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The ECJ Preliminary Ruling in French Endives: Two (Too?) Simple Rules to Attune Article 101 TFEU to the Common Agricultural Policy

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The competition and agricultural rules in the EU treaties have lived separate lives for many decades. While an agricultural exemption from the competition rules was already foreseen by Article 42 of the Treaty of Rome (now Article 42 TFEU) and this exemption has been included in secondary legislation since 1962, in practice its scope was never clear due to the vagueness of the legislation. While the United States treated farmer cooperatives as individual businesses since the 1922 Capper-Volstead Act, a similar assimilation was never achieved in the EU. Since the 2008 Milk Package, the common agricultural policy accepts the joint negotiation of farm products by producer organisations (POs) and associations of producer organisations (APOs) – if they are official recognized by the Member States – but how this should be viewed by antitrust authorities was never really clear.

In its [Grand Chamber judgment of 14 November 2017 in APVE](#) (which I already anticipated [here](#)), the ECJ has now provided an analytical framework to assess cooperation within and by POs and APOs from an antitrust perspective. The framework provided, which is to a large extent informed by the [Opinion](#) which Advocate General Wahl issued in April of this year, is quite clear, although its implications may be far reaching.

The preliminary ruling comes in response to a request by the French Cour de Cassation who was reviewing a judgment on a cartel between French endive producers that ran from 1998 to 2012. The French competition authority had uncovered this cartel which comprised agreements between several POs and other organisations to fix prices and limit the quantities of endives put on the market and the exchange of information to maintain these agreements. The endive producers could not argue that they should benefit from the agricultural exceptions explicitly foreseen in secondary EU legislation since these invariable required an exemption decision by the Commission (at least until 2013) – which they had not requested. The producers argued, however, that the creation of POs and APOs in the secondary legislation amounted to an implied exemption from the antitrust rules. The Cour de Cassation asked the ECJ whether that was the case and under which conditions.

In its ruling, the ECJ put forward two simple rules:

1. Cooperation by farmers *within* a recognized PO or APO (and strictly necessary to achieve the objectives of that PO or APO) is not governed by Article 101(1) TFEU (the ECJ, like its Advocate General, states that this is an exclusion of Article 101(1) TFEU, rather than a derogation or

exemption from it);

2. Cooperation *between* different recognized POs and APOs is governed by Article 101(1) TFEU (in other words: such cooperation will restrict competition if the conditions of Article 101 TFEU are fulfilled). The same is true for the cooperation by farmers outside of recognized POs or APOs (so in the context of organisations or associations which are not officially recognized as POs or APOs) or which goes beyond what is strictly necessary to achieve the objectives of a PO or APO.

Since the French endives cartel concerned agreements *between* POs and APOs and also involved organisations that were not recognized as POs or APOs, the agricultural exception is not applicable to the cartel.

The approach of the ECJ fits well into established antitrust doctrine. It treats POs (and APOs) as the “basic elements” (para. 44 of the judgment) of the agricultural sector, equivalent to “undertakings”. As a consequence, the agreements, decisions and concerted practices within that basic element are excluded from Article 101(1) TFEU since the latter is not concerned with the relations between different entities within a single economic unit (established case law since case 15/74 *Centrafarm*). Agreements, decisions and concerted practices between different basic units, on the other hand, can be viewed as covering relations between different undertakings and are therefore subject to Article 101(1) TFEU.

The simplicity of this approach is also welcome compared to the approach of the Commission in its first guidelines on the application of the competition rules in the agricultural sector, the [guidelines for the olive oil, beef and veal and arable crops sectors](#), where it states: “A PO is an association of individual producers and consequently is considered to be both an association of undertakings and an undertaking in its own right for the purposes of applying EU competition law, where it conducts an economic activity.” (para. 13). Such a neither fish nor fowl approach creates a lot of legal uncertainty.

However, the approach of the ECJ also raises questions. First of all, the ECJ states that cooperation between POs is covered by Article 101 TFEU but cooperation within an APO is not. But both cannot be true since APOs are precisely associations of POs. Presumably the ECJ means that any cooperation within a recognised agricultural entity, be it a PO or an APO is excluded from the competition rules and that cooperation outside of recognised agricultural entities (such as between POs which do not form part of an APO) is excluded. While the ECJ could have been clearer on this, the ambiguity of the agricultural legislation is certainly in large part to blame: it lacks clear definitions of POs and APOs and often attributes the same responsibilities to APOs as to POs.

More problematic from an enforcement perspective is that the distinction used by the ECJ is entirely dependent on whether an organisation (PO or APO) is recognised by a Member State. Effectively this means that Member States receive the authority to exempt cooperation between farmers from the competition rules (at least to the extent that that cooperation pursues the objectives foreseen in secondary legislation, but these objectives are extremely broad and include “stabilizing producer prices” – see Article 152 of Regulation 1308/2013). I would not be surprised if this is going to result in fireworks in the future.

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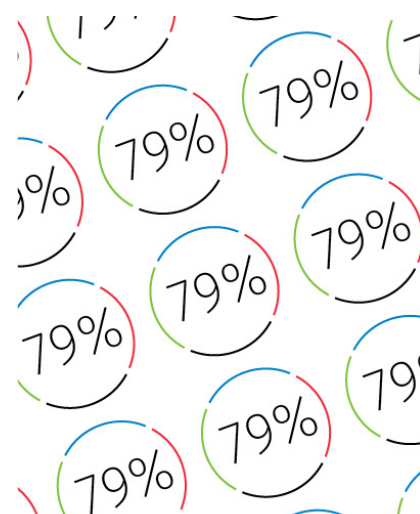
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