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Jornada sobre Competencia en el Sector Agroalimentario

***Ensuring a well functioning food
supply chain in Europe: recent
Commission initiatives and the role
of Competition Authorities***

**Paolo Cesarini
European Commission**

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Overview

- Part I: Presentation of the Commission Communication on the food supply chain of October 2009
- Part II: Issues concerning the interplay of competition and regulation in the agriculture sector



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Part I: Presentation of the Commission Communication on the food supply chain of October 2009

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Institutional and economic context of the Food Communication

- Strong turbulences on commodity markets since 2007 and stickiness of consumer prices
- Market monitoring conducted since 2008 on the food supply chain:
 - Two Communications on food prices in May and December 2008
 - Monitoring by, and coordination within, the European Competition Network (ECN)
 - Communication on “*A better functioning food supply chain in Europe*” adopted on 28 October 2009
- Other parallel Commission initiatives regarding the food supply chain:
 - High-Level Group on the Competitiveness of the Agro-food industry
 - Retail market monitoring exercise



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Key challenges

- Differences in bargaining power between stakeholders along the chain
 - Diversity of markets and actors => Unfair trading practices vs. anti-competitive practices
- Lack of transparency on price formation along the chain and increased volatility of commodity products
- Fragmentation of the Internal Market and competitiveness deficit in the chain:
 - Strong price differences across Member States
 - Barriers to market integration (territorial supply constraints)



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Proposals to promote sustainable and market-based relationships between stakeholders

- Eliminate unfair contractual practices :
 - Launch of awareness campaigns, exchange of best practices on contractual arrangements
 - Promoting sets of standard contracts
 - Need for Community measures to address unfair contractual practices in the Internal Market ?

- Enhancing cooperation in the framework of the ECN:
 - Sustained exchange of information, swift identification of shared priorities, and efficient allocation of tasks within the Network
 - Where necessary, creation of Joint Working Teams on specific practices and markets (e.g. Joint Working Team on Milk)



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Proposals to increase transparency in the chain

- Further development of the existing European Food Prices Monitoring Tool
- Recommendation to Member States to develop food retail price comparison services
- Improve oversight of agricultural commodity derivatives markets



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Proposals to foster the competitiveness and integration of the chain

- Assess measures to address territorial supply constraints (i.e. Impact assessment by 2010)
- Facilitate the restructuring and consolidation of the agricultural sector (e.g. encourage the creation of voluntary agricultural producer organisations)



Staff Working Paper on competition in the food supply chain

- Exercise based on: (i) a stakeholders survey and (ii) a ECN activity report identifying the main and latest enforcement, advocacy and monitoring actions undertaken by National Competition Authorities (NCAs)
- Given the national or local dimension of food markets, NCAs play a key role in ensuring a level playing field in these markets
- Need to differentiate non-processed food supply chains (characterized by highly atomized suppliers vs. stronger buyers) and processed food supply chains (more concentrated supply side)



Staff Working Paper on competition in the food supply chain

- Price formation follows complex patterns:
 - Impact of exogenous factors
 - Impact of different regulatory frameworks at Member State level
 - Structural inefficiencies of the supply chain for non-processed food
 - Concentration and competition at the retail and industrial processing levels

- Possible anti-competitive conducts:
 - Cartels and price resale maintenance (hardcore restrictions)
 - Other commercial practices requiring a careful balancing of efficiency enhancing and anti-competitive effects (e.g. joint production and selling agreements, tying and bundling, joint purchasing agreements and use of private labels)



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Part II: Issues concerning the interplay of competition and regulation in the agriculture sector



Competition and regulation in agriculture

- The maintenance of effective competition on the market for agricultural products has been one of the objectives of the CAP in the past 50 years
- Articles 81 (prohibition of anti-competitive agreements between undertakings) and 82 (prohibition of abuses of dominant position) apply also to agricultural products
- Since 1962, the application of Article 81 is subject to a limited number of derogations, but such derogations would not allow classic hard core cartels such as price fixing and market partitioning.
- However, co-operation agreements between competitors may be allowed under general competition rules when they entail efficiencies



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Two sets of rules

- Particular competition rules applicable in the agricultural sector: Regulation 1234/2007 (Single CMO) and Regulation 1184/2006
- General competition rules: Arts. 81 and 82 EC



Arts. 175 and 176 Single CMO

Derogations from the application of Art. 81(1) EC

- Agreements which are an integral part of internal market organisations
- Agreements necessary for the attainment of the objectives of the CAP (Article 33 EC)
- Agreements between farmers, farmers' associations and associations of farmers' associations concerning the production or sale of agricultural products or the use of joint facilities for the storage, treatment or processing of agricultural products

Art. 82 EC remains fully applicable to the agricultural sector



Derogations under Art. 176 Single CMO

- The European Courts and the Commission prior practice have interpreted narrowly the derogations set forth under Art. 176 Single CMO
- 1st derogation. Agreements falling under national market organisations: Very limited importance to the extent that the majority of agricultural products are now covered by a single CMO



Derogations under Art. 176 Single CMO

- 2nd derogation. Agreements necessary for the attainment of the objectives of Art. 33 EC:
 - If an agreement is not expressly provided for by a common market organisation, it is not deemed to be “necessary” (EC Decision of 14.12.1998, *Sicasov*)
 - The agreement must be necessary for the attainment of all the objectives (CFI Joined Cases T-70/92 and T-71/92, *Florimex*)

- Objectives of Article 33 EC are:
 - increase agriculture productivity
 - ensure a fair standard of living for farmers
 - stabilise markets
 - assure availability of supplies
 - ensure reasonable prices for consumer



Derogations under Art. 176 Single CMO

- 3rd derogation. It requires 3 cumulative conditions:
 - (i) The agreement must be concluded between farmers, farmers' associations or associations of farmers' associations belonging to a single Member State: the agreement is excluded if other third operators or farmers' trade associations are involved, (EC Decision of 7.12.1984, *Milchförderungsfonds*; EC Decision of 26.11.1986, *Meldoc*) or if the restrictive contract terms are included in a contract with a 3rd party which becomes subject to the restriction (EC Decision of 26.07.1988, *Bloemenveilingen Aalsmeer*)
 - (ii) The agreement must refer to the joint production or marketing of agricultural products or the use of joint facilities for the storage, treatment or processing of agricultural products, BUT price-fixing agreements are excluded (ECJ Case C-399/93, *Oude Luttikhuis*; CFI Joined Cases T-217/03 and T-245/03, *French beef*)
 - (iii) The agreement may not eliminate competition or jeopardize the objectives of the CAP



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Key issues when analysing the interface between agricultural and competition rules

- Role of producer organisations (POs) and other forms of farmers' associations which may increase the bargaining power of farmers, including cooperatives
- Formation and operation of interbranch organisations (IPOs)
- Adoption of standardised contractual frameworks to regulate the commercial relationships between farmers and other operators in the chain
- Increase of price transparency



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Role of POs and other forms of farmers' associations

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General competition rules applicable to POs in the agricultural sector

- If the derogations under Art. 176 Single CMO are excluded, Art. 81 EC remains fully applicable
- POs or other forms of farmers' associations should then be analysed under the general competition rules on horizontal agreements between competitors (Horizontal Guidelines)
- Depending on the aims pursued and the level of integration of activities between farmers, two main categories of agreements are of relevance:
 - (i) joint production and selling agreements
 - (ii) pure commercialisation agreements



Joint production and selling agreements

- By means of a joint production agreement, two or more parties agree to cooperate in downstream processing and selling (e.g. cooperatives)
- The European case law has expressly recognised the pro-competitive effects of certain types of farmers' organisations involving joint production arrangements (i.e. ECJ Case C-399/93, *Oude Luttikhuis*; ECJ Joined Cases T-70/92 and T-71/92, *Florimex*; ECJ Case C-250/92, *DLG*)
- However, cooperatives can also give rise to potential restrictions of competition if they entail the creation or increase of market power (ECJ Case C-137/00, *Milk Marque*). General principles on the definition of the relevant product and geographic market apply (Commission Notice on the definition of relevant markets)



Joint production and selling agreements

- Market share thresholds should be taken into account when assessing the market power of a cooperative (e.g. <20%)
- The contractual ties imposed upon co-operative members, in particular with respect to their possibilities to withdraw from the organisation or their freedom to supply to 3rd parties should also be taken into account (ECJ Case C-399/93, *Oude Luttikhuis*)
- Setting of sales targets and price fixing to immediate customers may be considered as an “ancillary restraint” directly related and necessary to the establishment of a cooperative, and therefore allowed



Commercialisation agreements

- Commercialisation agreements cover cooperation agreements between competitors in the selling, distribution or promotion of their products
- A basic distinction must be made depending on whether the commercialisation agreements involve price fixing or not
- Commercialisation agreements not involving price fixing:
 - They are only subject to Article 81(1) EC if the parties have some degree of market power (e.g. above 15%)



Commercialisation agreements

- Commercialisation agreements involving price fixing:
 - They fall under Art. 81(1) EC irrespective of the market power of the parties

 - Cartels are always prohibited

 - However, price fixing may be exempted under Art. 81(3) if the cooperation involves a certain level of integration of marketing functions which generate substantial efficiencies and for which price fixing is indispensable (provided that the parties do not have market power which allows them to eliminate competition)

 - Examples: large clients reluctant to deal with a multitude of prices; creation of a common brand requiring that all aspects of marketing, including price, are standardised



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Formation and operation of IPOs

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The role of IPOs

- The recognised aims pursued by IPOs are:
 - Concentrating and coordinating supply and marketing of the produce of members
 - Adapting production and processing jointly to the requirements of the market and improving the product
 - Promoting rationalisation and improvement of production/ processing
 - Carrying out research into sustainable products/ market developments

- Unless they are entrusted with a specific role at Community level, IPOs can be recognised by Member States under national law if they respect EC law (e.g. such national IPOs exist in the milk sector)



Competition concerns raised by IPOs

- An agreement with a horizontal and vertical dimension bringing together operators at various steps of the supply chain, having an effect on Community trade and leading to price fixing, would be regarded as a hardcore restriction of competition
- The Courts have insisted that price fixing agreements would run against the very objectives of Art 33 EC
- Other issues raised by IPOs: temporary output restrictions, extension of IPO rules to non-members, joint decisions to establish the existence of a "serious disturbance of the market" and to take joint remedial actions (e.g. ECJ Case C-505/07, *Cecasa*)



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Potential adoption of standardised contractual frameworks

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Towards a standardised contractual framework?

- A view shared by NCAs is that contracts should remain voluntary and their terms freely agreed between parties
- NCAs would in principle be favourable to the adoption of voluntary codes of conduct/ good practice containing certain safeguarding provisions (core requirements of the contract such as duration, penalties for breach, etc)
- NCAs insist that this process should not lead to a standardisation of the contents of the contracts, which would run counter the principle of contractual freedom
- The current call for greater “contractualisation” should not be used as a tool to fix prices, in violation of competition rules



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Increased price transparency

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Is increased price transparency beneficial for farmers?

- A number of NCAs warn that greater price transparency in the milk sector may be problematic
- Increased knowledge of supply pricing may enable strong buyers to put pressure on farmers
- Reduced uncertainty for buyers about their competitors' strategies may lead to collusion in oligopolistic markets



Conclusion: the need for a modern agricultural sector

- The reform of the CAP has taken a market-oriented approach with the objective of helping farmers to better respond to market signals, whilst improving their incentives to develop more innovative business models
- Competition rules can assist this development by fostering rationalisation and structural modernisation of the agricultural supply chains
- This may go in pair with concentrating supply and allowing farmers to grasp the efficiencies of their cooperation, whilst ensuring that benefits are passed onto consumers



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¡Gracias por su atención!