THE REFORM OF THE COMMON ORGANISATION OF THE MARKETS IN AGRICULTURAL PRODUCTS AND THE ROLE OF COMPETITION AGENCIES

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On 17 December 2013, the European Parliament and the Council adopted the EU Regulation 1308/2013, establishing a common organisation of the markets in agricultural products. The Regulation, which entered into force on the 1st January 2014, repeals and replaces all existing relevant normative instruments, thus providing a new single legal and institutional framework for the EU common agricultural policy.

While the main purpose of the Regulation is to streamline and simplify the legislative provisions applicable to agricultural products, with a view to ensure their smooth and consistent enforcement across the relevant markets, special regimes are introduced for specific sectors, which derogate from article 101 TFEU.

In particular, qualified exemptions from the antitrust prohibition are provided for by article 169-171 of Regulation 1308/2013 for the sectors of olive oil, beef and veal, and certain arable crops. This is possible inasmuch as recognized producers’ organisations pursuing the objectives of concentrating supply, optimizing production costs or placing their members’ products on the market are allowed to negotiate on behalf of the associated undertakings as regards the supply of all or part of the latter’s aggregate production.

When the relevant conditions are met, the behaviour of producers’ organisations is exempted from the implementation of article 101 TFEU. Moreover, no prior decision to that effect is required by either the European Commission or any national competition agencies.

As elicited in recital 139 of Regulation 1308/2013, the new provisions are meant to ensure the viable development of production; thus, they are also meant to ensure a fair standard of living for suppliers, by strengthening their bargaining power vis-à-vis downstream operators.

Limited exceptions to competition rules concerning some agreements between farmers and their associations are certainly not novel. In accordance with article 42 TFEU, the legislative framework pre-

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1 Italian Competition Authority


3 Namely common wheat, barley, maize, rye, durum wheat, oats, triticale, rapeseed, sunflower seed, soya beans, field beans and field peas.
Regulation 1308/2013 already ruled out the applicability of article 101 TFEU to any conduct relating to the production of, or trade in, agricultural products necessary for the attainment of the objectives of the common agricultural policy set out in article 39 TFEU. Most notably, this exception - now enshrined in article 209 of Regulation 1308/2013 - explicitly covered all agreements between farmers and their associations. They also covered those with reference to producers’ organisations, concerning the production or sale of agricultural products or the use of joint facilities for storage, treatment or processing of such products, unless the goals of article 39 TFEU could be jeopardized.\(^4\)

However, agreements entailing an obligation to charge identical prices cannot benefit from such general exemption, and thus remain subject to the implementation of competition rules. On the contrary, in the sectors of olive oil, beef and veal, and certain arable crops the joint fixing of the selling price by a producers’ organisation would not fall \textit{per se} outside the scope of the exemption.

Therefore, in these sectors, producers’ organisations wishing to engage in contractual negotiations on behalf of their members must comply with stringent quantitative and functional conditions, which are intended to limit the potential adverse impact of such conduct on competition as well as on the fulfilment of the objectives of the common agricultural policy.

Pursuant to articles 170(2)(c) and 171(2)(c), joint negotiations may take place among the recognized organisations of producers of beef and veal and relevant arable crops. However, the quantity of production covered by such negotiations for any particular producers’ organisation and for each product produced in any particular Member State must not exceed 15\% of the total national production. For olive oil, article 169(2)(c) sets the quantitative threshold at 20\% of the relevant market.

Diverging legislative formulations and market share thresholds result from the Commission’s efforts to balance the producers’ economic interests, with the safeguard of the competition principles in the context of complex trilogue negotiations leading to the adoption of the Regulation.

In fact, in the sectors of beef and veal and arable crops, the relatively narrow safe harbour might fail to prevent significant distortions of competition, since the relevant 15\% threshold is calculated on a hypothetical national market for each of the products concerned. Therefore, the market share calculation might in principle include products which do not represent a competitive constraint on each other due to their specific qualitative characteristics or the geographical location of the production facilities.

On the other hand, in the olive oil sector, the European Parliament accepted to refer to the notion of relevant market, thus obtaining an increase in the volume of production which may be covered by the

negotiations of a recognized producers’ organisation. The definition of relevant market is provided in article 207 of Regulation 1308/2013, which is fully in line with the guidelines and the practice elaborated by the Directorate General for Competition of the European Commission.

Moreover, the exemption from article 101 TFEU is only available when the pursuit of the joint negotiations’ objectives leads to an integration of activities likely to generate significant efficiencies. Hence, the conduct of the producers’ organisations should overall contribute to the fulfilment of the goals of the common agricultural policy, namely: to increase agricultural productivity by promoting technical progress and by ensuring the rational development of agricultural production and the optimum utilisation of the factors of production, in particular labour; to ensure a fair standard of living for the agricultural community, in particular by increasing the individual earnings of persons engaged in agriculture; to stabilise markets; to assure the availability of supplies; to ensure that supplies reach consumers at reasonable prices.

Articles 169-171 of Regulation 1308/2013 envisage a dual role for competition agencies, which are called to define the relevant markets and to police the compliance with the exemption conditions. In the sectors of beef and veal and arable crops, by way of derogation from the provisions which allow producers’ organisations to engage in negotiations on behalf of their members (provided that the 15% threshold is not exceeded), national competition agencies may decide that an individual negotiation should either be re-opened or should not take place at all if this is necessary to avoid competition being excluded, or the products covered by the negotiations form part of a separate market, where the 15% threshold would be exceeded, or the objectives set by article 39 TFEU are jeopardized.5

This provision enables competition agencies to provide a correct definition of the relevant product and geographic market, thus excluding the risk that joint negotiations might unduly restrict competition while respecting the 15% threshold.

Such safeguard clause would be pointless in the olive oil sector, since the threshold triggering the antitrust exemption is calculated on the relevant market defined according to the competition standards. Accordingly, article 169(5) enables the competent agency to intervene and block the negotiations of producers’ organisations below the 20% mark only when this is necessary so as to prevent the exclusion of competition or a prejudice to the objectives of the common agricultural policy.

The intervention of competition agencies pursuant to article 169(5), 170(5) and 171(5) does not entail the withdrawal of the antitrust exemption and the ensuing possibility of applying article 101 TFEU to the conduct of the producers’ organisations. The powers of competition agencies are limited to the

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5 The European Commission has exclusive competence to adopt such decision when the negotiations at stake cover more than one Member State – see articles 170(5) and 171(5).
adoption of individual resolutions prohibiting joint negotiations or mandating that they be re-opened, which becomes effective upon their notification to the undertakings concerned.

It is somewhat unclear, however, what consequences would be triggered by a failure to comply with the prohibition decision issued by a competition agency. Since Regulation 1308/2013 envisages no ad hoc instruments to foster compliance, the conduct might arguably be assessed in the light of national or EU competition rules.

The antitrust exemption may only operate when joint negotiations are likely to generate significant efficiencies, thus contributing to the achievement of article 39 TFEU objectives. If such requirement is not met, the behaviour of producers’ organisation falls outside the scope of the special regime, and must comply with the competition rules. While the language of the Regulation echoes well-established notions of competition law, the assessment of efficiencies in this context does not correspond to the scrutiny carried out by competition agencies under article 101(3) TFEU.

While horizontal co-operation agreements involving price fixing might very seldom benefit from an individual exemption under the EU antitrust rules, their impact on the multi-faceted objectives of common agricultural policy could prove difficult to predict, for both competition agencies and the producers’ organisations concerned.

The case law of EU courts – which has mostly developed on the general antitrust exemptions applying to non-price agreements – suggests that the five goals set out in article 39 TFEU must be attained at the same time. Therefore, any efficiency gains materializing with reference to one of those objectives cannot arguably countervail a prejudice on any of the others.6

However, since articles 169-171 do not require the activities of producers’ organisations to be necessary for the attainment of all the common agricultural policy’s objectives, the exemption will be available whenever the net impact of such activities is positive vis-à-vis at least one of the objectives, and at least neutral vis-à-vis all the others.

Joint negotiations involving price fixing are likely to raise thorny methodological issues concerning the possible tension between the objective to ensure a fair standard of living for the agricultural community - which is pursued by favouring supply side concentration and thus the creation of market power - and the goal to safeguard the consumers’ interests.

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In particular, the question arises as to whether the joint determination by producers’ organisations of a selling price higher than the level which would prevail absent the joint negotiations is per se incompatible with the objective to ensure fair consumer prices, or such contrast only occurs when the activities carried out by the producers’ organisations result in “unreasonable” prices on the market.

In fact, a significant adverse impact on consumer prices might be deemed per se inimical to the achievement of the fifth objective set by article 39 TFEU, thus relieving competition agencies from the irksome burden of proving the unfairness of pricing levels stemming from the joint negotiations.

In practice, such interpretation entails that the individual earnings of people engaged in agriculture could not be supported through direct wealth transfers from consumers, via higher retail prices. In a dynamic perspective, any improvement in the standard of living for the agricultural community could only be achieved when the joint activities of producers’ organisations generate efficiency gains and cost savings capable to offset any significant upward pressure on consumer prices.

Regulation 1308/2013 provides some guidance as to the activities which producers’ organisations in the olive oil, beef and veal, and arable crops sectors might jointly undertake in order to fulfil the requisite of legal standard, including distribution, promotion, organisation of quality controls, use of equipment and storage facilities and procurement of inputs. Of course, efficiencies are only likely to materialize when these activities are significant in terms of quantity of the product concerned, and in terms of cost of the production and placing of the product on the market.

A fine-tuned balancing of negative and positive effects on prices flowing from joint negotiations would require a sophisticated economic analysis, possibly out of reach for many producers’ organisations and very resource-intensive for competition agencies. Therefore, market players would greatly benefit from rule of thumb rules, enabling them to identify at a glance the net impact of their activities. For instance, efficiency enhancing initiatives could be deemed significant when the share of production concerned corresponds to the share covered by joint selling. Moreover, competition agencies might identify a level of cost savings which would in any case offset incentives to increase prices as a result of joint negotiations.

Guidance on these and other aspects of the new rules is essential to ensure that market players are able to assess ex ante the lawfulness of their conduct and hence the success of the regulatory framework. Regulation 1308/2013 acknowledges this need: recital 172 states that where appropriate, guidelines adopted by the European Commission might represent a suitable instrument to provide guidance to undertakings and other stakeholders concerned.

The compromise struck by Regulation 1308/2013 between the interests of farmers affected by their customers’ stronger bargaining position and the public interest to protect competition on the supply side of agricultural market is relatively advanced. When compared with the milk package, the antitrust
exceptions applicable to the olive oil, beef and veal, and arable crops sectors are visibly narrower in scope. First of all, the safe harbours are thinner – and in the case of olive oil the market share triggering the exemption is calculated according to sound and consolidated competition standards. Moreover, the margin of manoeuvre of competition agencies is wider, since effective safeguards clauses prevent any significant adverse impact on consumer prices.

However, Regulation 1308/2013 marks a further step in the progressive erosion of the reach of competition rules and principles in the agricultural sector. European competition agencies have been consistently evangelizing concerning the importance of applying competition law in this sector of the economy, arguing that large scale exemptions would only hamper the necessary adaptation and consolidation of supply, while at the same time hindering several objectives on the common agricultural policy itself.

Apparently, they failed to make their case. Indeed, article 101(3) TFEU would not prevent intensive cooperation among producers and some level of integration in marketing structures, as long as these activities create economic efficiencies and do not jeopardise the competitive process to the detriment of final consumers. The ensuing strengthening of suppliers’ bargaining position might allow them to benefit from the cost savings stemming from this cooperation, thus setting the stage for an increase in the producers’ standard of living without customers being called in to foot the bill.

On the other hand, stakeholders’ support for the unfettered application of competition rules in the agricultural sector is possibly alienated, to a certain extent, by the perceived opacity and rigidity of competition regimes. First of all, the *ex ante* assessment of a business conduct based on article 101(3) may baffle even relatively sophisticated undertakings and require access to qualified legal advice; hence the farmers’ call for clear-cut rules and straightforward antitrust exceptions applying to a cooperative conduct.

Moreover, commercialisation agreements involving price fixing “can never be exempted under article 101(3), as they entail a prohibited hardcore restriction.”

The “price taboo” of competition policy is only overcome in exceptional circumstances, which invariably postulate the demonstration of the indispensability of such competitive restriction. Farmers may feel that this approach limits their ability to benefit from efficiency gains generated through cooperation arrangements.

Greater acceptance for the application of competition law in the agricultural sector might be gained through rules which have a sounder economic underpinning, while at the same time ensuring a satisfactory level of predictability of outcomes. A renovated effort to provide guidance to stakeholders

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might in the end prove more helpful than the current consolatory rhetoric reconciling competing developmental narratives.\(^8\)

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