

# ECJ clarification means endive producers must turn over new leaf

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## Introduction

Under certain strict conditions, agricultural producers can coordinate their pricing and quantities without risk of falling foul of the EU competition rules. However, the European Court of Justice (ECJ) recently [confirmed](#) that not all practices by agricultural producer organisations and their associations are automatically excluded from the application of those rules: "The common organisations of the markets in agricultural products are not a competition-free zone."

The European Union's Common Agricultural Policy takes precedence over its competition objectives, and certain behaviours and practices which might otherwise be considered anti-competitive are excluded from the scope of the competition rules.<sup>(1)</sup> However, in responding to questions asked by France's highest court, the ECJ held that producers of endives (a vegetable also known as chicon) had gone too far and that "the scope of those exclusions is to be construed strictly". While producers cannot set minimum prices, within state-recognised producer organisations they can exchange information and coordinate quantities and prices.

## Background

### ***Exclusion of EU competition law for agricultural producer organisations***

In the fruit and vegetable sectors, a producer organisation or association of producer organisations must be officially recognised by a member state and attributed responsibility for at least one of these three objectives:

- ensuring that production is planned and adjusted to demand, particularly in terms of quality and quantity;
- concentrating supply and placing the products produced by its members on the market; or
- optimising production costs and stabilising producer prices.

Any practices by these organisations which are necessary to achieving these objectives are not subject to EU competition rules.

### ***What did the endive companies do?***

The French competition authority imposed a fine of almost €4 million on various producer organisations, associations of producer organisations and other entities involved in producing and marketing endives. It considered that they had been involved in a "complex and continuous cartel" which had enabled them to collectively fix a minimum producer price and maintain minimum sale prices for over a decade. The penalised entities argued that their behaviour fell outside the scope of EU competition law. On appeal, France's highest court asked the ECJ to clarify the position, asking in essence whether practices where producer organisation, associations of producer organisations and professional organisations collectively fix minimum sales prices, agree on quantities placed on the

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market or exchange strategic information can escape EU competition rules.

## **ECJ decision**

The ECJ first provided a useful summary of the complicated legal framework governing the relationship between competition law and the operation of agricultural producer organisations and associations of producer organisations.

### ***Who can benefit from the exclusion?***

The ECJ clarified that the inapplicability of the competition rules can apply only where the practice or behaviour:

- is carried out by a producer organisation, association of producer organisations or inter-branch organisation (ie, an entity recognised by a member state as regards the common organisation of the market concerned); and
- takes place within a single producer organisation or association of producer organisations (ie, between producers that are members of the same producer organisation or association of producer organisations recognised by a member state).

### ***What behaviour by producer organisations or associations of producer organisations can benefit from the exclusion?***

Only practices that are strictly necessary for the pursuit of one or more of the objectives assigned to the producer organisation or association of producer organisations concerned may be exempt from the EU competition rules. In particular, the ECJ noted that the following are likely to fall within the derogation if carried out within a single producer organisation or association of producer organisations:

- exchanges of strategic information made for the purposes of one or more of the assigned objectives and limited to information that is strictly necessary;
- coordination with regard to the quantities of agricultural products put on the market; and
- coordination of pricing policy of individual agricultural producers, particularly where the producer organisation or association of producer organisations has been assigned by its members the responsibility of marketing all of its products.

### ***When does the exclusion not apply?***

It follows from the above that the EU competition rules will apply to:

- practices of industry associations or industry groups that are not recognised by a member state as producer organisations or associations of producer organisations;
- practices established between a number of producer organisations and associations of producer organisations (ie, not within a single producer organisation or association of producer organisations); and
- practices that go beyond what is strictly necessary for achieving the objectives of a producer organisation or association of producer organisations.

The ECJ held that the collective fixing of minimum sale prices within a producer organisation or association of producer organisations will not be considered to be proportionate or necessary if it does not allow producers that sell their own products to sell them at a price below those fixed minimum prices. The court considered that this would have the effect of reducing the already low level of competition in the markets for agricultural products.

The fact that competition law applies does not mean that the behaviour in question is necessarily anti-competitive, but simply that it can be assessed under the EU competition rules.

In the French endive sector, agreements took place between producer organisations and associations of producer organisations, and with organisations that were not recognised as such. The agricultural exclusion was therefore not inapplicable.

## **Comment**

The ECJ has set out a clear framework for the application of EU competition law to cooperation within and by agricultural producer organisations and associations of producer organisations, and this clarity is welcome. In order to coordinate on prices and quantities and exchange strategic information without the restrictions of competition law, producers must do so within a producer organisation or association of producer organisations. The ECJ's judgment may encourage producers not to operate individually, but to group together in order to make coordination easier and strengthen their position against supermarket chains. This will please France's President Macron, who has called for stronger producer organisations, **(2)** but other member states may not take the same approach. The power to recognise an organisation as a producer organisation or association of producer organisations rests with individual member states, and differences in approach could lead to disparity of producer strength and bargaining position across the European Union.

However, a look at the broader picture clearly shows that competition authorities across the European Union recognise the food and agricultural sectors as priority areas. In 2012 the European Competition Network produced a report on enforcement and market monitoring activities in the food sector across the European Union. It identified various structural and regulatory factors that may have a negative impact on the functioning and competitiveness of the food sector, such as:

*"[the] fragmented and atomistic structure of farmers in some Member States, the existence of unnecessary intermediary stages in the supply chain or the existence of regulatory entry barriers to retail markets". **(3)***

The European Commission has also looked in detail at the sector. It produced a communication in 2008 on competition in the food supply chain which identified the following priorities:

- promoting sustainable and market-based relationships between stakeholders;
- increasing transparency to encourage competition and improve resilience to price volatility; and
- fostering integration and competitiveness across member states. **(4)**

The European Commission built on this work with its 2014 study on the retail food sector, which aimed to measure how choice had evolved over the previous decade for consumers. **(5)**

While policy discussions continue, this recent ECJ judgment is a timely and useful reminder that the EU competition rules apply broadly to the agricultural sector and that any exclusions will be interpreted restrictively. This case comes off the back of significant recent enforcement action in the agricultural sector. The European Commission has imposed heavy fines in recent years for cartel behaviour on companies in agricultural sectors, including canned mushrooms (fines totalling €37 million in 2014 and 2016), shrimp (fines of €28 million in 2013) and bananas (fines totalling €69 million in 2008 and 2011). **(6)**

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## Endnotes

(1) Established in Article 42 of the Treaty on the Functioning of the European Union and set out in secondary legislation (in particular Regulation 1308/2013).

(2) See [here](#).

(3) Frequently asked questions on the European Competition Network's "Report on competition law enforcement and market monitoring activities by European competition authorities in the food sector" (2012) are available [here](#).

(4) Available [here](#).

(5) Further information from the commission on the relationship between EU competition law and the agriculture and food sectors can be found [here](#).

(6) See [here](#).

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