04 May 2018: Agricultural sector

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**Following a referral by the government, the Autorité de la Concurrence has issued an opinion
that clarifies the conditions for application of competition law in the agricultural sector**

Background

During the French National Food Conference (*États généraux de l'alimentation*), producers, producer organisations and inter-branch organisations from the agricultural sector expressed the need to provide legal certainty for their activities in respect of competition law.

This need for legal certainty is particularly crucial in that the agricultural sector is confronted with specific characteristics (natural constraints, market imbalances, CAP).

At the close of the Conference, the French Minister of Economy and Finance submitted a request to the *Autorité de la concurrence* for an opinion on possible courses of action open to stakeholders in the agricultural sector to allow them to structure the various sub-sectors and balance supply and demand as efficiently as possible.

This referral takes place against a specific backdrop, marked by the recent ruling of the Court of Justice of the European Union of 14 November 2017 handed down in the case known as the Endive case, as well as by the changes to the European legislative framework through the adoption of the "Omnibus" Regulation on 13 December 2017.

The referral contains 18 questions, which can be grouped together in 4 sections:

1. "HORIZONTAL" PRACTICES (BETWEEN PRODUCERS)
Which actions can producers take within producer organisations (PO) and associations of producer organisations (APO)?

2. "VERTICAL" AGREEMENTS (BETWEEN SECTORAL PLAYERS AT INTER-BRANCH LEVEL)
Which actions can be taken by inter-branch organisations (IBO)?

3. "TRIPARTITE" APPROACHES
How does competition law apply to tripartite approaches bringing together producers, intermediaries and distributors?

4. QUALITY FOOD SUPPLY CHAINS
How does competition law apply to quality food supply chains?

The opinion issued will, in particular, enable the French Directorate General for Competition Policy, Consumer Affairs and Fraud Control (DGCCRF) to draft guidelines on the application of competition law to the sector.

1. THE "ENDIVE" RULING OF THE COURT OF JUSTICE AND THE "OMNIBUS" REGULATION HAVE RESPECTIVELY SPECIFIED AND EXPANDED THE POSSIBILITIES OF HORIZONTAL PRACTICES BETWEEN PRODUCERS WITHIN POS AND APOS

POs and APOs are structures set up at the initiative of producers wishing to come together to pool their resources in order to rebalance commercial relations with the upstream and downstream economic players in their sector. There are currently 650 POs, primarily in the dairy, fruit and vegetable, livestock and meat sectors.

The European legislator has, for a long time, advocated the grouping together of producers into POs in order to remedy imbalances in agricultural markets stemming from a fragmented supply structure and concentrated demand. In this respect, according to the publicly available figures, there were around 472,000 agricultural holdings in France in 2016, along with 17,600 agri-food undertakings and 4 major purchasing offices.

The "Endive" ruling of the Court of Justice has clarified the legal framework applicable to PO and APO practices. The practices used by POs and APOs and formally recognised by Member States (exchanges of strategic information, collective setting of minimum sales prices, agreements on volumes, etc.) may be exempt from the provisions of Article 101, paragraph 1 of the TFEU if they are absolutely necessary in order to achieve the objectives of POs and APOs in compliance with the CMO Regulation. However, the practices used among POs and APOs are not covered by this exemption from competition law and may thus be prohibited under cartel law.

The "Omnibus" Regulation introduced a new exemption from cartel law for official POs and APOs, subject to compliance with a number of conditions, including concentrating supply and placing on the market the production of their members with or without transfer of ownership. Pursuing activities covered by the exemption must not, however, lead to the exclusion of competitors or jeopardise the objectives of the CAP, which would lead to the *Autorité* or the European Commission to suspend or ban such practices in the future.

If they are in doubt as to the compatibility of their practices with competition law, POs and APOs may refer the matter to the European Commission for an opinion.

These recent developments should lead to an increase in the concentration of supply through the creation of new POs and APOs, the latter still being fairly limited in number.

> For more details, see pages 17 to 38

2. AS PART OF THEIR SECTORAL STRUCTURING MISSION, IBOS CAN

DISSEMINATE INDICATORS AND INDICES, AS WELL AS STANDARD VALUE-SHARING CLAUSES, SUCH AS THOSE ESTABLISHED IN THE OMNIBUS REGULATION, SUBJECT TO COMPLIANCE WITH CERTAIN PRECAUTIONS.

Interbrand-organizations (IBOs), including representatives of the production sector and at least one partner from the supply chain (processors or distributors) are created in response to common problems and act in the general interests of all of their members. For historical reasons, they are a very active form of organisation in the structuring of agricultural and food sectors in France.

As underlined by the French Minister in the referral, the French National Food Conference highlighted a strong demand for transparency in the markets and the need to take better account of production costs when determining the purchase prices of agricultural products. Publication by IBOs of relevant indicators and indices has developed as one of the principal tools used. In this respect, the *Autorité* recalls that IBOs are allowed to publish anonymous and sufficiently aggregated historic statistical data.

Thus, IBOs may, for example, provide their members with general economic information, produce standard contracts, launch quality or trading-up initiatives or promote products among consumers. Inter-branch organisations may also make use of the option explicitly granted to them in the Omnibus Regulation to establish standard value-sharing clauses between farmers and their initial buyers.

The exemptions from competition rules granted to them under the CMO Regulation differ from those granted to POs and APOs. They cannot, for example, establish volume control actions. The CMO Regulation explicitly bans IBOs from fixing prices and quotas.

Moreover, when they develop their own indicators, which can entail exchanges of strategic information within the IBO, they must ensure compliance with competition rules, for example in respect of the conditions for collecting information. Lastly, the indicators and value-sharing clauses must not be of a prescriptive nature or become compulsory, including within the framework of an

extension of an inter-branch agreement, and must not be akin to price recommendations that could lead to a collective agreement on the price levels adopted by operators.

If they have any doubts about the indicators or standard clauses they are developing, IBOs can notify them to the European Commission in order to ensure that they comply with competition law.

> For more details, see pages 39 to 55

3. TRIPARTITE APPROACHES GUARANTEE EFFICIENCY GAINS FOR THE PARTIES SUBJECT TO COMPLIANCE WITH A NUMBER OF CONDITIONS

In the agricultural sector, the fluctuation of supply and demand in the markets has prompted some players to use contractualisation in the form of tripartite approaches between producers, processors and distributors. These actions often entail a series of bipartite contracts, between producers and processors and between processors and distributors, for a specific volume of production and specific purchase prices, subject to compliance with a set of product quality criteria.

These tripartite agreements are likely to yield large efficiency gains for the different parties: better remuneration and guarantee of outlets for the producer, guarantee for the processor of monetizing part of its infrastructure, guarantee for the distributor of a supply that meets its requirements in terms of quality, transparency and better quality for the consumer.

The parties to a tripartite agreement must, however, be careful when they own a market share in excess of the 30% threshold established by the Regulation on Vertical Restraints, especially if the contract is based on an exclusive relationship between a producer or a group of producers and its buyer.

> For more details, see pages 56 to 60

4. MAKING USE OF EXEMPTIONS GRANTED BY AGRICULTURAL LEGISLATION ALLOWS PRODUCERS TO SECURE THE TRADING UP OF THEIR PRODUCTS.

In respect of trading up practices, the *Autorité* recommends that stakeholders in the agricultural sector make use of the exemptions specific to the agricultural sector. In this respect, the CMO Regulation allows Member States, at the request of producers, their associations, or IBOs, to adopt legally binding supply control measures for cheeses and ham covered by a Protected Designation of Origin (PDO) or a Protected Geographical Indication (PGI), as well as in the wine-producing sector.

These specific exemptions to competition rules based on quality considerations relate exclusively to volume management and may not relate to prices. The parties heard by the *Autorité* appreciate the effectiveness of such rules for the competitiveness of their sectors.

In this respect, in the interests of clarifying the rules, the *Autorité* recommends extending the existing supply control measures in these sectors covered by PDOs and PGIs to other products covered by such designations.

> For more details, see pages 61 to 68

> See full text of Opinion18-A-05 of 3 May 2018 regarding the agricultural sector

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