



ANTITRUST POLICY IMPACT ON EU'S AGRICULTURAL SECTOR

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Abstract

The antitrust law represents a key component of competition policy in the European Union. Our paper aims to highlight in what extent the antitrust policy may boost the growth of agricultural sector, also maintaining the free competition on the European Internal market. In order to achieve this goal we will present, through a qualitative analysis, the most recent developments in the EU competition framework for agriculture. Our research will also point out, the role of antitrust regulations for boosting European agricultural sector development while preserving a competitive environment using some relevant cases studies and European statistics in the field. In the final part of our article we will assess (based on the conclusions of the SWOT analysis) how the antitrust policy main constitute an important vector for boosting production and competitiveness in the European agricultural sector.

Keywords

Antitrust policy and law, free competition, Common Agricultural Policy, agricultural sector

1. The contribution of antitrust enforcement for achieving the strategic objectives of the EU

The enforcement of antitrust law - an important instrument of competition policy - by the European Commission and the National Competition Authorities of the member states plays an important role in maintaining the integrity, functionality and competitive nature of the EU single market. The competition policy may also be considered an important tool for achieving the strategic objectives of the EU economy - growth, investment and innovation, especially in some strategic sectors.

The "corrective" character of decisions issued by the European Commission following complex investigations is due to the fact that it can only intervene after some companies have adopted anti-competitive and illegal agreements and practices. The deterrence effect is achieved through the fines and commitments imposed by the Commission's decisions so that other companies are encouraged to take all necessary measures not to violate the current legislation.

Benefits resulting from safeguarding competition "on merit" and the maintenance of open markets in the EU are targeting both European firms, which strengthen their ability to compete on the international market and companies outside the EU, which may carry out business within the Union, having a level playing field for all economic actors.

Article 101 of the Treaty on the Functioning of the European Union (TFUE) prohibits, as being incompatible with the internal market regulations, 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. Such agreements or decisions fix purchase or selling prices or any other trading conditions; limit or control production, markets, technical development, investment, share markets or sources of supply.

These provisions may be declared inapplicable in the case of any agreement or decision which contributes to improve the production or distribution of goods or to promote technical or economic progress while allowing consumers a fair share of the resulting benefit, and without eliminating competition in respect of a substantial part of the products in question.

Certain agreements between undertakings may have beneficial results for competitiveness, for example cooperation between competitors in research and development, to conduct costly fundamental research, but which generates positive effects on growth. For example, the vertical agreements between undertakings that have activities in different stages of the production process can increase efficiency without creating competition problems.

Article 102 TFUE prohibits, as being incompatible with the internal market, any abuse by one or more undertakings with a dominant position within the internal market or in a substantial part of it, in so far as it may affect trade between Member States. Such abuse may consist in: i) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions; ii) limiting production, markets or technical development to the prejudice of consumers; iii) applying

dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; iv) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts. Therefore, the EU Treaty does not prohibit getting a dominant position by internal growth, innovation and success, which raises no competition problems, but only provides for the application of antitrust law in case of abusive behaviour of a company that already has a dominant position within the relevant market.

2. Antitrust law: challenges for the enforcement in the agricultural sector

The application of EU competition rules to the whole food supply chain¹, from agricultural production to grocery retail, plays a key role, especially in the context of important developments after 2007, such as the significant increase of the food prices, commodity prices volatility and concentration at the manufacturing level and to a lesser extent at the retail level. The concerns raised by these developments represented the stimulus for the more intense activities of the Commission's competition department (DG Competition) and the National Competition Authorities in the European Competition Network (ECN) over the last decade aiming to improve the competitive environment in agro-food markets and to ensure a better functioning of the food supply chain, to the benefit of European consumers. The European Commission (2009) identified the challenges for the functioning of the food supply chain in the member countries and called for a strengthening of the application of competition rules in food markets through a coordinated approach within the ECN.

The food supply chain is characterised by a wide diversity of actors and includes both very large companies and small and medium-size enterprises: farmers, food processors, traders, wholesalers and retailers - which are simultaneously competitors, suppliers or customers.

The agricultural sector relies on the good functioning of the entire food supply chain, including the effective application of competition rules in all related sectors throughout the whole food chain, which can be highly concentrated. The various actors which operate in the food supply chain confront with difficulties that may hold back the full potential of the chain. Various analyses showed the necessity to draw a clear distinction

between *potentially unfair trading practices* – related to the imbalances in bargaining power of contracting parties – and *anti-competitive practices*.

According to Professor Catherine Del Cont (2014), the specificity of agriculture and the social function of the Common Agricultural Policy (CAP) should be considered in the application of competition rules, thereby articulating the two major Community policies: the Competition Policy and the CAP.

The characteristics of the food supply chain and the need to ensure its good functioning led to the specific treatment granted to the agricultural sector by the TFEU. The Treaty lays down that the competition rules apply to the production and trade in agricultural products only following a decision by the Council. *Pursuant to Article 42 TFEU, the principle on how the competition law is applicable to agriculture is the following: the legislator can modify the standard competition rules when applying them to production of and trade in agricultural products, taking into account the CAP objectives set out in the Article 39 TFEU.*

Catherine Del Cont (2014) underlines that the «philosophy» of Article 42 TFEU is overturned by the «principle - exceptions» paradigm established by the Council Regulation No 26/62 which extended the rules on agreements between undertakings that distorted or threatened to distort competition within the common market (*Article 101 TFEU*) and on the abuse of dominant positions (*Article 102 TFEU*). However, the application in principle of competition law to the production of and trade in agricultural products retains a few exceptions regarding antitrust and undertakings: *“the provision on agreements does not apply if those decisions form part of the common organisations of the markets or if they are necessary for achieving the objectives of the Treaty in the agricultural sector.”* The Regulation refers, for example, to exceptions applicable for “certain agreements between producers or producer organisations provided that their purpose is not to fix prices that they do not prevent competition and that EU’s objectives are not threatened.”

This model is maintained by the Council Regulations No 1184/2006 and No 1237/2007, and by the European Commission’ proposals for a Regulation of the European Parliament and of the Council establishing a common organisation of the markets and on specific provisions for certain agricultural products [COM(2010) 799; COM(2011)626]. Likewise, the decisional practices of ECJ point out that the EU authorities managed to reconcile the CAP objectives with those of competition policy while maintaining the primacy of competition policy.

The antitrust European and national laws are applied in parallel, and “the national authorities cannot take

¹ The food supply chain connects three important sectors of the European economy – agriculture, the food processing industry and the distribution sectors - that are essential for economic, social and environmental welfare as well as for the health of European citizens.

decisions which conflict with those of the Commission, or create the risk of such a conflict.”²

The competition rules for agricultural products (other than fisheries products) are set out in *Regulation 1308/2013* (The European Parliament and the Council of the European Union, 2013), known as the "Common Market Organisation (CMO) Regulation", *establishing a common organisation of the markets in agricultural products*. Article 206 of this regulation stipulates that standard competition rules apply to agricultural products with some specific derogations.

The object of the Regulation includes various agricultural products, such as olive oil and products of cattle, arable crops also applying to the “joint selling”. Bastien Pars (2015) states that this Regulation points out that the agricultural sector is subject to competition law only if the EU’s legislature didn’t stipulate differently, but, in the same time, almost affirms the opposite principle: *“It should be provided that the rules on competition relating to the agreements, decisions and practices referred to in Article 101 TFEU and to abuse of a dominant position apply to the production of, and the trade in, agricultural products, provided that their application does not jeopardise the attainment of the objectives of the CAP.”*

Designing exceptions is an indirect way to regulate. According to the Regulation 1308/2013, 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 lead to the partitioning of markets, affect the sound operation of the CMO, distort or eliminate competition, entail the fixing of prices or quotas, or create discrimination*.

Specific guidelines adopted by the European Commission are a suitable instrument to provide guidance to undertakings and other stakeholders concerned on how these rules will be applied in agriculture, thus setting the balance between competition and regulation in the food chain. The priorities for antitrust policy activities included the recent initiative of DG Competition – the new antitrust guidelines for the joint commercialization by producers in the sectors of olive oil, beef and veal and arable crops. These guidelines follow the new specific rules laid down in Articles 169, 170 and 171 of the CMO Regulation and aim to provide concrete explanations and technical parameters for the undertakings and ensure that the National Competition Authorities and courts apply the new rules consistently.

² Court Judgment 1 October 2009 in Case C-505/07, *Compañía Española de Comercialización de Aceite SA.*, par. 56.

3. The latest antitrust guidelines and their impact on the EU agricultural sector

In January 2016, the European Commission finalized, following a public consultation launched in 2015³, the text of new guidelines⁴ on the application of European antitrust regulations in the agricultural sector. The new guidelines represent a bridge between some rules of the Common Agricultural Policy (CAP) and the antitrust law (as shown in Figure 1).



Source: Authors synthesis based on the EU guidelines.

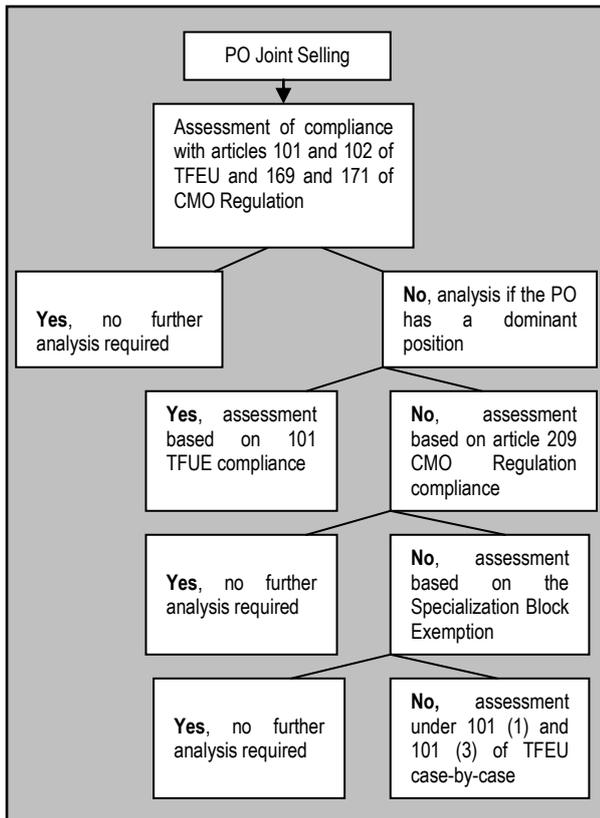
Figure 1. The latest antitrust regulation and CAP: implications for the European agricultural sector

As shown in the Figure 1 an important goal of CAP is to encourage the agricultural productivity and to boost the supplies on the EU internal market. The new guidelines set out the framework for joint sales by producers of olive oil, beef and veal and arable crops thus becoming an important tool for increasing the agricultural production on the internal market. Some analyses (European Commission, 2016) have stated that the new rules are raising both technical and practical issues. The technical issues (see Figure 1) are related to the European Commission antitrust policy.

Those rules ban the agreements to set prices or to share markets unless the agreements improve production or distribution allowing consumers a fair share of the resulting benefits. In this respect, in order to benefit from the exemptions provided by the new guidelines, the European producers’ organizations (PO) must prove that their associations respect the EU antitrust law providing also benefits for consumers.

³ Between January and May 2015, the European Commission organized a public consultation about the draft proposal of the new guidelines for the application of antitrust rules in the agricultural sector. Through this process, a large number of national competition authorities from the Member States and the European Parliament were consulted in order to achieve valuable inputs for the final form of the new regulations.

⁴ The new regulations approve joint marketing of specific categories of goods: olive oil, beef and veal. They also apply to arable crops sectors.



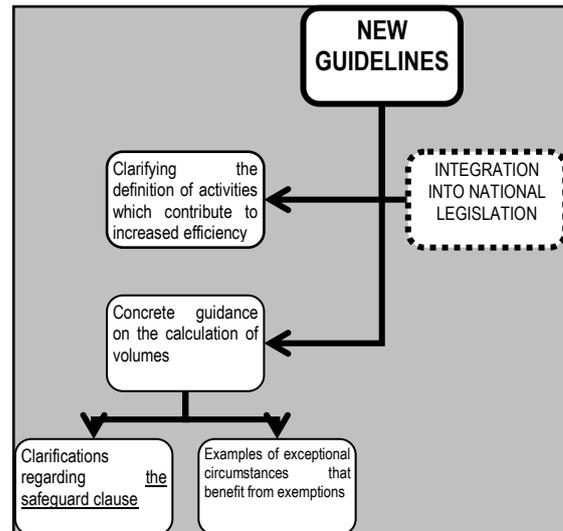
Source: Authors synthesis based on the EU guidelines.

Explanatory note: Article 101 of the TFEU sets out the EU's standard competition rules that ban agreements to set prices or to share markets unless they improve production or distribution while allowing consumers a fair share of the resulting benefit. CMO Regulation (also named Common Market Organisation Regulation) sets out the standard competition rules for the agricultural sector and their main derogations.

Figure 2. Main indicators for the enforcement of the new antitrust guidelines for the agricultural sector

The new antitrust guidelines provide efficiency-derogations for the European farmers (but only for those that act under “the umbrella” of a PO) allowing them to jointly sell and set out prices (if they complied with the conditions exposed in the Figure 2). In order to benefit from those derogations the PO must prove that they are helping farmers to be more efficient by providing them support for storage, transport and distribution. It is important to say that there are some limitations involved: the volumes marketed by a PO must not exceed certain thresholds (20% of the relevant market for olive oil and 15% of the national market for beef, veal, and arable crops).

In our opinion, the new guidelines support European farmers to meet these efficiency requirements, providing clear criteria for the competition authorities and national courts from the Member States in the enforcement process (see Figure 3).



Source: Authors synthesis based on the EU guidelines.

Explanatory note: The safeguard clause allows national competition authorities to decide, in exceptional circumstances, that the share sales of an organization of farmers should be reinvestigated, or that such sales should not have been allowed if the free competition on that market is harmed.

Figure 3. Key elements of the new antitrust guidelines

Regarding the efficiency related provisions, it should be noted that the new guidelines apply to agreements between producers that may bring clear economic benefits, such as: risk sharing activities, cost reduction activities, investments and sharing of know-how. It is estimated that the new antitrust guidelines will contribute to meet CAP objectives related to productivity (through shared access to technologies and joint procurement) and also those related to farmers' incomes (through products quality or storage facilities).

4. SWOT analysis of new antitrust rules contribution on sustaining the European agricultural sector

Currently, according to official statistics (Eurostat, 2016) the combined markets of the products targeted by the new antitrust guidelines have an annual value of about 80 billion euros. It should be noted that the European Union is the world leader in terms of production, consumption and export of olive oil. According to DG Agriculture and Rural Development data, during 2010 - 2015, the EU produced 69%, consumed 57% and exported 65% of total worldwide production of olive oil. According to an analysis of DG Agriculture and Rural Development (2012), olive groves cover about 5 million hectares in the EU and are concentrated mainly in three Mediterranean countries Spain (50%), Italy (26%) and Greece (22%) (as shown in Table 1).

Table 1. Geographical distribution of olives and olive oil crops (hectares)

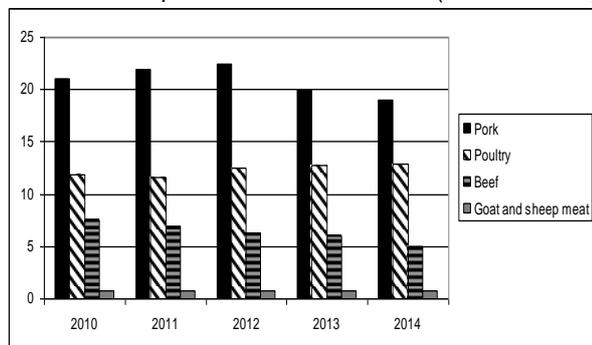
| | Spain | Italy | Greece |
|---------------|------------------|------------------|------------------|
| Irrigated | 700 000 | 280 556 | 307 796 |
| Non-irrigated | 1 800 000 | 1 069 444 | 852 204 |
| Total | 2 500 000 | 1 330 000 | 1 160 000 |

Source: DG Agriculture and Rural Development (2012). *Economic analysis of the olive oil sector*

Given the importance of olive groves and olive oil production for the European agriculture sector, it is expected that the new antitrust guidelines will help European producers and farmers to better exploit the economic potential of their crops. Also, the new rules may remedy the difficulties identified by some analyses (European Commission, 2015) namely that the producers of olive oil do not have the means to adapt supply to demand, and consequently to fully benefit from their production.

The new guidelines may also bring benefits for the European producers of beef and veal while they have a real need for support. After the introduction of CAP decoupling regulations, their production constantly decreased with only a slight recovery in 2013 and 2014 (see the Chart 1).

Chart 1. Meat production in the EU - 28 (million tonnes)



Source: Eurostat, 2016. Note: Data for 2014 are the latest available.

In our opinion, the antitrust policy, especially through its latest guidelines may be considered an important vector for boosting production and competitiveness in the European agricultural sector, but there are also a series of challenges that need to be addressed (see Table 2). For instance, while the new guidelines could help to strengthen the EU farmers position on the internal market (through joint sales), they are also restrictive imposing them the membership in a PO.

5. Conclusions

The antitrust policy is an important pillar for ensuring the preservation of free competition on the EU internal market and may also be complementary to some of the CAP objectives related to agricultural productivity.

Table 2. SWOT analysis of the new antitrust rules impact on the agricultural sector

| | |
|---|--|
| <p>STRONG</p> <ul style="list-style-type: none"> Increasing farmers market position Increasing supply and bargaining power of the farmers who join a PO, compared to the situation of individual sales | <p>WEAK</p> <ul style="list-style-type: none"> The New Guidelines are not legally binding. While they aim to provide specific guidance to producers, it remains the responsibility of the producers and of the member states to assess their own practices. |
| <p>OPPORTUNITIES</p> <ul style="list-style-type: none"> Negotiation of supply contracts by a PO on behalf of its members Such contractual negotiations may have different forms: auctions (physical or online), telephone sales, trading on a spot market or on a futures exchange. The form of the contractual negotiations does not influence the application of the derogations from the new regulations. | <p>THREATS</p> <ul style="list-style-type: none"> An agreement, decision or concerted practice which does not respect the conditions set out by articles 169, 170 and 171 of the CMO Regulation (for instance because the contractual negotiations of arable crop products would cover more than 15 % of the total national production of the product) cannot benefit from the new guidelines. |

Source: Authors synthesis based on the EU guidelines.

As a result of developing the EU competition framework for agriculture, some specific rules were stipulated for farmers, associations of farmers, producer organisations, and inter-branch organisations. The European antitrust law applies to agriculture only in situations which could disturb the trade between Member States, thus taking into consideration the specificity of production and marketing of agricultural products, the imbalance between the different food chain operators and even the economic crisis situations experienced by some sectors.

The competition policy applied to agricultural sector should reflect other important objectives of the EU such as rural development, a better quality of agricultural products, sustainable development.

In our opinion the maintenance of effective competition on the market for agricultural products is also one of the main objectives of CAP. The new antitrust guidelines will contribute to this goal, for a better cooperation between European farmers. They may also constitute an important tool for boosting agricultural sector efficiency through the provisions related to joint use of equipment that is likely to generate an increase in the necessary investments in significant agricultural machinery (such as a harvester or a dryer). Through the joint use of storage, the new antitrust rules help increasing efficiency of European farmers' activities in

certain situations (this can be the case where a PO invests in the storage facilities in order to meet health and industry requirements).

While some analysis (Debroux, 2009) have stated that prior to CAP reform there have been some clear tensions between its regulation and those of competition policy, it is our opinion that the new antitrust guidelines may speed up the agricultural sector's shift towards more effective methods of commercialization and therefore improve its ability to be more competitive preserving in the same time the free competition on the internal market.

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