



REPORT ON COMPETITION AND THE AGRIFOOD SECTOR

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EXECUTIVE SUMMARY

There have recently been debates in various national and international agencies regarding possible solutions to reinforce the viability of the agricultural sector. This debate has intensified given the current economic climate. One of the questions discussed has been the relationship between the competition rules and regulations and the agricultural sector, referring both to the interpretation of the current Community and domestic rules on the subject and the possibility of amending those rules in order to relax the application of competition law to practices in this area.

After the annual appearance of the President of the Spanish National Competition Commission (CNC) before the Spanish Parliament on 3 December 2009, the Chairman of the Parliament's Economy and Finance Committee made a formal request to the CNC on 17 December 2009 for a report on the application of the competition rules to the agrifood sector.

This report of the CNC is a response to that request, and at the same time is an attempt to contribute to the debate referred to above by examining the implications of various specific measures for improving the operation of the sector under consideration from the point of view of competition. The examination therefore aims to provide guidance to both public authorities and the operators in the sector on their room for manoeuvre when it comes to designing such measures as they think fit without any detriment to the competition conditions.

The report focuses on the level of agricultural production within the agrifood chain and starts from the economic characterisation of the offer at that level. It is frequently assumed that the agricultural production sector is made up of a set of uniform characteristics. However, a quick look at the various sub-sectors or products that comprise it shows that there are profound and wide-ranging differences from the point of view of their costs structures, their marketing and distribution channels, the weight of imports in the total offer or the importance of

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exports in the sales of the sector, amongst other factors. In the same way, the percentage of the final price that the producers receive in comparison with the percentage received by the rest of the agents in the chain varies greatly depending on the product.

In terms of the applicability of the competition rules to the agricultural sphere at a Community level, the Treaty on the Functioning of the European Union (the Treaty), along with the various Community Regulations applicable to the sector (in particular Regulation 1234/2007, which establishes a single CMO), establishes the terms on which the defence of competition rules are applied to the sector. One can see from an examination of all these rules that articles 101 and 102 of the Treaty, which prohibit concerted practices and the abuse of a dominant position, are in principle applicable to the practices engaged in by agricultural operators. Articles 175 and 176 of Regulation 1234/2007 lay down various exceptions to such general applicability, but various Community precedents on this question have shown that the conditions for such exceptions to come into play are very strict.

In the case of practices that do not have a Community interest within the meaning of articles 101 and 102 of the Treaty, the domestic competition legislation is applied. In this regard, Act 15/2007 of 3 July 2007, the Spanish Competition Act, covers all sectors of activity without distinction. It therefore applies to the agricultural sector as well. As a result, provided that the practices in question are not *de minimis*, and save for the applicability of article 1.3 of the Competition Act to agreements that restrict competition on a case by case basis, there is no exemption from the competition rules for this sector.

In addition, in the event that in the future there should be an exemption from the applicability of the competition rules for the agricultural sector by virtue of a domestic enactment, such exemption would be limited to practices that are strictly domestic in their effect and have no Community interest, by virtue of the doctrine of effects of the Community rules.

It is also appropriate to highlight that the participation of public authorities in agreements between operators in the agrifood sector in the capacity of signatories or sponsors of such agreements does not prevent the application of the competition rules and regulations to the operators who are parties to the agreements, nor does it prevent a finding in appropriate cases that the practices in question are anti-competitive if they contain elements that justify such a classification. Equally, it does not prevent the possible imposition of sanctions, once the anti-competitive conduct has been proved, unless the requirements

are satisfied so as to mean that the principle of the protection of the legitimate expectations of the operators participating in these agreements is applicable.

In terms of the future functioning of the sector, certain public and private agents have recently been suggesting that there should be a review of the applicability of the competition rules to the agricultural sector, in the sense that the application of the rules to the sector should be relaxed or even removed altogether. In this regard the CNC's opinion is that the current framework, whereby the competition rules are applicable to the conduct of agricultural producers must continue to form the framework on which the activity of the sector is supported. Various reasons lead to this conclusion.

On the one hand, there would be insufficient justification for exempting the agricultural production sector from the applicability of the competition rules. Public intervention to exempt a particular economic activity from the competition legislation (legal transcription of the freedom of enterprise enshrined in article 38 of the Spanish Constitution) can only be justified when it is necessary to correct market failures inherent in the operating of the sector of activity in question or in order to ensure the attainment of other public interest objectives. However, it does not seem that such market failures are present in the agricultural sector to such an extent that it is impossible for free competition to function, particularly if one considers the sector as a whole. Nor, in the event that such market failures existed, would removing the requirement that its operators be subject to the competition rules be the regulatory response that would improve its operation.

Furthermore, the attainment of various public interest objectives, such as food safety, preserving the rural environment or environmental protection, through the fixing of minimum prices or guaranteed income for producers on conditions that are contrary to competition, would be disproportionate in comparison with the prejudice caused to consumers, who would have to face higher prices and possibly a lower quality of agricultural products, and to the disincentives to improve the operation and innovation of the sector itself, as well as establishing a discriminatory treatment compared with other sectors.

It is also untrue that the modification of the rules on defence of competition to accommodate practices that are prejudicial to competition may resolve the structural problems of the sector. Even in those sub-sectors within the agricultural sector in which the imbalance in bargaining power in favour of its immediate demand is most clear, the effects of such a decision would have a fundamentally negative effect on the efficiency of the production phase at

source (without representing a real increase in the bargaining power of the demand) and on the functioning of the agrifood chain in general.

Furthermore, the fact that agreements between operators in this sector have to be subject to the competition rules, when they are not covered by the derogation contemplated in certain cases by the Community Regulations applicable to the sector, does not mean that they cannot be allowed, if the circumstances provided for in article 101.3 of the Treaty / article 1.3 of the Competition Act are present. In light of this criterion, there are instruments of a very diverse kind that public authorities and private operators can use to overcome the problems facing agricultural producers, without the need to modify the current regulatory framework.

In this respect, the CNC presents various guidelines in this report on the implications on competition of certain measures or initiatives which, due to their interest and topicality, merit particular attention. They include:

- *Price agreements and recommendations.* Price agreements are a restriction on competition coming within the scope of article 1.1 of the Competition Act / article 101.1 of the Treaty. It is very unlikely therefore that they will be permitted in light of the efficiency analysis proposed in sub-section 3 of both articles.
- *Fixing of benchmark indices.* These indices may give rise to restrictions on competition that are similar to price fixing and they will therefore be the subject of exhaustive monitoring by the competition authorities.
- *Encouraging cooperativism by means of agreements between producers.* There are various ways in which agricultural producers may increase their bargaining power by means of joint venture agreements: for example, joint production, joint storage or joint marketing agreements. Such agreements will conform to the competition rules if they satisfy a series of requirements, which in general are related to the generation of economic efficiencies. On the other hand, they will be deemed anti-competitive if they give rise to production restrictions, market sharing or price fixing.
- *Quality standards.* The fixing of quality standards and the use of adequate symbols or indications to identify quality may improve the competitive situation of producers who incentivise such quality by passing on better information to consumers. The guarantee that the product in question complies with certain qualitative requirements may be helpful, for example in order to give added value to a particular product source designation (*denominación de origen*), but only where this does not give rise to restrictions on the market or to discrimination or the creation of entry or exit barriers.

- *Improvements in producers' access to information.* These initiatives may eliminate asymmetries in terms of information between suppliers and customers and contribute to moderating price volatility. However, they must be adequately designed to avoid any possible anti-competitive effect, particularly with regard to information on prices. With this in mind it is preferable that such measures come from public institutions and that the information is presented with a sufficient level of aggregation and confidentiality guarantees to prevent possible anti-competitive practices between the operators who are competing with one another.
- *Generalised use of agrifood contracts.* Initiatives aimed at encouraging the formalisation of commercial relationships by means of contracts, and even by means of contracts officially approved by public institutions, help to preserve legal certainty and avoid possible abuses between the parties. Nevertheless, the fundamental elements that define the content of the contract, such as prices, quantities and other types of conditions, must always be freely negotiated between the parties.
- *Inter-trade codes of conduct.* Such instruments, provided that their content does not incorporate clauses that are restrictive of competition, may facilitate and improve relations between agricultural producers and the rest of the agents in the value chain. The adoption of these codes must always be free and voluntary, avoiding discrimination and the creation of restrictions on entry to or exit from the market. In addition, if such codes are going to be credible, it will be necessary to provide effective and mandatory dispute resolution mechanisms.
- *Mechanisms for correcting unfair competition.* In order to prevent and correct unfair practices deriving from imbalances between the bargaining power of the agricultural producers and the agents operating in other links of the agrifood chain, the mechanisms established in codes of conduct may be effective, provided that the codes include instruments that are capable of guaranteeing that the signatories to the codes comply with all the commitments assumed by them.