Reports of Cases

OPINION OF ADVOCATE GENERAL
WAHL
delivered on 6 April 2017 [1]

Case C-671/15

President of the Autorité de la concurrence
v
Association des producteurs vendeurs d'endives (APVE),
Association Comité économique régional agricole fruits et légumes de Bretagne (Cerafel),
Comité économique fruits et légumes du Nord de la France (Celfnord),
Association des producteurs d'endives de France (APEF),
Section nationale de l'endive (SNE),
Fédération du commerce de l'endive (FCE),
Société Fraileg,
Société Prim'Santerre,
Union des endiviers,
Société Soleil du Nord,
Société France endives,
Société Cambrésis Artois-Picardie endives (CAP'Endives),
Société Marché de Phalempin,
Société Primacoop,
Société Coopérative agricole du marais audomarois (Sipema),
Société Groupe Perle du Nord,
Société Valois-Fruits,
Ministre de l'Économie, de l'Industrie et du Numérique

(Request for a preliminary ruling from the Cour de cassation (Court of Cassation, France))

(Reference for a preliminary ruling — Anticompetitive practices — Article 101 TFEU — Applicability — Common organisation of markets — Producers' organisations — Responsibilities of those organisations — Practices of fixing minimum sale prices, concertation on quantities placed on the market and exchanges of strategic information — French endive market)

1. The common agricultural policy (CAP) and European competition policy, both pillars in the construction of Europe, may at first sight appear difficult to reconcile. Whereas the first, which is supposed to remedy failings in agricultural markets, initially led to considerable public interventionism, particularly through the introduction of production quota systems and support for producers, the second, by contrast, is based on the idea that market liberalisation is the best way to ensure economic efficiency and, ultimately, consumer well-being. The problems of reconciling the two, highlighted by the legal literature and which the Court has already had occasion to consider, require a precise definition of the scope of the 'agricultural derogation' laid down in the Treaties, as defined by secondary legislation. This is the central issue in the present case.

1 Original language: French.

2. The present request for a preliminary ruling was submitted in connection with an appeal in cassation brought by the President of the Autorité de la concurrence (French Competition Authority) against the judgment of 15 May 2014 of the Cour d'appel de Paris (Paris Court of Appeal, France) varying Decision No 12-D-08 of 6 March 2012 of the Competition Authority on practices applied in the endive production and marketing sector ('the decision at issue'). By that decision, the Authority found, on the basis of Article 101(1) TFEU in particular, that there had been a complex and continuous cartel on the French endive market over a period of 14 years, and imposed a fine of around EUR 4 million.

3. The Court is therefore requested to provide long-awaited [2] clarifications which, as well as being fundamentally significant, will be of considerable practical usefulness, [3] on the relationship between European legislation on the CAP and the application of European competition law. More precisely, the question is whether, in addition to general derogations from the application of European competition rules, expressly laid down by regulations on the common organisation of markets (CMO) — derogations whose application is not directly involved in the present case — 'specific derogations' must also be recognised arising by implication from the responsibilities assigned, under the European regulations adopted on the basis of Article 42 TFEU, to producer organisations (POs) and associations of producer organisations (APOs).

4. That question calls for a nuanced response, in my view. It is true that, as I propose to explain in the paragraphs below, the responsibilities assigned to the key players in the CMOs — the POs and APOs — necessarily imply that certain concertation practices within those entities, which are not covered by the general legislative derogations, may escape the prohibition of anticompetitive agreements laid down by Article 101(1) TFEU.

5. That exclusion is fundamentally based on the precedence, laid down by the judgment in *Maizena* v *Council* [4] and reaffirmed in more recent case-law, of the CAP over competition policy. Nevertheless, unless the requirement is to be disregarded that exclusions from the application of the competition rules must be interpreted strictly, collusive practices such as those leading to horizontal price-fixing cannot escape that prohibition solely on the ground that they are in some way intended to fulfil the responsibilities of the POs and APOs, in particular the objective of 'stabilising prices' under the CMOs. In this context, it will be necessary to define the practices of these entities which are necessarily covered by those responsibilities and those which, on the contrary, may not automatically escape the application of the competition rules.

Legal context

EU law

6. Article 42 TFEU provides that Union rules on competition apply to production of and trade in agricultural products only to the extent determined by secondary legislation, account being taken of the objectives of the common agricultural policy set out in Article 39 TFEU.

2 See, in particular, the *Report of the Agricultural Markets Task Force, 'Improving market outcomes'* (Brussels, November 2016) (available at https://ec.europa.eu/agriculture/agri-markets-task-force_en), according to which 'questions about the precise scope of the possibilities and constraints applying to producer cooperation abound. Ambiguity of rules also risks giving rise to diverging approaches by national competition authorities thereby undermining the internal market' (paragraph 147).

3 This is shown by the relatively exceptional fact (17 times in 12 years) that the European Commission has intervened in the main proceedings as an *amicus curiae* pursuant to Article 15(3) of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ 2003 L 1, p. 1). This provision provides in particular that, where the coherent application of provisions of the Treaty so requires, the Commission, acting on its own initiative, may submit written observations to the courts of the Member States.

4 Judgment of 29 October 1980, *Maizena* v *Council* (139/79, EU:C:1980:250, paragraph 23).

7. As regards, in particular, the fruit and vegetables sector, the provisions of secondary legislation governing the application of rules on competition to the production of and trade in agricultural products were adopted by the Union legislature in Regulation No 26,[5] which was succeeded by Regulation (EC) No 1184/2006[6] and Articles 175 to 182 of Part IV, entitled 'Competition rules', of Regulation (EC) No 1234/2007.[7]

8. As regards more particularly the CMO in the fruit and vegetables sector, additional conditions are set out in Article 20 of Regulation (EC) No 2200/96,[8] which was succeeded by Article 22 of Regulation (EC) No 1182/2007[9] and then Article 176a of Regulation No 1234/2007.

Regulation No 26

9. Article 1 of Regulation No 26 provides:

'From the entry into force of this Regulation, Articles 85 to 90 of the Treaty and provisions made in implementation thereof shall, subject to Article 2 below, apply to all agreements, decisions and practices referred to in Articles 85(1) and 86 of the Treaty which relate to production of or trade in the products listed in Annex II to the Treaty.'

10. That provision is essentially reproduced in Article 1a of Regulation No 1184/2006 and then Article 175 of Regulation No 1234/2007.

11. Article 2 of Regulation No 26 is worded as follows:

'1. Article 85(1) of the Treaty shall not apply to such of the agreements, decisions and practices referred to in the preceding Article as form an integral part of a national market organisation or are necessary for attainment of the objectives set out in Article 39 of the Treaty. In particular, it shall not apply to agreements, decisions and practices of farmers, farmers' associations, or associations of such associations belonging to a single Member State which concern the production or sale of agricultural products or the use of joint facilities for the storage, treatment or processing of agricultural products, and under which there is no obligation to charge identical prices, unless the Commission finds that competition is thereby excluded or that the objectives of Article 39 of the Treaty are jeopardised.

2. After consulting the Member States and hearing the undertakings or associations of undertakings concerned and any other natural or legal person that it considers appropriate, the Commission shall have sole power, subject to review by the Court of Justice, to determine, by decision which shall be published, which agreements, decisions and practices fulfil the conditions specified in paragraph 1.

3. The Commission shall undertake such determination either on its own initiative or at the request of a competent authority of a Member State or of an interested undertaking or association of undertakings.

4. The publication shall state the names of the parties and the main content of the decision; it shall have regard to the legitimate interest of undertakings in the protection of their business secrets.'

5 Regulation of 4 April 1962 applying certain rules of competition to production of and trade in agricultural products (OJ, English Special Edition 1959-1962, p. 129).

6 Council Regulation of 24 July 2006 applying certain rules of competition to the production of, and trade in, agricultural products (OJ 2006 L 214, p. 7).

7 Council Regulation of 22 October 2007 establishing a common organisation of agricultural markets and on specific provisions for certain agricultural products (Single CMO Regulation) (OJ 2007 L 299, p. 1).

8 Council Regulation of 28 October 1996 on the common organisation of the market in fruit and vegetables (OJ 1996 L 297, p. 1).

9 Council Regulation of 26 September 2007 laying down specific rules as regards the fruit and vegetable sector, amending Directives 2001/112/EC and 2001/113/EC and Regulations (EEC) No 827/68, (EC) No 2200/96, (EC) No 2201/96, (EC) No 2826/2000, (EC) No 1782/2003 and (EC) No 318/2006 and repealing Regulation (EC) No 2202/96 (OJ 2007 L 273, p. 1).

12. That provision is essentially reproduced in Article 2 of Regulation No 1184/2006 and then Article 176 of Regulation No 1234/2007.

Regulation No 2200/96

13. Article 11(1) of this regulation provides:

'For the purposes of this Regulation, "producer organisation" means any legal entity:

(a) which is formed on the own initiative of growers …;

(b) which has in particular the aim of:

(1) ensuring that production is planned and adjusted to demand, particularly in terms of quality and quantity;

(2) promoting concentration of supply and the placing on the market of the products produced by its members;

(3) reducing production costs and stabilising producer prices;

(4) promoting the use of cultivation practices, production techniques and environmentally sound waste-management practices in particular to protect the quality of water, soil and landscape and preserve and/or encourage biodiversity;

…'

14. Article 20(1) to (3) of the same regulation is worded as follows:

'1. Notwithstanding Article 1 of Regulation No 26, Article 85(1) of the Treaty shall not apply to the agreements, decisions and concerted practices of recognised interbranch organisations intended to implement the measures referred to in Article 19(1) (c).

2. Paragraph 1 shall apply only provided that:

– the agreements, decisions and concerted practices have been notified to the Commission, and that

– within two months of receipt of all the details required the Commission has not found that the agreements, decisions or concerted practices are incompatible with Community rules.

– The agreements, decisions and concerted practices may not be implemented until the period indicated in the second indent of the first subparagraph has elapsed.

3. Agreements, decisions and concerted practices which:

– may lead to the partitioning of markets in any form within the Community,

– may affect the sound operation of the market organisation,

– may create distortions of competition which are not essential in achieving the objectives of the common agricultural policy pursued by the interbranch organisation measure,

– entail the fixing of prices, without prejudice to measures taken by interbranch organisations in the application of specific provisions of Community rules,

– may create discrimination or eliminate competition in respect of a substantial proportion of the products in question, shall in any case be declared contrary to Community rules.'

15. Article 23(1) of Regulation No 2200/96 reads as follows:

'Producer organisations and their associations may choose not to put up for sale products listed in Article 1(2) contributed by their members, both in quantities and for periods which they consider appropriate.'

Regulation No 1182/2007

16. Article 3(1) of Regulation No 1182/2007 is, in essence, similar to Article 11(1) of Regulation No 2200/96.

Regulation No 1234/2007

17. The first paragraph of Article 122 of Regulation No 1234/2007, in the version resulting from Regulation (EC) No 361/2008,[10] provided:

'Member States shall recognise producer organisations, which:

(a) are constituted by producers of one of the following sectors:

…

(iii) fruit and vegetables in respect of farmers growing one or more products of that sector and/or of such products solely intended for processing;

…

(b) are formed on the initiative of the producers;

(c) pursue a specific aim, which may in particular relate to:

(i) ensuring that production is planned and adjusted to demand, particularly in terms of quality and quantity;

(ii) concentration of supply and the placing on the market of the products produced by its members;

(iii) optimising production costs and stabilising producer prices.

…'

10 Council Regulation of 14 April 2008 amending Regulation No 1234/2007 (OJ 2008 L 121, p. 1).

18. Article 175 of this regulation, as amended by Regulation (EC) No 491/2009,[11] is worded as follows:

‘Save as otherwise provided for in this Regulation, Articles 81 to 86 of the Treaty and implementation provisions thereof shall, subject to Articles 176 to 177 of this Regulation, apply to all agreements, decisions and practices referred to in Articles 81(1) and 82 of the Treaty which relate to the production of, or trade in, the products covered by this Regulation.’

19. Article 176 of the regulation reads as follows:

‘1. Article 81(1) of the Treaty shall not apply to the agreements, decisions and practices referred to in Article 175 of this Regulation which are an integral part of a national market organisation or are necessary for the attainment of the objectives set out in Article 33 of the Treaty.

In particular, Article 81(1) of the Treaty shall not apply to agreements, decisions and practices of farmers, farmers’ associations, or associations of such associations belonging to a single Member State which concern the production or sale of agricultural products or the use of joint facilities for the storage, treatment or processing of agricultural products, and under which there is no obligation to charge identical prices, unless the Commission finds that competition is thereby excluded or that the objectives of Article 33 of the Treaty are jeopardised.

2. After consulting the Member States and hearing the undertakings or associations of undertakings concerned and any other natural or legal person that it considers appropriate, the Commission shall have sole power, subject to review by the Court of Justice, to determine, by a decision which shall be published, which agreements, decisions and practices fulfil the conditions specified in paragraph 1.

The Commission shall undertake such determination either on its own initiative or at the request of a competent authority of a Member State or of an interested undertaking or association of undertakings.

3. The publication of the decision referred to in the first subparagraph of paragraph 2 shall state the names of the parties and the main content of the decision. It shall have regard to the legitimate interest of undertakings in the protection of their business secrets.’

20. Article 176a of the same regulation provides:

‘1. Article 81(1) of the Treaty shall not apply to the agreements, decisions and concerted practices of recognised interbranch organisations with the object of carrying out the activities referred to in Article 123(3)(c) of this Regulation.

2. Paragraph 1 shall only apply if:

(a) the agreements, decisions and concerted practices have been notified to the Commission;

(b) within two months of receipt of all the details required the Commission has not found that the agreements, decisions or concerted practices are incompatible with Community rules.

3. The agreements, decisions and concerted practices may not be put into effect before the period referred to in point (b) of paragraph 2 elapses.

11 Council Regulation of 25 May 2009 amending Regulation No 1234/2007 (OJ 2009 L 154, p. 1).

4. The following agreements, decisions and concerted practices shall in any case be declared incompatible with Community rules:

(a) agreements, decisions and concerted practices which may lead to the partitioning of markets in any form within the Community;

(b) agreements, decisions and concerted practices which may affect the sound operation of the market organisation;

(c) agreements, decisions and concerted practices which may create distortions of competition which are not essential to achieving the objectives of the common agricultural policy pursued by the interbranch organisation activity;

(d) agreements, decisions and concerted practices which entail the fixing of prices, without prejudice to activities carried out by interbranch organisations in the application of specific Community rules;

(e) agreements, decisions and concerted practices which may create discrimination or eliminate competition in respect of a substantial proportion of the products in question.

5. If, following expiry of the two-month period referred to in paragraph 2(b), the Commission finds that the conditions for applying paragraph 1 have not been met, it shall take a Decision declaring that Article 81(1) of the Treaty applies to the agreement, decision or concerted practice in question.'

French law

21. Article L.420-1 of the code de commerce (Commercial Code) provides:

'Concerted actions, agreements, express or tacit understandings or coalitions shall be prohibited, even through the direct or indirect intermediation of a company in the group established outside France, where they have the aim or may have the effect of preventing, restricting or distorting the free competition in a market, particularly when they are intended to:

1. limit access to the market or the free exercise of competition by other undertakings;

2. prevent price setting by the free play of market forces, by artificially encouraging the increase or reduction of prices;

3. limit or control production, opportunities, investments or technical progress;

4. share out markets or sources of supply.'

The case before the referring court, the questions referred and the procedure before the Court

22. Following inspection and seizure operations conducted by departments of the direction générale de la concurrence, de la consommation et de la répression des fraudes (Directorate-General for Competition, Consumer Affairs and the Prevention of Fraud, DGCCRF) on 12 April 2007, the Ministre chargé de l'économie (French Minister for the Economy) referred to the Conseil de la concurrence (Competition Council, now the Competition Authority), on 11 July 2008, potentially anticompetitive practices applied in the endive production and marketing sector.

23. By the decision at issue, the Competition Authority decided that the APEF, APVE, Celfnord, Cerafel, FCE, FNPE, SNE, SAS Groupe Perle du Nord and the OPs Cap'Endives, Fraileg, France Endives, Marché de Phalempin, Nord Alliance, Primacoop, Prim'Santerre, Soleil du Nord, Sipema and Valois-Fruits had operated a complex and continuous cartel prohibited by Article L.420-1 of the Commercial Code and Article 101 TFEU on the endive market. According to the Competition Authority, that cartel had consisted of an agreement on the price of endives through different concertation mechanisms at different times — such as disseminating a minimum price on a weekly basis, setting a 'cours pivot' (central rate), establishing a trading exchange, setting a 'prix cliquet' (reserve price) and misusing the withdrawal price mechanism — of collusion on the quantities of endives placed on the market and of a system for the exchange of strategic information used for the purpose of price maintenance, those practices having been aimed at the collective fixing of a minimum producer price for endives and having allowed producers and several professional producer organisations to maintain minimum sale prices during a period which started in January 1998 and was still ongoing on the date of the decision at issue. It consequently imposed on them fines totalling EUR 3 970 590.

24. In the decision at issue, the Competition Authority in particular rejected the producers' arguments that the agreements in question should be regarded as necessary for attainment of the objectives of the CAP, on the ground that the derogations provided for in Article 2(1) of Regulation No 1184/2006 and in Article 176 of Regulation No 1234/2007 were not applicable in the present case. The Competition Authority also considered that the practices criticised went 'beyond the legitimate responsibilities of the professional organisations in question' and, further, that the POs and APOs were, in its view, entirely aware that those practices were unlawful.

25. On 6 April 2012, a number of the undertakings and organisations fined brought an action for annulment and, in the alternative, an action to vary the decision at issue, before the Cour d'appel de Paris (Paris Court of Appeal).

26. By judgment of 15 May 2014, the Cour d'appel de Paris (Paris Court of Appeal) varied all the provisions of the decision at issue and, ruling on the substance, held that it had not been established that the provisions of Article L.420-1 of the Commercial Code and of Article 101(1) TFEU had been infringed. It noted, in particular, that it had not been established that the dissemination of minimum price instructions was, in every case, necessarily and definitively prohibited, so that it had not been indisputably established that the organisations in question had exceeded the bounds of the responsibilities lawfully assigned to them as regards price stabilisation.

27. The President of the Competition Authority brought an appeal in cassation against that judgment.

28. In those proceedings, the European Commission submitted observations before the Cour de cassation (Court of Cassation) pursuant to Article 15(3) of Regulation No 1/2003. It explained that there are not just general derogations, adopted on the basis of Article 2 of Regulations No 26 and No 1184/2006 and Article 176 of Regulation No 1234/2007, from the applicability of EU competition rules to the agricultural sector, but also, under Article 175 of Regulation No 1234/2007, specific derogations laid down in the various regulations on the CMO, which impose on organisations active in the production of and trade in fruit and vegetables certain specific tasks which would normally be likely to be caught by the prohibitions laid down in the competition rules. It considers, however, that the main conduct at issue in the main proceedings — the minimum price mechanisms agreed by the principal associations of producer organisations — does not form part of the specific tasks provided for by the CMO and cannot be considered to be covered by those specific derogations.

29. In a judgment of 8 December 2015, the Cour de cassation (Court of Cassation) noted that the Court of Justice had held that Article 42 TFEU establishes the principle that the European competition rules are applicable in the agriculture sector and that the maintenance of effective competition on the market for agricultural products is one of the objectives of the common

agricultural policy,[12] while also considering that, even in regard to the competition rules of the Treaty, Article 42 TFEU gives precedence to the objectives of the CAP over those in relation to competition policy.[13]

30. However, it considered that the Court of Justice had not yet ruled on the existence of the 'specific derogations' referred to by the Commission, nor had it specified, where appropriate, their relationship with the 'general derogations' set out in the regulations on the application of the competition rules in the agricultural sector. It also stated that the Court had also not given a ruling on the profile of the responsibilities assigned to POs and APOs under the regulations establishing CMO in the fruit and vegetables sector (Regulations No 2200/96, No 1182/2007 and No 1234/2007).

31. The Cour de cassation (Court of Cassation) therefore decided to stay proceedings and refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Can agreements, decisions or practices of producer organisations, associations of producer organisations and professional organisations which could be classified as anticompetitive under Article 101 TFEU escape the prohibition laid down in that article on the sole ground that they could be linked to the responsibilities assigned to those organisations under the [CMO], even if they are not covered by any of the general derogations provided for in turn by Article 2 of Regulation [No 26] and Regulation No 1184/2006 of 24 July 2006, and by Article 176 of Regulation [No 1234/2007]?

(2) If so, must Article 11(1) of Regulation [No 2200/1996], Article 3(1) of Regulation No 1182/2007 and the first paragraph of Article 122 of Regulation No 1234/2007, which include, among the objectives assigned to producer organisations and their associations, those of stabilising producer prices and adjusting production to demand, particularly in terms of quantity, be interpreted as meaning that practices whereby those organisations or their associations collectively fix minimum prices, concert on the quantities placed on the market or exchange strategic information escape the prohibition of anticompetitive agreements, decisions and practices in so far as they are aimed at achieving those objectives?'

32. Written observations were submitted by the president of the French Competition Authority, by, together, the Association Comité économique régional agricole fruits et légumes de Bretagne (Cerafel), the Comité économique fruits et légumes du Nord de la France (Celfnord), the Association des producteurs d'endives de France (APEF), the Section nationale de l'endive (SNE), the Fédération du commerce de l'endive (FCE), by, together, the companies Fraileg and Prim'Santerre, by, together, the companies France Endive, Cambrésis Artois-Picardie endives (CAP'Endives), Marché de Phalempin, Primacoop, Coopérative agricole du marais audomarois (Sipema) and Groupe Perle du Nord, by the French, Spanish and Italian Governments, and by the Commission.

33. A hearing was held on 31 January 2017, attended by the president of the French Competition Authority, Cerafel, Celfnord, APEF, SNE, FCE, Fraileg and Prim'Santerre, France Endive, CAP'Endives, Marché de Phalempin, Primacoop, Sipema and Groupe Perle du Nord, the French and Spanish Governments, and the Commission.

12 Judgments of 9 September 2003, *Milk Marque and National Farmers' Union* (C-137/00, EU:C:2003:429, paragraphs 57 and 58), and of 19 September 2013, *Panellinios Syndesmos Viomichanion Metapoiisis Kapnou* (C-373/11, EU:C:2013:567, paragraph 37).

13 Judgments of 9 September 2003, *Milk Marque and National Farmers' Union* (C-137/00, EU:C:2003:429, paragraph 81), and of 19 September 2013, *Panellinios Syndesmos Viomichanion Metapoiisis Kapnou* (C-373/11, EU:C:2013:567, paragraph 39).

Analysis

34. In considering this request for a preliminary ruling it is first necessary to note the general principles governing the relationship between the competition rules and the rules of the CAP.

Preliminary observations on the relationship between the rules of the CAP and the competition rules

35. On the basis that the objectives pursued by the CAP are not necessarily the same as those intended to be promoted by competition policy, and that there may therefore be a tension in the implementation of those policies,[14] Article 42 TFEU, the wording of which essentially corresponds to Article 36 of the EC Treaty, although establishing the precedence of the CAP over the competition objectives set out in the Treaty, lays down a general rule for reconciling the two.

36. That article provides that the rules on competition apply to production of and trade in agricultural products only to the extent determined by secondary legislation, account being taken of the objectives set out in Article 39 TFEU. Article 39(1) TFEU sets out the following economic and social objectives of the CAP: increasing productivity, ensuring a fair standard of living for the agricultural community, stabilising markets, assuring the availability of supplies, and ensuring that supplies reach consumers at reasonable prices.

37. It is therefore in fact for the Council of the European Union to define whether and how far the EU competition rules apply to the agriculture sector, although that application must not compromise the attainment of the objectives of the CAP.

38. This has been done since 1962 with the adoption of Article 1 of Regulation No 26, according to which the Treaty provisions on competition apply to the agreements, decisions and practices referred to relating to production of or trade in the products listed in Annex II to the Treaty (including fruit and vegetables, with endives listed). Over time that provision has been replaced by identical or similar provisions. For the period covered in the main proceedings, the provisions in question are Articles 1 and 2 of Regulation No 1184/2006 and Articles 175 and 176 of Regulation No 1234/2007.

39. Those provisions provide for the competition rules to apply in principle. Under Article 2 of Regulation No 1184/2006 (a provision essentially reproduced by Article 176 of Regulation No 1234/2007), only the agreements, decisions and practices referred to in Article 101 TFEU relating to production of or trade in the products listed in Annex I to the Treaty, which form an integral part of a CMO or are necessary for attainment of the objectives of the CAP, escape the application of those rules. In the paragraphs below I shall come back to the general derogations which these applicable texts (Article 2(1) of Regulation No 26 and the equivalent articles which succeeded it) laid down.

40. It follows that the agricultural sector, and particularly the CMO sector, cannot be regarded as a 'competition-free zone'.[15] The Court has accordingly held that Article 42 TFEU establishes the principle that the EU competition rules are applicable in the agricultural sector and that the maintenance of effective competition on the market for agricultural products is one of the objectives of the common agricultural policy.[16]

14 See, in that respect, judgment of 29 October 1980, *Maizena* v *Council* (139/79, EU:C:1980:250, paragraph 23).

15 Judgment of 9 September 2003, *Milk Marque and National Farmers' Union* (C-137/00, EU:C:2003:429, paragraph 61), and order of 22 March 2010, *SPM* v *Council and Commission* (C-39/09 P, not published, EU:C:2010:157, paragraph 47).

16 Judgments of 9 September 2003, *Milk Marque and National Farmers' Union* (C-137/00, EU:C:2003:429, paragraphs 57 and 58), and of 19 September 2013, *Panellinios Syndesmos Viomichanion Metapoiisis Kapnou* (C-373/11, EU:C:2013:567, paragraph 37).

41. In that regard, it should be noted that the activity of farmers, although it has certain specific features and is the object of very detailed regulation, is of an economic nature and therefore falls within the scope of the competition rules laid down by the TFEU.[17]

42. That said, despite the fact that CMOs for agricultural products are not 'competition-free zones', Article 42 TFEU still gives precedence to the objectives of the CAP over those in relation to competition policy.[18]

43. It therefore follows from Article 42 TFEU, which lays down both the precedence of the CAP over competition policy and, at the same time, the possibility for the Council to decide to what extent the rules on competition must be applied in the agricultural sector, that certain behaviour of players in the agricultural markets *may automatically escape* the competition rules and in particular those on anticompetitive agreements. That exclusion must, however, be strictly circumscribed, since that is required by the secondary legislation to which the primary law refers. In the end, therefore, it is all about finding a balance between pursuit of the objectives of the CAP and the need to maintain effective competition on agricultural markets.

44. Those considerations must be borne in mind when examining the present request for a preliminary ruling.

The first question referred

45. By its first question, the referring court asks the Court of Justice whether — beyond the 'general derogations' provided for by the relevant regulations — agreements, decisions or practices of POs, APOs and professional organisations 'which could be classified as anticompetitive under Article 101 TFEU' can escape the prohibition of restrictive agreements laid down in that article on the sole ground that they could be linked to the responsibilities assigned to those organisations under the CMO.

46. After explaining why the referring court's question should be recast as seeking to identify exclusions — rather than implied 'derogations' — from the competition rules in the CMO sector, exclusions primarily based on the precedence to be given to the CAP, I shall describe the conditions which the behaviour objected to must satisfy in order to escape the application of Article 101(1) TFEU.

How certain behaviour that can strictly be linked to the responsibilities assigned to players in CMOs can escape the competition rules: an exclusion rather than an implied derogation from the application of Article 101 TFEU

47. The first question, as formulated by the referring court, is based on the premiss that the behaviour in question is, a priori, anticompetitive.

48. That premiss appears to me to be incorrect.

17 See judgment of 13 December 2006, *FNCBV and Others* v *Commission* (T-217/03 and T-245/03, EU:T:2006:391, paragraphs 52, 53 and 86).

18 Judgments of 9 September 2003, *Milk Marque and National Farmers' Union* (C-137/00, EU:C:2003:429, paragraph 81), and of 19 September 2013, *Panellinios Syndesmos Viomichanion Metapoiisis Kapnou* (C-373/11, EU:C:2013:567, paragraph 39).

49. Irrespective of whether the measures in question are examined from the point of view of their actual or potential effects, in order to decide whether collusive behaviour serves an anticompetitive object, that collusive behaviour must still be examined in the light of its factual and legal context. When determining that context, it is necessary to take into consideration the nature of the goods or services affected, as well as the real conditions of the functioning and structure of the market or markets in question. [19]

50. In particular, if a given collusive behaviour occurs in a non-competitive environment, resulting in particular from the fact that the behaviour is directly linked to the fulfilment of the responsibilities assigned to the CMO players under the applicable regulations, it is no longer anticompetitive behaviour liable to come under Article 101(1) TFEU. As the Court has stated, the national competition authorities must take account first of the CMO rules in order to assess whether or not behaviour adopted by the POs and APOs is anticompetitive. [20]

51. In my view, these considerations indicate that, rather than a *derogation* (or exemption, depending on the terminology used) from the application of competition law, it is more a case here of an *exclusion* from that application, arising from the need to carry out the responsibilities assigned to the key players in the CMOs. In so far as — and only in so far as — it is established that the practices followed in the context of a CMO are, ultimately, strictly necessary for the fulfilment of those responsibilities, the application of the rules on competition, and particularly those on anticompetitive agreements, must automatically be excluded. Contrary to the view put forward by some of the interveners, the behaviour in question cannot, therefore, be regarded, a priori, as 'anticompetitive', for the simple reason that it is not being used in an area that is subject to competition.

52. This terminological clarification is not unimportant. On the contrary, it has significant implications both for the methods used to examine measures taken by players in the CMOs and for the burden of proving the potentially anticompetitive nature of those measures.

53. It has been clearly established that it is for the authority responsible for prosecuting anticompetitive behaviour by undertakings both to prove that the measures in question fall within the scope of the competition rules, and to demonstrate that they have effects which restrict competition.

54. If it is assumed that the measures are, prima facie, anticompetitive, without a detailed examination of how they have been developed and implemented, it becomes extremely difficult for the economic entities in question to prove that their behaviour is closely linked to the fulfilment of their responsibilities under the CMO, and that it is therefore a 'competition-free zone'. In such a situation, the entities can only demonstrate that the measures should be exempt from the application of the competition rules, in the light of the particular circumstances in which they were developed. It would amount to requiring the entities to take steps comparable to those laid down in order to benefit from a 'general' derogation, or those involved in a request for exemption under Article 101(3) TFEU.

55. In the present case, therefore, what must be determined is not whether Article 101(1) TFEU can be disregarded even though it applies to the contested behaviour, but whether that provision is actually applicable.

56. If we are not to prejudge the anticompetitiveness of the conduct at issue, therefore, the problem before us is whether the application of Article 101 TFEU is precluded, rather than whether there is a derogation from the application of that provision.

19 See, inter alia, judgment of 11 September 2014, *CB* v *Commission* (C-67/13 P, EU:C:2014:2204, paragraph 53 and the case-law cited).

20 See, inter alia, to that effect judgment of 9 September 2003, *Milk Marque and National Farmers' Union* (C-137/00, EU:C:2003:429, paragraph 94).

57. Having clarified that point, I take the view that, in the present case, the actual question is whether undertakings can adopt behaviour which does not come under general derogations and which, because of its importance for the effective operation of a CMO under the CAP, may nevertheless escape the application of Article 101 TFEU and, if so, what conditions the practices in question must satisfy.

58. For reasons which I shall explain in the following points, I consider that the answer to this question must be yes.

The need to recognise that certain measures essential for the fulfilment of the responsibilities assigned to the POs and APOs may escape the application of Article 101(1) TFEU

– A necessity arising from the rules governing the CMO

59. With regard to the derogations expressly laid down by the EU legislature, for the period of the facts in the main proceedings and pursuant to the relevant regulations,[21] three general derogations from the application of the rules on restrictive agreements are provided for, which are granted subject to a decision of the Commission.[22] In fact, the Commission has only very rarely allowed such derogations[23] and the Court has repeatedly held that they should be interpreted strictly.[24]

60. The first derogation concerns agreements, decisions and practices which form an integral part of a *national market organisation*. The scope of this derogation is now limited, since almost all agricultural products have gradually been covered by a sectoral CMO, and then by Regulation No 1234/2007 establishing the single CMO.[25]

61. The second general derogation concerns cases where the Commission has been led to decide that certain agreements, decisions and practices restricting competition are necessary for the attainment of the *objectives* of the CAP set out in Article 39 TFEU. This derogation is interpreted restrictively by the Court, in so far as it has been a requirement that the behaviour in question should promote the attainment of *all* those objectives or, at the very least, that account was taken of all those objectives.[26]

62. Lastly, the third derogation relates to competition-restricting agreements, decisions and practices of farmers, farmers' associations, or associations of such associations belonging to a single Member State, in so far as, without involving any 'obligation to charge identical prices', they concern the production or sale of agricultural products or the use of joint facilities for the storage, treatment or processing of agricultural products, unless the Commission finds that competition is thereby excluded or that the objectives of the CAP are jeopardised.[27]

21 See Article 2 of Regulation No 1184/2006 then Articles 175 and 176a of Regulation No 1234/2007.

22 Since the entry into force of Regulation (EU) No 1308/2013 of the European Parliament and of the Council of 17 December 2013 establishing a common organisation of the markets in agricultural products (OJ 2013 L 347, p. 671), not applicable to the facts in this case, there are now two 'general' derogations and a prior decision of the Commission is no longer required (directly applicable exception system) (see Article 209(2) of Regulation No 1308/2013).

23 As far as I can see, the only case allowed was in response to an application from the French Republic in the potato sector (see Commission Decision 88/109/EEC of 18 December 1987 relating to a proceeding pursuant to Article 85 of the EEC Treaty (IV/31.735 — New potatoes)) (OJ 1988 L 59, p. 25).

24 See, in particular, judgment of 12 December 1995, *Oude Luttikhuis and Others* (C-399/93, EU:C:1995:434, paragraph 23).

25 Endives have been covered by a CMO since the adoption of Council Regulation (EEC) No 1035/72 of 18 May 1972 on the common organisation of the market in fruit and vegetables (OJ, English Special Edition 1972(II), p. 437).

26 See, in particular, judgments of 15 May 1975, *Nederlandse Vereniging voor de fruit en groentenimporthandel and Frubo* v *Commission* (71/74, EU:C:1975:61, paragraphs 24 to 26); of 12 December 1995, *Oude Luttikhuis and Others* (C-399/93, EU:C:1995:434, paragraph 25); and of 30 March 2000, *VBA* v *Florimex and Others* (C-265/97 P, EU:C:2000:170, paragraph 94). See also judgments of 14 May 1997, *Florimex and VGB* v *Commission* (T-70/92 and T-71/92, EU:T:1997:69, paragraph 153), and of 13 December 2006, *FNCBV and Others* v *Commission* (T-217/03 and T-245/03, EU:T:2006:391, paragraph 199).

27 On the independent and specific nature of this derogation, see, in particular, judgment of 12 December 1995, *Dijkstra and Others* (C-319/93, C-40/94 and C-224/94, EU:C:1995:433, paragraph 20).

63. As the referring court mentioned, these general derogations are not relevant in the present case [28] and it is not for us to determine whether they might, if appropriate, have been relied on by the entities involved in the main proceedings. In any event, and as is clear from my earlier explanations and the absence of a Commission decision on the subject — which, I would point out, was required at the time of the facts in the main action — it is apparent that none of these derogations is clearly applicable in the present case.

64. As reformulated (see point 57 above), the first question leads us, by contrast, to determine whether more implicit exclusions from the application of Article 101(1) TFEU might not flow from the very nature of the CAP and, more particularly, from the specific responsibilities assigned to the POs and APOs by secondary legislation adopted on the basis of Article 42 TFEU.

65. In that regard, it is important to bear in mind that it has been clearly established that the objectives of the CAP set out in Article 39 TFEU take precedence over the objectives of competition. It should be noted that Article 38(2) TFEU, like the Treaty provisions which preceded it, gives precedence to the specific provisions adopted in the context of the CAP, [29] without making any distinction according to the provisions of the regulations in question. Article 40 TFEU provides that the CMO, which was established in order to attain the objectives of the CAP, 'may include all measures required to attain [these] objectives, in particular regulation of prices'. As the Court has held on various occasions, that means that the authorities in the Member States may not take measures likely to undermine a CMO. In particular, it has held that measures adopted by the competition authorities must not impede the working of the machinery provided for by a CMO. [30]

66. It thus follows from the scheme intended by the authors of the Treaties that a measure may escape the application of the competition rules where those measures are necessary to the POs and APOs in order to carry out one or more of the tasks assigned to them.

67. That finding is echoed by Article 175 of Regulation No 1234/2007, which succeeded Article 1 of Regulation No 26 and Article 1a of Regulation No 1184/2006, and which provides that the competition rules apply 'save as otherwise provided for in this Regulation'. That is particularly true of regulations establishing CMOs which frame certain responsibilities and certain methods of intervention in agricultural markets. Those regulations assign to entities active in the production of and trade in agricultural products — the POs and the APOs — certain specific tasks and responsibilities which may lead them to adopt certain forms of coordination.

68. In that regard, it is important to note that the CMO is intended to govern all production of and trade in agricultural products in the Member States. It is a vital mechanism for attaining the objectives of the CAP set out in the Treaty, in particular the stabilisation of agricultural markets and the maintenance of a fair standard of living for farmers.

69. The internal aspect of the CMO thus provides for a number of measures designed to take account of the specific features of the agricultural market, which is characterised by a growing concentration of demand and, in parallel, by a fragmentation of supply.

28 Both the *iudex a quo* and the defendant parties in the proceedings before the Cour de cassation (Court of Cassation) appear to accept that the general derogations do not apply.

29 Judgments of 26 June 1979, *McCarren* (177/78, EU:C:1979:164, paragraph 9); of 16 January 2003, *Hammarsten* (C-462/01, EU:C:2003:33, paragraph 26); and of 26 May 2005, *Kuipers* (C-283/03, EU:C:2005:314, paragraph 32).

30 Judgments of 9 September 2003, *Milk Marque and National Farmers' Union* (C-137/00, EU:C:2003:429, paragraph 94 and the case-law cited), and of 1 October 2009, *Compañía Española de Comercialización de Aceite* (C-505/07, EU:C:2009:591, paragraph 55).

70. In a context in which, as recital 7 of Regulation No 2200/96 states, 'the grouping of supply … is more than ever an economic necessity in order to strengthen the position of producers in the market', POs and then APOs were seen in the regulations on the CMO in fruit and vegetables as being able to play a useful role in, among other things, concentrating supply and stabilising prices [31] and as therefore being key players in that CMO. In support of this, recital 7 states that '[POs] are the basis elements in the [CMO], the decentralised operation of which they ensure at their level'. [32]

71. Consequently, where, in the regulations governing the CMOs and the regulations introducing implementing rules for them, the Council makes provision for certain concertation measures, it thereby precludes the application of the competition rules and, in particular, the prohibition of anticompetitive agreements under Article 101(1) TFEU. In other words, agreements, decisions and concerted practices of POs and APOs which comply with those regulations necessarily escape the application of Article 101(1) TFEU.

72. In the present case, the first question referred for a preliminary ruling therefore requires us to consider the role assigned to the POs and the APOs as key players in the CMOs, particularly the CMO in fruit and vegetables, under the relevant regulations.

– A necessity justified in particular by the role conferred on POs and APOs under the CMOs

73. With regard to POs, [33] they answer the overriding need to strengthen the position of producers in the market and are defined as legal entities formed on a voluntary basis on the initiative of producers for the purpose of pursuing certain objectives. It is usually the aim of these producers to pool their resources in order to rebalance their commercial relationship with economic actors downstream of their industry and, in particular, to strengthen their negotiating power when selling their products. POs group together on the basis of an operational programme. Groups of producers which provide proof that they have a minimum number of members and cover a minimum volume of marketable production must be recognised as POs (see Articles 15 to 23 of Regulation No 2200/96).

74. POs are formed for a purpose which is clearly defined by the regulations. [34] The aims of forming a PO include, in particular, ensuring that production is planned and adjusted to demand, promoting concentration of supply and the placing on the market of the products produced by its members, and reducing production costs and stabilising producer prices. [35]

75. In order to achieve those objectives, the PO must control the conditions of sale and, in particular, the sale price of its member producers' products. The member producers, for their part, undertake to apply certain rules adopted by the PO, to belong to only one PO and to market their entire production through the PO to which they belong. [36] It should also be noted that thresholds are fixed for each sector, based on the number of producers or the value of the production marketed, which a PO must attain in order to gain recognition.

31 See also, in that regard, recital 131 of Regulation No 1308/2013, which succeeded Regulation No 1234/2007.

32 For a general overview of the position of POs in the CAP, reference should be made to my Opinion in *Fruition Po* (C-500/11, EU:C:2013:259, particularly points 24 to 31).

33 See, in particular, recitals 7 and 16 and Articles 11 to 18 of Regulation No 2200/96; Articles 3 and 4 of Regulation No 1182/2007 and Article 122 of Regulation No 1234/2007.

34 See, in particular, Article 11(1)(b) of Regulation No 2200/96 and Article 122(c) of Regulation No 1234/2007 — applicable to the facts in the present case — which reproduce Article 13 of Commission Regulation (EEC) No 335/72 of 16 February 1972 establishing export refunds for white sugar and raw sugar in its unaltered state (OJ 1972 L 42, p. 8).

35 See Article 11(1)(b) of Regulation No 2200/96, the wording of which is reproduced in Article 3(1) of Regulation No 1182/2007 and in the first paragraph of Article 122 of Regulation No 1234/2007.

36 See, in particular, Article 11(1)(c) of Regulation No 2200/96.

76. POs may also, again under the relevant regulations, form APOs [37] or professional organisations. [38]

77. Article 125c of Regulation No 1234/2007 provides that the fulfilment of the responsibilities referred to is extended to APOs. [39]

78. The applicable regulations provide that the aim of these players is (i) ensuring that production is planned and adjusted to demand, particularly in terms of quality and quantity, (ii) promoting concentration of supply and the placing on the market of the products produced by members, (iii) reducing production costs and stabilising producer prices, and (iv) promoting the use of cultivation practices, production techniques and environmentally sound waste-management practices in particular to protect the quality of water, soil and landscape and preserve and/or encourage biodiversity. [40]

79. In order to fulfil these responsibilities effectively, both the POs and APOs may therefore, first, find it necessary to negotiate the conditions of sale for their members' total production directly with purchasing groups.

80. Secondly, they may find it necessary to take measures to manage the quantities placed on the market.

81. In that regard, the European legislation expressly provided that POs could adopt *withdrawal measures*, in other words decide not to put up for sale particular quantities of products at particular periods which they considered appropriate. During the period when Regulation No 2200/96 applied, up to the end of 2007, those measures were seen as intervention measures taken by the POs which could therefore apply both to their members and to non-members, provided that the PO concerned was regarded as representative. [41] The management of these withdrawal operations, through an operational fund and programme, [42] requires the POs and APOs to be subject to a certain scrutiny, since they have the power to adopt rules which the Member State concerned may make binding on all producers in a given economic area. The system of withdrawal measures was substantially amended by Regulation No 1234/2007, since they are no longer seen as part of the operational programmes for crisis prevention and management. [43]

82. In additional to these withdrawal measures, POs and APOs also have the power to *plan production* in order to adjust it to demand in accordance with the objectives defined by the relevant regulations. [44]

83. It follows from all of those provisions that POs and APOs are inevitably required to play a decisive role in centralising the marketing of their members' products. *They are, in essence, forums for collective concertation*.

37 See Article 16 of Regulation No 2200/96; Article 5 of Regulation No 1182/2007; Article 125c of Regulation No 1234/2007.

38 See Articles 19 to 21 of Regulation No 2200/96; Articles 20 and 21 of Regulation No 1182/2007; Article 123 of Regulation No 1234/2007.

39 Under this provision, introduced by Regulation No 361/2008, Member States may recognise, on request, an association of producer organisations where the Member State considers that the association is capable of effectively carrying out those activities and the association does not hold a dominant position on a given market unless this is necessary in pursuance of the objectives of the CAP.

40 Article 11(1) of Regulation No 2200/96; Article 3(1) of Regulation No 1182/2007; the first paragraph, under (c), of Article 122 of Regulation No 1234/2007 (the latter no longer refers to promoting the use of cultivation practices, production techniques and environmentally sound waste-management practices in particular to protect the quality of water, soil and landscape and preserve and/or encourage biodiversity, though this is partly included in Article 125b(1)(a) of this regulation).

41 See, in particular, recitals 16 and 18 and Articles 23 and 24 of Regulation No 2200/96.

42 Articles 15 to 18 of Regulation No 2200/96.

43 See Article 103c(2)(a) of Regulation No 1234/2007.

44 See Article 9(2)(a) of Regulation No 1182/2007; Article 15(2)(a) and Article 3 of Regulation No 2200/96; and Article 103c(a) of Regulation No 1234/2007.

84. The pursuance of their objectives means that, unless the CMO legislation is to be rendered nugatory, some of the actions they take which are strictly necessary for the fulfilment of their responsibilities may escape the application of competition law. In order to carry out the tasks assigned to them by the EU legislature under the CMO, they have to put in place forms of coordination and concertation which are not covered by market principles and which are therefore inconsistent with the idea of competition.

85. The pursuance of such objectives inevitably means, as the General Court has had occasion to note,[45] that the PO concerned must have proper control over the conditions of sale and, in particular, sale prices. It is precisely this control that the member producers undertake to ensure by maintaining a certain discipline, in accordance with Article 11(1)(c) of Regulation No 2200/96.

86. That does not imply, however, that different POs and APOs can act in concert to fix prices. It should also not mean that measures taken by entities or organisations which have not been made responsible by their members for marketing their products escape the application of Article 101(1) TFEU. I shall examine this aspect in more detail later.

87. As well as the general derogations mentioned earlier, the practices followed by these actors must also, if the regulation mechanisms introduced by the regulations governing CMOs are to have any effect, escape to a certain extent the application of the competition rules, in particular Article 101(1) TFEU.

88. Rather than a 'specific' derogation, this is about drawing all the appropriate conclusions from the agricultural derogation provided for by the Treaties.

89. However, is it sufficient, as some of the interveners maintained, that measures taken by the POs and APOs in some way help them to fulfil the responsibilities assigned to them by the CMO regulations for those measures to escape the application of competition law?

90. I do not think so.

91. As I shall explain in the points below, only practices relating to the tasks specifically assigned to the POs, APOs and professional organisations in charge of marketing the products concerned should escape the application of the competition rules.

– A necessity arising from the role of the POs and APOs in charge of marketing the products concerned

92. It goes without saying that exclusions from the application of competition law for particular measures cannot be accepted solely on the ground that, according to the POs or APOs concerned, they help to achieve general objectives such as reducing production costs or stabilising producer prices.

93. In general terms, it must be made clear, as the Commission has argued, that for the practices in question to escape the application of Article 101(1) TFEU, it must be established that they have indeed been adopted at the 'correct level' and by the 'correct entity', either a PO or an APO *actually in charge of managing the production and marketing of the product concerned*.

45 See judgment of 30 September 2009, *France* v *Commission* (T-432/07, not published, EU:T:2009:373, paragraphs 53 to 56).

94. Apart from situations in which the regulation establishing a CMO precisely defines specific measures that may be taken by POs and APOs, such as the withdrawal measures referred to earlier, practices occurring between POs or APOs or involving non-member actors on the market must be subject to the rules on competition.

95. Consequently, concertation on prices, on quantities produced and on the dissemination of sensitive commercial information must not be the result of collusion between different POs or APOs, or within an entity which, whatever its actual or supposed designation, has not been put in charge of marketing the products concerned by its members.

96. That requirement appears to me to result implicitly but necessarily from the applicable legislation, which defines the tasks of concentrating supply and stabilising prices assigned to those entities. For concertation practices between different POs or APOs to be able to escape the application of Article 101(1) TFEU, the regulations governing the CMO at issue would have had to make express provision for it.

97. Thus, Article 11(1)(c) of Regulation No 2200/96, Article 3 of Regulation No 1182/2007 and the first paragraph of Article 122 of Regulation No 1234/2007 in fact state that the role conferred on POs relates only to the products of members or producers associated with the organisation.

98. In that vein, the General Court [46] has already held that promoting concentration of supply, as provided for in Article 11(1)(b)(2) of Regulation No 2200/96, is possible only if a significant part of members' production is sold through the producers' organisation. Without that requirement, measures adopted by POs and APOs will have only a very limited impact on the market and on the concentration of supply.

99. It is precisely the effective role which these entities can play in the concentration of supply and, ultimately, in stabilising prices which is capable, in some circumstances, of justifying their adoption of forms of concertation which escape the competition rules, particularly the application of Article 101(1) TFEU.

100. Consequently, apart from the intervention measures strictly provided for by the CMO regulation, I take the view that concertation practices adopted not only between different POs or APOs, but also within entities which are not in charge of a significant part of their members' production, must be subject to competition law.

101. Practices adopted *within* a PO or APO which is in fact in charge of managing the production and marketing of its members' products are comparable to those adopted within a company or group presenting itself, on the market in question and given the particular features of the agricultural market, as a single economic entity. Such 'internal' practices are not subject to the application of competition law. In such a configuration, the farmers represented no longer have any control, for the purpose of selling their products, over negotiations on products or prices.

102. Conversely, and irrespective, once again, of the arrangements expressly laid down by the applicable regulations, practices adopted *between* POs or APOs or within entities not responsible for marketing for their members, or between a PO/APO and other types of players on the market in question, cannot escape the application of competition law, since those practices operate between economic entities which are supposed to be independent.

46 See judgment of 30 September 2009, *France* v *Commission* (T-432/07, not published, EU:T:2009:373, paragraphs 53 to 56).

103. Although the objective of concentrating supply pursued by the regulations on the CMO implies that members of the POs and APOs in actual charge of marketing may act in concert, it does not mean that agreements on production and marketing conditions concluded between different POs, APOs and other entities which may not be recognised by the applicable regulations escape the application of the rules on anticompetitive agreements. It also does not validate practices, particularly on price fixing, within one of those entities, if that entity is not in control of marketing its members' products. In that case, it is no longer a question of concentration of supply, but of concertation between entities which are still competing on the final market for the product concerned.

104. Of course, it might appear easy to get round that requirement by creating large-scale POs and APOs through mergers. However, it must be remembered that the size of a PO/APO is a factor taken into account, in principle, at the stage when it gains or retains recognition. The regulations on the CMO expressly provide that Member States may recognise, on request, a PO or an APO provided that, among other things, they 'do not hold a dominant position in a given market', unless this is necessary in pursuance of the goals of the CAP.[47]

105. Consequently, any behaviour or practice which goes beyond what is strictly necessary for the fulfilment of the responsibilities assigned to the POs and APOs in respect of member producers is liable to come under the prohibition of restrictive agreements laid down by Article 101(1) TFEU.

106. In the light of the foregoing, I propose that the Court should reply to the first question referred that agreements, decisions or practices of POs, APOs and professional organisations may, even if they are not covered by any of the general derogations provided for in turn by Article 2 of Regulations No 26 and No 1184/2006, and by Article 176 of Regulation No 1234/2007, escape the prohibition on restrictive agreements laid down in Article 101(1) TFEU where it is established that that behaviour, first, is necessary or permitted for the accomplishment of the task assigned to the PO, APO or professional organisation in actual charge of marketing the products concerned and, second, has been adopted in the context of and in accordance with the regulations on the CMO concerned.

The second question referred

107. The second question referred concerns whether the contested practices in the main proceedings, relating to, respectively, (i) the collective fixing of minimum prices, (ii) concertation on the quantities of product placed on the market, and (iii) the exchange of sensitive/strategic information, can escape the application of Article 101 TFEU in so far as they are aimed in particular at achieving the objectives of stabilising producer prices and adjusting production to demand, assigned to the POs and APOs (see Article 11(1) of Regulation No 2200/96; Article 3 of Regulation No 1182/2007, and the first paragraph of Article 122 of Regulation No 1234/2007).

108. First of all, I must point out that the fact, mentioned, in particular, at the hearing, that the measures were adopted by the players concerned with the intention of tackling supposed or recognised problems faced by endive producers, particularly in a difficult economic situation of conflict with large-scale distributors, is not decisive. In that regard, the Court has stated that, even supposing it to be established that the parties to an agreement acted without any subjective intention of restricting competition, but with the object of remedying the effects of a crisis in their sector, such considerations are irrelevant for the purposes of applying Article 101(1) TFEU, but may, if appropriate, be taken into consideration for the purposes of obtaining an exemption from the prohibition laid down in Article 101(3) TFEU.[48]

47 See, regarding POs, Article 4(1)(g) of Regulation No 1182/2007 and Article 125b(1)(g) of Regulation No 1234/2007, and, regarding APOs, the first paragraph, under (b), of Article 5 of Regulation No 1182/2007 and the first paragraph, under (b), of Article 125c of Regulation No 1234/2007.

48 See, in particular, judgment of 20 November 2008, *Beef Industry Development Society and Barry Brothers* (C-209/07, EU:C:2008:643, paragraphs 19 to 21).

109. Moreover, without wishing altogether to prejudge the examination of the facts, which it is ultimately for the national court alone to conduct, it must be noted that, according to the information in the file before the Court, the practices in question in the present case are not just followed within one PO or one APO in charge of marketing for their members, but much more widely. According to the figures gathered by the French Competition Authority in its investigations, the contested practices involved not just 10 POs and 4 APOs, but also 5 unrecognised groups which are not responsible for any particular task under the relevant regulations.

110. It is therefore necessary, first of all, to make certain preliminary comments on the measures which can actually be taken by the various groups and POs regarding price regulation and adjusting production to demand.

111. Secondly, and in the light of the conclusions reached on this point, I shall examine in turn the various types of measures at issue in the main proceedings, distinguishing for each one cases where they concern members of a PO or APO in charge of marketing its members' products ('internal configuration') from those where they are operated by entities which, although classified as 'POs' or 'APOs', are not responsible for marketing their members' products, by different POs/APOs, and/or by unrecognised entities ('external configuration').

Preliminary observations on measures that can be adopted by POs and APOs under their responsibility to regulate prices and adjust production to demand

112. As I mentioned earlier, the role conferred on POs and APOs in regulating prices and adjusting production to demand may lead them to adopt forms of consultation and concertation with their members.

113. The central question which arises in the present case is whether that task of regulation and adjustment may result in the fixing, within a PO or APO and in concertation with its members, of minimum sale prices for the products covered by the CMO.

114. I think that that cannot be envisaged under any circumstances.

115. In an internal configuration, if the members of a PO or APO have actually assigned it the responsibility, as required by the regulations on the CMO, of marketing most or all of their production, it appears essential that the PO or APO must negotiate with distributors a *single price* applicable to all of that production. The PO or APO concerned is, in a way, given the status, by its members, of a single negotiator, in particular with players downstream of the industry. That single price, which is determined according to marketing periods and the quality of the product concerned, is, by definition, variable.

116. Consequently, where the fact that the PO or APO is responsible for marketing all the products concerned results in the fixing of a single price, there is, by definition, no point in one of those entities fixing a *minimum price* which cannot be varied.

117. Minimum price-fixing practices are only feasible in a context where the producers of the product concerned still have some power when it comes to negotiating the sale price for that product.

118. As the French Competition Authority noted in particular, the responsibility of 'stabilising producer prices' assigned to the POs/APOs must be understood in the context of the aim of stabilising markets pursued by the CMO and in the light of the methods expressly contemplated in the European regulations (withdrawal measures and/or production plans), and cannot mean that the fixing of minimum prices such as appears to be at issue in the main proceedings, that is, the fixing of prices imposed on all POs/APOs and applicable to all the products in question over most of the national production, escapes the application of Article 101(1) TFEU.

119. As for the external configuration, although the POs/APOs have, under successive relevant provisions,[49] been assigned important responsibilities, particularly in concentrating supply and stabilising producer prices, the importance of those responsibilities cannot be interpreted as authorising collusive measures to fix prices imposed across the board on all their members and for all products marketed.

120. In conclusion, exclusion from the application of Article 101 TFEU cannot be extended to concertation practices operating between different POs or APOs, or within unrecognised entities or groups.

Examination of the measures at issue in the main proceedings

– Practices of collective price-fixing

121. In view of the foregoing, price-fixing practices *between* POs or APOs or between them and other entities (the external configuration) should, in any event, be subject to competition law, given that it has been clearly established that price-fixing practices are regarded, by their very nature, as being harmful to the proper functioning of competition.[50]

122. That finding also applies in circumstances where an entity, although designated as a PO or APO, has not actually been made responsible by its members for marketing their products. That appears to be the case with the 'governance' APOs[51] referred to in the main proceedings.

123. As regards the internal configuration, carrying on from what I said earlier, there is no rationale for minimum price-fixing *within* a PO or APO in actual charge of marketing for the very reason that a single price system exists for its members' products.

124. In general terms, it should be remembered that, according to the scheme of the system established under the single CMO in particular, price stabilisation/regulation necessarily has to be carried out using measures expressly envisaged in the regulations on the CMO, and which are designed to regulate the quantities of products placed on the market in question, that is, withdrawal measures and production plans that can be put in place within the POs and the APOs.

125. This responsibility for stabilising/regulating prices may mean, for example, that the PO or APO concerned disseminates information reporting on market trends, but it must not under any circumstances result in a scale of recommended prices. It may also mean that the POs or APOs concerned issue certain recommendations in order to influence the volumes of products placed on the market.

49 See Article 11(1)(b) of Regulation No 2200/96 and Article 122 of Regulation No 1234/2007. Article 122, first paragraph, of Regulation No 1234/2007 as amended by Regulation No 361/2008.

50 See judgment of 11 September 2014, *CB* v *Commission* (C-67/13 P, EU:C:2014:2204, paragraph 51).

51 In reply to a written question from the Court, the Commission stated that these governance APOs, recognised in French law but not provided for by the CMO regulations, are not responsible for marketing products. They play a national steering role for each product and group of products in order to improve the adjustment of supply to demand and to optimise crisis prevention and management measures.

126. In that regard, I take the view that the existence of 'withdrawal' prices, which were theoretically possible before the introduction of the single CMO by Regulation No 1234/2007, cannot be used as an argument to justify the operation of minimum price-fixing between POs or APOs. The withdrawal price is defined as a price below which associated producers will not put up for sale *a certain quantity* (rather than all) of the products contributed by their members, who receive compensation in return. The remaining production of the members of the PO or APO is still subject to market forces and therefore cannot be marketed at a minimum price set in advance by those members.

127. Consequently, an agreement, a decision adopted by an association of undertakings or a concerted practice on prices, in particular aimed at fixing a minimum price, cannot under any circumstances automatically escape the application of Article 101(1) TFEU.

128. In conclusion, whether within a single PO or APO responsible for marketing its members' products, or between different POs or APOs, a policy of fixing a minimum price between producers cannot, in my opinion, escape the application of Article 101(1) TFEU.

– Concertation on quantities placed on the market

129. It must be acknowledged that concertation on the quantities of products placed on the market can help to plan production and adjust it to demand, particularly in a context where agricultural production is fragmented, which can lead to an imbalance given that demand for the products concerned is usually highly concentrated. It can, ultimately, contribute not just to ensuring the stabilisation of the markets concerned — by regulating the type and volume of products available on the market — but also to regulating prices in order to maintain a fair standard of living for the agricultural community.

130. The relevant regulations provide, in that connection, that POs/APOs can adopt rules to adjust the supply volume of a given product to the requirements of the market, in other words, programme the quantity of products supplied at a given point in time in order to keep selling rates at a certain level.

131. Until the adoption of the single CMO by Regulation No 1234/2007, the applicable regulations on the subject also made it possible to adopt withdrawal measures, allowing short-term action plans to be put into practice by adjusting the volumes placed on the market. The POs and APOs could therefore decide not to put up for sale a certain quantity of products contributed by their members during certain periods.

132. As I stated earlier, however, Regulation No 1234/2007 limited the scope for using these withdrawal measures, since they are now contemplated only as a means of crisis prevention and management which can no longer, as a rule, be extended to all producers, as was previously the case.

133. However, in line with the observations made earlier concerning price regulation practices, I take the view that, regardless of whether it is possible to implement withdrawal measures as part of previously approved short-term action plans (under Article 23 of Regulation No 2200/96 in particular),[52] concertation practices relating to quantities placed on the market must be viewed differently depending on the intended configuration.

134. In an internal configuration, measures such as those adopted under production plans provided for in European legislation may, where their aim is indeed to regulate production in order to stabilise the prices of the products concerned, escape the application of that provision.

52 This appears to have been the case in the main proceedings. It is evident from the documents in the main action that, from 1998 to 2007, the APOs practised withdrawal measures under which the POs and their associations were able, for a certain period, not to put up for sale a certain volume of products contributed by their members.

135. In an external configuration, however, such practices cannot escape the application of Article 101(1) TFEU. It should be noted that, since the single CMO was established by Regulation No 1234/2007, it is no longer possible to extend withdrawal measures adopted by POs and APOs to producers which are not members of those entities.

136. In the present case, it appears that the practices at issue consisted in concertation limiting and generally controlling the quantities placed on the market throughout the entire endive market. An agreement on such a national scale, adopted between a number of POs and APOs and ultimately resulting in a limit on production over the long term, does not escape the application of the competition rules.

– Practices of exchanging strategic information

137. In line with the approach followed earlier, a distinction must be drawn between practices followed within one PO or APO and those designed in reality to establish a comprehensive national price policy between all producers, regardless of whether they belong to any of these organisations or associations.

138. In the internal configuration, it must be accepted that the responsibilities assigned to the POs and APOs under a CMO necessarily involve exchanges of strategic information within an APO. The fulfilment of their responsibilities to stabilise prices and/or plan production and adjust it to demand could be greatly compromised without the communication of information on the type and volumes of species produced, but also on the volumes marketed or stored.

139. That necessity was recognised by Implementing Regulation (EU) No 543/2011,[53] Article 23 of which provides that 'Member States shall ensure that producer organisations have at their disposal the staff, infrastructure and equipment necessary … to ensure their essential functioning', particularly as regards 'the knowledge of their members' production' and 'collecting, sorting, storing and packaging of the production of their members'.

140. Consequently, in such an internal configuration, it will be necessary for the court to ascertain whether the exchanges of information at issue are connected with the pursuance of the POs' and APOs' responsibilities and, therefore, cannot be subject to the competition rules, in particular Article 101(1) TFEU.

141. In an external configuration, on the other hand, practices of exchanging information must be subject to the application of Article 101(1) TFEU.

142. Returning to the case in the main proceedings, it would appear that the exchanges of information at issue consisted in the communication of prices between POs, APOs and other competing entities. In my view it is impossible to conclude that such communication is linked to the responsibilities assigned to the POs/APOs under the CMO.

143. In that regard, it should be pointed out that it is settled case-law that exchanges of information may be regarded as pursuing an anticompetitive object if they are capable of removing uncertainties concerning the intended conduct of the participating undertakings.[54]

53 Commission Implementing Regulation of 7 June 2011 laying down detailed rules for the application of Council Regulation No 1234/2007 in respect of the fruit and vegetables and processed fruit and vegetables sectors (OJ 2011 L 157, p. 1).

54 See, in particular, judgment of 28 May 1998, *Deere* v *Commission* (C-7/95 P, EU:C:1998:256, paragraph 88).

144. However, exchanges of information may be regarded as consistent with the competition rules in certain circumstances: where the market is not concentrated, where the figures are public and aggregated, and where the information is not comparable to scales of prices and/or does not allow the operators' total costs to be reconstructed.

145. Thus, agricultural markets have specific features, particularly as a result of the establishment of CMOs, which are capable of justifying exchanges of information under less strict conditions than in a less circumscribed market.

146. In the present case, however, it appears that it has not been established that the exchanges of information at issue, the real purpose of which was, in all probability, to agree on prices for the products in question, were necessary in the light of the specific nature of the market concerned.

147. In conclusion, Article 11(1) of Regulation No 2200/1996, Article 3(1) of Regulation No 1182/2007 and the first paragraph of Article 122 of Regulation No 1234/2007, which include, among the objectives assigned to producer organisations and their associations, those of stabilising producer prices and adjusting production to demand, must be interpreted as meaning that practices whereby POs and/or APOs collectively fix minimum prices cannot under any circumstances automatically escape the application of Article 101(1) TFEU. Nor do practices of exchanging strategic information on the minimum prices applied by and between those organisations or their associations escape the prohibition on restrictive agreements laid down in Article 101(1) TFEU on the sole ground that they could help to achieve the general objectives assigned to the POs and their associations. For that to be the case, it is in particular for the national court to ascertain whether the practice in question, first, is necessary or permitted for the accomplishment of the task specifically assigned to the PO, APO or professional organisation actually in charge of marketing the products concerned, and, second, has been adopted in the context of and in accordance with the regulations on the CMO concerned.

148. Practices such as those at issue in the main proceedings, adopted between various POs, APOs and unrecognised entities, and the purpose of which is the fixing of minimum prices, concertation on prices and exchanges of strategic information, are not among those which may automatically escape the application of Article 101(1) TFEU.

Conclusion

149. In the light of the foregoing considerations, I propose that the Court should answer the questions referred by the Cour de cassation (Court of Cassation, France) as follows:

(1) Agreements, decisions or practices of producer organisations, associations of producer organisations and professional organisations may, even if they are not covered by any of the general derogations provided for in turn in Article 2 of Regulation No 26 of 4 April 1962 applying certain rules of competition to production of and trade in agricultural products and of Council Regulation (EC) No 1184/2006 of 24 July 2006 applying certain rules of competition to the production of, and trade in, agricultural products, and in Article 176 of Council Regulation (EC) No 1234/2007 of 22 October 2007 establishing a common organisation of agricultural markets and on specific provisions for certain agricultural products (Single CMO Regulation), escape the prohibition on restrictive agreements laid down in Article 101(1) TFEU where it is established that that behaviour, first, is necessary or permitted for the accomplishment of the task assigned to the producer organisation, association of producer organisations or professional organisation in actual charge of marketing the products concerned, and, second, has been adopted in the context of and in accordance with the regulations on the common organisation of the markets concerned.

(2) Article 11(1) of Council Regulation (EC) No 2200/1996 of 28 October 1996 on the common organisation of the market in fruit and vegetables, Article 3(1) of Council Regulation (EC) No 1182/2007 of 26 September 2007 laying down specific rules as regards the fruit and vegetable sector, amending Directives 2001/112/EC and 2001/113/EC and Regulations (EEC) No 827/68, (EC) No 2200/96, (EC) No 2201/96, (EC) No 2826/2000, (EC) No 1782/2003 and (EC) No 318/2006 and repealing Regulation (EC) No 2202/96, and the first paragraph of Article 122 of Regulation No 1234/2007, which include, among the objectives assigned to producer organisations or associations of producer organisations and their associations, those of stabilising producer prices and adjusting production to demand, must be interpreted as meaning that practices whereby they collectively fix minimum prices cannot under any circumstances automatically escape the application of Article 101(1) TFEU. Nor do practices of exchanging strategic information on the minimum prices applied by those organisations or their associations escape the prohibition of restrictive agreements laid down in Article 101(1) TFEU on the sole ground that they could help to achieve the general objectives assigned to the producer organisations and their associations. For that to be the case, it is in particular for the national court to ascertain whether the practice in question, first, is necessary or permitted for the accomplishment of the task specifically assigned to the producer organisation or association of producer organisations actually in charge of marketing the products concerned, and, second, has been adopted in the context of and in accordance with the regulations on the common organisation of the markets concerned.

Practices such as those at issue in the main proceedings, adopted between various producer organisations, associations of producer organisations and unrecognised entities, and the purpose of which is the fixing of minimum prices, concertation on prices and exchanges of strategic information, are not among those which may automatically escape the application of Article 101(1) TFEU.