1234/2007 as amended by Regulation (EU) No 261/2012.

**Beyond these indications of the Community legislature, the principle stays the freedom of contract negotiation**<sup>56</sup>. One could even say that the formulation is as likely to cancel the condition of minimum requirements. Indeed, *«all elements of contracts for the delivery of raw milk concluded by farmers, collectors or processors of raw milk, including the elements referred to in paragraph 2(c), shall be freely negotiated between the parties»*. The wording is identical in the new version of Article 185f 4) of Regulation No 1234/2007. **The proposed system, already stated by Regulation (EU) No 261/2012, is not particularly innovative.** It is similar to the general Sales law, more or less present at least in the countries of Latin culture. There is not really a will to protect the agricultural producer (supposed to be the weakest part), like was done with the consumer (in Consumer law) by imposing strict information on the main elements of the contract, in order to impose to the agrifood industry (supposed to be the strongest part) the responsibility for providing the information, on pain of sanctions. This system, already existing in French law (*"contrats d'intégration"*) for example, is relatively efficient when sanctions are persuasive or when the risk to see its liability be challenged is high. In Regulation No 2011/626, there is no such thing. Therefore, one may ask what the effectiveness of the device is. It only emphasises the importance of three of the characteristic factors of a sale of milk and allows Member States to provide, or not, more details on this matter.

Another question can be added, concerning the *«philosophy of the written contract»*, held by the Commission. As seen previously, the Community requirements do not automatically guarantee better information for the contracting parties. It does not say either that the written contract provides a *"natural"* rebalancing of the contract. Firstly, everything will depend on the law of each Member State (eg prohibition of one-sided clauses, fixed or determinable price, or rescission for substantive inequality of bargain...). Secondly, the writing as such does not affect the application of these rules. **It should be emphasised that the contract, even if framed by rules to avoid abuses of the contracting parties, is the result of the economic balance of powers between partners.** The recent example of contracts for the delivery of milk in France, following the *«writing requirement»* under French Law 2010/874<sup>57</sup>, is particularly relevant: the contracting industrial retains control over the volume, the quality, and the inputs and outputs of producers (exclusivity/captivity), and even on price calculation which remains relatively opaque. This remark applies to individual negotiations and to standard contracts discussed in the interbranch organisations. In other words, the contract will be balanced only if the relationships between the contracting parties are fair. Therefore, the balance depends more on the structuring of producers, vis-à-vis its partners, than on the fact that the contract is written or not.

The interest of the writing would then lie in the facilitation of evidence, if it presents neither an interest for information nor for the rebalancing of an unfair economic situation. This argument could be accepted; even though the accounting data, concerning prices and volumes, could facilitate the perception of the reality of the contractual relationship.

A final comment deserves to be raised. European law contains an exception for co-operatives: *«By way of derogation from paragraph 1, a contract shall not be required where raw milk is delivered by a farmer to a processor of raw milk where the processor is a co-operative of which the farmer is a member if its statutes contain provisions having*

<sup>56</sup> Article 104.4.: *«All elements of contracts for the delivery of raw milk concluded by farmers, collectors or processors of raw milk, including those elements referred to in paragraph 2(c), shall be freely negotiated between the parties»*.

<sup>57</sup> Art. L. 631-24, French rural code.

*similar effects as those set out in points (a), (b) and (c) of paragraph 2» (Article 104.3)<sup>58</sup>. The general and not so operational nature (from a legal point of view) of these «similar effects», that would need to be defined and controlled, shall be underlined. **As often, the European legislature assumes that the cooperative carries a different operating approach. In law, this presumption can be verified; but, in practice, it is not certain that this is always the case:** Can producers, members of a cooperative, be in the same economic position as those who have contracted with a non-cooperative enterprise? What is the part of real involvement of a producer and its weight in large cooperatives? On this sore point, it might seem interesting to look at the substance more than at the form. So why not require formalising the contract in writing like for the other actors?*

### 2.2.3.1. Finally, concerning contracts

**Regarding the obligation of a written contract**, from a general point of view, it would be appropriate for the Parliament to think about the interest of a written contract in this area and about the objectives. If this is to better inform producers on their commitments, the «minimum standards» seem inadequate. If this is to «rebalance» the contractual relationship, the provisions contained in Regulation No 2011/626 are unnecessary. If this is to bring evidence in case of conflict, the current scope of the device seems to be very limited.

Another general question is noticeable: why limit the scope to the milk sector while the contractual issue arises in all agricultural sectors? The structuring of supply and demand may vary, particularly given the degree of concentration of operators, but the interest of the written contract as a source of information and understanding of the commitments of each parties, is valid for all. Should we not then implement the more horizontal view of agricultural products as reflected in recital 90? This assumes, of course, to answer previously to the first question.

From a particular point of view, even if Regulation (EU) No 261/2012 has completed the legal framework, the provisions relating to prices and volumes remain not specific enough to really provide a framework to the Member States and to the drafters of contracts. It must at least be specific that, in any case, the basic elements of the contract must not be left to the will of the parties. Furthermore, the definition of the «good» to be delivered should be more detailed and should include not only a reference to the volumes but also to the product quality.

The objective is to achieve substantive information by writing, to protect agricultural producers due to their weak economic position (e.g. atomistic offer). Therefore, a more ambitious proposal like the French "*contrats d'intégration*" (with compulsory elements in the contract e.g. price, good, duration...) should be considered thought as well as the sanctions in the absence of information. In this case, special care must be taken of the adverse effects of contractual information: "*it is not because I am better informed that I have to lose my options*". This happens sometimes in the field of Consumer law when the seller may assert against the consumer that he was informed, in order to prevent any action against him or to limit its scope (e.g. food labelling).

Finally, some remarks concerning the **exception of cooperatives**. In our view, the form should not hide the substance. Therefore, either there are ways to check the cooperatives' rules of procedures and statutes, according that the «similar effects» covered by the text are understood, or the central objective of information and clarification by writing is a

<sup>58</sup> See also recital (90): « ... *Since some dairy co-operatives may have rules with similar effect in their statutes, in the interests of simplicity they should be exempted from the requirement for a contract...* »

priority, and cooperatives are subject to the same treatment as other operators. Between the two systems, there are surely some modulations to find (eg thresholds...) which will probably have adverse effects (eg threshold effects...).

#### **2.2.4. Regarding the examination procedure of agreements and the role of the Commission**

The proposal confirms the central role of the Commission. The proposed regulatory framework, applying to all sectors, establishes a common set of general rules. Consequently, later texts of application will determine the rules specific to each sector on the basis of Articles 290 and 43 of the Treaty. In this configuration, the role of the legislature (Article 42 of the Treaty) is limited to the expression of these general rules.

**Regarding delegated powers and other implementing powers (Articles 114 to 116):** Article 114 states that «*the Commission shall be empowered to adopt delegated acts in accordance with Article 160 regarding producer organisations, associations of producer organisations, interbranch organisations and operator organisations in particular on the specific aims which may, shall or shall not be pursued by such organisations and associations, including derogations from those laid down in Articles 106 to 109, the rules of association, the recognition, structure, legal personality, membership, size, accountability and activities of such organisations and associations, the requirement referred to in point (d) of Article 106, (...) the extension of certain rules of the organisations provided for in Article 110 to non members and the compulsory payment of subscriptions by non-members referred to in Article 111*», and the **recognition** of such organisations. In other words, the proposal gives to the Commission some definitions of key notions concerning rules on sector organisation and application of Competition law. It is therefore likely that the Commission and the European Court of Justice continue to interpret and apply the exceptions as they have done so far. **There is no legal or political reason** for the "*philosophy*" of competition to change, if legal rules are not modified.

**Concerning the examination procedure of agreements (Articles 144 and 145):** the proposal does not change the previous situation. Regarding the exceptions for the CAP objectives and farmers and their associations, «*the Commission shall have sole power, subject to review by the ECJ, to determine, by adopting, by means of implementing acts, a Decision which shall be published, which agreements, decisions and practices fulfil the conditions specified in paragraph 1*». The control is always done *ex post*.

**Agreements and concerted practices of recognised interbranch organisations** are controlled *ex ante*; Article 145§3 states (as in the former CMO Regulation) that the agreements, decisions and concerted practices have been notified to the Commission and may not be put into effect before the lapse of the period referred to in paragraph 2(b). The notification shows the suspicion of the Commission towards interbranch agreements and the willingness to maintain its restrictive interpretation of exceptions. Prior notification of interbranch agreements remains mandatory contrary to ordinary Competition law and to the «*new approach*» of **Regulation No 1/2003**.

Since 2003, the **notification system** is replaced by the legal exception. Therefore, undertakings must assess themselves the validity of their agreements. But these agreements may however be controlled *ex post* by the Commission. This self-assessment can be a problem in terms of legal certainty because the economic operators have to assess their own agreements. One may question the relevance of maintaining the prior notification of Article 145. The self-assessment does not guarantee legal certainty for operators. Moreover, it assumes that the sectors have the legal capacity (internal or outsourced) to conduct this assessment. Some sectors are powerful enough to do this

work; in contrast, the weakest or less structured sectors will not have the capacity to carry out this evaluation. It should be noted also that when organisations seek the advice of the national competition administrations, the latest are very cautious concerning the application of the exceptions<sup>59</sup>. National authorities adopt positions consistent with those of the Community authorities. It should be noted that Regulation No 1/2003 aims to ensure that the European competition rules will be applied effectively and uniformly in the Community (Recital 1). For this purpose, the Regulation guarantees homogeneous conditions of competition. The application of Articles 101 and 102 of the Treaty is decentralised to national courts. But at the same time, the Regulation affirms the primacy of Community law (Article 16): national authorities cannot take any decision contrary to a decision adopted by the Commission<sup>60</sup>. In addition, the Commission and Member States now form a network of public authorities applying the European competition law in close cooperation: this is the European Competition Network (Recital 15 and Article 15, Regulation No 1/2003). There is little risk to see divergent interpretations between national authorities and the Commission. The Commission may formulate observations before the national authorities (Article 11) and national authorities are also able to do it before the Commission. Regulation No 1/2003 modified and strengthened the role of the Commission. Through guidelines and guidance documents, the Commission has developed typologies of clauses and typologies of agreements. They constitute the **interpretive guides** of Competition law for courts and economic operators. The built model is very much influenced by the economic analysis of Competition law (Law and Economics). The advent of the single internal market has marked both the primacy of the European antitrust discipline on national ones, and the tendential judicialisation of the EU antitrust governance<sup>61</sup>.

**The lack of specific procedure in the event of a crisis:** no procedure is envisaged in case of a crisis. This suggests that the ordinary procedure (Articles 144 and 145) will apply. But the two-month period provided for the notification does not permit any fast and flexible reactions. Recent event such as the *E-coli* crisis have shown the need for very rapid answers. The negative effects of the crisis spread quickly to all operators in the sector. A quicker procedure should be implemented in order to allow the putting into effect certain agreements aimed at solving the crisis or negative effects of the crisis on a sector. This **emergency procedure** may take the form of a notification with a time of response from the Commission of up to 10 days, and at least within a short period. Another option is to remove any notification in case of crisis. The latter solution has the advantage of being flexible and swift. It also strengthens the role played by the interbranch organisations. It will be coherent with the objectives of Recital 85 and with the « special approach » mentioned in Recital 123 as regards certain activities of interbranch organisations.

The absence of a specific procedure for extending agreements in case of crisis within Article 111 is also regrettable. The introduction of such a provision could be useful.

<sup>59</sup> See for example the french milk interbranch agreement, Perron D., "La production laitière et les ententes", Droit rural N° 370, Février 2009, étude 2.

<sup>60</sup> « 1. When national courts rule on agreements, decisions or practices under Article 81 or Article 82 of the Treaty which are already the subject of a Commission decision, they cannot take decisions running counter to the decision adopted by the Commission. They must also avoid giving decisions which would conflict with a decision contemplated by the Commission in proceedings it has initiated. To that effect, the national court may assess whether it is necessary to stay its proceedings. This obligation is without prejudice to the rights and obligations under Article 234 of the Treaty.  
2. When competition authorities of the Member States rule on agreements, decisions or practices under Article 81 or Article 82 of the Treaty which are already the subject of a Commission decision, they cannot take decisions which would run counter to the decision adopted by the Commission. »

<sup>61</sup> See Jannarelli (2011), cited, 16ss.



### 3. RECOMMENDATIONS

#### KEY FINDINGS

- **to introduce a presumption of compatibility of the horizontal agreements included in Article 144:** the agreements, decisions and practices of farmers, farmers' associations or producer organisations mentioned in this provision should be presumed to pursue the attainment of the objectives of Article 39 of the Treaty;
- **to develop at the same time an exemption regulation on vertical interbranch agreements:** practices and interbranch agreements (Article 145) will be presumed to be compatible with competition rules and necessary to achieve the CAP objectives;
- **to remove the prohibition of dominant position mentioned in Article 106d) as well as the price-fixing prohibition;**
- **to extend the provisions of the Regulation (EU) No 261/2012 (consistent with art.104 of the Proposal COM (2011) 626 final/2) concerning the obligation of written contract in milk sector to all sectors covered by Annex I.**

With regard to the analysis developed previously in Chapter 1 and in order to achieve the following objectives:

- rebalancing the food chain, and giving agriculture a regulatory framework taking into account the specificities of this sector;
- making farmers' and producers' organisations into real actors of the regulation;
- reading the objectives of Article 39 of the Treaty in the light of past changes and future CAP reforms;
- improving the coherence and the application of texts that apply to agriculture;

the report proposes the following recommendations.

#### 3.1. Concerning competition rules

The architecture of the texts relating to agricultural competition since Regulation No 26/62 is based on the following scheme: a principle of application of the competition rules and some exceptions. This model (also contained in Regulations No 1184/2006 and 1234/2007) is a reversal of the logic of Article 42 of the Treaty, which 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 European Parliament and the Council». It is not altered by the proposal COM (2011) 626 final / 2. In other words, to change the competition rules in order to restore the substance of Article 42 of the Treaty, the rules of the single CMO as well as Regulation No 184 shall be modified. One condition shall be fulfilled in order to introduce substantial changes in the proposal COM (2011) 626 final / 2: the Regulation No 1184/2006 must be made consistent with the rules of the single CMO. Under this condition, changes could be considered in order to apply Articles 101 to 106 of the Treaty on the production and trade in agricultural products only to the extent determined by Articles 144 to 146. Such a hypothesis is not possible in the only framework

of the single CMO. Therefore, the briefing note recommends changes reflecting the state of substantive law (principle-exception scheme) and the need to strengthen the effectiveness of exceptions.

### **3.1.1. Article 144 Exceptions for the objectives of the CAP and farmers and their associations**

#### **3.1.1.1. Article 144§1 first sentence**

No modification.

#### **3.1.1.2. Article 144§1 second sentence regarding the horizontal agreements between farmers' and producers' organisations**

*«In particular, Article 101(1) of the Treaty shall not apply to agreements, decisions and practices of farmers, farmers' associations, or associations of such associations, or producer organisations **recognised under Article 106 of this Regulation**, or associations of producer organisations recognised under Article 107 of this Regulation, which concern the production or sale of agricultural products or the use of joint facilities for the storage, treatment or processing of agricultural products, and under which **there is no obligation to charge identical prices**, unless competition is thereby excluded or the objectives of Article 39 of the Treaty are jeopardised.»*

In order to reinforce the bargaining power of farmers' organisations and in order to create a counterbalancing power, this provision should be modified. A presumption of compatibility should be introduced: the agreements, decisions and practices of farmers, farmers' associations, or associations of such associations, or producer organisations mentioned in this provision should be presumed to pursue the attainment of the objectives of Article 39 TFEU.

Furthermore, the **prohibition of dominant position** as well as the price fixing prohibition should be removed.

According to the arguments developed below with Article 106 (see point 3.2), the prohibition of dominant position (Article 106d) has to be removed.

Considering the provisions of Regulation No 6/62 remained unchanged in Regulation No 1184/2006, which provide that the producers' associations can implement agreements concerning the production, it seems logical and consistent to remove the prohibition on price fixing. Indeed, these agreements include assumptions of a planned reduction in production. Economically, the decline in production has an impact on prices, by reducing supply. It would therefore be paradoxical that horizontal agreements between producers are valid when they have an indirect effect on prices and illegal when they impact directly on prices. In other words, the only justification for prohibition was not to hinder EU policy on prices. The departure from the administered prices' policy should logically lead to the end of this prohibition.

**New wording Article 144§1 second sentence :** *«In particular, are presumed to pursue the achievement of the objectives Article 39 of the Treaty, the agreements, decisions and practices of farmers, farmers' associations, or associations of such associations, or producer organisations recognised under Article 106 of this Regulation, or associations of producer organisations recognised under Article 107 of this Regulation, which concern the production or sale of agricultural products or the use of joint facilities for the storage, treatment or processing of agricultural products, unless competition is thereby excluded or those objectives are jeopardised».*



### 3.1.1.3. Article 144§2:

This text considers two categories of agreements: the agreements or practices horizontal or vertical which are necessary for the attainment of the objectives set out in Article 39 of the Treaty (§1 first sentence), and the horizontal agreements or practices of farmers, farmers' associations, or associations of such associations (§2, second sentence).

The introduction of a presumption of compatibility of agreements covered in the second sentence of §1 also involves the modification of §2.

**New wording 144§2, first sentence:** *«After consulting the Member States and hearing the undertakings or associations of undertakings concerned and any other natural or legal person that it considers appropriate, the Commission shall have sole power, subject to review by the Court of Justice, to determine, by adopting, by means of implementing acts, a decision which shall be published, which agreements, decisions and practices fulfil the conditions specified in paragraph 1 first sentence».*

**New wording 144§2, second sentence:** *«For the agreements, decisions and practices referred to in paragraph 1 second sentence, the Commission shall undertake such determination either on its own initiative or at the request of a competent authority of a Member State or of an interested undertaking or association of undertakings».*

Given the presumption of validity of horizontal agreements which is included in Article 144, it does not seem necessary to introduce into the basic text a positive list of agreements or to develop an exemption regulation specific to these horizontal agreements. These agreements are presumed to comply with Competition law unless the Commission provides the proof that they exclude all competition (academic hypothesis) or jeopardise the objectives of Article 39 of the Treaty.

### 3.1.1.4. Conclusion Article 144

Article 144, as amended, strengthens the preferential treatment granted to producer organisations, i.e. to agriculture in the strict sense (understood as the production and trade of agricultural products), and which excludes vertical agreements incorporating industrial processors and retailers. A similar solution has always been accepted by the North American antitrust law. This position is consistent with competition rules relating to de minimis aid (Exemption Regulation (EC) No 857/2006) which relates only to the narrow definition of agriculture, i.e. activities of primary production of agricultural products. The activities relating to the processing or marketing of agricultural products, covered by the SME Regulation (Exemption Regulation No 800/2008) are excluded from the scope of the Regulation<sup>62</sup>.

## 3.1.2. Article 145: Agreements and concerted practices of recognised interbranch organisations.

### 3.1.2.1. Article 145§1:

Considering that the objectives detailed in Article 108§2c) (see below 3.2) should be extended to all sectors, therefore Article 145§1 should be modified.

**New wording 145§1:** *«Article 101(1) of the Treaty shall not apply to the agreements, decisions and concerted practices of interbranch organisations recognised under Article 108 of this Regulation with the object of carrying out the activities listed».*

<sup>62</sup> Commission Regulation (EC) No 800/2008 of 6 August 2008 declaring certain categories of aid compatible with the common market in application of Articles 87 and 88 of the Treaty Official Journal L 241, 9.8.2008, page 3, [http://ec.europa.eu/agriculture/stateaid/exemption/index\\_fr.htm](http://ec.europa.eu/agriculture/stateaid/exemption/index_fr.htm).

**3.1.2.2. Article 145§4:**

Considering the arguments developed before (Chapter 2, point 2.4 and below Article 144); considering that the proposal encourages statistical tools, and monitoring of markets (for example in the milk sector)<sup>63</sup>, which have an indirect effect on pricing; and considering, finally, that the risks of affecting competition are limited since the agreements are notified to the Commission prior to their entry into force, the *ex ante* prohibition of price-fixing should be eliminated in Article 145§4d.

**New wording 145§4:** *«Agreements, decisions and concerted practices shall in any case be declared incompatible with Union rules if they:*

- (a) may lead to the partitioning of markets within the Union in any form;*
- (b) may affect the sound operation of the market organisation;*
- (c) may create distortions of competition which are not essential to achieving the objectives of the CAP pursued by the interbranch organisation activity;*
- (d) entail the fixing of quotas;*
- (e) may create discrimination or eliminate competition in respect of a substantial proportion of the products in question.»*

**3.1.2.3. Article 145§2a) concerning prior notification of interbranch agreements:**

*«Paragraph 1 shall apply only provided that (a) the agreements, decisions and concerted practices have been notified to the Commission». Considering that vertical interbranch agreements include processors and industrials are based on a broad definition of agriculture; considering that all sectors are not able to perform a self-assessment of their agreements; and considering that economic operators have need for legal certainty, it seems preferable to maintain the procedure of prior notification of agreements.»*

It should be emphasised that maintaining the notification could be accompanied by **the parallel development of an exemption regulation on vertical interbranch agreements**. It could take the form of **a positive list of practices and interbranch agreements, presumed to be compatible with competition rules and necessary to achieve the CAP objectives**. Therefore, operators would have a self-assessment tool to consider *ex ante* the validity of their agreements, based on the model of block exemption regulations. Once the regulation was adopted, prior notification would then be removed like for all other economic activities, in accordance with Regulation (EC) No 1/2003. However, it is worth remembering here that removing the notification is not without problems of legal certainty. The question of whether such a deletion is appropriate should be assessed with interbranch organisations by taking into account their ability to self-assess. One may ask if such a regulation should fall into the category of exemption regulations of "ordinary law" covered by Article 103 § 1 and 2c)<sup>64</sup> TFEU? In this case, it would be the role of the Council to determine (through enabling regulations) the specific framework in which the Commission could adopt such an exemption regulation. The Council also has the power to adopt regulations even if this prerogative is rarely used. However, as regards the application of competition rules to the production and marketing of agricultural products, **an exemption regulation should fall within the jurisdiction of the Council and**

<sup>63</sup> See art. 104 and 105 of the proposal.

<sup>64</sup> «1. The appropriate regulations or directives to give effect to the principles set out in Articles 101 and 102 shall be laid down by the Council, on a proposal from the Commission and after consulting the European Parliament. 2. The regulations or directives referred to in paragraph 1 shall be designed in particular: (c) to define, if need be, in the various branches of the economy, the scope of the provisions of Articles 101 and 102».

**Parliament in accordance with Articles 42 and 43 of the Treaty**<sup>65</sup>. It is up to Parliament and the Council to determine, according to the procedure of Article 43§2, the extent to which competition rules apply to the production of and trade in agricultural products: «2. *The European Parliament and the Council, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, shall establish the common organisation of agricultural markets provided for in Article 40(1) and the other provisions necessary for the pursuit of the objectives of the CAP and the common fisheries policy*».

Such a regulation would reduce the primacy of competition policy on the CAP, implemented since 1962 in the texts and in the decisions from the Commission and the Court of Justice. Only legislative action can initiate and justify a modification of the application of the rules of competition to production and marketing of agricultural products as well as the interpretation of exceptions. This regulation could modify or eventually replace the Regulation No 1184/2006 and would restore the original meaning and the scope of Article 42 of the Treaty. «*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 European Parliament and the Council (...), account being taken of the objectives set out in Article 39*»; competition rules must be consistent with the objectives of Article 39. This regulation should also be the appropriate means to propose some «keys of understanding» of the objectives of Article 39 taking into account all the changes and evolutions in agriculture since 1962. The CAP objectives must be highlighted by the social and economic context and by all the legal rules applicable to agriculture. These objectives can be isolated from other policies that contribute to the CAP: rural development policy, quality policy, environmental policy and sustainable development strategy.

#### **3.1.2.4. Article 145§7:**

Considering that in case of a crisis, decisions and interbranch agreements must be implemented quickly, it should be necessary to add a paragraph to Article 145.

**New wording Article 145§7:** «*In situation of crisis, the agreements, decisions and concerted practices may be put into effect before the opinion of the Commission. If, following expiry of a period of ten days, the Commission finds that the conditions for applying paragraph 1 have not been met, it shall, by means of implementing acts, take a Decision declaring that Article 101(1) of the Treaty applies to the agreement, decision or concerted practice in question*».

## **3.2. Concerning farmers' and interbranch organisations**

### **3.2.1. Article 106 d):**

The farmers' organisations «*do not hold a dominant position on a given market unless this is necessary in pursuance of the objectives of Article 39 of the Treaty*».

Considering that the European competition law prohibits only the abuse of a dominant position; considering that this provision is in contradiction to the provisions of Article 110 and 111; considering that the producers are the weakest operators of the food chain and in order to ensure the concentrating of offer and to enforce producers' bargaining power, point c) of Article 106 should be removed. In consequence, the reference to this provision

<sup>65</sup> Concerning codecision in matters of agriculture until the Treaty of Lisbon and the competence of the Commission, see the fundamental essay of Adornato F., *Agricoltura, politiche agricole ed istituzioni comunitarie: un equilibrio mobile*, *Rivista di diritto agrario*, 2010/2, 261-284.

should also be eliminated. The Article 114b) regarding the delegated powers of the Commission should also be modified and the reference to dominant position eliminated.

### **3.2.2. New wording of Article 114b):**

*«the rules of association, the recognition, structure, legal personality, membership, size, accountability and activities of such organisations and associations, the effects deriving from recognition, the withdrawal of recognition, and mergers».*

### **3.2.3. Article 108 regarding interbranch organisations:**

#### **3.2.3.1. Article 108§1 c)i:**

In order to take into account the European and the international markets, remove «at regional or national level»:

**New wording proposed:** *«in the internal market and in the third countries».*

#### **3.2.3.2. Article 108§2:**

Considering that the objectives detailed (a, b, c) are restricted to olive oil and table olive and tobacco sectors; considering that these objectives should be extended to the other sectors because they are essential to each interbranch:

New wording of Article 108 removing §2 and including it into the point c) of Article 108:

*«concentrating and co-ordinating supply and marketing of the produce of the members; adapting production and processing jointly to the requirements of the market and improving the product; promoting the rationalisation and improvement of production and processing».*

## **3.3. Concerning contractual relations: new Article 100 bis**

Given the arguments previously developed (Chapter 2, points 2.2.3); given Recitals 90 and 91; considering that the contractual relation and the obligation to conclude written contracts are intended to ensure greater transparency between producers and their business partners and to rebalance the contractual relationship; given that it is necessary to strengthen the bargaining power of farmers, the provisions of Article 104 of the Proposal should **be extended to all sectors** covered by Annex I. Most of these provisions are reproduced in Article 185f of Regulation (EU) No 261/2012 of the European Parliament and of the Council of 14 March 2012 amending Council Regulation (EC) No 1234/2007 as regards contractual relations in the milk and milk products sector.

In order to ensure a fair standard of living for producers and a fairer distribution of value-added along the supply chain, and in order to attain these CAP objectives, a provision should be adopted pursuant to Articles 42 and 43(2) of the Treaty to allow producer organisations, constituted by farmers or their associations, to negotiate contract terms.

Such a provision could take place in a **new article 100 bis**, inserted in a new **Chapter 1bis**:*«Common rules applying on contractual relations»* of the Title II Rules Concerning Marketing and Producer Organisations.

### **Wording of the new Article 100 bis, Contract of supply of agricultural products:**

*«1. If a Member State decides that every delivery or supply of products, referred to in Annex I, by one or several farmers to a processor or a distributor must be covered by a written contract between the parties, such contract shall fulfil the conditions laid down in paragraph 2 and 3.*

*In the case described in the first subparagraph, the Member State concerned shall also decide that if the delivery (or the supply) is made through one or more intermediaries, each stage of the delivery (or the supply) must be covered by such a contract between the parties.*

*2. All elements of contracts for the delivery or supply shall be freely negotiated between the parties, subject to compliance with the conditions referred to in paragraph 3.*

*3. The contract shall*

*a) Be made in advance of the delivery of agricultural products,*

*b) Be made in writing, and*

*c) Include, in particular, the following elements:*

*i) The price payable for the delivery, which shall:*

*- be static and be set out in the contract, and/or*

*- vary only on factors which are set out in the contract, and non dependant on the willingness of the parties, in particular the development of the market situation based on market indicators, the volume delivered and the quality or composition of the products delivered,*

*ii) The volume which may and/or shall be delivered, which shall:*

*- include the timing of deliveries, and*

*- not depend on the later willingness of the parties;*

*iii) The quality of the products to be delivered which shall not be determined by the parties after the delivery, which shall not depend on the later willingness of the parties;*

*iiii) The duration of the contract, which may include an indefinite duration with termination clauses ;*

*iv) Details regarding payment periods and procedures;*

*v) Arrangements for delivering products, and;*

*vi) Rules applicable in event of force majeure.*

*4. If a Member State decides that every delivery of products referred to in Annex I milk must be covered by a written contract between the parties, such contract shall apply regardless of the legal form of the parties.*

*5. In order to guarantee a uniform application of this Article, the Commission may, by means of implementing acts, adopt necessary measures. Those implementing acts shall be adopted in accordance with the examination procedure referred to in Article 162(2). »*



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