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THE EFFECT OF EUROPEAN AND NATIONAL COMPETITION LAW ON THE AGRICULTURAL SECTOR

L'ECONOMIE AGRICOLE FACE AU DROIT DE LA CONCURRENCE EUROPEEN ET NATIONAL

DIE AGRARWIRTSCHAFT IM LICHTE DES EUROPÄISCHEN UND NATIONALEN WETTBEWERBSRECHTS

General Report – Rapport général – Allgemeiner Bericht

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General Report

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Introduction

Competition is the central axis of a regime of market economy and therein has to accomplish significant functions. Indeed, competition is threatened from two sides. On the one hand by the state which intervenes on markets. Especially granting state subsidies to certain companies and sectors may distort competition. On the other hand, the participants on the market themselves can hinder or even eliminate competition. Because of the eminent significance of competition as a fundamental element of a market economy, it will be easily understood that the legislature strives to protect and secure competition by legal rules.

The General Report will focus on provisions of national and Community Law which protect the autonomy of market participants and competition as a basic institution of market economy. The General Report relies on national reports from : Argentina, Belgium, Germany, France, Italy, the Netherlands, Norway and the United Kingdom and on personal research as well. Community competition law will also be covered as it has considerable significance for the Member States and influence on their national competition rules. I have to sincerely thank those colleagues who made this General Report possible by their detailed and thorough national reports.

1. General Competition Law

1.1) Legal Foundations

The European Community, the Member States and Norway, Switzerland and Argentina as well have special competition (cartel) laws. In several Member States cartel laws were introduced or reformed only upon the countries' access to the Community. Some countries for the first time passed legislation regulating competition when they became members of the Community (Greece 1977, Portugal 1983) ; others adapted existing cartel legislation more or less to Community competition rules (Spain 1989, Finland 1992, Austria 1993). During the 1980s and 1990s some more countries either passed cartel laws (Italy 1990) or modified existing cartel laws taking into account Community law (France 1986, Ireland 1991, Belgium 1991, Austria 1993, the Netherlands 1998, United Kingdom 1998, Germany 1998).

Two kinds of competition legislation have to be distinguished. Most countries have a uniform statute, which unites all national rules relating to cartels etc. Even if this is the case single provisions relating to agriculture and forestry may be found in other statutes (eg Germany). In some cases competition rules may be dispersed in different statutes (eg European Community, United Kingdom, Switzerland). France has integrated competition law into its commercial code.

A further distinction of competition legislation can be made according to the different concepts adopted therein. The predominant criterion of one group of national competition legislation is to secure competition. This is the case for Community law, in Germany, Austria, Greece, and Italy. There is another group of national competition law legislation, which not only tries to satisfy the criterion of securing competition, but simultaneously strives to realise goals of economic policy, such as economic and technological progress, international competitiveness, regional economic development, employment policy and also consumer interests. Under those legal regimes, the criterion of securing competition may stand on equal footing with criteria defined by economic policy. Although securing competition may be the primary legislative

criterion of a law, other criteria, such as economic or public policy may be taken into account when interpreting provisions of competition law legislation (Norway, the Netherlands, Belgium).

1.2) Instruments for the Control of Competition

Competition laws feature two possible legal tools to secure competition : the principle of prohibition and the principle of abuse. Under the principle of prohibition certain agreements restricting competition are prohibited. In so far as the prohibition covers agreements between undertakings or decisions by associations of undertakings, they are (generally) prohibited. Whereas under the principle of abuse, national competition authorities enjoy discretion. Under certain conditions they may prohibit or sanction agreements restricting competition. Older laws apply the principle of abuse. The primary objective of these laws is not to secure competition, but to adjust to the public interest as defined by a country's goals of economic policy. The EC Treaty and further antitrust statute based on the prohibition principle. The Dutch cartel law was modified in 1998 in order to replace the prohibition principle by the principle of abuse. Some national laws feature both principles ; under certain circumstances the principle of abuse may be supplemented by the prohibition principle (eg Denmark, Norway). The other way round the principle of prohibition may apply the principle of abuse for certain circumstances (Germany in case of exclusive vertical agreements). Laws featuring the prohibition principle allow for certain flexibility when it comes to the application of the prohibition. Modified market conditions and environmental and other interests may be weighed against competition (eg Germany, the Netherlands).

Some competition laws are based on the principle of transparency. It requires that agreements restricting competition must be notified to the competent competition authority and entered into a public register. Notification facilitates control for competition authorities on the one hand. On the other hand the companies concerned may rely on the legality of their agreement. They can be sure that authorities will not intervene. In Italy undertakings may notify their agreements to the competition authority. If the authority doesn't intervene within a certain period of time, intervention in the future is precluded. Finally the entry of the notification into a register also serves the information of the public. The need for public information on competition matters is also satisfied by official publications of competition law decisions (eg. Official Journal C of the EC).

1.3) Sanctions

Competition laws contain all sorts of sanctions, civil law, administrative and penal law sanctions. If agreements and decisions which restrict competition are prohibited, the prohibition takes effect generally by ordering the *ex tunc* invalidity of the agreement or decision under civil law. Whereas if the competition law authority prohibits an agreement because of abuse, it will be void in the future. In case a provision of competition law or an order of the competition authority protects third parties, the latter may seek injunctive relief. Under certain circumstances the competition authority may be sued and ordered to intervene against an agreement (the Netherlands). Some national competition laws allow for collective action ; according to German law associations for the promotion of commercial interests may file an injunction in case of anti-competitive agreements. In the case of an intentional or negligent violation of competition law provisions or orders of the competition authority, the infringing undertaking may be obliged to pay damages (eg Germany).

Competition authorities may apply different sorts of sanctions. They can prohibit behaviour which is illegal according to the competition laws in force. This prohibition may be enforced by applying administrative enforcement measures such as fining/mulcting the undertaking under administrative law. Competition authorities may furthermore order an undertaking to reduce prices or prohibit an increase of prices (Switzerland). Fines and criminal law sanctions are also used to enforce prohibitions under competition law. Finally an undertaking can be obliged to credit the State with the profit realised through anti-competitive behaviour (Norway, Germany).

1.4) Horizontal and Vertical Restraints of Competition

Competition laws cover horizontal as well as vertical restraints of competition. However, two kinds of legislation can be distinguished. In general, competition rules refer to both forms of restrictions of competition without any distinction. Indeed, a distinction can be made when applying the general provisions ; Dutch competition authorities consider vertical anti-competitive agreements as being less detrimental to competition than horizontal agreements. Some laws however, distinguish explicitly between horizontal and vertical restraints of competition, as eg in Germany, Austria, UK and Finland. As far as vertical restraints are concerned German legislation distinguishes between agreements on price fixing and trading conditions, which can be prohibited, and exclusive agreements, which are subject to abuse control.

Horizontal and vertical restraints also play a role in agriculture and food production. On the horizontal level associations of farmers exist with respect to supply, processing and marketing. Special significance can be attributed to producer associations. During the past decades contractual agriculture has seen considerable development. In some countries contractual relations between farmers, processing entities and buyers are exclusively governed by civil law ; several countries have come up with special legal regulation for contractual agriculture (France, Spain, Italy). Of relevance for contractual agriculture are : the prohibition of resale price maintenance, drawing up of trading conditions with third parties, especially agreements granting exclusive conditions (eg restrictions on the freedom to use the goods supplied or other goods ; restrictions on supply by third parties or on sale to third parties ; making the conclusion of contracts subject to acceptance by the other party of conditions, i.e. to buy goods which by their nature or according to commercial usage, have no connection with the subject of the contract). The general competition rules relating to horizontal and vertical restraints of competition are applicable if national laws don't provide for exceptions for farmers.

1.5) Exceptions to the General Prohibition of Cartels

Antitrust statutes provide exceptions from the general prohibition of cartels. The Community now tolerates anti-competitive agreements under certain circumstances (Art. 81 (3) EC) without any special investigation and decision of the European Commission being necessary (Art. 1(2) Regulation 1/2003/EC). Many national competition laws require, however, a notification or even a decision on the exemption by the cartel authority. It may be the case that only competition authorities are competent to make an exception. Under German law the Minister for Industry and Commerce[1] is competent in specific cases. When using his discretion he may consider other factors other than merely competition. If competition authorities have exclusive competence there is a stronger risk that the political influence on the outcome of the decision could easily be disguised. In so far as laws do not provide for specific exceptions for agriculture, farmers and associations may use the general exceptions when concluding anti-competitive agreements. British competition law contains a provision according to which the competent Secretary of State may issue a block exemption from the general prohibition for vertical agreements, but also for agreements on the grant, modification, transfer and the repeal of easements for land ; this sort of competence does not apply to the vertical resale price maintenance of buyers.

1.6) Recommendations

The prohibition of cartels includes generally agreements on horizontal and vertical restrictions of competition, decisions by associations of undertakings and gentlemen's agreements. Circumvention of the prohibition and of decisions of competition authorities can be achieved by a recommendation to act in parallel. It is therefore only consistent if recommendations

[1] Wirtschaftsminister.

circumventing the prohibition of cartels are prohibited as well (eg Germany). Laws which don't prohibit recommendations (eg European Community, the Netherlands), the latter are covered by the prohibition of concerted practices or by the prohibition of decisions by associations of undertakings if the recommendation is issued by them. Laws containing a prohibition of recommendations also allow for exceptions (similar to the prohibition of cartels) (eg Germany).

1.7) Abuse of a Dominant Position

European Community law (Art. 82 EC) and also the laws of most Member States prohibit the abuse of a dominant position (eg Germany, Belgium, France, United Kingdom, Greece, the Netherlands, Ireland, Italy, Portugal and Spain). It lies with the legislature to develop criteria or to formulate presumptions under which an undertaking must be considered to be dominant. A dominant position can be abused by *inter alii :* interfering with the competitiveness of other undertakings without a reason, or by setting or offering predatory prices and unfair trading conditions. The prohibition of abuse of a dominant position concerns undertakings in the agrarian sector, but not single farms.

1.8) Discriminating and Impeding Behaviour of Undertakings

Dominant undertakings may neither discriminate against undertakings of the same size nor encumber them. Non-discrimination and the prohibition to impede other undertakings may extend to other undertakings upon which smaller and medium-seized enterprises are dependent. French, Greek and German competition law contain a specific clause on non-discrimination or a prohibition on exploiting economic dependency. A dominant undertaking may especially be found to obstruct other smaller and medium-seized enterprises, if without a reason and not merely occasionally, goods are sold at a price below production cost. Sale at a price below cost by dominant undertakings could obstruct farms, which are dependent on a dominant producer. From the perspective of farms the rule of non-discrimination and the prohibition of obstructive behaviour can have a protective effect. German courts were faced with cases of discrimination especially in relation to the distribution of sugar quota according to the common market organisation for sugar. The undertakings processing sweet turnips acted discriminatory towards the producers of sweet turnips.

1.9) Merger Control

Community law as well as the law of the Member States provides for merger control because oligopolies and monopolies may restrict considerably or even eliminate competition on a given market. Explicit provisions on mergers are to be found in the laws of the Community, Germany, France, United Kingdom, Ireland, Belgium, Spain, Portugal, Greece, Sweden, Italy, Austria, Norway and Argentina. In the remaining Member States general competition rules are applied to mergers. When it comes to merger control, the legislature has to tackle three main issues : first the scope of merger control must be determined ; what are mergers and in which situations should competition law interfere with mergers (possible criteria are turnover, market shares or the value of the assets taken over). Second it must be decided whether it should be an *ex ante*-control (European Community, Germany, the Netherlands, Ireland, Belgium, Portugal, Greece, Sweden, Italy, Austria, and Argentina) or an *ex post*-control (Spain, France, United Kingdom, Norway). Third, the reasons for the prohibition of a merger must be defined. The national laws contain different criteria. Some legislation focuses only on securing competition when deciding on a merger while others may also consider economic policy interests as on an equal footing with the securing of competition.

Within co-operative societies, but also among processing and distributing undertakings of the agrarian sector over the last decades an increasing concentration can be noticed. Merger control has therefore become more and more important for the food producing industry.

When deciding on a merger, the applicable law may contain provisions allowing for a balancing of interest (eg. Germany). According to such provisions a merger may be compatible with the laws at hand, if the conditions for competition are improved to such an extent that they outweigh the drawbacks of dominance. This may be the case eg with mergers of food processing and food distributing undertakings if the advantages in selling outweigh the disadvantages on the relevant market.

2. Special Competition Law Provisions Relating to Agriculture

2.1) Legal Foundations

Farms and their associations are covered by the general rules of competition law, with respect to vertical and horizontal restraints, abuse of a dominant position, discriminatory and obstructive behaviour and mergers. In case of horizontal and vertical restraints the general exceptions of the law also apply to the agricultural sector. In addition to that some laws contain special exceptions, applicable only to farmers and their associations. Such special clauses, which may also be applicable to forestry, may pursue two objectives : One objective is to extend, as compared to the general rules, the possibilities for farmers with respect to horizontal co-operations and vertical agreements, in order to take into account the specific situation of the agricultural production. Another objective is to favour farmers with special protection against discriminatory and obstructive measures of undertakings upon which the farmers depend.

By the introduction of special provisions for farmers, some legislators want to take into account the special conditions under which farmers produce. Agricultural production can be characterised by a reduced capacity to adapt to the market which in turn is due to the natural conditions of the production process, by the long duration of production, the uncertainty whether production will be successful, the style of production which makes it difficult switch over production, the limited shelflife quality of agricultural products, and finally by the fact that farmers are forced to resist a fall in prices by increasing supply which runs counter to the tenets of market economy. Therefore measures to stabilise the market need to be taken, either by the State or by farmers themselves. On the demand side of agricultural products a considerable concentration is taking place, while the supply side of agricultural products remains extremely scattered. Simultaneously the demand of agricultural products is rather inelastic. The legislatures are therefore responsible for creating legal exceptions allowing farmers to form horizontal and vertical co-operation in order to compensate their weak position compared to other actors on the market and to stabilize the market.

Special provisions of competition law, which explicitly concern agriculture, are not very common. The reasons for this are first that some laws embrace the abuse rather than the prohibition principle and second that competition authorities in their decisions may consider on an equal footing competition criteria and criteria of economic policy. This opens a wide margin of appreciation for competition authorities to take into account the peculiar conditions of agricultural production. Even competition legislation based on the principle of prohibition as in the Netherlands and Belgium doesn't contain special provisions on agriculture. With regard to special competition law provisions on agriculture different types need to be distinguished :

- The Finnish Law on Restrictions of Competition of 1988 does not apply to contracts or agreements on produce of original production which is dealt with in the law regarding profits made out of agricultural production. Similarly products of agriculture, forestry and fishing are excluded from the scope of the Norwegian competition law.
- Special provisions can be found in the law of the European Community. According to Regulation 26/62 the prohibition of horizontal and vertical restraints of competition does not apply if certain anti-competitive measures are necessary in order to realise the objectives of the common agricultural policy as laid down in the Treaty. Resale price maintenance remains, however, prohibited. The Common Market Organisations for different products

contain special competition law provisions for producer associations, producer organisations and business associations. British law has adopted the EC-exceptions for anti-competitive agreements on production or for trade in agricultural products between farms, associations of farms and their associations. Such agreements may cover the production and sale of agricultural products or the joint use of facilities for storage or processing of agricultural products ; whereas resale price maintenance remains prohibited. German competition law is structured parallel to Community competition law. Under German law anti-competitive agreements between farms, associations of farms and their umbrella organizations are exempted from the prohibition of horizontal restraints to the same extent as under Community law. Price fixing is prohibited. Certain vertical restraints are considered to be admissible. According to the law on husbandry, the prohibition of vertical resale price maintenance doesn't apply to livestock breeding. Other laws than the law on restrictions of competition contain exceptions for recognised producer associations. A competition law exemption applies according to the Federal Forest Act also to agreements in the forestry sector.

- French law provides for exceptions from the prohibition on cartels, which may explicitly benefit agricultural products. In this way French law exempts measures which organize the scope and quality of production, marketing and sales policy including fixed resale prices for agricultural products marketed under the same label or firm-name ; a notification is however necessary. A competition law exemption also applies under certain circumstances to agreements regulating prices of agricultural products between representative producer organizations on the one hand and representative organizations of processing undertakings, marketing firms and distributors on the other hand.
- The Greek antitrust law 1977, amended 1993, describes its scope as being applicable to undertakings and associations of undertakings which produce, process and market products of the agricultural, forestry and fisheries sector ; by regulations certain categories of undertakings or certain sectors of their activity may, however, be exempted from the scope of the cartel law.
- The Austrian antitrust law 1988 originally exempted forestry from the scope of the law. When the law was amended in 1991 it became applicable to forestry as well. The Austrian law doesn't contain a sectorial exception for agriculture. It features, however, a special provision for co-operative societies, which is important mainly for the agricultural sector. The Austrian law doesn't cover restrictions on competition between members of a co-operative society or between the co-operative society and its members within an assistance program of the co-operative society.
- Italy does not provide a sectorial exception for agriculture either, but contains a special clause for producer organizations and inter-branch associations or contracts. The Swiss antitrust law doesn't refer to agriculture at all though the Law on Agriculture contains special competition law provisions on professional organizations with regard to certain measures of self-help.

2.2) Sectorial Exceptions for Agriculture

Operational and representational Scope of Application

If a legal order features a sectorial exception /derogation for the agricultural sector, the legislator has to address two issues. First, it must be determined who is exempted from competition law rules : farms, producer associations and umbrella organizations. Second the legislator ought to decide which horizontal and vertical restraints of competition should be exempted and under which conditions this should be the case.

The exemption from the prohibition of cartels may be linked either to a product or to the producing entity. In Community law as well as in German antitrust law both connecting factors are to be found. Regulation 26/62 and the German antitrust law since 1998 both determine the

scope of the exemption by referring to the products mentioned in Annex I to Art. 32 EC, which cover not only agricultural products, but fish as well. Products of forestry are missing from Annex I. The list contains not only original agricultural products, but also certain processed agricultural products. The line is drawn in relation to the producing entity ; i.e. processed products fall under list in Annex I only if processing normally takes place on a farm. Foodstuffs industry and manufacture are excluded as well as processed goods if the processing commonly takes place outside the farms. Producer organizations and umbrella organizations are privileged under competition laws if they process agricultural products or if they are established as mere marketing organizations. Producer organizations usually are co-operative societies, but they may also take other legal forms. Competition laws differ on the question whether commercial undertakings may be part of a producer organization. EC law admits this if the undertakings play a secondary part. According to German and Norwegian law members of producer organizations must be farms. With regard to processed products the line is drawn in relation to the producing entity. However, in relation to the production of agricultural goods the line is drawn with regard to the product, regardless whether the good has been produced by a farm working the soil or by a finishing undertaking working independent from the soil. Disturbances in the market occur independently of the entity producing the agricultural product.

Horizontal Restraints of Competition

German competition law is structured parallel to Community competition law as far as exemptions of horizontal restraints of competition are concerned. The laws cover agreements, decisions, but also concerted practices and recommendations, which concern production and marketing of agricultural products as well as the use of common facilities for storage and the processing of agricultural products. It is for example legal to agree on a decrease or increase of production. Agreements on the itinerary a product is to take from the producer to the consumer will also remain without objection. This would be the case if it were agreed that there is an obligation to offer products to certain organizations, to lay down uniform quality standards, conditions of marketing and sale as well as routes and conditions of supply and so forth. Since 1998 British law has adopted the special Community provisions on production and marketing of agricultural goods. Community law as well as the German and the British law contain an essential restriction : anti-competitive agreements may not fix prices. This limitation shall safeguard the parameter of price as free from restrictions of competition, even for the privileged agricultural sector. The limitation includes price fixing as well as price recommendations. It is, however, allowed to fix uniform prices for resale by a marketing organization, as a necessary consequence of the sale in co-operation. French competition law allows under certain circumstances for agreements regulating prices of agricultural products marketed under the same label or firm-name or in case of agreements between representative producer organizations and partners on the market.

As a further limitation of the exemption from the prohibition of cartels, competition may not be eliminated altogether by the restrictions of competition allowed. According to Community law a restraint of competition cannot be tolerated if it has been established by the European Commission that the restraint puts in jeopardy the objectives of agricultural policy under the Treaty.

Community competition law goes beyond the rules of German antitrust law. The prohibition of restrictions of competition of the Treaty is not applicable to anti-competitive agreements, which are necessary to realise the objectives of agricultural policy contained in the Treaty. This general sectorial exception, in the case of agreements necessary for the realisation of Treaty objectives in the field of agricultural policy, is of relevance if undertakings involved only in trade and processing take part in horizontal agreements or if vertical agreements are concluded between farmers and their buyers. In the case of anti-competitive agreements between undertakings of upstream and downstream markets concerning products included in Annex I, the necessity for the realisation of agricultural policy objectives is not present because such agreements are counter-productive for the position of farmers on the market.

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Producer Associations/Producer Organizations

Community law as well as national laws provide for the establishment of producer associations. They are associations of farm-owners and fisheries enterprises which pursue the common object of adapting the sale of their products to the needs of the market. The legislative support of these associations is meant to compensate for the weakness of farmers as actors on the market by concentrating agricultural supply. The weaker position of farmers is created by the atomisation of supply as a consequence of the high number of farms compared to an increasing concentration on the demand side. The law's support for producer associations furthermore helps farmers to structure their supply in conformity with the requirements of their market partners as regards standardisation, quality, sorting and so forth. Producer associations lay down rules on production and marketing for their members. If certain requirements are fulfilled, associations may be recognised. Recognition is a precondition for public financial aid. Simultaneously recognition can lead to certain privileges under cartel laws. Producer associations recognised under Community law may be charged with certain tasks within the common market organization.

Community law does not have a body of general rules applying to producer associations. Rules always apply to producer associations and organizations of specific products (hops, silk worm breeders, raw tobacco, olives, fresh fruit and vegetables, fisheries products, wine and bananas, and cotton as well which is not listed in Annex I to Art. 32 EC). The rules on producer associations differ depending on the product, i.e. with regard to whether only farmers or also commercial undertakings may be members as long as farmers retain control. Producer associations or producer organizations are covered by Regulation 26/62. In general the prohibition of price maintenance is applicable to producer associations or producer organizations, i.e. not only vertical resale price maintenance towards their customers is prohibited, but also horizontal price fixing. An exception is made for fresh fruit and vegetables and fisheries products. The Common Market Organisations for fresh fruit and vegetables and fisheries products entrust these producer organizations with interventions such as taking back products of their members from the market ; producer associations fix the prices of the products taken back from the market.

Special legal provisions on producer associations can also be found in national legislation. Germany provides for special regulation for recognised producer associations which goes beyond the general cartel law exemption for the agricultural sector. The prohibition of price fixing does not apply to the decisions of producer associations. Producer associations may therefore fix maximum and minimum prices for their organs. As regards members, by way of exception, they are allowed to market and sell products on their own ; price fixing for members would be admissible. Recognised organisations of producer associations are not generally exempted from the prohibition of cartels. They only fall under the general sectorial exception for agriculture. Recognised organizations of producer associations may however advise their member associations with respect to the determination of prices and for that purpose issue price recommendations.

Forestry and Exemption from Cartel Law

While legislation containing a sectorial exception for agricultural products usually covers fisheries as well, forestry products are subject to rather different legal regimes. Annex I to the EC Treaty lists only original and processed agricultural products including fish. It does not mention forestry products. This is also the case for the United Kingdom's exemption from the prohibition of cartels, which doesn't extend to forestry products. Some laws, however, explicitly apply also to forestry products, in addition to products of agriculture and fisheries (Norway, Greece). In Austria, forestry as well did not fall under the cartel law exemption ; when the law was amended in 1991 it was added to the scope of application of the law. In Germany the Federal Law on Forests contains an exemption from the prohibition of cartels between undertakings of the forestry sector. As with producer associations, the prohibition of price fixing does not apply to decisions of forestry associations. Accepted forestry associations as

umbrella organizations may advise their members in setting prices and may give price recommendations. Whereas, decisions and agreements relating to the production and marketing of forestry products remain prohibited.

Vertical Restraints of Competition

Community law doesn't separate horizontal and vertical restraints of competition. The exemption from the prohibition of cartels therefore applies to both kinds of restraints likewise. German law, however, deals separately with horizontal and vertical restraints of competition. Farms and their associations are exempted from the prohibition of vertical anti-competitive agreements on sorting, labelling and packaging of agricultural goods. In general the prohibition of vertical price maintenance remains applicable. In that respect the only exception is granted to undertakings involved in breeding. Livestock breeding organizations recognised under the Law on Breeding, i.e. undertakings and associations of breeders are under certain conditions exempted from the prohibition of vertical price maintenance.

Business Associations and Inter-Branch Agreements

Community law contains regulations on professional organizations of various Common Market Organizations, i.e. vertical alliances of producers, processing and marketing undertakings of a given product. Business (trade) associations and agreements are regulated within the Common Market Organizations for raw tobacco, olives, fresh fruit and vegetables, fisheries products, wine and aquatic cultures. Special competition law rules have been laid down for business associations in the sectors of fruit and vegetables, fisheries products, and tobacco. Under certain conditions their cartel agreements are exempted from EC competition law altogether – if the agreements are related to measures which are the object of their activities.

In other Common Market Organizations provisions will be found in intra-branch/professional agreements and contracts of supply, which might contain anti-competitive clauses. Such contract clauses, which are common in intra-branch/professional agreements and contracts of supply under the Common Market Organization for sugar, merely constitute a putting into effect of the objectives identified by the Common Agricultural Policy. The clauses must, however, be tested according to Regulation 26/62 as to whether they are necessary for the attainment of these objectives.

French law covers also business associations. They are trade associations, which unite professional organisations of producers, as well as undertakings for processing and marketing of agricultural products. Under the roof of an inter-branch association inter-branch agreements may be concluded, inter alia relating to regulations of supply, rules on marketing, prices, and payment conditions, product quality as well as sales support on foreign and domestic markets. Inter-branch agreements may contain clauses with anti-competitive effect. In a situation of falling prices due to generally declining market conditions for agricultural products representative producer organizations or recognised producer associations on the one hand and representative organizations of processing undertakings, marketing firms and distributors on the other hand may conclude agreements, limited in time, relating to the planning of production, quality and fixing of sale's and transfer prices. Italian law provides for collective agreements for certain kinds of products. They may be concluded by representatives of several farmers on the one hand and marketing and processing undertakings or their associations on the other hand. Such collective agreements may fix the quantities of production to be supplied to processing undertakings and determine the applicable legal framework of the individual contracts of the parties. Within such contracts it would be in accordance with the law to fix minimum prices or to determine the criteria for fixing such prices in case of long-term contracts.

Swiss law provides for producer organisations and business associations (trade associations), which unite producers, as well as undertakings for processing and marketing agricultural products. Within the framework of business associations, measures of self-help may be agreed upon, *inter alia* rules relating to the promotion of quality, measures supporting sale and

realisation in favour of domestic production, elaboration of model contracts, as well as to the adaptation of production and supply to the requirements of the market. Agreements relating to price are still illegal. On the occasion of an amendment to the Law on Agriculture as part of the Agricultural Policy 2007 it is planned to allow producer organizations for certain products or groups of products or the corresponding business on a regional or national level to set up standard prices (Richtpreise), as agreed upon by suppliers and buyers. In contrast to other measures of self-help by business associations it will not be possible to declare standard prices as generally binding.

General Binding Declaration

The old Dutch legislation generally allowed declaring notified cartel agreements as general binding. This possibility has, however, been abolished by the new legislation. Community law provides for general binding declarations concerning rules on production and marketing and concerning the obligation to take back products from the market as far as they come from producer organizations of fruit and vegetable or product ; under certain conditions such rules may become binding even on non-members, and in the fisheries sector even on suppliers from third countries. In addition to that representative business associations in the sectors of fruit and vegetables, fisheries and tobacco may require that for a certain period of time their agreements, decisions and concerted practices should be binding on non-members as well.

The instrument of a general binding declaration originates from French law, but so far has not been applied on Community level.

French law allows for general binding declarations in the case of rules on production and marketing by producer associations, inter-professional agreements, as well as in the area of agriculture, contractual frameworks concluded between representative professional organisations and seasonal as well as standard contracts based thereon. A temporary fixing of minimum prices for fruit and vegetable by representative organisations of partners on the market may be declared to be generally binding. In 2001 entered into force the French law on the reform of the relations between farmers and traders. Until now the law applies only to the fruit and vegetable sector ; provision is made that it should be extended to other agricultural products especially to marketing dead and live stock. The law allows for the fixing of minimum prices. In cases of crisis the competent ministries may, for a period of three months, declare a certain minimum price to be obligatory if that price is fixed by recognised producer associations on the one hand and representative organisations of processing or marketing undertakings, distributors or customers which account for 25 % of the sales on the other hand.

Swiss law as well features the possibility that rules on self-help measures by trade associations, meaning associations of producers, processing and marketing undertakings of agricultural goods may, under certain conditions, be declared to be generally binding. The self-help measures of professional organisations, such as adapting production and supply to the requirements of the market, improvement of quality etc. Participation in the financing of self-help measures may also become generally binding.

Protection of Breeders' Rights, Cultivation, Seed

German law contains special provisions on contractual licensing of protection of breeders' rights, cultivation and seeds. The provision on licensing protection of breeders' rights is part of a general provision on licence contracts with respect to other intellectual property laws (patents and registered designs etc.). The application of this provision has been extended on the one hand to contracts on the sale or licensing of non-protected services beneficial to agricultural botany and on the other hand to contracts on seeds. Restrictions which go beyond the content of the protected industrial intellectual property right are prohibited. Community law does not contain special competition law provisions on intellectual property rights ; Art. 81 and 82 are applicable. The ECJ has taken into account the particularities of rights and decided that the prohibition of cartels does not prohibit exclusive licensing contracts over new varities of seeds (which is not the case for seeds sold for production purposes).

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Supervision of Abuse

The exemption of agriculture from the prohibition of cartels is not unlimited. Community Regulation 26/62 withdraws the exemption for certain cartel agreements if the European Commission can establish that competition is thereby eliminated or that the objectives of European agricultural policy are thereby put at risk. According to German law the recognition of producer organizations and forestry associations depends on whether they do not eliminate competition or in other words whether they leave room for substantial competition. The exemption of certain horizontal and vertical cartel agreements is subject to abuse control by national competition authorities. Norwegian law, which provides for a sectorial exemption for agriculture, forestry and fisheries, allows for intervention of the national competition authority in case of abuse. In France the exceptions for the agrarian sector are not applicable to agreements on restraints of competition concluded between farmers or between farmers and their partners on the market if one or more of the contracting partners are in a dominant position.

Antitrust Law and National Law Relating to Market Organization

National organizations of the market as well as legal provisions on minimum and maximum prices qualify as a restraint of competition. The German antitrust law 1957 contained an explicit provision that the law should not be applicable if certain national market organizations allowed for restrictions of competition. Upon amendment of the law in 1998 this provision was repealed as Community law has mostly replaced national market organizations. It is self-evident that national competition law is not applicable if Common Market Organizations of the EC provide for restraints of competition. Member States have to check whether national laws restricting competition are compatible with Community law. If the national law relating to the organizations of markets, contains restrictions on competition which are legal under Community law or for non-Member States under the relevant national law, such restrictions don't need further authorisation by cartel laws ; i.e. laws relating to the organizations of markets, and other special laws as well (as the Swiss Law on Agriculture) prevail over cartel laws.

It is a peculiarity of Norwegian law that the essential basis of agricultural policy such as prices and agricultural measures of support are laid down in agreements between the state and agricultural organizations, which then have to be approved by Parliament. If they don't conclude an agreement, Parliament decides. This may have an effect on the behaviour of the competing actors within the agrarian sector. Argentina has deregulated the economy in most sectors ; however, for certain agricultural products export quotas have been maintained, as for meat, non-refined sugar, fresh citrus fruit, and apples.

Agriculture and General Antitrust Law

Special provisions on agriculture are rarely to be found in competition laws. Even if national law provides for rules facilitating co-operation within the agrarian sector, this doesn't preclude farmers from using the general exception from the prohibition of cartels for small and medium-sized enterprises.

Protection of Farmers in Case of Discriminatory and Obstructive Measures

Farmers depend on other undertakings in many respects. This may lead to a situation where they are exposed to discriminatory or obstructive measures or where they are threatened with competitive disadvantages or promised advantages in order to induce them to adopt a certain behaviour which according to competition law may not be agreed upon. These cases are either covered by control of abusive conduct or considered to be subject to the general prohibition of anti-competitive behaviour or explicitly provided for in cartel laws. If a sugar-refinery discriminates against the producers of sweet turnips when it comes to the distribution of sugar quota or if agricultural products are sold below cost or at an abusively low price, farmers may invoke general prohibitions of discrimination and obstruction which are also applicable to commercial undertakings (Germany, France). In France traders circumvent the legal prohibition

of a sale below cost by charging so-called hidden margins, for example for publicity, storage etc. These hidden margins may amount from 30 to 50 % of the actual price.

A new French law of 2001 for a reform of relations between farmers and trade, which for now is only applicable to the sector of fruit and vegetables restricts sales promotions (*promotions sur catalogue*) and at the same time allows fixing minimum prices for a limited period of time.

Norway has not adopted any special provisions protecting farmers against discriminatory and obstructive measures ; market organization rules, however, require big co-operative societies to buy the products delivered by farmers at a certain price.

3. European and National Competition Law

3.1) Conflicts of European and National Competition Law

EC competition law is applicable in the Member State without further implementation and in the Member States of the European Economic Area as in Norway, which is bound to apply EC competition law. The scope of application of European and national competition law is not fully identical ; the two legal regimes may overlap. Community law covers only restraints of competition which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition (Art. 81 (1) EC). Community law also prohibits the abuse of a dominant position within the Common Market or in a substantial part of it insofar as this may affect trade between Member States (Art. 82 EC). As far as horizontal or vertical restraints of competition or the abuse of a dominant position only affect the market of one Member State national competition law is applicable. If restraints of competition or the abuse of a dominant position affect intra-community trade Community and national law apply alongside each other. However, in the latter case the supremacy of Community law comes into play. The relation of Community law and national law is the same for merger control. In case of mergers affecting the trade between Member States Community Law takes precedence over national law.

The European Commission as well as the ECJ has many times dealt with the compatibility of anti-competitive agreements and the abuse of a dominant position within the common market.

If Community law does not take precedence over national law, the latter remains applicable. According to the jurisprudence of the ECJ, Member States must take into account the principles and general rules of the common agricultural policy when applying national competition law.

In other areas of the world states are also coming together to create common internal markets. For instance, MERCOSUR was founded by the Treaty of Asunción 1992 between Argentina, Brazil, Paraguay and Uruguay. The MERCOSUR-Treaty also contains competition rules.

3.2) Influence of Community Law on National Competition Law

National competition law may be influenced by Community law. The imminent accession to the EU has led some countries to introduce a competition law or amend existing competition laws, whereby an adoption of Community competition law principles has taken place. The amendment of competition law in several Member States during the last decade has caused a strong adaptation of national competition law to Community law (for example Belgium, the Netherlands, United Kingdom). Simultaneously national provisions have been amended or repealed in order to remove potential conflicts with Community law. This for example holds true for the new Dutch antitrust law 1998. The amendment of the German antitrust law 1998 has led to an approximation to Community law. On the one hand with regard to the definition of agricultural products and farms, German law has been approximated to Community law or rather ‘fitted into’ Community law. On the other hand the provision on the legality of resale price maintenance with regard to seeds was repealed. Due to EC law the provision had been

abandoned because a watertight price maintenance could not be enforced and therefore did not have any meaning in practice. The exception from the prohibition of resale price maintenance in the case of the sale or licensing of property rights (e.g. plant variety rights) was removed because price fixing is generally illegal under Community law.

4. Reform of Competition Law and Agriculture

In some countries amendments to the existing competition law are being discussed (for example in Norway). In some cases the agrarian sector will not be concerned by the discussion. However, in Norway the Commission for the Amendment of Competition Law has proposed to drop the special exemption from the prohibition of cartels which now is applicable to agriculture. Instead the government shall be empowered to exempt by means of regulation the agrarian sector from competition laws as far as it deems this to be necessary. The Belgian as well as the Argentine national report are in favour of special provisions for agriculture under competition law regimes. Germany has currently no plans to amend its competition law with regard to the exemption of agriculture. However, deliberations are under way as to an improved protection of farmers against price dumping by traders of food-stuffs. The Dutch report considers the agrarian sector to be a sector of national economy like any other and rejects special rules on agriculture. The characteristics of agriculture can be taken into account when applying general competition law rules. The Italian report holds the view that the co-regulation of the agrarian sector by national law and Community law works out well even if the margin for competition is small within this sector. The French report points to the unequal bargaining power of farmers on the one hand and buyers of agricultural products on the other hand ; in this context measures should be developed to improve the conditions for competition in favour of farmers. The British report mentions that among farmers there is a certain reserve to invoke competition law arguments when dealing with their partners on the market. This is due to the fact that farmers wrongly assume that competition law threatens the agrarian sector.