6 March 2012: The endive production and marketing sector

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The Autorité de la concurrence puts a stop to a price-fixing cartel between endive growers and several of their professional bodies that have maintained minimum prices by various means for fourteen years.

It imposes moderate fines to take into consideration firstly the limited impact this price-fixing has had owing to the bargaining power of the retail grocery sector, and secondly the producers' limited funds.

> Version française

On an introductory note, the Autorité de la concurrence points out that competition law is flexible and allows a pragmatic approach to problems experienced by the farming sector. This is the approach adopted by the Autorité de la concurrence, which for instance has authorised all the groupings of cooperatives submitted to it since 2009 (37 to date).

Far from being a curb on their development, competition law can on the contrary support producers and help them boost their bargaining power when confronting the mass food retailers. It allows the use of helpful tools[1] (contractualization, trend indicators, futures markets, etc.), which give producers better insight and foresight in running their farms.

Although the courses of action available to producers are extensive, in particular under regulations implementing the Common Agricultural Policy but also under national law, the Autorité de la concurrence once again points out to them that certain practices, such as price-fixing, remain prohibited and are inadmissible.

Referred to by the minister for the economy, the Autorité de la concurrence has today issued a decision in which it establishes a series of illicit practices, organized by about ten producer organizations and seven representative organizations, which are part of a general plan to fix minimum selling prices for endives, and reminds them that the ban on anticompetitive practices also applies to the agricultural sector.

This wide-ranging cartel, which started in 1998, has for certain practices continued to this day. This cartel has affected all French endive production and all types of endives, and more specifically the Nord-Pas-de-Calais and Picardie regions, and to a lesser extent Brittany, where most of French endive production is concentrated.

An organized and elaborate system aimed solely at controlling the price of endives sold by the growers to wholesalers and retailers

On the grounds that endive prices were "too low", the endive growers and their representatives organized a "general plan" to manage the market and thereby place the setting of endive prices outside the scope of normal effective competition. Since 1998 at least, a series of agreements and practices have been implemented by market participants to jointly coordinate their pricing and sales policy and thereby control endive selling prices charged to wholesalers and retailers.

The aim of maintaining a minimum price was achieved through several types of practices:

- regular and constant circulation of minimum price instructions for each category of endives;
- guidelines on special offers;
- managing volumes of endives put on sale through compulsory denaturing operations (destruction of produce), which took place when the price of endives fell below a certain threshold, in order to maintain the artificial price of endives decided on in common;
- a system of exchanges of information on prices charged by producers, which has been diverted from its initial purpose in order to ensure the implementation

of the cartel agreement.

This concerted policy of controlling the endive market has eliminated price competition between producers.

A computerized information exchange tool was used as a means of price control to ensure the observance of cartel rules by producers

The computerized information exchange tool (Infoclar) centralized producers' selling prices in real time to check that they matched those decided on collectively. Since the data thus collected did not remain anonymous, recalcitrants were immediately identified if their prices strayed and could be the subject of punitive measures and reprisals provided for in such cases.

The parties to the cartel were aware of the unlawfulness of such practices

The services of the DGCCRF (General Directorate for Competition Policy, Consumer Affairs and Fraud Control) had on more than one occasion warned players in the endive sector that the agricultural sector was no exception to competition law.

In 2001, the DDCCRF departmental director for the Nord-Pas-de-Calais region drew the Infoclar initiators' attention to the legal risks they were running should the Infoclar system be used in practice as a price control mechanism or more generally as a way of maintaining a price-fixing cartel.

A 2006 e-mail from a representative of a farmer's union bears out the fact that the producers were aware of the unlawfulness of their practices. "After discreetly consulting the DGCCRF through the FNSEA, please ignore my previous message, the instructions are clear, as you can imagine: No paper trail on the part of anyone whomsoever, even with a price range (which necessarily includes a minimum price). Verbal communication between producers and shippers must therefore be organized."

A final element confirms that the producers knew they were engaging in banned practices: one of them was a "maverick", firmly and clearly opposing some of

these practices.

Serious practices, albeit having a limited impact on consumers

A price-fixing cartel between competitors is undeniably a serious matter. Nevertheless, the impact of the cartel on the price of endives paid by consumers was limited in the case in point insofar as the volume retailers, who are the main customers of endive growers, have so much buying power that they were able to force prices downwards for the duration of the practices. The price effect producers strived to achieve was thus in fact considerably limited.

Moderate sanctions proportionate to the circumstances of each producer and organization

In determining the amount of the fines, the Autorité de la concurrence considered the seriousness of the facts and made allowance for the limited harm caused to the economy. It then adapted them to the individual circumstances of each sanctioned producer and organization: it took into account the role of each player in the cartel, their ability to pay and any mitigating circumstances (such as "maverick" conduct) or aggravating circumstances (repeat offences).

Regarding the basic amount of fine for each producer, the Autorité de la concurrence took into consideration the very specific structure of the accounts of producers organizations'. Indeed, their incomes are dependent on government subsidies, demonstrating their economic vulnerability. The Autorité has thus considered that the value of their sales of endives did not really reflect their importance on the market and has taken this particular circumstance into account in determining the amount of fines. As a result of this approach, related to the specific circumstances of endive growers, the final amount of their fines is limited to **3.6 million euros**.

The Autorité has also taken into consideration the fact that some of the companies in question were in all essentials single-product companies, and that some of them had demonstrated the existence of financial difficulties that justified a reduction in their fine. In this respect, companies Soleil du Nord,

Prim'Santerre and Fraileg have been granted a reduction in their fines of 56%, 74% and 87% respectively. Nord Alliance, in official receivership, has not been fined.
The penalties:

Company or organization	**Fine**
Producers' organizations	
Cap'Endives	103 800 €
Fraileg	83 000 €
France endives	587 430 €
Marché de Phalempin	1 186 930 €
Nord Alliance	-
Primacoop	891 900 €
Prim'Santerre	127 000 €
SAS Groupe Perle du Nord	5 730 €
Soleil du Nord	72 000 €
Sipema	251 700 €
Valois-Fruits	341 100 €
Total POs	**3 650 590 €**
Trade associations	
APVE	5 000 €
APEF	50 000 €
CELFNORD	100 000 €
CERAFEL	75 000 €
FCE	5 000 €
FNPE	80 000 €
SNE	5 000 €
Total associations and unions	**320 000 €**

[1]*See inter alia opinions 08-A-07 on the organization of the fruit and vegetables sector, 09-A-48 on the functioning of the dairy sector and 10-A-28, 11-A-03, 11-A-12 , 11-A-14 on contractualization in various farming sectors.*

> Full text of decision 12-D-08 of 6 March 2012 on practices in the endive growing and marketing sector (in French)

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> See decision of the Paris Court of Appeal (15th May 2014)

> See Judgement of the Court of Cassation (Supreme Court of appeals) - 8th December 2015

> See Judgement of the Court of Justice of the European Union (CJEU) - 14th November 2017

> See Judgement of the Court of Cassation (Supreme court of appeals) - 12th September 2018