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Unfair commercial practices in the food supply chain¹

1. Imbalances in the food supply chain

Successive reforms of the CAP have made it possible to adapt the mechanisms used to achieve the objectives set by the Treaty on the Functioning of the EU where, prior to 2014, the CAP model was based on two pillars. However, the decoupled single payments resulting from a model introduced to support production that did not meet the needs of competitive and innovative agriculture requires a thorough review.² The aid system in Spain is not the best suited to the characteristics of its agricultural sector because it has been reducing the negotiating capacity of our producers in the current context, and in the new CAP 2021–2027 new alliances must be discussed

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¹ Paper carried out in the framework of the research project “Challenges and opportunities in the concentration and integration of agri-food companies” (P12-SEJ-2555). I would like to join in honouring Professor Budzinowski, a colleague and lecturer in agricultural law who over the last 50 years has worked as an agricultural expert, showing a love of knowledge and cultivating knowledge, never giving in to adversity, with humility, effort and constant work, and always with a vocation for service and dedication to education and training at the Adam Mickiewicz University in Poznań, an institution that I believe has been very lucky to have such a researcher of worldwide renown: Professor Roman Budzinowski.

² R. Compés López, J.M. García Álvarez-Coque, *La reforma de la Política Agraria Comunitaria del 2013 y estratégicas negociadoras para España*, in: *PAC 2013+*, Vitoria-Gasteis 2010, <http://www.juntadeandalucia.es/agriculturaypesca/portal/export/sites/default/comun/galerias/galeriaDescargas/cap/politica-agraria-comun/documentos-home/raulcompes-Cclopez.pdf>.

within the European Commission by the environmental commissioners and the agricultural commissioners. At the same time negotiating strategies must be adopted both at the European Commission as well as the European Parliament levels. The final model is an arbitration between the Commission, the Presidency of the Council (at that time the Presidency was held by Ireland, but now it is held by Lithuania) and the European Parliament. For this we start from the current CAP 2014–2020 whose objectives focus on:

- ensuring viable food production,
- managing natural resources in a sustainable way and adopting measures to tackle climate change, in line with the objectives set out in Agenda 2020,
- achieving a balanced territorial development, geared towards the diversification of agricultural activity and the viability of rural areas.

These are all objectives that add cost to production and which, as we know, are being borne by the producer, leading him to sell at a loss at times of the season, as the concentration is on demand, but not on supply.

But not everything is negative because the CAP has recognised the importance of fruit and vegetable products and has promoted the creation of fruit and vegetable organisations of producers in order to concentrate supply, thus benefiting members by allowing them to opt for joint production, transport, marketing, etc., and making them eligible for EU aid, further promoting the conservation and protection of the environment; supporting the increase in the maximum limit of EU financial aid devoted to producer organisations and their associations in the fruit and vegetable sector.

We are currently heading towards a new CAP 2021–2027 in which the Commission requires each Member State to draw up a strategic plan which, in the case of Spain, will be used to allocate more than 45,000 million euros received in direct aid for rural development. This is intended to achieve nine objectives: economic, farm profitability, market management, food chain, environmental, climate change and sustainable development and social, such as generational replacement or rural depopulation.

The future legislative framework for the next period will involve a change in the model for implementing the CAP, where subsidiarity and results will be the backbone of agricultural intervention and in the multiannual strategic plans of each State will help to achieve the figures and objectives set by common agreement. The Committee on Agriculture and Rural Development and the European Parliament's Committee on Agriculture and Rural Development (AGRI) adopted amendments to several proposals, one of them concerning the CMO, which included the improvement of competition rules to further promote producer organisations.

In this context we highlight Directive (EU) 2019/633 on unfair business-to-business commercial practices in the agricultural and food supply chain, which recognises that there are often significant imbalances in bargaining power between suppliers and buyers of agricultural and food products. These imbalances in bargaining power are likely to lead to unfair trading practices,³ if larger trading partners may seek to impose certain practices or contractual provisions that benefit them in relation to a sales transaction. Such practices may, for example, depart significantly from good commercial conduct, be contrary to good faith and fair dealing and be imposed unilaterally by one party on the other; or impose a disproportionate and unjustified transfer of economic risk from one party to the other; or impose a significant imbalance of the rights and obligations on one party.⁴ Certain practices could be grossly unfair, even if both parties agree to them. It is appropriate to introduce a minimum level of protection in the Union against unfair trading practices in order to reduce the incidence of such practices which may have a negative impact on the living standards of the farming community. The minimum harmonisation approach included in this Directive allows Member States to adopt or maintain national legislation going beyond the unfair commercial practices listed in this Directive.⁵

And more recently, also Royal Decree-Law 5/2020 of 25 February,⁶ which adopts certain urgent measures on agriculture and food, where under the previous premises of the vulnerability of the agri-food sector, perishable production and structural imbalance of the market, measures were generated for the rebalancing of the food chain, arguing the economic dependence of the supplier on the buyer, possibly leading to the imposition of unfair commercial practices by the larger agents on the smaller ones.

However, in order to negotiate, it is necessary to concentrate the supply of production, and in our case in Spain, following the Community Regulations which are obligatory. Two Royal Decrees has implemented these regulations

³ M. Hingley, A. Lindgreen, *Living with power imbalance in the food supply chain*, in: C. Mena, G. Stevens (eds.), *Delivering Performance in Food Supply Chains*, Oxford – Cambridge – New Delhi 2010, pp. 37–57.

⁴ M.J. Cazorla González, *Armonización europea de las prácticas comerciales desleales: nuevas medidas para equilibrar la negociación en la cadena alimentaria*, Madrid 2020, pp. 51–66.

⁵ A. Massot, *Hacia una política agrícola común posterior a 2020*, Fichas técnicas sobre la Unión Europea, 2019/6, www.europarl.europa.eu/factsheets/es [accessed on 15.03.2022].

⁶ Directive (EU) 2019/633 of The European Parliament and of The Council of 17 April 2019 on unfair trading practices in business-to-business relationships in the agricultural and food supply chain.

at state level, in provisions, firstly on the recognition and functioning of producer organisations, such as the FVPO, which we will discuss at the end of this paper, and secondly on operational funds and programmes. And in order to balance the negotiation, the solution is not always, or at least not exclusively, a state intervention in private negotiations. This is not meant to belittle the objective of the law, but it does point out to two cross-cutting issues: firstly, that the most competitive and innovative products produced in Andalusia and Extremadura (both regions are mentioned in section II, Contents, of the preamble to the RD-L) are exported to Europe, and the measures established here fall outside the scope of the application of the relevant law. And secondly, that the power of negotiation lies in the positioning of each party within the market and this forms part of the autonomy of will and private interest, where State or Autonomous Community interventionism can accompany and complement, but not replace or substitute.

2. Distribution and sales channels in Europe

The agri-food industry is mainly made up of small and medium-sized companies, as well as large Spanish and international industrial groups.

The food distribution sector is divided into two types of sales channels. One is an organised sales channel, which is highly concentrated in companies with medium and large sales areas offering a wide range of products that normally belong to large retail distribution groups that concentrate the demand of the different points of sale, which gives them great bargaining power vis-à-vis suppliers. The other sales channel is a specialised trade channel, made up of companies with small, family-type retail outlets, located in municipal markets, shopping arcades or their own sales facilities.

This heterogeneity has undoubtedly conditioned the functioning and relationships of the agents operating along the food chain, revealing deficiencies that have been aggravated in the context of the current global economic crisis. The volatility of prices perceived by producers, the high cost of inputs and the instability of international markets are factors that have undermined the competitiveness and profitability of the agri-food sector.

The analysis of the current situation of the value chain, which evidenced the existence of clear asymmetries in the bargaining power that can lead, and sometimes do lead, to a lack of transparency in price formation and potentially unfair commercial practices and anti-competitive practices that

distort the market and sometimes have a negative effect on the competitiveness of the entire agri-food sector, is part of the motivations pointed out in the preamble of Royal Decree-Law 5/2020, where it is included as the main novelty: the obligation for each operator to pay the immediately preceding operator a price equal to or higher than the cost of production of that product incurred by that operator. This is because the purpose of this measure is to preserve the growing added value that underpins one of the backbones of public action in this sector which contributes to increasing its overall competitiveness through added value and which, ultimately, benefits society as a whole except for contracts for the final sale of the product to the consumer to whom the business risk derived from its commercial policy in terms of prices offered to the public cannot be passed on.

It is true that the proper functioning of the food supply chain is essential to ensure sustainable added value for all operators, which helps to increase their overall competitiveness and benefits consumers. It is essential to guarantee sustainable added value for all operators, which helps to increase their overall competitiveness as well as benefits consumers; but we do not believe that the measure is in keeping with the need to establish balanced bargaining power for producers in the chain on its own. We therefore believe that it is essential to tackle this problem from an overall perspective,⁷ involving all the agents that are interrelated throughout the food chain, in order to guarantee market unity so that the agri-food sector can develop fully and unfold its full potential with other measures such as the collection and integration of producers as short and medium-term measures; and other longer-term measures such as the diversification of distribution channels and product processing.

In short, the guarantee of market unity in the food supply chain is the key factor of competitiveness that will allow a greater use to be made of economies of scale, the division of labour and the intensity of competition, which will reduce production costs, improve productivity and enable higher levels of employment and welfare to be achieved. But if we focus on the state interventionist regulation (RDL 5/2020 or EU Directive 633/2019), it is not the producer who will be empowered as an agent in the food chain, but only the vulnerable agent deserving of protection measures. And sincerely, from our point of view, this option is a mistake that we should not pass on

⁷ P. Gil Adrados, *El control del sistema agroalimentario de la Unión Europea*, “Revista de Derecho agrario y agroalimentario” 2012, no. 61, p. 77 et seq.

to future generations of agricultural professionals, as they have earned our respect campaign after campaign.⁸

3. Legal relations in the agribusiness sector

3.1. Atomisation and the imbalance in agri-food sector contracts

The mode of relationship between producers and buyers⁹ of agricultural products,¹⁰ especially in the food sector, is changing, as it is common for companies interested in acquiring food products from producers not only to buy what they produce,¹¹ but also to demand quantity and quality commitments and, sometimes, to provide the materials necessary for production, such as seeds or fertilisers, also giving technical assistance or instructions on production or the final result.

On the other hand, the buyers of agricultural production are international companies that purchase the necessary materials in different countries and from different producers, spreading their risks among a large number of producers, while producers are usually linked to only one or two companies and therefore bear all the risk of the farm without the possibility of transferring it to others.¹²

With this approach and applying our civil law regulations within the framework of the Community and national competition rules, where the

⁸ B. Keirsbilck, E. Terryn, *Unfair trading practices in the food supply chain*, Cambridge 2020, p. 73 et seq.

⁹ Article 2.4 Directive 2019/633: “For the purposes of this Directive, the following definitions apply: ‘supplier’ means any agricultural producer or any natural or legal person, irrespective of their place of establishment, who sells agricultural and food products; the term ‘supplier’ may include a group of such agricultural producers or a group of such natural and legal persons, such as producer organisations, organisations of suppliers and associations of such organisations.”

¹⁰ Article 2.2 Directive 2019/633: “For the purposes of this Directive, the following definitions apply: ‘buyer’ means any natural or legal person, irrespective of that person’s place of establishment, or any public authority in the Union, who buys agricultural and food products; the term ‘buyer’ may include a group of such natural and legal persons.”

¹¹ J. Bijman, S.W.F. Omta, J.H. Trienekens, J.H.M. Wijnands, E.F.M. Wubben, *International agri-food chains and networks. Management and organization*, Wageningen 2006, <https://doi.org/10.3920/978-90-8686-573-4>.

¹² M.C. Pablo-Romero Gil-Delgado, *Unidroit y contratos agrarios. Nueva guía modelo para el futuro de las relaciones jurídico comerciales en el sector de la agroindustria*, “Derecho de los Negocios” 25 March 2013.

parties give their consent in the purchase and sale by means of the offer and the acceptance to the determination of the thing and the price as regulated by Article 1255 C.c. or by Articles 968 and following Articles of the C.co. for the supply contract, it must be assumed that in the case of agricultural production it can happen that the object of the contract is present or future goods, and that the price is determinable, varying downwards when the acquisition of the production is made before having it (harvest contract); or upwards when production is scarce and there is more demand than supply, which in our opinion can lead at specific moments to a gap between the intrinsic value of the thing and the price set in the contract, but which does not justify selling at a loss, i.e. below the cost of production, which is a demand of the sector that RDL 5/2020 aims to respond to.

Another issue to be assessed in contractual relationships for the sale of produce in the agri-food sector is that although the price must be recorded in civil and commercial sales and purchases as an essential element for its full validity, in accordance with Articles 1445, 1447, 1448 and 1449 C.c or 339, 340 and 341 Commercial Code, the fact is that it is not essential that the price must be fair,¹³ therefore, it operates as effective and sufficiently determined if it is lower than the actual price, since in Spanish law the *pretio vilari facti* does not generate radical invalidity of the contract, as this circumstance does not constitute full proof to destroy the presumption of the existence and lawfulness of the cause of the business, since its effectiveness does not depend exclusively on the adequate price or the most suitable price for the market in relation to the one fixed by the parties.¹⁴

Thus, in sales and purchases, the price constitutes the true cause of the contract for the seller, in accordance with the criterion upheld by the Supreme Court, which does not require proportionality with the price of the product, but rather that the price be certain (Article 1445 C.c.), without the price being left to the discretion of one of the parties (Article 1449 C.c.). In the wording of Royal Decree 5/2020 for the agricultural and food supply chain, this can often lead to significant imbalances in the bargaining power between suppliers and purchasers of agricultural and food products. These imbalances in bargaining power are likely to lead to unfair trading practices, if larger and more powerful trading partners try to impose certain practices or contractual provisions that benefit them in relation to a sales transaction. Such practices may, for example, deviate to a large extent from good com-

¹³ M. Ruiz Muñoz, *La calidad, el precio justo y la fijación del precio en función de los clientes*, “Revista de Derecho de la Competencia y la Distribución” 2013, no. 12, p. 15.

¹⁴ S. Vázquez Barros, *Compraventa y permuta*, Editorial v-Lex. 2009.

mercial conduct, be contrary to good faith and fair dealing and be imposed unilaterally by one party on the other; or impose a disproportionate and unjustified transfer of economic risk from one party to the other; or impose a significant imbalance of the rights and obligations on one party.

Thus, and taking into account the circumstances surrounding the sale of agricultural production and the price, Law 12/2013 of 2 August on measures to improve the functioning of the food chain¹⁵ provides solutions for the national territory by presenting a written model that includes not only the essential elements of the contract containing the price to be paid for the production, but also all the conditions that formally constitute the contract of sale and that will allow determining the positions of equality or not between the parties to the contract. A formal instrument was introduced in RDL 5/2020 and modified in the new wording of Article 23.2 of Law 12/2013 when it classifies as a serious infringement a situation if food contracts are not formalised in writing, or the price is not incorporated in accordance with the new wording of Article 9.1, which is also modified, or if carrying out modifications to the price has not been previously agreed, or in the event of carrying out promotional activities that are misleading as to the price or image of the product, or acts that result in the destruction of value in accordance with the new Article 12 ter incorporated into Law 12/2013.

3.2. Proposals to improve the functioning of the food supply chain in Spain under Law 16/2021 of 14 December

The European Union has not been oblivious to this reality and in the last decade it has increased its efforts to ensure the proper functioning of this economic and social sector. In addition to the pioneering Communication on improving the functioning of the agri-food chain in 2009, a High Level Forum on Improving the Functioning of the Food Supply Chain was set up and the processing of what has finally been approved as Directive (EU) 2019/633 of the European Parliament and of the Council of 17 April 2019 on unfair commercial practices in relations between companies in the agricultural and food supply chain, which has had as one of its main

¹⁵ Ley 12/2013, de 2 de agosto, de medidas para mejorar el funcionamiento de la cadena alimentaria, BOE no. 185, 3 August 2013, pp. 56551–56581, Sección I. Disposiciones generales. Departamento: Jefatura del Estado (BOE-A-2013-8554. Modified by Law 16/2021, de 14 de diciembre).

inspirations precisely Law 12/2013 of 2 August, and which is now being transposed, was initiated.

Within the framework of the EU, it is a common objective to achieve a balance in the food chain and to be able to guarantee fair competition, maintaining an adequate level of prices and informing consumers appropriately.¹⁶

This objective is shared by Spain which years ago developed Law 16/2021 aimed to improve the functioning and structuring of the food supply chain to increase the efficiency and competitiveness of the Spanish agri-food sector and reduce the imbalance in commercial relations between the different operators in the value chain, introduced within the framework of fair competition that benefits not only the sector but also consumers.

Law 16/2021 of 14 December amending Law 12/2013 of 2 August, on measures to improve the functioning of the food supply chain, aims to achieve a balance in the food supply chain and to ensure fair competition, while maintaining an appropriate level of prices and providing consumers with adequate information.

All these objectives are reinforced under Royal Decree 5/2020 through the articles added to the Law to improve the functioning of the food supply chain, such as Article 12ter, aimed at avoiding the destruction of value in the food supply chain, with the prompt payment measure.¹⁷

This law introduces the need for a written contract to record in a document the conditions set by the parties to determine the price,¹⁸ the balanced or

¹⁶ D. Crespo Pereira, F.J. Arias Varona, *Hacia una regulación de la cadena alimentaria*, “Gaceta jurídica de la Unión Europea y de la Competencia” 2013, no. 33.

¹⁷ Ley 8/2020, de 16 de diciembre, por la que se adoptan determinadas medidas urgentes en materia de agricultura y alimentación. Article 12 ter. Destruction of value in the chain: “In order to prevent the destruction of value in the food chain, each operator in the food chain shall pay to the next operator upstream a price equal to or greater than the actual cost of production of that product actually incurred or borne by that operator. Proof shall be furnished in accordance with legally admissible means of proof. The operator who makes the final sale of the product to the consumer may under no circumstances pass on to any of the previous operators his entrepreneurial risk arising from his commercial policy as regards the prices offered to the public.”

¹⁸ Ley 16/2021, de 14 de diciembre, por la que se modifica la Ley 12/2013, de 2 de agosto, de medidas para mejorar el funcionamiento de la cadena alimentaria. BOE no. 299, 15 December 2021, pp. 153323–153352. BOE-A-2021-20630. Article 8.1 shall read as follows: “Food contracts shall be drawn up in writing and signed by each of the parties to the contract and shall be based on the principles of transparency, clarity, specification and simplicity. They shall be drawn up before the commencement of the services to which they give rise, and may be signed electronically, with a copy being kept by each of the parties.” However, where a member delivers production to a cooperative or other associative body, an individualised food contract must be drawn up in writing, containing the same minimum elements as those

unbalanced position of the parties and the proportionality of the obligations established for both. This content was regulated in Article 8.1 that “Food contracts shall be concluded in writing. Such formalisation must be made before the commencement of the performance arising therefrom.” This measure is based on the guarantee of transparency of the essential element of the price, to avoid unilateral and abusive modifications to the detriment of the economic interests of the producers.

The main problem, according to Diego Crespo Pereira and Francisco Javier Arias Varona¹⁹ and concerning the scope of application, stems from the limitation provided for the particular and more restrictive regime foreseen for food contracts (Articles 8 to 10, their written formalisation, and the minimum content and provisions on electronic auctions). This is a vital part of the rule, as it is the precise tool for the effectiveness of the prohibitions. The need for the written form of contracts is not only present in the legal systems that have definitively regulated this aspect, but is also a constant recommendation in the reports on the subject and one of the few provisions that have received a positive assessment, for example, by the CNC.²⁰

This is why the modification finally made to Article 8.1 in the final text is relevant. If it had not been made, the novelty referring to the written formality incorporated in the text from the first proposals of the Draft Bill and project would have led to a good part of the contracts and large distributors being left out of the obligation to document them in writing by means of the novation of the contract.

It should be borne in mind that this formalisation not only implies a written receipt (which sometimes occurs or would not be very costly to implement), but also the requirement of a minimum content and very serious consequences in the contractual dynamics (for example, the prohibition of discounts that are not included in this written contract). This is something we do not agree with, as what the draft simply does is to maintain the limits for formalising the contract in writing for a price higher than 2,500 EUR set by the parties (an amount that is in line with Law 7/2012, which prohibits payments higher than the amount).

referred to in Article 9, unless the statutes or agreements of the cooperative or associative body lay down, before delivery takes place, the procedure for determining the value of the product delivered by its members and the timetable for settlement and these are known to the members. To this end, there must be a reliable communication to the interested parties, which will be included in the agreement and approved by the relevant governing body.”

¹⁹ D. Crespo Pereira, F.J. Arias Varona, *Hacia una regulación...*

²⁰ F.J. Arias Varona, *La armonización europea de la regulación de la cadena alimentaria*, “La Ley Mercantil” 2019, no. 60.

The obligation to document the contract in writing must be adjusted to contractual environments in which there is an imbalance between the parties in one of the following ways established in Article 2 of the Law:

- one of the operators has the status of an SME and the other does not,
- in cases of marketing of unprocessed agricultural products, perishables and food inputs, one has the status of primary producer and the other does not; or
- there is a situation of economic dependence (at least 30% of the turnover of the product to which the contract relates) between the operators.

It should be specified that this Article has undergone a change from the text of the draft to the current Law, and consists of the addition of a fourth point, which states that “The existence of a contract formalised in writing shall be compulsory in the case of forward or deferred price purchase and sale transactions, except in those cases in which, in advance, it can be estimated that the contract price will in any case be less than 2,500 euros” (Article 2.4 Law 12/2013).

Another issue to highlight is the prevalence of the particular conditions over the general conditions in the event of contradiction STS 22 January 1999,²¹ which is not the case here because it is the Law itself that requires these modifications to be in writing. In this case, the requirements of form are imposed on the parties in a non-derogable manner and, therefore, there can be no doubt as to the ineffectiveness of agreements made without observing this form. Such seems to be the solution in the case regulated in Article 5 LCS according to which “the insurance contract and its modifications or additions must be formalised in writing” although the doctrine understands that in this case the requirements of form are so “for evidential purposes and also in order to be aware of its regulations.” With the exception of relations between operators where the price is delivered upon receipt of the goods, which are subject to Royal Decree 1619/2012 of 30 November, which approves the Regulation governing invoicing obligations; the contract or any subsequent modification, as well as forward or deferred price sales must comply with the written formality, but in no case is the requirement of form required for existence and validity (Article 8 of Law 16/2021).

We understand this to mean that the continuity of the contract prevails over the interpretation given by the SC in the aforementioned 1999 ruling, with the particular conditions prevailing over the general conditions as the form,

²¹ Judgment annotated by M.J. Cazorla González, *Relaciones contractuales en la cadena alimentaria y su incidencia en la competitividad de los mercados*, “Revista de Derecho Agrario y Alimentario” 2013, no. 62, p. 15.

despite the provisions of Article 8.1, but in compliance with Article 8.2, which makes it clear that in the event of non-compliance with the written form, the sanction will not be the nullity of the contract. Therefore, the question we ask ourselves is: is ineffectiveness possible? Obviously, neither nullity nor annulment will be possible, but are rescission, revocation or termination possible? Let us remember that when a contract has unfair consequences that derive from its ineffectiveness, rescission is possible, as well as requesting termination due to non-fulfilment of one of the legal conditions.

Finally, it should be pointed out that when the law on the improvement of the food chain establishes the resolution of conflicts (which is not very explicit), this system can provide a rapid solution in accordance with the market, if it is given an appropriate regulatory development in the final text of the Law, where *a priori* the most appropriate thing to do is to begin by expressly establishing what is tacitly mentioned, that we are in the extrajudicial resolution of conflicts in which arbitration and mediation are possible, although for our part we understand it and place it in a previous phase within the arbitration procedure.

4. Protection of competition in the agricultural sector: Directive 2019/633

With regard to the applicability of competition law to the agricultural sector, at Community level, the Treaty on the Functioning of the European Union (TFEU), as well as various sectoral Community Regulations (in particular 1234/2007 establishing a single CMO) establish the terms in which the antitrust rules apply to the sector. It follows from an examination of all these rules that Articles 101 and 102 TFEU, which prohibit collusive conduct and abuse of a dominant position, are in principle applicable to the conduct of agricultural operators. Articles 175 and 176 of the above-mentioned Regulation provide for a number of exceptions to such general applicability, but various Community precedents in this area have shown that the conditions for the application of these exceptions are very demanding.

Regarding conduct that is not of Community interest within the meaning of Articles 101 and 102 TFEU, national competition law applies. In this respect, the scope of Law 15/2007 of 3 July 2007 on the Protection of Competition covers all sectors of activity without distinction, including the agricultural sector.²² Consequently, as long as it is not a matter of minor con-

²² F. Marcos, *El ámbito de aplicación subjetivo de la LDC y la condena de la Junta Andaluza en el cártel de la uva y del mosto de Jerez: Comentario a la RCNC de 6 de octubre de*

duct, and except for the applicability on a case-by-case basis of Article 1.3 LDC to agreements restricting competition, there is no exemption from the competition rules for this sector.²³

Moreover, if in the future there were to be an exemption from the applicability of the competition rules to the agricultural sector by virtue of a national law, this exemption, in accordance with the interpretation of the doctrine of the effectiveness of Community rules, would be limited to conduct that is strictly national in scope and not of Community interest.

It should also be stressed that the participation of public authorities in agreements between operators in the agri-food sector as signatories or sponsors of such agreements does not prevent the application of competition law to the operators who are party to such agreements, nor the accreditation, where appropriate, of the corresponding conduct as anti-competitive, if it contains elements that justify such a classification. Nor does it prevent the possible imposition of sanctions, once the anti-competitive conduct has been accredited, unless the requirements for understanding the principle of protection of legitimate expectations to be applicable to the operators participating in these agreements are met.

With regard to the future functioning of the sector, certain public and private agents have recently been proposing a review of the applicability of the competition rules to the agricultural sector, in the sense of relaxing or even exempting this sector from the application of these rules. In this respect, the opinion of the CNC (National Competition Commission) is that the current framework for the applicability of competition rules to the conduct of agricultural producers should continue to constitute the framework on the basis of which the sector's activity should be structured. Several reasons lead to this conclusion.

On the one hand, exemption from the applicability of competition rules to the agricultural production sector would not be sufficiently justified. Public intervention to exempt a given economic activity from competition rules (a legal transcript of the freedom to conduct a business enshrined in Article 38 of the Spanish Constitution) can only be justified when it is necessary to correct market failures inherent to the functioning of that sector of activity, or to ensure the achievement of other public interest objectives. However,

2011, *Exp. S/0167/09wsF*, IE Law School (Madrid), "Revista de Derecho de la Competencia y la Distribución" 2012, no. 11.

²³ S. Bachez Opi, *La jurisprudencia del Tribunal Supremo en materia de derecho de defensa de la competencia desde la entrada en vigor de la ley 15/2007*, in: S. Bachez Opi (ed.), *La Ley 15/2007, de Defensa de la Competencia. Balance de su aplicación*, Madrid 2010.

it does not appear that such market failures are present in the agricultural sector to an extent that would make it impossible for free competition to operate, especially if the sector as a whole is considered. Nor, if such market failures do exist, would the removal of the subjection of market operators to competition rules be the regulatory response that would improve the functioning of the market.

It should also be noted that the participation of the Public Administrations in agreements between operators in the agri-food sector as signatories or sponsors of such agreements does not prevent the application of competition law to the operators that are party to such agreements, nor the accreditation, where appropriate, of the corresponding conduct as anti-competitive, if it contains elements that justify such a classification. Nor does it prevent the possible imposition of sanctions, once the anti-competitive conduct has been accredited, unless the requirements for understanding the principle of protection of legitimate expectations to be applicable to the operators participating in these agreements are met.

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On the one hand, exemption from the applicability of competition rules to the agricultural production sector would not be sufficiently justified. Public intervention to exempt a given economic activity from competition rules (a legal transcript of the freedom to conduct a business enshrined in Article 38 of the Spanish Constitution) can only be justified when it is necessary to correct market failures inherent to the functioning of that sector of activity, or to ensure the achievement of other public interest objectives. However, it does not appear that such market failures are present in the agricultural sector to an extent that would make it impossible for free competition to operate, especially if the sector as a whole is considered. Nor, if such market failures do exist, would the elimination of the subjection of market operators to competition rules be the regulatory response that would improve the functioning of the market.

Moreover, the achievement of various public interest objectives, such as food safety, preservation of the countryside or protection of the environment, by setting minimum prices or guaranteeing producers' incomes under anti-competitive conditions, would be disproportionate compared with the harm caused to consumers, who would have to face higher prices and possibly lower quality agricultural products, as well as disincentives to improve the functioning and innovation of the sector itself, as well as discriminatory treatment in relation to other sectors.

It is also false that the modification of antitrust rules to accommodate anti-competitive behaviour can solve the structural problems of the sector. Even in those sub-sectors within the agricultural sector where the existence of a bargaining imbalance in favour of immediate demand is more evident, the effects of such a decision would be mainly of a negative nature on the efficiency of the production stage at origin (without entailing a real increase in the bargaining power of demand) and on the functioning of the agri-food chain in general.

On the other hand, the fact that agreements between operators in the sector must be subject to the competition rules when they are not covered by the derogation provided for in certain cases by the sectoral Community Regulations, does not mean that they cannot be permitted, if the circumstances provided for in Articles 101(3) TFEU/ 1(3) CDL are met. In the light of this criterion, there are a wide range of instruments that public authorities and private operators can use to overcome the problems faced by agricultural producers without the need to modify the current regulatory framework.

In this respect, the CNC presents in this report various guidelines regarding the implications for competition of some measures or initiatives which, due to their interest and topicality, deserve special attention, including price agreements and recommendations, the setting of reference indices and the promotion of cooperatives through agreements between producers.²⁴

There are a number of ways in which agricultural producers can increase their bargaining power through associative arrangements, e.g. joint production, joint storage or marketing agreements. These will be in line with competition law when they meet a number of requirements, generally related to the generation of economic efficiencies. On the other hand, they will be anti-competitive when they lead to production limitations, market sharing,

²⁴ V. Jiménez Serranía, *El conflictivo mercado de la gestión de derechos de Propiedad Intelectual: notas sobre el informe de la Comisión Nacional de la Competencia acerca de la gestión colectiva*, "Diario La Ley" 2010, no. 7403.

or price fixing (in FVPOs²⁵ – fruit and vegetable producers’ organisation – it is allowed that prices be fixed for members within the FVPO, see regulation and CJEU report explaining this).

When deciding whether a given commercial practice is unfair under Directive 2019/633, it is important to reduce the risk of limiting the use of fair and efficiency-generating agreements between the parties. Accordingly, it is appropriate to differentiate between practices which are provided for in clear and unambiguous terms in supply contracts, or in subsequent agreements between the parties, and practices which take place after the transaction has started and which have not been agreed in advance, so that only unilateral and retroactive changes to those clear and unambiguous terms of the supply contract are prohibited. However, some commercial practices are considered unfair *per se* and should not be subject to the contractual freedom of the parties.

In conclusion, there are a wide variety of instruments that public authorities and private operators can use to overcome the problems of agricultural producers, without necessarily contravening the current antitrust regulatory context. For example, the promotion of cooperatives, the generalisation of the formal contractualisation of relations between producers and customers, and the establishment of codes of conduct with instruments to ensure proper compliance can be effective in guaranteeing a better organisation of relations between producers and the rest of the agents in the chain. The public authorities, for their part, must also ensure that the initiatives they develop for these purposes are designed in such a way that they do not restrict competition, but they cannot interfere with the rules that interfere in the defence of competition, hence the agents in the food supply chain must be aware of the need to create interregional companies where they can group together to market and negotiate prices in the agri-foodstuffs contract.

The articles of the Directive objectify situations of dependence between companies, starting with relations between them in terms of turnover, where possible asymmetries in bargaining power and economic dependence are described by economic amount, thus eliminating existing discussions in jurisprudence regarding questions of subjective assessment related to economic dependence, but listing unfair practices in a list to make them more specific.

²⁵ Real Decreto 1154/2021, de 28 de diciembre, regulating the recognition of producer organisations and associations thereof in certain livestock sectors and laying down the conditions for contract negotiations by such organisations and their associations, BOE no. 17, 20 January 2022, pp. 5645–5663.

Thus, the competitiveness of the sector and the internalisation that many have to carry out,²⁶ and from where the supply of production comes from, is through the different legal types of associative entities such as agricultural cooperatives, agricultural transformation companies or FVPOs,²⁷ which are the suppliers of agricultural and food products.

5. The fruit and vegetable producer organisations and their bargaining power in the food supply chain

The protection provided by this Directive should benefit agricultural producers and natural or legal persons who are suppliers of agricultural products and foodstuffs, including producer organisations, whether recognised or not, and associations of producer organisations, whether recognised or not, according to their relative bargaining power. Such producer organisations and associations of producer organisations include cooperatives, agricultural processing companies and agricultural trading companies (which have been incorporated as FVPOs). These producers and persons are particularly vulnerable to unfair commercial practices, and less able to deal with them without negative repercussions on their economic viability. As regards the categories of suppliers to be protected under this Directive, it should be noted that a significant proportion of cooperatives formed by farmers are larger than SMEs but with an annual turnover of less than 350 million EUR.

As mentioned above, in recent years there has been a strong concentration of demand to the detriment of supply, with large operators at destination (e.g. large supply chains) to the detriment of supply and the wholesale market. For this reason, entities such as producer organisations help to reverse this trend, seeking to concentrate supply, and strengthening their structure. Additionally they face competition from third countries supplies, which weakens the bargaining power as producers.²⁸

²⁶ Legal guides wolters kluwer.es. Capital companies.

²⁷ The reform of the Common Agricultural Policy (CAP) in 2013 recognised in Spain the important role that producer organisations can play in concentrating supply and improving marketing and production planning, as well as in adapting production to demand, optimising production costs and stabilising producer prices. In addition, these organisations could pursue a number of other purposes, including research and promotion of sustainable practices, technical assistance to producers, management of derived products and development of risk management tools, which also contribute to strengthening the position of producers in the food value chain.

²⁸ A.J. Macías Ruano, J. De Pablo Valenciano, *Las alhóndigas*, in: C. Cano Ortega, C. Vargas Vasserot (eds.), *Integración y concentración de empresas agroalimentarias*:

The European regulatory regulation, Regulation 1308/2013 on the common organisation of the market in agricultural products (hereinafter CMO Regulation),²⁹ defines Producer Organisations as groups of agricultural producers which are constituted in accordance with the rules that guarantee the associated producers democratic control of their organisation and its decisions by producers of a specific sector created at the initiative of the producers, which carry out at least one of the activities established by the Regulation and pursue a specific purpose.

With special reference to the fruit and vegetable sector because of its importance in the food chain, Fruit and Vegetable Producers' Organisations (hereinafter FVPOs) can be set up. These organisations are associative entities with their own legal personality, made up of fruit and vegetable producers or entities that group them together. These entities must meet certain minimum requirements in terms of the number of members and value of marketed production in order to be recognised as fruit and vegetable producer organisations by the Member States, and must undertake to comply with certain rules regarding their purpose, organisation and operation.³⁰

It is worth noting here the criterion adopted by Rosario Cañabate Pozo, as it considers that “fruit and vegetable producer organisations lack legal personality and must therefore be a legal entity with recognised legal personality.”³¹ It is true that such an entity has not existed prior to its constitution and lacked legal personality, but once created, it acquires legal personality with its recognition by the competent autonomous community (administrative procedure), just as other entities such as agricultural processing companies need to be entered in the corresponding register, cooperatives need to be entered in the register of cooperatives and as well as commercial companies need to be entered in the commercial register for full legal personality to be acquired. I therefore consider that they have legal personality as long as

estudio jurídico y económico del sector y de la Ley 13-2013 de fomento de la integración cooperativa, Madrid 2018, p. 187.

²⁹ Regulation (EU) No. 1308/2013 of the European Parliament and of the Council of 17 December 2013 (OJEU 20 December 2013) establishing the common organisation of the markets in agricultural products and repealing Regulations (EEC) No 922/72, (EEC) No. 234/79, (EC) No 1037/2001 and (EC) No. 1234/2007 and we find the definition of FVPOs in Article 152 thereof.

³⁰ <https://www.juntadeandalucia.es/organismos/agriculturaganaderiapescaydesarrollo-sostenible/areas/industrias-agroalimentarias/organizaciones-entidades/paginas/aplicacion-recopa.html> [accessed on 15.03.2022].

³¹ R. Cañabete Pozo, *Nuevo marco legal para el reconocimiento como organización de frutas y hortalizas de entidades jurídico-empresariales*, “REVESCO. Revista de Estudios Cooperativos” 2018, vol. 130, p. 7.

they are constituted in accordance with the requirements of the regulations, and their recognition is an essential formal step that will allow them to be subjects of rights and obligations, in the same manner as it applies to other legal entities in our legal systems, and I therefore understand that there is no need to distinguish between them.

5.1. The FVPO as actors in the food supply chain

Producer organisations are a very useful mechanism for concentrating agricultural production. In order to become a FVPO, it is necessary to be a legal entity or a clearly defined part of a legal entity. It will be the internal legislation of each Member State that will be responsible for establishing the national legal and administrative structures necessary to be capable of setting up FVPOs. In view of the need to resort to our national regulations, the regulation of Royal Decree 532/2017 establishes that they must have the form of a Cooperative, Agricultural Transformation Company or Trading Company

In Spain, it is regulated by Royal Decree 532/2017 implemented in application of European regulations for non-producer members, which is not the same in all EU member countries as flexibility was given to all countries to legislate on the producer organization. This, which apparently seems positive is beginning to create discrepancies between certain countries, when currently some are in favour of increasing the minimum number of producers, while others favour the same minimum number of producers but an increase in the value of marketable production.³² In Spain, FVPOs must have a minimum number of members (five) and/or cover a minimum volume or value of marketable production, to be set by the Member State concerned.

As a clearly defined part of a legal entity, the Royal Decree makes it possible to recognise them as a section of a cooperative or as a group of producers of a SAT that forms a section that meets the requirements of the regulations governing cooperative sections and at the same time respects their own.³³

³² Fruit and vegetable cooperatives position paper: CAP post 2020 and the future EU fruit and vegetable support scheme. <http://www.agro-alimentarias.coop/ficheros/doc/05583.pdf> [accessed on 15.03.2022].

³³ The exception is in the case of the marketing of products intended for the industry or which do not require compliance with marketing standards, in which case the FVPO will not need to have the technical means for the collection, sorting, storage and packaging of its members' production. A second exception would be where full compliance with the requirements of the marketing standard is carried out on the holdings of the producer members of the

An essential characteristic of FVPOs is their creation at the initiative of the producers and the carrying out of at least some activity such as joint processing, joint distribution, including joint sales platforms or joint transport, joint packaging, labelling and promotion, joint organisation of quality control, joint use of equipment or storage facilities, joint management of waste directly related to production, joint purchase of raw materials, or any other type of joint service activities aimed at pursuing a specific purpose consisting of achieving one or more of the objectives set out in the CMO Regulation.³⁴

As an exception, European sectoral regulations provide that FVPOs may accept as members natural or legal persons who are not producers, determining that they must have a certain number, although in this case they will not be taken into account in the recognition or in the measures financed by the Union.

Producer organisations shall also provide sufficient guarantees by demonstrating that they can adequately carry out their activities, both in terms of duration and in terms of the effectiveness and provision of human, material and technical assistance of their members, and where relevant concentration of supply. A producer organisation must therefore have the material and human resources necessary to fulfil the specific purpose it pursues. However, the regulations do provide for some exceptions.³⁵

organisation, and the organisation sells its entire production exclusively by auction, in which case it will not be necessary to have the means for adapting the presentation of the production to that requested by the buyer of the goods at the auction, and for storage.

³⁴ CMO Regulation and amendments introduced by the Omnibus Regulation (EU) 2017/2393. As well as the regulation of the objectives to be achieved by FVPOs contained in Articles 152.1 c and 160 CMO Regulation: i) to ensure that production is planned and adjusted in accordance with demand, particularly in terms of quality and quantity; ii) to concentrate the supply and marketing of its members' products, including direct marketing; iii) to optimise production costs and the benefits of investments made in response to environmental and animal welfare standards, and to stabilise producer prices. Provision is made for the admission of non-producer members whose legal status is that of a cooperative or agricultural processing company, subject to the condition that they may not participate in decision-making on the organisation's operation and operational programmes and funds, which must be laid down in its articles of association. Consequently, as established by Rosario Cañabate Pozo in the case of a trading company or a section, all its members must be producers, for which recognition as a FVPO is requested. Consequently, the control of the FVPO will remain in the hands of the producer members who constituted it.

³⁵ The exception is in the case of the marketing of products intended for the industry or which do not require compliance with marketing standards, in which case the FVPO will not need to have the technical means for the collection, sorting, storage and packaging of its members' production. A second exception would be where full compliance with the require-

For example, to determine the number of members, this concept is obtained from the sum of two values: the value of the production marketed by the entity applying for recognition and the value of the production marketed by the producers,

Flexibility with respect to FVPOs has occurred in several areas, including the technical resources required, where the regulations allow them to be provided by their members, or by their subsidiaries, or by associations of producer organisations to which they belong, or even by a third party via outsourcing. Therefore, a producer organisation may outsource its activities to a third party to achieve the purpose or purposes it pursues, except for the production, which may not be outsourced. This must be approved by the competent body according to the type of legal personality it possesses and be set out in the corresponding written commercial agreements. In this regard, it should be remembered that no producer organisation will be recognised if it has obtained the requirements for recognition by creating artificial situations, such as when the organisation has outsourced all the activities that it can outsource. In this regard, case law has ruled on the outsourcing of activities to third parties, which could lead to the loss of recognition as a FVPO, the CJEU ruling of 19 December 2013 already ruled in this regard “in order to meet the requirements for recognition mentioned in that provision, a producer organisation, which has entrusted to third parties the exercise of the activities essential to its recognition within the meaning of that provision, is required to conclude a contractual agreement enabling it to remain responsible for that exercise and overall management control, so that that organisation ultimately retains the power to control and, where appropriate, to intervene in good time in that exercise throughout the life of the agreement.”

Regarding the content of the operating statutes, the minimum period of membership of the producer members of the organisation is three years, unless there is a justified cause beyond the control of the members, and the democratic control of the producer organisation. This is one of the most relevant issues in the organisation’s statutes, which establishes the maximum percentage of voting rights and capital that any natural or legal person may hold in a FVPO. However, this control will not be necessary in those FVPOs that have a legal structure that requires democratic accountability; this would

ments of the marketing standard is carried out on the holdings of the producer members of the organisation, and the organisation sells its entire production exclusively by auction, in which case it will not be necessary to have the means for adapting the presentation of the production to that requested by the buyer of the goods at the auction, and for storage.

be the case of cooperatives and their sections that are covered by a legal rule that implies their democratic functioning. The Judgment of the Court of Justice of the European Union of 6 March 2012 ruled on the democratic control of a FVPO by establishing that “for the purposes of maintaining control of the organisation and of the organisation’s decisions in the hands of the producer members and, in particular, even when the Member States verify the democratic functioning of a producer organisation, the identity of natural or legal persons holding the capital of the members of the FVPO cannot be disregarded, as this could result in a natural or legal person with a large majority of the capital of the members of the organisation being able to exercise control and decision-making in the organisation itself.”

In addition, the concentration of supply and the marketing of the products of its members is one of the most important and defining aims of this type of associative entity, which is why the main activity of a producers’ organisation will consist of carrying out this objective.³⁶

The placing on the market will be carried out by the producer organisation and will also be under its control in cases of outsourcing of an activity, including the decision on the product to be sold, the form of sale and, unless the sale is made by auction, the negotiation of the quantity and price;

³⁶ Commission Delegated Regulation (EU) 2017/891 of 13 March 2017 supplementing Regulation (EU) No. 1308/2013 of the European Parliament and of the Council with regard to the fruit and vegetables and processed fruit and vegetables sectors and supplementing Regulation (EU) No. 1306/2013 of the European Parliament and of the Council with regard to penalties to be applied in those sectors and amending Commission Implementing Regulation (EU) No. 543/2011, C/2017/1528, DO L 138 de 25.5.2017, p. 4/56. Article 11. 1. The main activity of a producer organisation shall relate to the concentration of supply and the placing on the market of the products of its members for which it is recognised. The placing on the market referred to in the first subparagraph shall be carried out by the producer organisation, or under the control of the producer organisation in the case of outsourcing as set out in Article 13. Placing on the market shall include among others the decision on the product to be sold, the way of selling and unless the sale is by means of auction, the negotiation of its quantity and price. 1. Producer organisations shall keep records, including accounting documents, for at least five years, which demonstrate that the producer organisation concentrated supply and placed on the market members’ products for which it is recognised. 2. A producer organisation may sell products from producers that are not a member of a producer organisation or of an association of producer organisations, where it is recognised in respect of those products and provided that the economic value of that activity is below the value of its marketed production calculated in accordance with Article 22. 3. The marketing of fruit and vegetables that are bought directly from another producer organisation and of products for which the producer organisation is not recognised shall not be considered as forming part of the producer organisation’s activities. 4. Where Article 22(8) applies, para. 2 of this Article shall apply *mutatis mutandis* to the subsidiaries concerned.

in cases of placing on the market by consignment sales, it may receive the same treatment as sales by auction of products.

It is Royal Decree 532/2017 that considers whether the FVPO has complied with the criterion of marketing all or part of its production when this is carried out through subsidiaries or an association of producer organisations or a second-degree cooperative to which it belongs. The Royal Decree also provides³⁷ that where a producer organisation markets all or part of its production through subsidiaries or through an association of producer organisations or a second-degree cooperative to which it belongs, compliance with the requirement of its main activity will apply *mutatis mutandi* to those entities. Producer organisations must therefore inform the competent body at the time of recognition of the subsidiaries which they own, both themselves and their members, and indicate the shareholdings and share capital held by each of them. In this regard, the judgment of the General Court of the European Union of 3 July 2019 has recently ruled that compliance with the criterion of recognition of the main activity based on the concentration of supply and the placing on the market of the products of its members, in respect of which it would have been recognized, cannot be claimed to have been met on the basis that the value of marketable production is met, because the value of marketable production and the main activity are two different criteria. Moreover, these both criteria will require specific controls to be carried out.

Finally, among the minimum content required in the statutes of producer organisations, is the indication of “the specific purpose” they pursue of those established in the Regulation (EU) 1308/2013,³⁸ regulated by the European

³⁷ Real Decreto 532/2017, de 26 de mayo, por el que se regulan el reconocimiento y el funcionamiento de las organizaciones de productores del sector de frutas y hortalizas, BOE no. 129, 31 May 2017, pp. 44157–44184, Article 10.

³⁸ 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 and repealing Council Regulations (EEC) No. 922/72, (EEC) No. 234/79, (EC) No. 1037/2001 and (EC) No. 1234/2007, DO L 347 de 20.12.2013, p. 671/854. Article 152.1.c): Member States may, on request, recognise producer organisations, which:

(a) are constituted, and controlled in accordance with point (c) of Article 153(2), by producers in a specific sector listed in Article 1(2);

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

(c) pursue a specific aim which may include at least one of the following objectives: (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, including through direct marketing; (iii) optimising production costs and returns on investments in response to environmental and animal welfare standards,

regulation and where the second refers to the concentration of supply and the marketing of their members' products, including direct marketing.

When the regulations refer to the main activity of a producer organisation, this consists of the concentration³⁹ of supply and the placing on the market

and stabilising producer prices; (iv) carrying out research and developing initiatives on sustainable production methods, innovative practices, economic competitiveness and market developments; (v) promoting, and providing technical assistance for, the use of environmentally sound cultivation practices and production techniques, and sound animal welfare practices and techniques; (vi) promoting, and providing technical assistance for, the use of production standards, improving product quality and developing products with a protected designation of origin, with a protected geographical indication or covered by a national quality label; (vii) the management of by-products and of waste in particular to protect the quality of water, soil and landscape and preserving or encouraging biodiversity; (viii) contributing to a sustainable use of natural resources and to climate change mitigation; (ix) developing initiatives in the area of promotion and marketing; (x) managing of the mutual funds referred to in operational programmes in the fruit and vegetables sector referred to in Article 31(2) of this Regulation and under Article 36 of Regulation (EU) No 1305/2013; (xi) providing the necessary technical assistance for the use of the futures markets and of insurance schemes.

³⁹ The Judgment of the General Court of the European Union, (Ninth Chamber) of 3 July 2019 (In case T 602/17), refers to the fulfilment of the requirements for recognition of FPOs, specifically about the criterion of the main activity: "...the main activity of a producer organisation consisted of concentrating supply and placing on the market the products of its members in respect of which it was recognised." It also "provides that a producer organisation may sell products of producers who are not members of a producer organisation or of an association of producer organisations when it is recognised for such products and provided that the economic value of that activity is less than the value of its marketed production, calculated in accordance with Article 50 of the same Implementing Regulation." It further adds "it appears that after each on-the-spot check a follow-up report was to be drawn up to review the details of the checks carried out. This follow-up report was to indicate, in particular, the aid scheme and application checked, the persons present, the actions, measures and documents checked, and the results of the check. [...] the Implementing Regulation obliged Member States to carry out on-the-spot checks to verify compliance with the criteria for the recognition of producer organisations in the year in question. Finally, it stresses that the value of marketable production and the main activity are different criteria "the control of the SMP criterion [...] had a different objective from that pursued by the control of the main activity criterion. The main purpose of the control of the SMP criterion was to verify whether the calculation of the SMP had been carried out correctly and whether the producer organisation complied with the minimum value of marketable production [...] determined by the Member State concerned. On the other hand, the control relating to the main activity was intended to ensure compliance with the [...] as regards the main activity of the producer organisation in respect of which it had been recognised. To this end, it had to be verified essentially whether the economic value of a possible sale of products from third party producers was lower than the sale value of products from members of the producer organisation in question." "...demonstrates that the principal activity criterion is a different criterion from the SVC criterion and requires specific checks to be carried out."

of the products of its members for which it has been recognised. Placing products on the market shall be carried out by the producer organisation and shall also be under its control in cases where an activity is outsourced. Placing on the market shall include the decision on the product to be sold, the manner of sale and, unless the sale is by auction, the negotiation of the quantity and price. In the case of placing of products on the market by means of consignment sales, such placing shall be treated in the same way as sales by auction. Furthermore, Royal Decree 532/2017 establishes that when a producer organisation markets all or part of its production through subsidiaries or an association of producer organisations or a second-degree cooperative to which it belongs, compliance with the requirement for its main activity will apply *mutatis mutandi* to these entities. Producer organisations shall therefore inform the body competent for their recognition of the subsidiaries they own, both the producer organisation and its members, and indicate the shareholdings and share capital held by each of them.

5.2 Price fixing by FVPOs and collusive practice under competition law: commentary on the CJEU

In 2012, the French Court referred a question to the CJEU⁴⁰ for a preliminary ruling on the substance of a 4 million EUR fine imposed by the French Antitrust Authority on chicory producers for fixing minimum selling prices, on the grounds that certain anti-competitive practices in the sector of production and marketing of chicory had been found to exist. These practices, carried out by producers' organisations (POs), associations of producers' organisations (AOPs) and various bodies and companies, consisted essentially on the concertation of the prices of endives on the quantities of endives marketed, and in the exchange of strategic information.

The CJEU ruled that the CAP takes precedence over competition objectives and therefore the EU legislature may exclude from the scope of competition law, as is the case in the fruit and vegetable sector, certain practices including practices necessary for producer organisations and associations of producer organisations to achieve the objective or objectives assigned to

⁴⁰ Judgment of the Court (Grand Chamber) of 14 November 2017 (reference for a preliminary ruling from the Tribunal de Grande Instance of the European Communities (France) lodged on 14 November 2017) (reference for a preliminary ruling from the Cour de cassation – Francia) – Président de l'Autorité de la concurrence / Association des producteurs vendeurs d'endives (APVE) y otros. https://eur-lex.europa.eu/legal-content/es/TXT/PDF/?uri=uriserv%3A0J.C_.2018.022.01.0004.01.SPA [accessed on 15.03.2022].

them by Union law, such as ensuring that production is planned and adjusted in line with the demand, concentrating supply and marketing production, optimising production costs and stabilising producer prices. Therefore, these actions, as long as they are in line with Community agricultural policies, can escape the prohibition of collusive practices established in the TFEU, recalling that these common organisations of agricultural product markets do not constitute an area free of competition being the first thing to be recognised, and, as we have pointed out above, they must also be effectively and strictly limited to the achievement of the objectives assigned in the statutes of the POs or the PPA. In other words, the collective fixing of minimum selling prices within a PO or PPA cannot be considered proportionate to the objectives of price stabilisation or concentration of supply when it does not allow producers who themselves market their own production to charge a price lower than those minimum prices and leads to a weakening of the already reduced level of competition in the markets for agricultural products.⁴¹

6. Conclusions

European Union law has been evolving also in respect of unfair competition law and the way it is interpreted with regard to collusive practices, in order to provide an application adjusted to the aims within the CAP. The evolution of the internal market according to the wishes of the EU is long as it is a long way to go, starting from the principles contained in Directive 2005/29/EC on unfair business-to-consumer commercial practices in the internal market to the objectification of situations of dependence contained in the recent Directive 2019/633 together with the blacklist of unfair practices that reminds us of the one established for consumers under the 1993 directive on unfair terms.

The EU's legislative policy in this area is thus extended, albeit qualified by the CJEU following the 2017 ruling which focused almost exclusively on antitrust rules without taking into account the guidelines and strategies approved in the last two CAPs.

On the other hand, the national policy initiated under the 16/2021 Law on the functioning of the food supply chain, partially modified by Royal Decree 5/2020, incorporates more of an interventionist policy based on struc-

⁴¹ <https://curia.europa.eu/jcms/upload/docs/application/pdf/2017-11/cp170120es.pdf> [accessed on 15.03.2022].

tural imbalance, whose adoption of additional measures makes it urgent to approve regulations such as the forthcoming reform of the aforementioned Law. In our opinion, this justification seems weak and contrary to the market rules and its recommendations should focus more on the integration of producers, either as cooperatives or under producer organisations such as the FVPO, equipped with greater bargaining power and the capacity to balance the negotiation in their favour through measures such as the withdrawal of products or the unification of marketing vis-à-vis distributors.

In short, the market rules under the principles of good faith, balance and proportionality are the same for both parties, and are known to all. In this framework, producers should be supported with legislative and fiscal measures that would make them more competitive and promote their integration under agricultural associations, increasing in consequence their bargaining power in the market and strengthening their position vis a vis other actors in the food chain.

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UNFAIR COMMERCIAL PRACTICES IN THE FOOD SUPPLY CHAIN

Summary

The aim of this article was to provide an overview of unfair market practices in the food supply chain. In order to achieve this objective relevant European Union and Spanish legal provisions were analysed. Next, successive stages of the agri-food chain and the legal forms of the protection of competition at each of these stages have been presented, followed by a postulate to implement at each of them legislative and fiscal measures that would increase the competitiveness of food producers. In this way agricultural associations could achieve a higher degree of integration and in consequence increase the bargaining power in the market, strengthening their position in the food chain.

Keywords: unfair commercial practices, agri-food chain, bargaining power

PRATICHE DI MERCATO SLEALI NELLA FILIERA ALIMENTARE

Riassunto

L'articolo è incentrato sulla problematica di pratiche sleali presenti lungo la filiera alimentare. Per raggiungere l'obiettivo prestabilito ad analisi è stata sottoposta la legislazione dell'Unione europea e quella spagnola. L'autrice ha presentato le singole tappe della filiera agroalimentare e forme giuridiche di tutela della concorrenza durante ogni tappa. A parere dell'autrice, in ciascuna di queste tappe, i produttori di generi alimentari dovrebbero otte-

nere un sostegno legislativo e fiscale che ne aumentino la competitività, il che a sua volta si traduce in un più alto grado di unione all'interno delle associazioni agricole. In questo modo accresce il potere contrattuale dei produttori sul mercato, e allo stesso tempo si rafforza la loro posizione rispetto a altri soggetti lungo la filiera alimentare.

Parole chiave: pratiche di mercato sleali, filiera agro-alimentare, potere contrattuale