COMPETITION COMMITTEE

Competition and Regulation in Agriculture: Monopsony Buying and Joint Selling

Series Roundtables on Competition Policy

N° 52

OECD

2004

For Official Use **DAF/COMP(2005)44**

Organisation de Coopération et de Développement Economiques
Organisation for Economic Co-operation and Development **21-Dec-2005**

English/French

DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE

DAF/COMP(2005)44
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COMPETITION AND REGULATION IN AGRICULTURE: MONOPSONY BUYING AND JOINT SELLING.

JT00196338

English/French

FOREWORD

This document comprises proceedings in the original languages of a Roundtable on Monopsony Buying and Joint Selling in Agriculture which was held by Working Party N°2 of the Competition Committee in June 2004.

It is published under the responsibility of the Secretary General of the OECD to bring information on this topic to the attention of a wider audience.

This compilation is one of a series of publications entitled "Competition Policy Roundtables".

PRÉFACE

Ce document rassemble la documentation dans la langue d'origine dans laquelle elle a été soumise, relative à une table ronde sur la Concurrence et Réglementation dans le Secteur de L'agriculture : Achat en Situation de Monopsone et Vente en Commun, qui s'est tenue en juin 2004 dans le cadre du Groupe de Travail N°2 du Comité de la Concurrence.

Il est publié sous la responsabilité du Secrétaire général de l'OCDE, afin de porter à la connaissance d'un large public les éléments d'information qui ont été réunis à cette occasion.

Cette compilation fait partie de la série intitulée « Les tables rondes sur la politique de la concurrence ».

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EXECUTIVE SUMMARY

By the Secretariat

In the light of the written submission, the background note and the oral discussion, the following points emerge:

Joint activity by agro-food producers can have a number of beneficial effects, including achieving economies of scale and scope, reducing costs of transactions, forming and maintaining a "brand", conducting advertising and conducting research. When farmer cooperatives exist to sell output and involve a small percentage of total output, they have the potential to serve pro-competitive purposes and to increase efficiency.

Unbranded products often have little advertising in comparison to branded and processed foods, largely because few mechanisms exists for sharing the costs of advertising among all the farmers who would benefit from that advertising. Cooperatives that exist for the purpose of advertising and research may need to be highly inclusive in order to prevent a free-rider problem. Joint fund-raising for the purpose of advertising can beneficially enhance consumer information and demand. While broad fund-raising may be necessary for advertising and research, highly inclusive cooperatives do not generally need to oversee sales of farm output.

Joint activity can generate significant harm to consumers when the joint activity focuses on price-setting or quantity-setting and there is relatively little competition from close substitutes. In these cases, the joint activity can constitute cartel behaviour. Highly inclusive farmer co-operatives generate higher prices for farm products when total quantities of marketed output are limited or some output is redirected. For such co-operatives to succeed in limiting quantity there is typically a mechanism for ensuring that all quantity produced is accounted for and that "excess" production does not reach the market. These monitoring mechanisms are comparable to those of cartels. At times, the government is involved with such monitoring, despite the harm to consumers from the high prices that result from limiting production.

At certain times, quantity restrictions may be necessary because otherwise producers over-harvest or over-use common areas, as has occurred with fisheries. However, the problem of harvesting from a common resource does not typically arise in crop-based farming where land is not shared. Even in fisheries, quantity limitations can prove problematic when they are not overseen by a neutral third party, as with a recent case of price-fixing that involved shrimp fishermen and traders in the Netherlands, Denmark and Germany. In general, however, quantity restrictions will lead to high prices for consumers and the extra profits from such restrictions will be converted into asset values rather than farmer income.

Beneficiaries of liberalisation have not only included consumers, who may experience lower prices, but also farmers.

In Australia, when competition between grain traders developed in one state, some farmers moved their grain into this state in order take advantage of dealing with competing grain traders

who could obtain better prices either domestically or for export. As single export desks have been eliminated, many farmers have found that they receive higher prices for their grain and customised orders are increasingly attractive.

Single marketing organisations often encourage standardisation even though there are niche markets that some farmers wish to fill. In New Zealand, a single seller of apples ultimately was partially deregulated and, after this, farmers pushed for a total deregulation. Prior to deregulation, growers who wanted to differentiate their products (by producing organic apples, kosher apples or branding) were limited in their abilities to do so.

Not only farmers can benefit from liberalisation. Consumer benefits from liberalisation can be substantial, as the Australian milk liberalisation showed when it led to a substantial decline in milk prices. Milk prices fell substantially even after including a levy on sales of drinkable milk that produced funds for providing dairy farmers with transition payments should they choose to leave dairy production.

Buyer power is a common concern of competition agencies examining the agricultural sector. Buyer power can generate harm to consumers, but this is unlikely except in the presence of selling market power by the buyer. Aggressive negotiations by buyers are to be expected and are most likely to yield lower prices among competing downstream retailers.

For certain products, a small group of buyers account for a high percentage of purchasing from farmers. While farmers often face increasingly specific terms for production and may feel the necessity to sign long-term contracts with buyers, such developments are common in many sectors. At times, buyers may rig bids, so that they pay a lower price for output than they otherwise would. Such bid-rigging is harmful to consumers and would be punished under most competition laws. Under a consumer welfare standard, buyer power against farmers would be most problematic when there is buyer power downstream as well, otherwise the competition between buyers will prevent them from reaping undue gains. It is questionable whether enterprises with purchasing power would benefit dynamically from marginalizing their suppliers and purchasing below the cost of production over a long time period.

One of the pieces of evidence that is commonly cited by farmers as evidence of buyer power is that there is an asymmetric price response of retail products to farmgate price changes. This means, for example, that when there is a supply shortage that raises farmgate prices, the increase is immediately passed on to consumers, while when there is a decrease in farmgate prices, the expected decrease in retail prices appears gradually and results in high profits to intermediaries during the period in which prices are unusually high. While there is substantial evidence of price asymmetry, it is not clear that this arises from buyer power. An alternative explanation is that such asymmetry arises from different search patterns by consumers when they face increasing prices compared to decreasing prices. In particular, they may search more aggressively for alternative suppliers when prices increase, but less aggressively when prices are stable or slowly decreasing.

While the setting of standards by producers is generally beneficial for consumers and helps to ensure quality, certain types of standards can result ***in the limiting output.*** *In such cases, standards setting may serve anti-competitive purposes and merit review by a competition authority.*

Farm products are often experience goods (quality known after consumption) or credence goods (quality not identified even with consumption, as with organic foods). For such goods,

trustworthy signals are important for maintaining consumer confidence. In absence of such signals, low-quality production will reduce willingness of consumer to purchase the product, and thus reduce the incentive of high-quality producers to maintain quality.

Generally setting of quality standards by producers can be beneficial, as it can help to enhance the quality of products available to the consumer. "Brand" type consortia and denomination of origin are valuable mechanisms for maintaining incentives for quality production. These are particularly common in France and Italy, but exist for farm products in many OECD countries. When inter-brand competition is vigorous, as with small cheese and wine denominations, it may not be harmful for such denominations to fix quantities of output.

Standards that become increasingly stringent as quantity produced increases are particularly likely to have an anti-competitive effect. For example, standards governing orange production have, in the past, become stricter over "minimum size" at times of high production, thus having the effect of limiting oranges sold through fresh outlets apparently for the benefit of producers against the benefit to consumers. Standards that establish different grades of quality are less likely to create competitive harm than standards that establish a minimum size because the minimum size standards can be used to limit total output reaching the fresh market, while establishing a gradation mechanism between different sizes does not limit the output reaching the fresh market.

Buyer-established standards do not have any obvious anti-competitive effects, as a general matter, and buyer-established standards are increasingly common across many areas of economic activity.

Buyer-established standards increase product consistency which has value both to consumers and buyers. While private standards created by buyers are playing an increasing role in many sectors, including the agro-food sector, there is no obvious harm to consumers from such standards. In particular, buyers may wish to ensure that they do not sell low-quality products, as this may damage their reputations with their consumers. So there are reasons to believe that such standards will benefit consumers.

Competition authorities have a beneficial role to play in the agro-food sector. There are three most common areas of activity: prosecuting bid-rigging among buyers, challenging anti-competitive mergers and advocating against over-inclusive selling co-operatives as well as potentially prosecuting price-fixing by producers.

In recent years, competition authorities have been active in bringing cases against bid-rigging, have challenged mergers among downstream buyers such as grain elevator operators and have prosecuted certain producer joint-activity organisations.

Elimination of competition law exemptions for the agro-food sector would increase the role of markets and generally benefit consumers.

Antitrust exemptions for the agricultural sector are not necessary. Joint-activity organisations that involve a small percentage of output or that result in the creation of brands can provide substantial benefits to consumers and as a result, such joint activity would not generally be illegal under many antitrust laws. In contrast, joint-activity organisations that have mandatory membership and engage in output restricting or redirecting activity likely harm consumers and do not promote the public interest. Only in exceptional cases would such activities enhance the public interest, so they do not merit a broad exemption.

RÉSUMÉ

Par le Sécretariat

Les contributions écrites, la note d'information et les discussions ont permis de mettre en évidence les points suivants :

Les activités communes des producteurs dans le secteur agroalimentaire peuvent avoir un certain nombre d'effets bénéfiques, dont la réalisation d'économies d'échelle et de gamme, la réduction des coûts de transaction, la création et la préservation d'une « marque », le lancement de campagnes de publicité et l'organisation de recherches. Lorsqu'elles sont créées pour écouler la production et qu'elles ne représentent qu'un faible pourcentage de la production totale, les coopératives agricoles peuvent favoriser la concurrence et permettre d'augmenter l'efficience.

Les produits sans marque font en général l'objet de peu de publicité par rapport aux produits de marque et aux produits transformés, en raison essentiellement du faible nombre de mécanismes permettant de partager les coûts de la publicité entre l'ensemble des exploitants agricoles qui en bénéficieraient. Les coopératives créées afin de faire de la publicité et de mener des recherches doivent regrouper un grand nombre de producteurs pour éviter les problèmes de parasitage. La collecte commune de fonds aux fins de publicité peut favoriser l'information et la demande des consommateurs. Si une large mobilisation de fonds est sans doute nécessaire pour entreprendre des activités de publicité et de recherche, les coopératives qui regroupent un grand nombre de producteurs ne sont d'ordinaire pas tenues de superviser la vente de la production agricole.

L'activité commune peut être très nocive pour le consommateur lorsqu'elle porte principalement sur la fixation des prix ou des quantités et que la concurrence de produits de substitution proches est relativement faible. En pareil cas, elle peut s'apparenter à une entente. Les coopératives regroupant de nombreux producteurs permettent souvent d'obtenir des prix plus élevés pour les produits agricoles lorsque les quantités totales de produits commercialisés sont limitées ou que la production est en partie réorientée. Pour que ces coopératives puissent limiter les quantités, il existe en règle générale un mécanisme tel que toutes les quantités produites sont prises en compte et que la production « excédentaire » n'arrive pas sur le marché. Ce mécanisme de contrôle est comparable à celui des ententes. Il arrive quelquefois que les pouvoirs publics soient associés à ces contrôles malgré l'effet préjudiciable qu'exercent sur les consommateurs des prix élevés résultant d'une limitation de la production.

Des restrictions quantitatives peuvent être parfois nécessaires, faute de quoi les producteurs surexploitent des zones communes, comme on l'a vu dans le secteur de la pêche. Toutefois, le problème de l'exploitation d'une ressource commune ne se pose d'ordinaire pas pour les cultures lorsque les terres ne sont pas partagées. Même dans la pêche, les limitations quantitatives peuvent poser des problèmes si elles ne sont pas supervisées par un tiers neutre, comme l'a récemment montré un cas d'entente sur les prix entre pêcheurs et marchands de crevettes aux Pays-Bas, au Danemark et en Allemagne. D'une manière générale cependant, ces restrictions renchérissent les prix pour les consommateurs et les bénéfices supplémentaires qui en résultent sont transformés en actifs et non en revenus pour les exploitants.

La libéralisation a profité non seulement aux consommateurs, qui voient parfois les prix baisser, mais aussi aux exploitants agricoles.

En Australie, où la concurrence entre négociants en céréales s'est développée dans un Etat, certains exploitants agricoles ont écoulé leurs céréales dans cet Etat pour pouvoir traiter avec des négociants concurrents susceptibles d'offrir des prix plus avantageux sur le marché intérieur ou à l'exportation.

A la suite de la suppression des bureaux d'exportation uniques, de nombreux exploitants agricoles ont constaté que leurs céréales se vendaient plus cher et que les commandes individualisées étaient de plus en plus attrayantes.

Les organismes de commercialisation uniques encouragent souvent l'uniformisation même s'il existe des créneaux que certains exploitants souhaitent investir. En Nouvelle-Zélande, un monopole de vente de pommes a en fin de compte fait l'objet d'une déréglementation partielle, après quoi les exploitants agricoles ont demandé une déréglementation totale. Auparavant, les pomiculteurs qui souhaitaient différencier leurs produits (en produisant des pommes biologiques, des pommes casher ou des pommes de marque) n'en avaient guère la possibilité.

Les exploitants agricoles ne sont pas les seuls à pouvoir bénéficier de la libéralisation. Les avantages que les consommateurs en tirent peuvent aussi être importants, comme l'a montré la libéralisation du secteur laitier en Australie, qui s'est traduite par une baisse notable des prix. Le prix du lait a sensiblement baissé, et ce même après le prélèvement d'une taxe sur les ventes de lait de consommation destinée à financer des paiements de reconversion aux producteurs laitiers qui décident de quitter le secteur.

Le pouvoir des acheteurs est une préoccupation courante des organismes chargés de la concurrence qui se penchent sur le secteur agricole. Il peut avoir des effets dommageables sur le consommateur mais uniquement si l'acheteur exerce une position dominante sur le marché de la distribution. Il faut s'attendre à ce que les acheteurs négocient âprement, ce qui conduira très probablement à des prix plus bas parmi les détaillants en aval qui se font concurrence.

Pour certains produits, un groupe restreint d'acheteurs représente un fort pourcentage des achats aux agriculteurs. Si ceux-ci se trouvent souvent face à des conditions de production de plus en plus particulières et peuvent ressentir le besoin de signer des contrats à long terme avec les acheteurs, cette évolution est courante dans de nombreux secteurs. Il arrive que les acheteurs s'entendent de manière à payer un prix inférieur à celui qu'ils acquitteraient autrement. Ces soumissions concertées sont préjudiciables aux consommateurs et sanctionnées par la plupart des lois sur la concurrence. Dans l'optique du bien-être du consommateur, le pouvoir que les acheteurs exercent sur les exploitants agricoles est particulièrement défavorable si les acheteurs sont aussi puissants en aval ; s'il n'en est pas ainsi, la concurrence entre les acheteurs empêchera ceux-ci de faire des bénéfices excessifs. On peut se demander si les entreprises ayant un pouvoir d'acheteur gagneraient véritablement à marginaliser leurs fournisseurs et à acheter en dessous du coût de production sur une longue période.

Un élément souvent avancé par les exploitants agricoles pour faire la preuve de la puissance des acheteurs est l'asymétrie des réactions des prix de détail aux variations des prix départ exploitation. En d'autres termes, si par exemple une pénurie de l'offre fait monter les prix départ exploitation, cette hausse est immédiatement répercutée sur le consommateur, alors qu'en cas de baisse des prix départ exploitation la diminution attendue des prix de détail est progressive et se traduit par une augmentation des bénéfices des intermédiaires pendant la période où les prix sont

anormalement élevés. Si tout prouve à l'évidence qu'il existe une asymétrie des prix, il n'est pas certain qu'elle résulte du pouvoir de l'acheteur. Elle peut aussi bien s'expliquer par des comportements variables des consommateurs suivant qu'ils sont confrontés à une hausse ou à une baisse des prix. Il se peut en particulier qu'ils recherchent plus activement d'autres fournisseurs lorsque les prix augmentent, mais qu'ils fassent preuve de moins d'ardeur lorsque les prix sont stables ou baissent lentement.

Si la fixation de normes par les producteurs profite généralement aux consommateurs et contribue à garantir la qualité, certains types de normes peuvent entraîner une limitation de la production. En pareil cas, les normes peuvent avoir un objectif anticoncurrentiel et mériter d'être réexaminées par un organisme chargé de la concurrence.

Les produits agricoles sont souvent des biens d'expérience (dont la qualité est connue après qu'on les a consommés) ou des biens de confiance (dont il n'est pas possible d'identifier la qualité même après consommation : c'est le cas des aliments biologiques). S'agissant de ces biens, il importe de donner des indications fiables pour ne pas perdre la confiance des consommateurs. Faute d'indications de ce type, une production de qualité médiocre n'incitera guère le consommateur à acheter le produit, et les producteurs de qualité seront moins enclins à maintenir la qualité.

La fixation de normes de qualité par les producteurs est d'ordinaire bénéfique, car elle permet d'améliorer la qualité des produits offerts aux consommateurs. Les groupements de marque et les dénominations d'origine sont des mécanismes utiles pour maintenir les incitations à une production de qualité. Ils sont particulièrement courants en France et en Italie mais existent pour les produits agricoles dans de nombreux pays de l'OCDE. Si la concurrence entre marques est forte, comme dans le cas des petites appellations de fromages et de vins, il n'est sans doute pas nocif pour ces appellations de fixer des quantités de production.

Les normes qui deviennent de plus en plus rigoureuses à mesure que la quantité produite augmente sont particulièrement susceptibles d'avoir un effet anticoncurrentiel. Ainsi, dans le passé, les normes régissant la production d'oranges ont été renforcées pour ce qui est du « calibre minimum » en cas de forte production, d'où une limitation des ventes d'oranges sur le marché des produits frais, apparemment au profit des producteurs et au détriment des consommateurs. Les normes qui fixent différentes qualités risquent moins d'être dommageables à la concurrence que celles qui fixent un calibre minimum, car ces dernières peuvent servir à limiter la production totale qui arrive sur le marché du frais alors que la mise en place d'un mécanisme de gradation entre les différents calibres ne limite pas cette production.

Les normes fixées par les acheteurs n'ont pas en règle générale d'effets anticoncurrentiels visibles et sont de plus en plus fréquentes dans de nombreux secteurs de l'activité économique.

Les normes fixées par les acheteurs permettent de rendre les produits plus homogènes, ce qui présente un intérêt à la fois pour les consommateurs et pour les acheteurs. Si les normes individuelles créées par les acheteurs jouent un rôle croissant dans de nombreux secteurs, y compris dans l'agroalimentaire, rien ne prouve qu'elles portent préjudice aux consommateurs. En particulier, les acheteurs peuvent souhaiter s'assurer ainsi de ne pas vendre de produits de qualité médiocre, ce qui risquerait de porter atteinte à leur réputation auprès de leurs consommateurs. Il y a donc lieu de penser que ces normes seront profitables aux consommateurs.

Les autorités de la concurrence ont un rôle bénéfique à jouer dans le secteur agroalimentaire, en particulier dans les trois grands domaines suivants: saisir la justice en cas d'ententes entre

acheteurs, contester les fusions anticoncurrentielle, lutter contre les coopératives de vente regroupant de trop nombreux producteurs et engager éventuellement des poursuites en cas d'entente sur les prix entre producteurs.

Ces dernières années, les autorités de la concurrence ont saisi les tribunaux dans les cas d'ententes, contesté des fusions entre les acheteurs en aval, notamment les exploitants de silos à grains, et engagé des poursuites contre certaines organisations de producteurs menant des activités communes.

La suppression des exemptions au droit de la concurrence dont bénéficie le secteur agroalimentaire renforcerait le rôle des marchés et profiterait d'une manière générale au consommateur.

Il est inutile de prévoir des exemptions au droit de la concurrence pour le secteur agricole. Les organisations menant des activités communes qui couvrent un faible pourcentage de la production ou qui sont à l'origine de la création de marques peuvent être très profitables au consommateur ; c'est pourquoi, dans de nombreux pays, les activités communes ne sont généralement pas jugées contraires au droit de la concurrence. Par contre, les organisations menant des activités communes auxquelles il est obligatoire d'adhérer et qui restreignent la production ou réorientent l'activité risquent de porter préjudice au consommateur et ne favorisent pas l'intérêt public. Ces activités ne contribueraient à l'intérêt général que dans des cas exceptionnels, de sorte qu'elles ne méritent pas une large exemption.

BACKGROUND NOTE

1. Introduction

Agricultural policy has often developed without concern for principles of competition policy. Historically, agricultural policies have been primarily devoted to improving the welfare of agricultural producers, because of political imperatives and social values.[1] One way that policymakers have sought to increase producer welfare has been through regulations that sometimes have anti-competitive effects and that sometimes raise domestic consumer prices, limit quantities sold and impact quality standards. Partly because many regulations governing producers of agricultural products actually have anti-competitive effects, agricultural producers are often explicitly exempted from competition laws.[2] These exemptions are much broader in the agricultural sector than in any other sector. In some circumstances, producers have even used the exemptions to form cartels, with the cartels on occasion being enforced by governments. The consumer and social welfare losses from such arrangements can be large.

Increasingly, ministries and courts recognize that, when evaluating potential policies and regulations, the public interest should be taken into account in addition to other policy objectives, such as improving farmer welfare.[3] The public interest includes consumer welfare considerations. As a practical matter, the importance of including the public interest in the cost-benefit analysis for policies is that policies designed solely to help one group (such as producers) may frequently damage the interests of other groups (such as consumers). A complete economic analysis of regulatory effects of agricultural policies should take consumer effects into account. This point is acknowledged in many laws.[4]

Antitrust exemptions can either have real effects by providing protection to anticompetitive activities, such as cartels, or have no effects, because the activities covered are not, in fact, anticompetitive. On the one hand, when exemptions provide real protection to producers engaged in anti-competitive activities, affected consumers are typically made worse off. Ironically, even when the antitrust exemptions have had real effects, the long-term effect of antitrust exemptions has not always benefited farmers because entry reduced returns to protected activities or the value of "excess" returns was incorporated into farmland prices. On the other hand, in many cases exemptions may exist but producers do not pursue anti-competitive activities. In many circumstances, the cooperative activities that farmers have pursued, for example, enhance efficiency and do not harm competition. In either case, there is little reason to maintain a broad competition law exemption for farmers.

As an alternative, the agricultural sector can be treated with the same carefully-tailored, case-specific competition analysis that is considered appropriate in many other sectors. If farmers seek guidance about what sorts of activities are permissible, government policy statements can clarify those types of conduct that would be considered in the public interest and clearly permissible as well as those types of conduct that would be considered harmful.

While farmers often benefit from antitrust law exemptions, they are often strong advocates of using antitrust laws to take action against increasingly concentrated buyers and retailers.[5] There are sometimes foundations to these farmer concerns. It is true that buyers of certain products are often quite concentrated in OECD countries, especially meatpackers. Moreover, retailers are increasingly concentrated in many OECD countries, with a relatively small number of supermarket chains accounting for the vast majority of end-consumer product purchases. Both buyers and retailers are increasingly influencing the process of production, with the result that farmers feel that not only are their margins being reduced but their independence to govern their own commercial activity is more limited than in the recent past. On occasion, price-fixing among buyers has been found and prosecuted in many OECD jurisdictions. Given the

difficulty of identifying local price-fixing agreements, there may be more price-fixing activity by agricultural buyers than has been prosecuted. Clearly, careful attention to potential buying-side problems is merited. Existing competition laws (including anti-cartel laws) with high penalties are normally considered sufficient for pursuing such anti-competitive behavior. While significant efforts should be taken to identify and punish wrongdoing, great care should be taken to avoid punishing behavior that has efficiency-enhancing characteristics and that renders agricultural products more affordable to intermediate or end-consumers.

In this note, two primary topics are considered. The first is different types of producer joint-activities and their competitive effects. Some of these activities are identified as likely harmful to competition and some are identified as likely not harmful. The second is monopsony-buying concerns and the effects such monopsony could have on farmers and consumers. Some monopsony-buying concerns may have merit while others likely do not.

This note is intended to address a relatively narrow topic at the intersection of competition policy, regulation, and the agricultural sector. It is not meant to provide a complete survey of all relevant laws, regulations, and research in this area, but to serve as an introduction to the main topics. There are a number of other issues that could affect competition, such as optimal methods for providing support to farmers. These are not the subject of the current inquiry, nor are WTO and international trade issues. The domestic topics addressed here already cover a broad range of complicated issues.

2. Key economic characteristics of agricultural products

Before beginning to analyze the competition issues, it is important to identify some of those economic and social features of the agricultural system that may be especially important and help to explain some of the distinctive regulatory solutions that have been adopted by agriculture policy. Not all agricultural products are characterized by these features, but the features are often present and influence the thinking of many policymakers. Note that, while some of the objectives of agricultural policy may ostensibly be "non-economic," the policies typically have identifiable economic impacts and require the use of economic resources. (Winter (1988)) Overall, farming is an economic activity. (Monti (2003))

2.1 Consumer information problems

Consumers often have significant difficulty in assessing whether they are buying high or low-quality goods. In economics, a *search* good is one whose quality is known prior to consumption, an *experience* good is one whose quality is known after consumption, and a *credence* good is one whose quality cannot be identified with consumption, but whose history affects some consumers' attitudes towards the good. (Organic foods, for example, are credence goods.) Food is often an experience or credence good, meaning that consumers cannot assess the products attributes fully prior to consumption. (Nelson (1970)) One strawberry may look and smell very much like another strawberry. But this does not mean they will have the same taste.[6] For experience goods, consumers may be deterred from purchasing the goods unless there are signals of quality. In the absence of such signals, high quality producers will have negative externalities from low-quality production, because the low-quality production will reduce consumer willingness to consume the high-quality product.

The existence of broadly-accepted quality signals can prevent the reduction of quality that can arise in "lemons" models. (See Akerlof (1970).) Signals take a variety of forms for food items, including branding, setting minimum quality standards by producers, setting minimum quality standards by purchasers, and retailer evaluation, in which retailers are trusted to act as a tester of quality (with consumers reducing purchases from retailers who do not ensure high quality.) An alternative to quality signaling is the

unconstrained use of commodity markets, in which different, objective "grades" of quality receive different payments, so that low-graded items sell for less.[7]

Both the skills of consumers in assessing quality prior to use and the cost of assessment are important for determining the appropriate quality-signaling mechanism, as are the uniformity (or heterogeneity) of consumer preferences. Assessment skills may be greater for large purchasers, such as processors who are able to assess the relevant qualities of goods at lower per-unit cost than other consumers. Despite this sophistication in assessment, the desire for consistency of input drives some processors to specify very precisely what product they want and how it shall be raised and certified, rather than rely on techniques of evaluation.

Quality standards can either increase or reduce social welfare, depending largely on whether farmers must incur significant costs to increase quality of output. Leland (1979) showed that minimum quality standards can improve social welfare when there is no indication to consumers that producers have undertaken costly effort. In such situations, limiting the ability to market low-effort output makes the higher-effort output, which may be sought by consumers, more profitable. Chambers and Weiss (1992) show that when the problem is one of consumers discriminating between good and bad producers but producer quality is not costly, minimum quality standards can be harmful, because they make it more difficult to identify the bad producers. Quality standards are an increasingly important area of agri-food activity and, in practice, their effects are complex. Increasingly, standards are being set by broad coalitions. (See OECD (2003).)

If consumer tastes are homogeneous, a unique quality standard for a product may be most appropriate, whereas if consumer tastes are highly heterogeneous, a unique quality standard is less likely desirable because it reduces the variety of choices available to the diverse consumers. Often, low quality produce that may not be appropriate for the fresh produce market (such as beans with unsightly sores) may be appropriate for some kind of processed food, such as soup stock or canned beans. In many countries, legislation exists that sets minimum standards on fruits and vegetables sold in retail markets.

2.2 Localised risk

One distinctive feature of many agricultural products is the variability of production, given the same inputs. Crop yields, for example, are notoriously prone to variations in weather and water supply that cannot be reliably predicted in advance of the planting season. This creates a risk that a region's output of a given product will be significantly lower in some years than others. Moreover, this risk is localized, given that crops are often traded over a broad territory and that weather effects can be highly local. Thus while one region's output may be lower in one year than another, there is no guarantee that aggregate output of the product will be lower at the same time. If aggregate output always varied in conjunction with regional outputs, the product's price would increase when output fell, partially or more than completely making up for the decline in a region's output with higher prices.

2.3 Transport

Transport can be quite expensive for certain bulky, heavy, and perishable items, especially those that require refrigeration, such as milk. The difficulties inherent in long-distance transport of milk mean that in large countries, such as Australia and the U.S., there are many localized fresh liquid milk markets. When the transport cost is larger than the difference in cost between producing the product in the most efficient and least efficient areas, the product may be produced in areas that are not the most productively efficient. In contrast, products such as almonds that are relatively long-life, storable and high price (compared to weight) may have much broader geographic markets for the purposes of competition analysis. The ability to store a product can smooth out short-run production problems and permit transport over great distances.

For certain products, the cost of fast transport is easily made up by sales values. Tropical fruits and some vegetables are sometimes flown great distances to their destinations.

2.4 Differentiation

Unlike branded products, basic agricultural commodities are often homogeneous between producers. This means that, in absence of cartels, profits will be relatively low, with sales prices at levels just high enough to cover the marginal production costs (including opportunity costs of the land) of the marginal producer. Undifferentiated markets with inelastic demand create high profits for cartel operation compared to markets with other characteristics.

Increasingly, products are becoming differentiated; even products that were once considered bulk commodities, such as grains. More traditional differentiated products include those of the same general type (such as lamb chops) that may have very different qualitative features. For example, Welsh lamb may have a very rich flavor compared with lamb from another location. Some farmers have better land for raising tomatoes than others, and may raise tastier products as a result. Qualitative features are often difficult to identify by small-quantity end-users, especially given that the lamb in an end-consumers store may come from one producer on one day, and another producer on another day.

While some goods may seem undifferentiated to small consumers, large quantity purchasers (intermediate companies such as salty corn-chip producers) may have very specific requirements for their grains. Such purchasers may enter into contracts in which they determine the exact type of seed that will be used, its fertilizers, the product's moisture content and size on delivery, the volume to be delivered and the dates of delivery. These intermediate companies may implement detailed quality standards to enhance their product's consistency, but farmers can perceive the end-result as a dedicated supplier contract that provides them with no freedom to run their farming operation. Such contracts do, however, provide the benefit of reducing price risks, in that prices may be stipulated with increases or decreases based on various quality criteria.

2.5 Advertising and positioning

Food products can be subject to major advertising campaigns. Some unbranded products, such as milk or cheese, may have national advertising campaigns. But these are the unusual cases. Most undifferentiated agricultural products, such as corn, do not have major advertising campaigns because the producers are not joined in an organization that would fund advertising and no individual producer receives sufficient direct benefits to compensate the costs of advertising. Even large producer organizations may experience free-riding behavior when advertising is involved.

While raw foods often do not receive significant advertising, branded foods often have high levels of advertising. Advertising clearly has benefits to the advertisers, otherwise they would not engage in such expensive activities. These high levels of advertising can, in turn, help to generate higher levels of return for the brand owners. The benefits of advertising to a firm include (1) convincing consumers to try a product they have not tried (2) changing consumer perceptions of products, including signaling product quality[8] (3) providing information to consumers about product characteristics (4) providing information to consumers about product prices and (5) developing unconscious mental associations about a product. Advertising may have the potential to permanently change consumer preferences from their initial state. In this context, the lack of advertising for unbranded products may mean that consumer preferences are naturally driven towards branded (and advertised) products.

2.6 Consumer heterogeneity

Consumer preferences about food vary considerably from one country to another and within a country. The nature of these preferences extends not only to preferences for one food to another, but includes preferences about taste, freshness, and credence values, such as organic content, animal welfare, and source of purchase (such as supermarket vs. local specialty retailer). Consumer variation within a given country is important because the more variation there is in preferences, the less appropriate simple quality standards may be. For example, when consumers who seek organic goods have different preferences over plant and animal treatment, it may be appropriate to have several different organic standards with reliable organizations enforcing each one. Government determination of uniform food standards may not always be the best way of satisfying consumer preferences. At the same time, there is some risk that competing private standards may create confusion.

3. Producer joint-activity organisations (co-operatives, marketing orders, market organizations)

"Joint-activity" organisations organize joint activity by independent sellers and would include both farmer-run cooperatives and government-operated joint sales organisations and rules, such as marketing orders and market organizations as well as collective bargaining organizations. Farmer "joint-activity" organizations on the selling side take a variety of forms, some of which would not be expected to create any anti-competitive harm, while others could create market power and limit supply or raise prices. Joint activity does not require that farmers sell their product through a central selling organization, such as a cooperative, but can involve other sorts of joint activity, such as limitations on supply, ingredients, or quality. Small farmer co-operatives that affect a limited percentage of the production of a given product within an appropriately-defined geographic area likely do not have any ability to influence prices or terms of competition and are unlikely to generate price increases. In contrast, large co-operatives, or mandatory membership organizations, whether run by the state or other entities, may have the ability to affect the terms of competition and could ultimately raise prices for consumers.

"Joint-activity" organizations often benefit from antitrust law exemptions that prevent cartel charges, as long as the organisations act appropriately. Joint-activity organisations are often independent of the government but at other times are endorsed by government and include mandatory membership for all producers of the relevant product in the relevant area.

3.1 Co-operatives not endorsed by state

Farmer cooperatives have a variety of different purposes. At times, they are related to purchasing (such as seed-buying cooperatives that are established in order to benefit from quantity discounts), at times they are related to farming production (such as cooperatives that share and maintain specialty machinery), and at times they are related to selling and processing of output. In this note, the primary matter of concern is cooperatives that are established related to selling.

Selling co-operatives are often organised by type of product. The functions they perform vary, and may include joint marketing of a product, overseeing product advertising and collecting a mandatory fee from farmers to support advertising and marketing expenses, and developing and enforcing standards about production processes and quality.

When cooperatives have significant effects on total output quantity, sales channels pursued, or wholesale prices, and when they could prevent or damage the operations of potential competitors, cooperatives do not have wholly innocuous effects. It is possible to assess effects by weighing efficiency gains and other pro-competitive effects that are achieved through cooperative action against potentially

anti-competitive effects. Factors to consider for the analysis of the competitive effects of a cooperative include:

- Percentage of appropriately defined market included within cooperative
- Exclusivity of producers to cooperative or limitations on outside contracting
- Whether incentives of different participants diverge, making anti-competitive agreements difficult
- Whether efficiencies can be achieved in a less anti-competitive manner

Cooperatives that contain a small percentage of production capacity are generally not likely to pose substantial anti-competitive concerns.[9] Cartel activities such as output limitation are particularly difficult to pursue when cooperatives do not involve all members and cannot observe all market trading to ensure that market allocation agreements would be pursued. While most cooperatives are small and would not pose antitrust concerns, some cooperatives have been set up that do include a large percentage of productive capacity[10] In such situations, "one cannot exclude that major co-operatives, such as the ones…in northern Europe, are dominant." (Monti (2003)) When cooperatives are highly inclusive, they may have the potential to engage in anti-competitive activities, though non-participation may reduce the ability to engage in anti-competitive conduct. Largely in order to limit the impacts of non-participation, joint-activity organizations have been established for certain agricultural products by many OECD members in which all producers are required to belong and enforcement of cartel-style agreements is provided through state-endorsed monitoring and legal action. State-enforced cooperative agreements are discussed below.

Cooperatives may require that farmers sell their product only through the cooperative. Such requirements are not necessarily anticompetitive. Especially when cooperatives need to ensure quantities to make adequate investment in capital assets, such as storage or processing, some kind of guaranteed volume may be necessary, e.g. for loan guarantees. At the same time, when a highly inclusive cooperative that has already achieved most economies of scale demands exclusive rights to sell a farmer's product, this can limit effective entry and limit the ability of consumers to obtain product from other sources.

Anticompetitive outcomes are less likely when farmers have divergent financial interests, as may arise when farmers produce different varieties of crops with different optimal end uses. For example, Valencia oranges may be most suitable to processing, while navel oranges are most suitable to fresh sales. This means that the two sets of producers have different financial incentives, especially as a joint cooperative may divert fresh navel oranges to processing uses, in order to raise the price of fresh oranges, but with an effect of reducing prices for processed oranges. Divergence of interest does not ensure that anti-competitive outcomes will not occur, but suggests that anti-competitive outcomes will be more difficult to achieve than when interests are convergent.

One reason for establishing cooperatives is to achieve efficiencies. But efficiencies can often be achieved without joint price-setting or joint-output limits. For example, producers may argue that in order to justify a risky financial investment, they must share potential profits between themselves, ensured by a mechanism of joint price-setting or quantity-setting. However, if such risky financial investments are made elsewhere without joint quantity-setting or price-setting, then the investment may not require the combinations over anti-competitive activity. The least anti-competitive means of ensuring that efficiencies are achieved is preferred.

3.2 Marketing orders, agencies, or organisations endorsed by state

A marketing order, or market organization, may govern the pricing, supply, and other terms for a given product. The supply rules may apply for specific users under various geographic limits. Marketing orders may establish quantity restrictions, type of output restrictions, minimum purchase prices or arrangements for determining an appropriate price. They may be viewed as regulated price/quantity mechanisms, when they govern most output of a specific type. Such rules have existed and continue to exist in a number of OECD countries. Were non-farmers to form such organizations, their activities would frequently be considered illegal. Farmers could benefit in at least some respects from the elimination of the mandatory government control inherent in government-endorsed marketing orders.[11]

Reasons for the existence of joint activity organizations vary and include: market stabilization, raising farmer incomes, achieving economies of scale, governing quality standards, providing farmers with control over their products, sharing risk, and avoiding free-rider problems (especially from marketing of a trade name or appellation). Sometimes these organizations control a trademark (or appellation). When this occurs, there is often a geographic limit on the area of production of a product. These geographic boundaries limit the number of producers and the amount that can be produced while, on the other hand, providing higher than usual profits that yield an incentive to maintain the product at a high quality and promote the product.

"Joint activity" organizations endorsed by federal or state government have existed in a number of different OECD countries, including Australia (milk), Canada (Farm Products Agencies Act, R.S., 1985, c. F-4, s. 1; 1993, c. 3, s. 2.), the European Union (Article 34 of Treaty Establishing European Community), and the U.S. (Agricultural Marketing Adjustment Act of 1937, 7 U.S.C. § 601-74). "Marketing orders and marketing agreements are designed to help stabilize market conditions for fruit and vegetable products. The programs allow farms to collectively work to solve marketing problems. Industries voluntarily enter into these programs and choose to have federal oversight of certain aspects of their operations." (USDA (2004))

The conditions for creation of a marketing order vary from jurisdiction to jurisdiction. Not all jurisdictions state the criteria explicitly, but in general they must receive significant producer support. For example, in the U.S., "For a marketing order to be implemented, it ultimately must be approved by at least two-thirds of those growers voting in a referendum, or by growers producing at least two-thirds of the volume of the commodity represented in a referendum. USDA encourages a showing of broad support for an order prior to holding a formal hearing." While marketing orders are proposed by producers, "the USDA's Agricultural Marketing Service oversees the programs to ensure that orders and agreements operate in the public interest and within legal bounds." (USDA (2004))

The ways that joint-activity organizations operate when they are endorsed by governments varies. The 1999 Italian Competition Authority Annual Report describes some of the conditions for the sugar common market organization in the European Union. "In order to ensure continuity and profitability of production, the European Union, which is world's leading sugar exporter, set up a Common Market Organization (CMO) in 1968. This, in keeping with the Common Agricultural Policy, provides agricultural producers with profitable price levels and guaranteed outlets. In the beet and sugar sector there is, however, a quantity limit to the guarantee system. This is established by setting a production ceiling shared out pro-rata among the member states; each member state then divides out its share to the sugar companies operating in its territory.

Cultivation contracts between sugar companies and growers are the principal means of vertical integration between agriculture and the industry. Through these contracts, the industry is assured of raw material supplies and an optimal use of plant through predetermined production schedules, while the

agricultural side enjoys advance guarantees both of placing its beet crop, and of prices. In most European countries, in a set period of the year – usually before the cultivation contracts are drawn up – it is common practice to conduct a collective negotiation between all the sugar factories and all the farming associations. This results in the so-called inter-professional agreement, which in effect regulates all the operations needed for the smooth functioning of the beet and sugar sector."

The evaluation of the competitive effects of "joint activity" organizations requires a consideration of both the functions and inclusiveness of the organization. In the rest of this section, pro-competitive, anti-competitive and ambiguous reasons for activity are considered, along with how inclusive such organizations need to be.

3.3 Pro-competitive reasons joint activities

There are four main reasons for cooperative action that are broadly pro-competitive:

- Achieving economies of scale and scope
- Forming and maintaining a "brand", such as an appellation
- Conducting advertising
- Conducting research

The first aids the achievement of productive efficiencies, while the others deal with various areas in which lack of co-ordination and lack of consumer information may lead to market failure. Co-ordination may help to improve performance in these areas but the degree of necessary coordination varies. On the one extreme, achieving economies of scale and scope will rarely require participation by all producers. At the other extreme, to avoid "free-rider" problems, shared advertising will most likely require participation of substantially all of the producers.

If an organization pursues one of these objectives and does not involve more participation than is necessary nor other activities besides these objectives, that does not necessarily mean that its behavior is pro-competitive, but only that its behavior is likely pro-competitive.

3.3.1 Economies of scale and scope

Achieving economies of scale and scope is particularly important when producers are small and there is a potential for reducing costs. Such economies may be particularly important for transport, storage, sharing of equipment, and purchasing. But one would rarely expect that the achievement of such economies would require all producers to belong to the joint organization that would seek such economies. More generally, one would rarely expect that coordination of price and quantity would be essential to the achievement of such economies. As a result, highly inclusive joint organizations are likely not necessary for the achievement of economies of scale and scope.

3.3.2 Forming a brand, such as an appellation

Many countries have particular regions that are known for producing agricultural goods of a certain type or quality. For example, Italian Prosciutto di Parma (ham), from the Parma region of Italy, is well-known and has a high-quality reputation. In fact, Prosciutto di Parma is a protected appellation in many countries, meaning that no product can be sold as Prosciutto di Parma unless it was produced under the rules of the Consortium of Prosciutto di Parma. Other forms of ham may taste similar, but regions outside

the Parma region that follow the Prosciutto di Parma appellation rules cannot label their ham as Prosciutto di Parma.[12] Appellations help to provide farmers of a region with an incentive to invest in developing a product and maintaining that product's reputation of quality.

The presence of geographical words does not necessarily mean that a product is protected under appellation rules or that one country accepts another's appellations. For example, "Swiss cheese" is a generic descriptor in English that describes a certain kind of hard cheese, rather than cheese from Switzerland.

Certain appellations are protected marks in certain territories under a variety of different rules.[13] In the European Union, for example, as of September 2003, there were 603 food products that had been granted official protection. (See Lee and Rund (2003).)

According the European Commission, "Considering the saturation of markets, the strategic importance of product differentiation becomes paramount for rural areas. The specific qualities linked to natural and human factors… offer rural businesses the possibility to position their products on market segments with higher added-value. These added values are essential to compensate for higher production costs."[14]

The designations of appellations are typically decided under international agreements and not all countries are signatories to all agreements. The decisions that countries make about when to implement appellations agreements are complex, product-specific, and difficult to generalize.

One important factor in appellation decisions is the extent to which not implementing (or implementing) an appellation causes consumer confusion. Consumers have limited information about products that they find in stores. Labeling is one of the best mechanisms for improving their information. If a name is used that makes consumers think they are receiving a product from a certain region when in fact the product is not from that region, consumers may be misled. On the other hand, if appellation rules are applied to a name that consumers consider as "generic" – such as Swiss cheese in English – and not associated with the production of a particular locality, consumers may be limited to the product of a given locality simply because they do not know the close substitutes for the given name that they use as generic. In that case, the appellation product will derive rents that arise not from high quality reputation but instead from consumer ignorance.[15] There may be reasons to maintain different rules for appellations in different countries, depending on the expected effect of an enforced appellation on consumers, given the consumer associations with different names.

Appellations are often governed by local committees of producers. Generally, such committees are engaged in pro-competitive activities with their quality enhancement and monitoring work. Appellations committees do not necessarily always acting in a pro-competitive manner, however. At times, they set production quotas and have been accused of anti-competitive activities.

For example, the Italian Competition Authority brought cases in 1998 against the Consortia of Parma ham producers, the consortia of San Daniele ham producers, and the consortia of Gorgonzola cheese producers for fixing quantities of output for their members.[16] The ham cases are discussed briefly in box 1 below.

One important issue in these cases is the extent to which competition within a consortium should be mandated. When brands within an appellation are recognized by consumers, as with different wineries in the St. Emilion of Bordeaux appellation, the consortium need not focus on pricing or output extensively, because each producer has an individual incentive to maintain quality and output and free-rider problems are limited, as consumers expect variation within the appellation. But when there are no well-known

brands within an appellation, there is a possibility that producers might free-ride on the reputation of the appellation by over-producing and reducing the profits of other members (and thus reducing the rewards for creating the initial reputation.) The Italian competition authority has taken the position in these cases that maintaining intra-consortium competition is important. The view that constraints on output are anti-competitive could be extended to the view that artificial constraints on inputs that have the effect of limiting output are also anticompetitive. Thus delicate issues of assuring strong incentives to innovate and maintain quality must be balanced against the desire for active competition between producers who are not commonly owned.

Box 1. Box 1. Consorzio del prosciutto di Parma-Consorzio del prosciutto di San Daniele

"In January 1999 the (Italian Competition) Authority rejected the application by the Parma and San Daniele ham consortia for an extension of the authorization of production agreements they had been granted until 31 December 1998 under Article 4 of Law no. 287/1990.

"In examining the application, the Authority found that the conditions obtaining at the time the original authorization was issued no longer existed. In June 1996 Commission Regulation (EC) no. 1107/96, which registered Prosciutto di Parma and Prosciutto di S. Daniele as protected denominations of origin, came into force. For products with a protected designation of origin, production and related controls are governed by Council Regulation no. (EEC) 2081/92 on the protection of geographical indications and designations of origin for agricultural products. In giving its reasons for not extending the authorization, the Authority noted that fixing the quantities to be produced was both unnecessary and inappropriate with respect to the declared objective of ensuring that the production of hams with a protected designation of origin conformed with the prescribed methods, since this task is now performed by bodies designated under Italian and Community law."

Source: 1998 Annual Report of Italian Competition Authority

3.3.3 Advertising

Mandatory membership in a cooperative can be pro-competitive, especially when the membership is expected to contribute to payments for common advertising for a given product. In some OECD countries, milk advertising is supported by organizations that effectively tax their membership a small amount to cover advertising costs. If low-nutritional-value branded foods are allowed to advertise, and this advertising diverts purchases away from higher nutritional value foods, public policy can quite reasonably promote common advertising expenses of healthful foods.

While marketing organizations may permit common advertising, they do not always do so and it is rarely their primary activity. Data on advertising activities by cooperatives is difficult to obtain. But under the U.S. marketing order scheme, some information is reported about each marketing order. Of the 30 active orders as of May 5, 2004, 15 permit joint advertising and 13 are known to maintain some level of common advertising. Market failures associated with common advertising do not appear to be the primary activity of marketing order organizations, but may be a significant factor.

3.3.4 Research and development

Like advertising, research and development is often a public good, in the sense that users of R&D cannot be fully excluded by the innovator and one person's use of the innovation does not typically prevent another person's use of the innovation. In these circumstances, the incentives for private innovation will often be lower than the public benefits from innovation, so there is a market failure. In order to increase the incentives for innovation, the formation of large groups of the likely beneficiaries, who may pay a levy for R&D, is one solution to funding. Another is for government to directly fund R&D. A third is for external private development and investment. Given the broad constraints on government funding, private sector alternatives may be desirable. Much like advertising, when a private sector alternative is formed, a very inclusive membership organization may be appropriate, in order to avoid "free-rider" problems. In fact, a

number of marketing order organizations do pursue R&D activity, although government funding for agricultural R&D is probably much greater in magnitude than marketing order funding.

3.4 Anti-competitive joint activity

A number of anti-competitive reasons for joint activity exist. These include

- Restricting output
- Raising prices

These two purposes are closely related, as output restrictions are often a part of "market stabilization" and typically lead to higher prices. While it is possible that in some circumstances, these anti-competitive reasons for joint activity are not problematic because of large counterbalancing efficiencies, in general they will result in lower total and consumer welfare. That is, although they may benefit producers, they will likely hurt consumers more.

3.4.1 Restricting output to at least some marketing channels

Output restrictions are one of the basic tools of monopolists and cartels for increasing profits. In the agricultural sector, output restrictions have been implemented in a number of different ways. For example, joint activity organizations in some member countries have controlled total quantity produced of certain products. In other cases, output for certain sales channels has been controlled, by means of percentage allocation rules that permit farmers to sell only a certain percentage of their output to the "profitable" channel (such as fresh fruit). Sometimes, output controls of one product have also required output controls on other related products, in order to eliminate possibilities of substitution. When producers jointly agree on aggregate output, or allocate output between inelastic and elastic purchasing segments, prices can rise significantly.

Box 2. Box 2. California-Arizona orange producers

A documented example of grower cartelization arises with the California-Arizona orange industry.

Observing the success of the lemon growers, the orange growers of California and Arizona attempted to establish an agreement regulating production in 1932. This agreement succeeded in raising prices briefly by 20%, but a number of non-participating growers with high shipments to the fresh fruit market quickly made the agreement inoperative.

The Agricultural Adjustment Act of 1933 and the Agricultural Marketing Act of 1937 permitted the majority of producers of an agricultural commodity to agree to form a marketing coalition that could determine, for all producers, the amount of product sold for different uses, rate of flow of the product onto the market and minimum quality standards for that product. The coalition could impose price posting and inspection programs for agricultural commodities. Producers who oversupplied could face substantial penalties. With the benefit of antitrust immunity, the Navel and Valencia orange producers formed cartels that governed the distribution of their oranges for fresh orange sales and processing sales, initially a joint cartel, and then after 1952, separate cartels for each kind of orange. The orange marketing orders allowed the administrative committees to set how much of the crop would be sold in the fresh form, the timing of shipments to the fresh domestic orange market, and the minimum size of oranges.

One of the administrative committees contends that the stability provided by the marketing order made fresh oranges "available to consumers at a cost which is free from the inefficiencies of non-orderly marketing." (Valencia Orange Administrative Committee, Annual Report of Operations under Federal Marketing Order 22, at 2 (1978-79)) However, an analysis of the effect of marketing orders suggests the reverse. Normally, in seasons of optimal growing conditions, a higher percentage of fruit would be of a quality appropriate for consumers of fresh fruit. However, the practice of the administrative committees has been to reduce the percentage of the fruit that goes to the fresh market in good seasons below the percentage allowed in bad seasons, largely by pro-rata limits as well as through quality limits on the size of oranges. The effect of such limitations is to keep prices high. In fact, while "85-90 percent of Navels and 65-80 percent of Valencias are of sufficient quality to be marketed in fresh form, fewer than 70 percent of Navels and 45 percent of Valencias typically reached the fresh market between the 1960-61 and 1980-81 seasons." (Shepard (1986)) More fruit was directed to processing than quality would suggest.

Why would the administrative committees pursue such strategies? The main reason is that fresh fruit consumers had very inelastic demand while processors have much more elastic demands. As a result, limiting production in the fresh fruit segment raises revenues for fresh fruit much more than switching that production over to processing lowers revenues. The price differences are substantial between the Navel and Valencia oranges sold for fresh consumption and those sold for processing. Navel oranges averaged $3.30 per carton for 1960-1980, but on-tree prices of -$0.18 per carton for processing. Valencia oranges averaged $1.54 per carton for fresh and $0.23 on-tree for processing. (A negative on-tree price would be possible because the cost of picking, packing and delivering the oranges to market would exceed the market price.) These price differences arise because Valencia oranges are less desirable for fresh fruit consumers than Navel oranges, but more desirable for processors. The distribution rules have raised prices for fresh fruit but substantially lowered them for processed fruit. The likely reason that the administrative committees require the sale of unprofitable fruit is that it feels all output most be controlled and accounted for in order to ensure that unauthorized fruit would not be distributed for illicit fresh sales. The best way to ensure farmers do not engage in illicit sales is to create observable transactions that account for their fruit. Even if the observable transactions for processing are unprofitable, they may increase the certainty of higher prices for fresh fruit sales and maintain the stability of the cartel.

Ironically, the effect of the cartelization of the orange industry may not have achieved all the objectives of the growers. While in the short-run, the effects of the cartel were primarily linked to raising prices for fresh fruit sales and lowering the prices for processed sales, the long-run impact of the greater than normal returns was increased entry into orange growing. That is, artificially high prices led to increases in capacity that made increased diversions to the processing market necessary. These increased diversions reached a level such that prices for Navel oranges for processing were actually unprofitable to farmers. These increased diversions led to much lower returns for growers in the market-allocation program. “Negative on-tree prices for processed fruit and increasing diversion to processing drove average returns from $4.00 per box in the early 1960s to less than $1.00.” (Shepard, 1986)

“That government-enforced price discrimination has actually conveyed few long-term benefits to the industry is entirely consistent with economic theory. The marketing orders have clearly permitted fruit to be diverted away from the inelastic fresh market in a way that could not be sustained without regulation. While this has the immediate effect of raising and stabilizing grower returns, unrestricted market entry has assured that average returns cannot in the long run exceed levels sustainable in a competitive environment. Instead, by stabilizing average prices, the marketing orders have reduced grower risk and, with it, long-run grower returns. More importantly, high initial fresh-market prices under the orders have been balanced by abnormally low processing orange prices, so that the conspicuous long-run effect of federal regulation has been a legacy of pronounced disequilibrium in the processing sector and misallocation of resources toward orange production.” (Shepard (1986)) In his econometric simulation of the Navel and Valencia marketing orders, Shepard (1986) predicts that long-run returns to farmers would actually be about 20 percent higher if competitive forces were allowed to allocate oranges between the fresh and processed markets.

The two marketing orders ceased activity in 1994.

(Source: Shepard, 1986)

3.4.2 Raising transaction prices

Sometimes, when controlling output has been difficult, agreements have been formed to raise transaction prices. For example, in October 2001, an agreement was signed in France between six federations, four of which represented cattle farmers and two of which represented cattle slaughter houses. After violent action of French farmers intercepting and destroying shipments of beef from outside of France, the slaughterhouses agreed to both limit imports from outside of France and adopt a “price scale” that raised the price they paid for French cattle. The agreement led to a 10-15% increase in prices for slaughterhouse prices of meat. (See recital 40 of European Commission (2003).)

The results of eliminations of price/output rules can be substantial and beneficial to consumers, while at the same time providing farmers with income stabilization payments supported by taxes that are introduced on the deregulated product. For example, in Australia, after milk deregulation, net prices to consumers fell on average, even including a tax payment that was used to subsidize dairy farmer incomes after the deregulation. For a description of the Australian experience with milk deregulation, see Box 3.

Box 3. Box 3. Australian milk deregulation

On July 1, 2000, Australia deregulated the dairy sector throughout the country. Prior to this time, farmgate prices for drinking milk were set by State Governments. Drinking milk accounted for only 18 percent of milk production annually. The rest of milk output was devoted to production of dairy goods such as cheese and butter where payments were determined by the international market and averaged less than half the drinking milk price.

The milk industry changed quickly after July 1, 2000. The Australian Competition and Consumer Commission (ACCC) undertook to monitor prices and profits of intermediaries in the period before and after the liberalization, in response to concerns that milk processors and retailers would be the primary beneficiaries, and the consumers would receive only marginal savings.

The ACCC performed its review six months after the regulatory change, in order to provide a speedy assessment of the results. The review found that milk prices to consumers fell substantially, supermarkets quickly established national retail prices for milk, retailer margins fell, and processor margins fell as well. Thus the concerns that consumers would not benefit from the deregulation were unfounded.

One major national supermarket chain announced that it would distribute two-year supply contracts, after the de-regulation. The opportunity to win these contracts set off aggressive bidding between the processors for the contracts. Once the chain obtained its contracts, it announced national prices on its own-brand fresh milk for the 1-, 2- and 3-litre packages. The chain chose a national marketing strategy of setting low prices for milk that were intended to drive increased traffic to their stores rather than to increase its revenue from milk.

Supermarket prices for plain milk fell by 22 cents per litre across all pack sizes and brands from the June quarter to the December quarter of 2000. Prices for reduced-fat and low-fat milk also fell, though to a lesser degree. Convenience stores also lowered their prices for 2-litre pack of plain milk, in response to lower supermarket prices. Price reductions for 1-litre containers from convenience stores were much less pronounced. The variation in prices between states fell considerably after deregulation. The development of plain milk prices is illustrated below.

Average national prices for 2-litre containers of plain milk for 2000, by type of retail outlet

Quarter 00	Supermarket (generic label) AUD/unit	Supermarket (branded) AUD/unit	Convenience stores AUD/unit
March	2.50	2.68	n/a
June	2.54	2.72	2.79
September	2.30	2.60	2.75
December	2.16	2.38	2.69

Source: ACCC (2001) (xvii) and ADC

While retail prices declined, retail margins also declined. In supermarkets, the retail margin on a litre declined by 19 percent, more than the decline in wholesale prices.[17] In convenience stores, sales volumes declined by about 24 percent as consumers switched to buying their milk from less expensive supermarkets. The average net profit margins of Australian milk processors decreased by 12-18 percent after deregulation. Farmers received lower farm-gate prices for drinking milk. In order to supplement farmer income, an assistance program was implemented at the same time as deregulation, to provide either payments to dairy farmers over an 8-year period or a tax-free exit payment. These payments were financed by a levy of 11 cents per litre on most drinkable milk products.[18]

Calculating the effects of the reforms for consumers, “Savings from sales of supermarket milk to Australian consumers are expected to conservatively realize around $118 million on a full year basis.”

3.5 Mixed pro- or anti-competitive joint selling activity

The primary area of joint activity that can have both pro-competitive and anti-competitive effects is quality standard-setting. Quality standards may have positive effects, although they can be abused for anti-competitive ends, especially if the quality standards are adjusted by producers from one season to another in such a way as to restrict output.

3.5.1 Supplier-established standards

Suppliers can set standards for output in such a way that consumer confidence in quality of a product is raised and more consumers choose to consumer the product.

In practice, producers sometimes maintain minimum quality standards to benefit themselves rather than to benefit consumers. Quality standards are likely designed for producer benefit when increased supply of the product leads to stricter quality standards that reduce saleable output for a given use. For example, a product may be produced in greater quantity when the weather is good and at the same time, a greater percentage of the product may be high quality. In such a circumstance, if quality standards (such as fruit size) are adjusted in a good season so that the quantity of "marketable" product is lower than it would have been under the prior standard, the effect of the variable standard is to reduce output to the consumer market. Arguments that the objective of such standard variation are to maintain a constant supply to the end-consumer market are misleading: consumers do not necessarily benefit from such a constant supply.[19]

3.6 Long-run effects

The long-run effects of "joint-activity" organizations that succeed in raising prices often do not enhance producer welfare in the long-run. This is because, while anti-competitive rules often limit the extent to which output can be used for its highest value uses, they do not prevent farmers from entering the market to produce the given output. If returns are high in any area of economic activity without entry constraints, entry will occur until returns fall to a lower level. This type of entry response has been observed for many products, including the California-Arizona oranges, as described in Box 2. These oranges had both fresh and processed uses. The result of the marketing orders was that while prices for fresh oranges were maintained at a high level, prices for processed oranges actually became negative in some cases and farmers found an increasing percentage of their production devoted to the low-value uses, as total output expanded. The average returns of orange farmers thus fell considerably during the lifetime of the orange marketing orders. If entry is limited, for example, because of limited land that is available for production as with certain geographic appellations, then the price of land will rise so that returns will not be exceptional.

Other forms of farmer aid, such as direct payments, do not create the same kind of artificial incentives to produce as cartels.

4. Monopsony buying

Buyers of agricultural products are increasingly concentrated both for processing and retailing. (OECD, 2001) Regulations and law play a large role in determining the structure and nature of competition in buying agricultural products in many OECD countries. In some countries, the level of concentration among processors and purchasers of agricultural products has increased significantly in recent years. For instance, in the UK, the top 4 grocery chains will have about 90% of the one-stop shopping grocery store market. In the US, there are now 4 meatpacking firms that have about 80% of the market. This concentration frequently arises from mergers and is often publicly justified by efficiencies. Certainly, there are significant economies of scale and of scope in many processing and retailing operations. But farmers have often argued that monopsony purchasing power has been used against them to lower their returns and increase the risks in their farming activities. Some researchers argue that weak enforcement of antitrust laws are responsible for an undue concentration of retailing and purchasing and that antitrust laws should be enforced more strictly against their buyers than against other combinations. (Carstensen (2004) and Taylor (2004)) Other researchers argue that as profit margins decline, increasing concentration is inevitable, in order to spread fixed costs and remain competitive. (Sutton (2003))

Farmers often feel that their increasingly difficult economic situation is driven both by their lack of economic power and by increasing market power of large purchasing and sales organizations. At times, farmers may be correct that financial difficulties arise from powerful bargaining positions of buyers. Buyers do sometimes engage in concerted action to keep prices below a level that would be determined in a competitive market. The level of such concerted action in the agriculture sector is not known with any certainty. Often, as with many other sectors of antitrust law enforcement, official complaints to authorities are not made as individual producers often fear that they may be delisted from their major buyer and "blacklisted" by other competitors. (Competition Commission (2000)) While many different sorts of claims are made, at least informally, few are appropriately documented with economically convincing evidence. Given that a number of the behaviors have innocent as well as anti-competitive interpretations, the need for careful analysis is paramount.

Many of the examples of the types of behavior by buyers that are claimed as anti-competitive are far from unique to the agricultural sector. A previous roundtable has generally discussed buyer power of multi-product retailers. (See OECD (1999).) In the agri-food sector, buyers may insist on a certain seed-type being used for grains, or a certain breed-line of chick for poultry farmers. In the past, farmers did not receive such specific instructions. But increasingly, farmers are not selling to a broad market but are directly linked to specific buyers. This places farmers in a more dependent supply relation than in the past. That is, after signing a contract and dedicating their facilities to production for a specific producer, farmers cannot easily disengage from a given producer. While this may not be satisfying to farmers, it is increasingly common in many areas of production, such as industrial production, that suppliers dedicate various portions of their output to specific buyers. Such dedication has the benefit of increasing uniformity and controlling quality for the buyer (and for the consumers who are the buyer's end-consumers).

4.1 Monopsony and monopoly analysis

One of the claims sometimes made is that monopsony power should be treated differently from monopoly power. (See Cartensen (2004).) Farmers may argue that while having four or five sellers may be sufficient to generate adequate levels of competition in supply markets, having such a limited number of major buyers is unduly limiting for agricultural sellers. Is this correct? Or should market power for buying be treated in much the same way, and using the same antitrust enforcement tools, as market power for selling?

Cartensen (2004) argues that lower market shares may suffice for anti-competitive harm to occur in buyer power cases. But this argument is actually based on the idea that low national concentration figures can mask high concentration for localized buyers. As Schwartz (2004) argues, "this observation merely states that one must be careful in properly identifying the relevant geographic market…But this caveat applies equally when gauging seller market power." (pp. 5-6)

Cartensen (2004) argues that as buying firms increasingly sign contracts in which payments to producers are based on prices observed in public spot markets, they increasingly have incentives to lower the prices obtained in spot markets, because those lower prices will reduce the expense of their contracts. While such contracting structures may create incentives for buyers not to pay high spot prices, similar incentives are created by Most Favored Nations (MFN) contracts. MFN contracts guarantee that sellers must give a certain buyer the best price they use (or that buyers must give sellers the best price they use). Thus MFN agreements can be either supplier limiting or buyer limiting. Such contracts reduce the willingness of one party to change prices for transactions that account for a small part of their output. Note that competition cases have been litigated in at least some jurisdictions over MFN agreements, without any special "buyer power" rules.

4.2 Mergers of processors and retailers

Mergers to form concentrated processing and retailing organizations may be motivated by productive efficiencies that arise from such processes or they may be motivated by the desire to exercise monopsony power. "A casual observer might believe that, if a merger lower the price the merged firm pays for its inputs, consumers will necessarily benefit. The logic seems to be that because the input producer is paying less, the input purchaser's customers should expect to pay less also. But that is not necessarily the case. Input prices can fall for two entirely different reasons, one of which arises from a true economic efficiency that will tend to result in lower prices for final consumers. The other, in contrast, represents an efficiency-reducing exercise of market power that will reduce economic welfare, lower prices for suppliers, and may well result in higher prices charged to final consumers." (Pate (2003))

In the EU, as in much of the rest of the OECD, grocery retailer concentration has increased notably in many countries over the last decade, as shown in Table 1. Different definitions of the relevant market can lead to even higher assessments of concentration than those in the table. For example, based on the UK Competition Commission's extensive report on UK supermarkets (Competition Commission (2000)) and a recent merger, the five-firm concentration ratio for one-stop shopping grocery outlets is above 90% in the UK as of 2004.

Table 1. Table 1.Five-firm Concentration (%) in Grocery and Daily Goods Retailing for EU member states (1993-1999)

Country	1993	1996	1999
Austria	54.2	58.6	60.2
Belgium+Luxembourg	60.2	61.6	60.9
Denmark	54.2	59.5	56.4
Finland	93.5	89.1	68.4
France	47.5	50.6	56.3
Germany	45.1	45.4	44.1
Greece	10.9	25.8	26.8
Ireland	62.6	64.2	58.3
Italy	10.9	11.8	17.6
Netherlands	52.5	50.4	56.2
Portugal	36.5	55.7	63.2
Spain	21.6	32.1	40.3
Sweden	79.3	77.9	78.2
UK	50.2	56.2	63.0

Source: Estimates based on data from Corporate Intelligence on Retailing's European Retail Handbook, as reported in Paul Dobson (2002)

As mentioned earlier, concentration is also high among processors in some OECD countries, particularly meatpackers. In the U.S., for example, the top 4 meatpackers account for 80% of slaughtered cattle. (Pate (2003)) While reliable statistics are somewhat difficult to find, increasingly meatpackers are raising their own livestock and turning to the market for a smaller and smaller percentage of their supply. Through ownership, joint ventures, and contracts, meatpackers own or control roughly 50% of their slaughter supply in the U.S.. (Taylor (2004))

Competition authorities have sometimes taken action against retail concentration mergers and have carefully examined meatpacker mergers. "For example the European Commission prohibited the proposed merger between Kesko and Tuko in Finland which would have offered the combined enterprise a national market share of 60%. In the case of Rewe's acquisition of Julius Meinl in Austria, store divestments were instructed in regions where the combined enterprise would control 65% or more of sales. However, for other mergers that have had a significant concentrating effect at the aggregate EU level, notably

Metro/Makro and Carrefour/Promodes, these have been allowed by the EC to proceed relatively unhindered. Similarly, national competition authorities have generally shown little appetite for blocking or limiting greater retail concentrations." (Dobson (2002))

4.3 Excess profits for purchasers

One concern among producers is that purchasers squeeze producer profits to low levels, and then make high profits on their products. Certainly, suppliers feel more price pressure from the very large purchasers than from others. The UK Competition Commission supermarket study found that whether suppliers were large or small, they did give larger discounts to the large supermarket chains than to most other buyers. These differences could not be fully explained by efficiencies, such as those that arise from full truck load deliveries and central warehousing. (Competition Commission (2000), p. 432)

The Competition Commission study did not receive equally extensive data on supplier prices as on retail prices, so was not able to fully evaluate supplier prices. But the study did find that, while suppliers appeared to be making net losses on some products, the supplier prices obtained from the main supermarket chains were broadly similar. None of the large retailers were doing consistently better than others in terms of supplier prices. In terms of excess profits, the study found that retailer margins for the studied agricultural products such as lettuce, apples, eggs, lamb, and chicken appeared similar to those of other products "suggesting that suppliers' losses were not caused by excessive profit-taking on the part of retailers."[20] (Competition Commission (2000), p. 448)

Box 4. Box 4. UK Supermarket Study

In response to complaints by suppliers, including farmers, about abuse of buyer power and from reports of higher prices in UK supermarkets than in other supermarkets, the UK Competition Commission carried out an extensive study of the supermarket industry in the UK. (Competition Commission (2000)) The questions asked included whether market power was being abused, whether prices were higher in the UK, and whether profits were higher in the UK. The Competition Commission requested extensive information, including internal documents and data from the UK supermarkets, as well as data from external sources and from surveys conducted by the Competition Commission itself.

Among other conclusions, the study found that:

- Even at a national level, the concentration of supermarket ownership was quite high. At local levels, concentration could be even higher, and in a number of locations, the study suggested that supermarkets operated in monopoly or duopoly conditions.

- Prices of groceries were higher in the UK than in Germany, France and the Netherlands, especially in the category of own-store brands, but also for identical branded products. "Great Britain grocery prices were between 12 and 16 per cent higher than a weighted average of prices in France, Germany and the Netherlands in the second half of 1999."

- Profitability was slightly higher for the major UK supermarket chains, though not much higher than elsewhere. One reason that retail prices would be notably higher while profits less so is that operating costs may be higher in the UK than elsewhere, both for staff and land. High land prices, in particular, mean that the high wholesale-retail product margin is not sufficient to establish the existence of broad anti-competitive activity.

- The main parties (major supermarket chains) performed price-checking most aggressively on a limited number of reference items to which consumers pay the most attention. These core comparative items may experience the most aggressive pricing, while other items are much less the focus of consumer concern and can have significantly higher margins.

While data was imperfect, "in most cases there was a fairly rapid and reasonably complete transmission of short-term cost changes from wholesale to retail level." (p 93) When price reductions had not been passed through, the

Competition Commission was satisfied that "there had been cost increases elsewhere in the supply chain." (p. 92) The Competition Commission did "not rule out the existence of short-term asymmetry." (p 260)

- External reports suggested that the price margin between farm-gate and retail meat prices had increased for beef, lamb and pork between 1995 and 1998. One explanation was the increased processing charges as a result of regulations and limits on uses of animal parts arising from the BSE crisis.

- External reports suggested that farm-gate price increases were more quickly passed on than farm-gate price decreases. The evidence of this was strongest for pork.

4.4 Buyer price-fixing

The existence of coordination between buyers that leads the buyers to set a price that is below the competitive level or to allocate producers between them can occur in auction settings as well as in individual negotiations. Such activity is a form of buyer-cartel operation and is illegal under most competition law regimes.

While price-fixing has occurred and been prosecuted with a number of feed additives, such as lysine and vitamins, it has been found less frequently on the buying side. However, competition authorities do prosecute bid rigging on a regular basis and have found and prosecuted bid rigging in the agricultural sector.[21]

4.5 Asymmetric price-cost response

One common claim made by farmers and their representatives is that purchasers do not share the profits from agricultural sales equitably. One alleged abuse of market power by purchasers is that retail prices do not follow wholesale prices closely. In particular, a common view is that when wholesale prices fall, retail prices are much slower to fall, but when wholesale prices increase, retail prices increase immediately in response. Thus when there are cost increases, the retailers maintain their margin, but when there are cost decreases, retailers earn a very high return on sales, while farmers see little of this benefit. Some researchers suggest that that the non-simultaneous movement is an indicator of market power imbalances. (Taylor (2004)) The broadest study of the phenomenon, covering both agricultural and non-agricultural products, finds no correlation with asymmetry and competition. (Peltzman (2000)) Little satisfactory empirical analysis of these claims exists for agricultural products, apart from general verification of the existence of asymmetric responses. However, a rigorous method for approaching the analysis of asymmetric response questions has recently been proposed by Lewis (2004). This approach was applied to the retail gasoline market, but could equally well be applied to agricultural products. There are three main theories of asymmetric response.

One theory is that price coordination is normally difficult, "but that firms are able to use past prices as a "focal price" at which to collude." (Lewis (2004)) When wholesale costs increase, the increase must immediately be passed on by retailers, otherwise their sales would be unprofitable. In contrast, when wholesale prices fall, collusion is easier because it simply involves not changing existing prices. (See Borenstein, Cameron & Gilbert (1997).)

A second theory of asymmetric response is the "variable uncertainty" theory. Consumer search patterns change with their assessment of volatility. When uncertainty about the level of wholesale costs increases, consumers cannot evaluate whether a changed retail price is unique to a particular retailer or market-wide. Being risk averse, they search less when there is uncertainty and competitive profits increase. In such a model, an asymmetry in adjustment speed arises because, when there is a wholesale cost increase, retail prices will rise both because of higher costs and higher margins. However, when there is a wholesale price decrease, the higher margins will counteract the tendency of falling costs, so that prices

will rise fast and fall slowly. (See Benabou and Gertner (1993).) Note that this is not a theory of collusion, but of uncertainty leading to higher margins, rather than collusion leading to higher margins.

A third theory of asymmetric response is the "reference price" theory. (Lewis (2004)) In this theory, consumers form expectations of retail prices based on the retail prices they have experienced in the past. Firms set their prices differently depending on how much search activity they expect. When actual retail prices at a given outlet are higher than expected, consumers will search actively, because they expect the gains from searching to be high. This active search will ensure that margins are low. In contrast, when prices are at a slightly lower level than consumers expect, the returns to searching will be lower, and consumers will search less aggressively for alternative sales outlets. Thus when wholesale costs fall, firms may lower their prices slightly, to reduce search, but they will not lower them dramatically, because since consumers are not searching aggressively, the retailers will not attract many new consumers as a result of a lower price. Thus prices will fall slowly in response to cost decreases, but rise quickly in response to cost increases. This is not a theory of collusion but of search behavior based around reference prices.

Each of these theories has distinct and empirically testable implications for pricing and cost dynamics. The implications are summarized in the table.

Table 2. Table 2.Predictions for empirical tests

	"Variable uncertainty" search model	**"Focal price" collusion model**	**"Reference price" search model**
When are profit margins high?	When prices are rising and falling	When prices are falling	When prices are falling
When do prices respond to cost changes?	At all times	Mainly when margins are low	Mainly when margins are low
How and when do retailers retailers reduce prices?	Gradually and in unison	Suddenly and at different times	Gradually and in unison

Source: Adapted from Lewis (2004)

Testing these theories empirically in the retail gasoline market, Lewis (2004) finds that "margins are high when prices are falling and low when prices are rising. Prices respond much more slowly to both positive and negative cost shocks when profit margins are high." These results are consistent with the "reference price" theory, but contradict some of the implications of the "focal price" theory and of the "variable uncertainty" theory. Thus evidence in the retail gasoline sector suggests that consumer search dynamics are primarily responsible for the asymmetry in price responses between cost increases and decreases rather than abuse of "market power."

While there is not yet significant direct evidence on the source of possible asymmetries in price responses to agricultural cost increases and decreases, the existence of such asymmetries would not, on its own, be sufficient to imply to that purchasers of agricultural products are abusing market power when retail prices fall slowly in response to a farm-gate price decrease.[22]

4.6 Vertical integration and risk shifting

As buyers seek to increase uniformity and consistency of their inputs and end product, they increasingly demand that producers use certain production methods. This creates the potential for expropriation of investments (Williamson (1985)) to the extent that producers make relationship-specific investments for a given buyer. In such circumstances, long-term contracts may be needed to provide confidence to investors, and if contracts cannot provide sufficient protection to investors, than full vertical integration may occur.[23] For meat processing, in particular, forms of vertical integration are increasingly common. Some observers estimate that as much as 50% of slaughter needs are now covered by long-run

vertical relations (including contracts) between meatpackers and the animal raising supplier. (Taylor (2004))

The implication of this integration is that the open market is used as an increasingly smaller source of supply for meatpacking. If demand is low, meatpackers supply from internally-controlled sources, and only if demand is high do they turn to the public market. Producers who choose to dedicate themselves to the open market face increased levels of fluctuation in demand and higher risk.

Suppliers to the open market sometimes claim that the increased risk they face is a result of market power of meatpackers. The risk does not come from market power but from increased vertical integration, and the vertical integration does not imply concentration or market power. Suppliers face the choice between either becoming captive suppliers to meatpackers or facing high risk in open markets. Neither choice is appealing for many producers. But vertical integration, which lies at the core of the issue, is a natural outcome of problems with "arms-length" contracting, increased requirements for uniformity and consistency, and the need for assured supply by suppliers. There is nothing inherently anti-competitive about vertical integration, the desire for increased consistency, or supply assurance.

4.7 Buyer-established standards

Buyers are increasingly introducing standards of their own, whether as individual buyers or through coalitions of buyers. (OECD (2003)) Introduction of quality standards, whether by producers or intermediate entities such as retailers or processors, is one way to improve processor and consumer information. The introduction of standards by individual buyers is less likely to pose anti-competitive problems than the introduction of standards by all producers.

Buyers can impose quality standards on the products they purchase that leave producers with some percentage of their product that is not saleable to those buyers. To the extent that large buyers with high quality standards constitute a greater share of farm sales, producers find disposing of product that does not meet the given standards more and more difficult.

As discussed earlier, standards imposed by farmers can solve externality problems created by a lack of consumer information but can also be abused, in certain circumstance, with anti-competitive effects (as with the changes in minimum sizes for fresh marketed oranges or the limitations on total quantity of output advocated by the Parma and San Danieli ham appellations). Buyer-established standards are less likely to be anti-competitive. When buyers demand product of a certain quality, this can reflect a passed-through desire of their customers for someone to undertake a quality-monitoring exercise with respect to food or it can reflect requirements of processing machinery. Retailers maintain their reputations for quality by refusing to sell low-quality products.

Other purchasers of products, such as processed food producers, are often the preferred outlet for selling food that is not deemed suitable for fresh sale. But processors will not accept all types of output. For example, there are minimal non-fresh sales alternatives for damaged lettuce.

5. Conclusion

This note has explored a number of competition-related regulatory issues for both joint-activity organizations of agricultural producers and for buyer activities in the agricultural sector. This overview is not meant to summarize all the issues related to competition, but is necessarily limited. It is focused on domestic, not international, agricultural policies and regulations. There are many factors that influence agricultural policies, including social attitudes and regional development. One factor that has, up until recently, been relatively ignored has been competition policy. Overall, competition policy can play a

greater role in the development of agricultural policies and regulations. One of the best ways to increase its role would be to eliminate antitrust exemptions for agricultural activities.

Broadly speaking, farmer cooperatives that involve a small percentage of output are likely to be pro-competitive, as are small appellations that constitute a modest percentage of output within a general product category. Such types of joint activity can lead to lower costs for farmers and help farmers to establish "brands" that can avoid quality deterioration arising from consumer difficulties in assessing quality. These effects are pro-competitive and thus, under most competition law, would not be illegal. Consequently, these sorts of activities do not require antitrust exemptions.

More inclusive organizations, especially joint-activity organizations that have mandatory membership, sometimes are focused just on maintaining quality, but often also engage in output restricting or redirecting activity that raises prices for many consumers. When such organizations engage in output restricting and redirecting activity, they distort markets and do not promote the public interest. The impact of many "market stabilization" policies is to restrict and redirect output. Only in exceptional cases would such activities enhance the public interest.

To the extent that the harm to the public interest is greater than the benefit to producers from such antitrust exemptions, the antitrust exemptions for farmers damage social welfare.

- Pro-competitive reasons for joint activity include:
  - Achieving economies of scale and scope
  - Forming and maintaining a "brand"
  - Conducting advertising
  - Conducting research
- Anti-competitive reasons for joint activity include:
  - Restricting output to at least some marketing channels
  - Raising prices
- Government sometimes plays a role in both organizing and enforcing the anti-competitive activities in the agricultural sector. When the harm to the public interest, including consumers, is greater than the benefits to farmers, such government activity is comparable to cartel maintenance. Government promotion of harmful agricultural cartels should be eliminated.

At the same time, there is an increasing danger that purchasers of agricultural products will engage in anti-competitive activities against farmers. While many of the buyer activities that concern farmers are natural evolutions of corporate activity, some buyer activities, particularly mergers, can create high levels of concentration among purchasers that can harm producers and can lead to increased likelihood of price-fixing by buyers. To avoid such outcomes, competition agencies must remain highly vigilant with respect to both mergers and potential price-fixing activities.

- Monopsony buying problems can be addressed using the same basic antitrust tools of market definition and competitive effects analysis that are used for addressing monopoly buying

problems. Thus no special antitrust laws or enforcement rules relating to monopsony buying are necessary.

- Mergers of retailers and processors must be carefully analyzed, with particular care taken to identify the appropriate geographic market of competition. In many cases, because of transportation and storage expenses for products, geographic markets for purchasing farm output can be relatively local. In contrast, post-processing distribution markets may be much broader.

- The existence of asymmetric price responses to cost increases and cost decreases does not necessarily imply market power by purchasers, but can very well arise from different consumer search behaviors in response to price increases and price decreases.

- Increasingly stringent standards are set by buyers that impact the production processes of farmers. These standards are likely a reflection of consumer desires for consistency and quality. Such standards can lead to vertical integration. To the extent that vertical integration leads to "corporate" farming, consumers may be interested in including information about raising methods on labels and verified by independent organizations, especially organic products or livestock.

NOTES

1 The objective of improving the income of farmers is sometimes explicit. For example, the Treaty Establishing the European Community (2002) (2002/C 325/01) states that the objectives of agricultural policy shall include ensuring "a fair standard of living for the agricultural community, in particular by increasing the individual earnings of persons engaged in agriculture."

2 Article 36 of the Consolidated Treaty of the European Union states that "The provisions of the chapter relating to rules on competition shall apply to production of and trade in agricultural products only to the extent determined by the Council within the framework of Article 37(2) and (3) and in accordance with the procedure laid down therein, account being taken of the objectives set out in Article 33." In the U.S., the Capper-Volstead Act (Public-No. 146-67th Congress) states that "That persons engaged in the production of agricultural products as farmers, planters, ranchmen, dairymen, nut or fruit growers may act together in associations, corporate or otherwise, with or without capital stock, in collectively processing, preparing for market, handling, and marketing in interstate and foreign commerce, such products of persons so engaged."

3 See Comments of the Department of Justice, October 30 1991, "Navel Oranges grown in Airzona and Designated part of California; proposed weekly levels of volume regulation for the 1991-1992 season", Docket No. FV-91-408PR before US Department of Agriculture. The Agricultural Marketing Agreement Act of 1937 (AMAA) "expressly directs the Secretary [of Agriculture] to temper the objective of enhancing grower income with the requirement that the interests of consumers also be taken into account…In order to protect consumers, the rate of adjustments in prices [to achieve parity] must be compatible with the "public interest." 7 U.S.C. § 602(2). Competitive considerations, including the efficient allocation of resources, generally are considered to be an important element of the public interest standard." (pp. 5-6)

4 For example, in Canada's Farm Products Agencies Act, §21, "The objects of an agency are (a) to promote a strong, efficient and competitive production and marketing industry for the regulated product or products in relation to which it may exercise its powers; and (b) to have due regard to the interests of producers and consumers of the regulated product or products." (Emphasis added.) The Consolidated Treaty on the European Union states, in Title II, Article 33, that one of the objectives of the Common Agricultural Policy is "to ensure that supplies reach consumers at reasonable prices." In the U.S., the AMAA, 7 U.S.C. § 602, declares the intent of Congress includes protection of consumer interest against prices above those intended by Congress. The Capper-Volstead Act requires the Secretary of Agriculture to act to restrain cooperatives to the "extent that the price of any agricultural product is unduly enhanced by reason thereof."

5 In fact, farmer complaints are partly responsible for the passage of antitrust laws. For example, Libecap (1992) suggests that the Sherman Act of 1890 arose primarily from agricultural producer concerns. Interestingly, the primary backers were from states with large agricultural production interests, not the states with major population centers where the consumer interests would have dominated.

6 Clearly, though, for some goods, external signals such as feel, smell and look can serve as powerful indications of quality, so consumers often search for these "organoleptic" characterisitics. The more that well-known external signals fully indicate the qualities of a good, the less serious the consumer information problems are.

7 Unconstrained commodity markets are possible when quality is cheaply and accurately assessed using objective measurement tools.

8 See Milgrom and Roberts (1986).

9 "[I]t is unlikely that a single farmer or minor co-operatives will ever hold a dominant position." (Monti (2003))

10 "It appears…that some co-operatives hold national market shares between 64 to 90%." (Monti (2003))

11 Graeme Samuel (1998) identifies at least four benefits that arise from the reform of "compulsory" cooperative marketing organizations: 1) It gives farmers the freedom to choose how, when, how much and to whom they sell their crops. 2) It is likely to reduce the share of a farmer's returns soaked up in administration costs. 3) Farmers will have greater control over their production, marketing and risk management decisions. 4) It provides greater incentives and opportunities for individual farmers and rural communities to undertake more innovative marketing and to invest in higher-value post-farm products.

12 In fact, the recent European Court Judgment on non-Parma controlled slicing of Parma ham for packaging (ECJ (2003)) found that if part of the appellation includes slicing and packaging, then packaging can be performed only at the place of origin, as long as the PDO-supporting regulation requires that, thus preventing supermarkets from reducing costs by slicing and packaging themselves.

13 Geographic Indicators (GIs) under the WTO TRIPS agreement (Section 3 of Part I, Articles 22-24), the Lisbon Agreement, and the European Protected Designation of Origin (PDO); Protected Geographic Indication (PGI); and Traditional Specialty Guaranteed (TSG) rules (EC Council Regulations No. 2081/92 of July 14, 1992, on protection of geographic indications and the designations of agricultural product origins and 2082/92 from July 14, 1992, on the specific character of agricultural products and foodstuffs.)

14 http://europa.eu.int/comm/research/agro/fair/en/fr0306.html

15 When comparable products are permitted to use terms such as "like Swiss cheese" in the label, the harm from making a generic name a geographic indicator is somewhat reduced.

16 The consortia are respectively called the Consorzio del prosciutto san daniele, consorzio del prosciutto di parma, Consorzio per la tutela del formaggio gorgonzola.

17 After the report was published, processors expressed concerns that rebates they were giving to the supermarkets might mean that supermarkets actually increased their margins on milk. After review of the relevant figures, the ACCC found that such payments had largely been taken into account and, to the extent they were not, the finding still stood that supermarket margins on milk had fallen. (ACCC,2001b, "ACCC Confirms Finding of Milk Monitoring Report", Press Release, ACCC.

18 The average price for UHT milk increased about 10 cents per litre after deregulation. The reasons for this were that UHT farm-gate regulated prices were lower than the prices for fresh milk uses. With the introduction of the dairy adjustment levy of 11 cents, this price increase was expected. Sales of UHT milk fell immediately after deregulation as a result of fresh milk coming closer in price to UHT milk.

19 If consumers do benefit, it is likely in an indirect way.

20 Note that studies of excess profits that are product-specific are made difficult by the multi-product pricing of supermarkets, in which they set low margins on certain products and high margins on others.

21 The U.S. Department of Justice, for example, successfully prosecuted cattle buyers in Nebraska for "bid-rigging in connection with the procurement of cattle…Both individuals pled guilty and were fined and ordered to make restitution to the victims." (Pate (2003))

22 Interestingly, it is not clear that the equilibrium prices are ever reached, as the shocks have durable effects in both consumer goods and producer goods markets. (Peltzman (2000))

23 For the purpose of this note, vertical integration includes full vertical integration, with ownership and control of production assets, as well as "weak" integration, embodied by separate ownership at different stages of production, with long-run contracts between them.

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NOTE DE RÉFÉRENCE

1. Introduction

La politique agricole a souvent été élaborée sans égard aux principes de la politique de la concurrence. Dans le passé, les politiques agricoles visaient au premier chef à améliorer le bien-être des producteurs agricoles, au nom d'impératifs politiques et de valeurs sociales.[1] Les responsables de l'élaboration des politiques ont cherché à améliorer le bien-être des producteurs en adoptant par exemple des réglementations qui, parfois, ont des effets anticoncurrentiels et font monter les prix intérieurs à la consommation, limitent les quantités vendues et influent sur les normes de qualité. Souvent, pour des raisons tenant en partie au fait que de nombreuses réglementations auxquelles ils sont soumis ont en pratique des effets anticoncurrentiels, les producteurs agricoles sont expressément exemptés de la législation sur la concurrence.[2] Ces exemptions sont beaucoup plus étendues dans le secteur agricole que dans les autres secteurs. Des producteurs se sont même déjà prévalus des exemptions pour former des ententes que les pouvoirs publics ont parfois mises en vigueur. Ce type d'accords peut entraîner des pertes de bien-être importantes pour les consommateurs et la société.

Les ministères et les tribunaux admettent de plus en plus que l'évaluation des projets de politiques et de réglementations doit non seulement prendre en compte des objectifs d'action comme l'amélioration du bien-être des agriculteurs, mais aussi l'intérêt public.[3] L'intérêt public englobe les considérations relatives au bien-être des consommateurs. En pratique, l'importance qu'il y a à inclure l'intérêt public dans l'analyse coûts-avantages des politiques tient à ce que les politiques conçues pour aider un seul groupe (par exemple, celui des producteurs) nuisent souvent aux intérêts d'autres groupes (par exemple, celui des consommateurs). Comme le reconnaissent de nombreux textes de lois, l'analyse économique complète des effets réglementaires des politiques agricoles devrait prendre en compte les effets de ces politiques sur les consommateurs.[4]

Les exemptions de la législation antitrust peuvent avoir des effets réels et fournir une protection à des activités anticoncurrentielles, comme les ententes, ou ne pas avoir d'effets parce que les activités visées ne sont à vrai dire pas anticoncurrentielles. D'une part, lorsqu'une exemption a véritablement pour effet de protéger des producteurs engagés dans des activités anticoncurrentielles, la situation des consommateurs concernés est généralement aggravée. Paradoxalement, même en ayant des effets réels, les exemptions de la législation antitrust n'ont pas toujours été profitables à long terme aux agriculteurs parce que les entrées ont fait baisser les revenus tirés des activités protégées ou que la valeur des revenus « excédentaires » a été incorporée dans les prix des terres agricoles. D'autre part, dans de nombreux cas, des exemptions sont accordées sans que les producteurs mènent pour autant des activités anticoncurrentielles. Très souvent, les activités coopératives des agriculteurs améliorent l'efficience et n'entravent pas la concurrence. Dans les deux cas, il n'est guère utile de maintenir une exemption étendue de la législation sur la concurrence à l'intention des agriculteurs.

On peut à la place aborder le secteur agricole en procédant, comme cela est de mise dans de nombreux autres secteurs, à l'analyse minutieuse et spécifique du caractère concurrentiel des activités. Les agriculteurs peuvent obtenir des indications sur les activités autorisées en se reportant aux énoncés des grandes orientations, qui précisent les types de comportement considérés comme conformes à l'intérêt public, et qui sont à l'évidence autorisés, et ceux qui sont jugés préjudiciables.

Les agriculteurs, qui bénéficient souvent d'exemptions de la législation antitrust, sont par ailleurs d'ardents partisans du recours à cette même législation pour engager des poursuites contre les acheteurs et

les détaillants, dont la concentration est croissante.[5] Les préoccupations des agriculteurs sont parfois justifiées. Il est vrai qu'il y a dans les pays de l'OCDE une forte concentration d'acheteurs de certains produits, en particulier des entreprises d'abattage et de conditionnement de la viande. On observe en outre, dans de nombreux pays de l'OCDE, une concentration croissante des détaillants, puisqu'un nombre relativement peu élevé de chaînes de supermarchés concentrent la plus grande part des achats de produits effectués par les consommateurs finals. Acheteurs et détaillants influencent de plus en plus le processus de production, et les agriculteurs estiment que cela réduit leurs marges et restreint davantage l'indépendance dont ils disposaient encore récemment pour diriger leur propre activité commerciale. Dans de nombreux pays de l'Organisation, des affaires d'entente sur les prix entre acheteurs ont été mises au jour et des poursuites ont été lancées. Compte tenu de la difficulté qu'il y a à détecter les ententes sur les prix qui sont conclues au niveau local, il est permis de supposer que toutes les activités de fixation des prix menées par des acheteurs de produits agricoles n'ont pas débouché sur des poursuites. A l'évidence, les problèmes potentiels du côté des acheteurs méritent un examen attentif. La législation actuellement en vigueur en matière de concurrence (notamment celle qui vise à réprimer les ententes) prévoit de fortes sanctions et est normalement considérée comme suffisante pour faire échec à ce type de comportement anticoncurrentiel. Des efforts considérables doivent être déployés pour détecter et réprimer les délits, mais il faudrait toutefois éviter soigneusement de punir les comportements qui contribuent à accroître l'efficience et qui rendent les prix des produits agricoles plus abordables pour les consommateurs intermédiaires ou finals.

La présente note aborde deux thèmes principaux. Le premier concerne les différents types d'activités communes menées par des producteurs et leur effets sur la concurrence. Certaines de ces activités paraissent susceptibles de nuire à la concurrence et d'autres non. Le deuxième porte sur les préoccupations que suscite l'achat en situation de monopsone et sur ses effets possibles sur les agriculteurs et les consommateurs. Certaines préoccupations relatives à l'achat en situation de monopsone pourraient être fondées tandis que d'autres ne le sont sans doute pas.

La présente note porte sur un sujet relativement circonscrit, au carrefour de la politique de la concurrence, de la réglementation et du secteur de l'agriculture. Elle ne vise pas à fournir un inventaire complet de toutes les lois, réglementations et recherches pertinentes dans ce domaine mais plutôt de présenter une introduction aux thèmes principaux déjà mentionnés. De nombreux autres facteurs peuvent avoir un effet sur la concurrence, au nombre desquels figurent les meilleures méthodes de soutien aux agriculteurs. Ces facteurs ne sont pas abordés ici, non plus que les questions concernant l'OMC et le commerce international. Les thèmes d'intérêt national qui sont évoqués couvrent déjà un vaste éventail de questions complexes.

2. Principales caractéristiques économiques des produits agricoles

Avant de commencer l'analyse des questions de concurrence, il importe de définir certaines des caractéristiques économiques et sociales du système agricole susceptibles de revêtir une importance particulière et d'expliquer certaines des solutions réglementaires distinctes qui ont été adoptées au titre de la politique agricole. Les produits agricoles ne présentent pas tous ces caractéristiques mais celles-ci sont toutefois souvent présentes et influencent la réflexion de nombreux décideurs. Il y a lieu de noter que bien qu'une politique agricole comporte certains objectifs sans portée économique manifeste, elle a en général des impacts économiques identifiables et fait appel à des ressources économiques (Winter, 1988). L'agriculture est avant tout une activité économique (Monti, 2003).

2.1 Problèmes d'information des consommateurs

Les consommateurs ont souvent beaucoup de difficulté à évaluer la qualité des biens qu'ils achètent. En économie, un bien *d'inspection* est un bien dont la qualité est connue avant la consommation, un bien d'*expérience* est un bien dont la qualité est connue après la consommation et un bien *de confiance* un bien

dont la qualité ne peut être identifiée lors de sa consommation mais dont les antécédents affectent certaines des attitudes des consommateurs à son égard. (Les aliments biologiques, par exemple, sont des biens de confiance.) La nourriture est souvent un bien d'expérience ou de confiance, puisque les consommateurs ne peuvent pas évaluer toutes les caractéristiques des produits avant leur consommation (Nelson, 1970). Deux fraises ayant un aspect et une odeur très semblables n'ont pas pour autant le même goût.[6] S'agissant des biens d'expérience, les consommateurs sont parfois dissuadés d'en acheter à moins d'avoir accès à des indications sur leur qualité. Lorsque ces indications font défaut, les producteurs qui offrent une qualité élevée subissent des externalités négatives, puisque la production de faible qualité diminue l'incitation des consommateurs à consommer leur produit.

L'existence d'indications de qualité généralement reconnues peut empêcher la baisse de qualité susceptible de survenir dans le cas des modèles des voitures d'occasion (voir Akerlof, 1970.) S'agissant des produits alimentaires, ces indications prennent diverses formes : marque, établissement de normes minimales de qualité par les producteurs et évaluation des détaillants, auxquels on s'en remet pour évaluer la qualité (les consommateurs diminuent leurs achats auprès des détaillants qui n'assurent pas un degré élevé de qualité.) Les indications de qualité pourraient être remplacées par le recours aux marchés des produits de base exempts de restrictions sur lesquels des « niveaux» objectifs de qualité différents reçoivent des paiements différents, de sorte que les articles de qualité moindre sont vendus moins cher.[7]

L'aptitude des consommateurs à évaluer la qualité avant l'utilisation, de même que le coût de l'évaluation et l'uniformité (ou l'hétérogénéité) des préférences des consommateurs, sont des éléments importants pour la définition d'un mécanisme approprié d'indication de qualité. Les gros acheteurs, par exemple les transformateurs, ont une plus grande capacité d'évaluation puisqu'ils peuvent évaluer la qualité des produits à un coût par unité moindre que les autres consommateurs. Malgré la finesse de l'évaluation, la recherche d'uniformité incite certains transformateurs à définir très rigoureusement le produit qu'ils souhaitent et la façon dont il doit être obtenu et certifié plutôt qu'à se fier aux techniques d'évaluation.

Les normes de qualité peuvent soit améliorer, soit diminuer le bien-être social, en fonction principalement de l'importance des coûts que les agriculteurs doivent assumer pour accroître la qualité de la production. Leland (1979) a montré que des normes de qualité minimales peuvent améliorer le bien-être social lorsque les consommateurs ne disposent pas d'indications sur les efforts coûteux déployés par les producteurs. Dans ces cas, limiter l'aptitude à commercialiser une production qui a suscité peu d'efforts accroît la rentabilité de la production qui en a occasionné beaucoup, et qui correspond à ce que recherchent les consommateurs. Chambers et Weiss (1992) montrent que lorsque le problème qui se pose est que les consommateurs ont de la difficulté à faire la distinction entre les bons producteurs et les mauvais, mais que la qualité n'est pas onéreuse, des normes de qualité minimales peuvent être nuisibles parce qu'il est alors plus ardu d'identifier les mauvais producteurs. Les normes de qualité revêtent de plus en plus d'importance dans l'activité agro-alimentaire et ont, dans la pratique, des effets complexes. De plus en plus, les normes sont établies par des grands groupements (voir OCDE, 2003.)

Lorsque les goûts des consommateurs sont uniformes, il est peut-être plus indiqué d'instituer une norme de qualité unique pour un produit donné. Cela est sans doute moins souhaitable s'ils sont très hétérogènes, car une norme unique réduit la variété des choix qui s'offrent aux consommateurs. Souvent, un produit de qualité moindre qui ne convient pas au marché des produits frais (haricots présentant des meurtrissures peu attrayantes) peut servir à la production d'aliments transformés (bouillon ou haricots en conserve). Dans de nombreux pays, la législation fixe les normes minimales applicables aux fruits et légumes vendus au détail.

2.2 Risque localisé

Une caractéristique distinctive de nombreux produits agricoles est la variabilité de la production obtenue avec les mêmes moyens de production. On sait bien, par exemple, que les rendements des récoltes sont soumis aux variations de température et d'approvisionnement en eau, impossibles à prévoir avec fiabilité à l'époque de la plantation. D'où le risque que la production d'un produit donné dans une région soit nettement moindre certaines années que d'autres. En outre, ce risque est localisé, car les récoltes sont souvent commercialisées sur un vaste territoire et les effets de la température peuvent être très circonscrits localement. Toutefois, même si la production d'une région peut diminuer d'une année sur l'autre, rien ne garantit que la production totale du produit considéré sera plus faible partout en même temps. Si la production totale a toujours varié en fonction des productions régionales, le prix du produit augmente en cas de diminution de la production, ce qui compense en partie ou très largement la baisse de production survenue dans une région.

2.3 Transport

Le transport de certains articles volumineux, pondéreux et périssables, en particulier ceux qui nécessitent de la réfrigération, comme le lait, peut être très onéreux. Les difficultés inhérentes au transport du lait sur de grandes distances signifient que dans des pays à grande superficie, comme l'Australie et les Etats-Unis, il existe de nombreux marchés décentralisés de lait liquide frais. Lorsque le coût du transport est supérieur à la différence entre le coût de production de la région la plus efficiente et celui de la région qui l'est le moins, la production peut intervenir dans les régions qui ne sont pas les plus efficientes. Au contraire, des produits comme les amandes, qui ont une durée de conservation relativement longue, qui peuvent être stockées et dont le prix est élevé (compte tenu de leur poids) peuvent avoir des marchés géographiques beaucoup plus étendus du point de vue de l'analyse de la concurrence. La possibilité de stocker un produit atténue les problèmes de production à court terme et permet le transport sur de grandes distances. Dans certains cas, le coût du transport rapide est aisément compensé par la valeur des ventes. Les fruits tropicaux et certains légumes sont parfois expédiés par avion vers des destinations très lointaines.

2.4 Différenciation

Contrairement aux produits de marque, les produits agricoles de base produits par des producteurs différents sont souvent homogènes. Cela signifie qu'en l'absence d'ententes, les profits sont relativement bas, et que les prix de vente se situent à des niveaux juste assez élevés pour couvrir les coûts marginaux de production (notamment les coûts d'opportunité des terres agricoles) du producteur à la marge. Les marchés indifférenciés sur lesquels la demande est peu élastique rapportent des profits élevés en cas d'entente comparativement aux marchés ayant d'autres caractéristiques.

On observe une différenciation croissante des produits, même ceux qui étaient auparavant considérés comme des produits bruts, comme les céréales. Les produits différenciés de plus longue date sont ceux qui appartiennent à une même catégorie générale (par exemple, les côtelettes de porc) et qui sont susceptibles de présenter des caractéristiques de qualité très différentes. Par exemple, l'agneau gallois peut être très savoureux comparativement à l'agneau produit ailleurs. Certains agriculteurs cultivent des tomates sur de meilleures terres que d'autres, et obtiennent par conséquent des produits d'une meilleure sapidité. Les caractéristiques qualitatives sont souvent difficiles à identifier par les utilisateurs finals qui consomment de petites quantités, surtout dans le cas de produits qui, comme l'agneau commercialisé dans un magasin pour consommateurs finals, proviennent pas nécessairement du même producteur d'un jour sur l'autre.

Si les consommateurs qui achètent de petites quantités peuvent considérer certains biens comme indifférenciés, les acheteurs de grandes quantités (les sociétés intermédiaires, par exemple les sociétés

productrices de chips de maïs salées) ont parfois des exigences très spécifiques pour leurs céréales. Ils peuvent conclure des contrats stipulant le type exact de graine qui sera semée, les engrais, le taux d'humidité du produit et sa dimension à la livraison, le volume qui sera livré et les dates de livraison. Il se peut que ces sociétés intermédiaires établissent des normes de qualité détaillées dans le but d'améliorer l'uniformité du produit, mais les agriculteurs estiment parfois qu'au final, cette pratique fait d'eux des fournisseurs exclusifs et leur ôte la liberté de gérer leur exploitation agricole. Ces contrats présentent toutefois l'avantage de réduire les risques de fluctuation des prix, dans la mesure ou les hausses ou baisses des prix peuvent y être stipulées selon différents critères de qualité.

2.5 Publicité et positionnement

Les produits alimentaires peuvent faire l'objet de vastes campagnes de publicité. Certains produits sans marque, comme le lait ou le fromage, font parfois l'objet de campagnes d'envergure nationale. Mais cette pratique reste rare. La plupart des produits agricoles indifférenciés, comme le maïs, ne sont pas largement annoncés parce que les producteurs ne sont pas membres d'une organisation susceptible de financer la publicité et qu'aucun producteur individuel ne réalise des profits directs suffisants pour assumer des coûts de publicité. Même les grandes organisations de producteurs peuvent être confrontées à des comportements opportunistes en matière de publicité.

Les matières premières alimentaires ne font généralement pas l'objet de vastes campagnes de publicité. Il en va autrement des aliments de marque, qui bénéficient de niveaux élevés de publicité. La publicité comporte des avantages indéniables pour les annonceurs, lesquels ne s'engageraient pas dans des activités aussi onéreuses si tel n'était pas le cas. Une forte publicité peut de même contribuer à engendrer des niveaux de revenus plus élevés pour les propriétaires de marques. Les avantages qu'offre la publicité à une entreprise sont de (1) convaincre les consommateurs d'essayer un produit qu'ils n'ont jamais essayé (2) modifier la perception que les consommateurs ont des produits, notamment en attirant l'attention sur leur qualité[8] (3) renseigner les consommateurs sur les caractéristiques des produits (4) renseigner les consommateurs sur les prix des produits et (5) faire naître dans l'esprit des consommateurs des associations inconscientes avec un produit. La publicité a parfois le pouvoir de modifier définitivement les préférences des consommateurs comparativement à une situation initiale. De ce point de vue, l'insuffisance de publicité pour les produits sans marque peut faire en sorte d'orienter naturellement les préférences des consommateurs vers les produits de marque (qui, eux, sont annoncés).

2.6 Hétérogénéité des consommateurs

Les préférences des consommateurs en matière d'aliments varient considérablement d'un pays à l'autre de même qu'à l'intérieur d'un même pays. Ces préférences concernent aussi bien les aliments les uns par rapport aux autres que leur goût et leur fraîcheur, de même que les valeurs liées à la confiance quant au contenu biologique, au bien-être des animaux et à la source d'approvisionnement (par exemple, un supermarché plutôt qu'un détaillant local spécialisé). Les différences entre les consommateurs à l'intérieur d'un pays donné sont importantes parce que plus les préférences sont diversifiées, moins des normes de qualité simples risquent d'être appropriées. Par exemple, lorsque les consommateurs qui cherchent des produits biologiques ont des préférences différentes en matière de traitement des plantes et des animaux, il peut être indiqué de fixer plusieurs normes biologiques dont le respect est assuré par des organisations fiables. L'établissement de normes alimentaires uniformes par les pouvoirs publics n'est peut-être pas toujours le meilleur moyen de satisfaire les préférences des consommateurs. De même, l'existence de normes privées concurrentes pourrait prêter à confusion.

3. Organisations mettant en œuvre des activités communes entreprises par des producteurs (coopératives, règlements relatifs à la commercialisation, organisations de marché)

Les organisations d'« activités communes » organisent les activités communes entreprises par des vendeurs indépendants et comprennent par exemple les coopératives exploitées par des agriculteurs, les organisations de marché et les règlements relatifs à la commercialisation mis en œuvre par les pouvoirs publics, de même que les organisations de négociation collective. Les organisations qui mettent en œuvre des activités communes de commercialisation entreprises par des agriculteurs revêtent des formes diverses, dont certaines ne paraissent pas susceptibles d'être nuisibles à la concurrence, tandis que d'autres pourraient engendrer un pouvoir de marché et limiter l'offre ou faire monter les prix. L'activité commune ne nécessite pas que les agriculteurs vendent leurs produits par l'entremise d'un organisme central de vente comme une coopérative mais peut comporter d'autres types d'activités menées conjointement, comme les limitations relatives à l'offre, aux ingrédients ou à la qualité. Les petites coopératives d'agriculteurs qui ont un effet sur un pourcentage limité de la production d'un produit donné dans une région géographique correctement définie ne sont vraisemblablement pas susceptibles d'influer sur les prix ou les conditions de la concurrence ni de provoquer des hausses de prix. Au contraire, les grandes coopératives ou les organisations à adhésion obligatoire, qu'elles soient administrées par l'Etat ou par d'autres entités, peuvent avoir la capacité d'influer sur les conditions de la concurrence et, au bout du compte, d'entraîner des hausses de prix pour les consommateurs.

Les organisations mettant en œuvre des activités communes bénéficient souvent d'exemptions de la législation antitrust qui empêchent les poursuites pour entente tant et aussi longtemps qu'elles agissent correctement. Ces organisations sont souvent indépendantes des pouvoirs publics mais sont parfois approuvées par ces derniers et tous les producteurs d'un produit en cause dans une région en cause sont tenus d'y adhérer.

3.1 Coopératives non appuyées par l'Etat

Les coopératives agricoles poursuivent des objectifs différents. Elles sont parfois créées pour effectuer des achats (coopératives d'achat de graines créées afin de bénéficier de réductions en raison de la quantité), pour réaliser la production agricole (coopératives qui partagent et entretiennent des machines spécialisées), ou encore pour procéder à la commercialisation et à la transformation de la production. La présente note s'intéresse principalement aux coopératives dont la création a la commercialisation pour objectif.

Les coopératives créées dans un objectif de commercialisation sont souvent structurées par type de produit. Elles mènent des activités variées : commercialisation en commun, supervision de la publicité et perception des cotisations que doivent verser les agriculteurs pour financer les dépenses de publicité et de commercialisation, et mise au point et application des normes en matière de procédés de production et de qualité.

Les effets des coopératives qui exercent une influence notable sur la quantité totale produite, les circuits de commercialisation empruntés ou les prix de gros et qui peuvent empêcher ou entraver les activités des concurrents potentiels ne sont pas tout à fait anodins. Il est possible d'évaluer les effets des coopératives en mesurant les gains d'efficience et les avantages qu'elles présentent pour la concurrence au regard de leurs éventuels effets anticoncurrentiels. L'analyse des effets des coopératives sur la concurrence nécessite la prise en compte des facteurs suivants :

- Part de marché, correctement définie, de la coopérative

- Rapport d'exclusivité des producteurs à l'égard de la coopérative ou restrictions dans les contrats avec des tiers

- Existence, entre les motivations des différents participants, d'une divergence susceptible de contrer des accords anticoncurrentiels

- Possibilité de parvenir à l'efficience d'une manière moins dommageable pour la concurrence

En général, les coopératives qui centralisent une petite partie de la capacité de production ne risquent pas de poser une menace sérieuse à la concurrence.[9] Se livrer à des pratiques d'entente comme la limitation de la production est particulièrement difficile pour les coopératives auxquelles n'adhèrent pas tous les producteurs et qui ne peuvent pas observer toutes les transactions sur le marché afin de s'assurer que les accords de partage du marché sont mis en œuvre. Bien que la plupart des coopératives soient de petite taille et peu susceptibles de poser des problèmes de concurrence, certaines englobent un pourcentage considérable de la capacité de production.[10] Dans ces cas, selon Monti (2003), on ne peut exclure la possibilité que de grandes coopératives comme celles qui existent en Europe septentrionale soient dominantes. Il se peut que les coopératives qui regroupent un grand nombre de producteurs aient la possibilité de mener des activités anticoncurrentielles, bien que la non-participation puisse diminuer leur aptitude à adopter un comportement anticoncurrentiel. Dans de nombreux pays Membres de l'OCDE, afin principalement de limiter les effets de la non-participation, on a mis sur pied des organisations d'activités communes auxquelles tous les producteurs de certains produits agricoles sont tenus d'adhérer. Ces organisations peuvent mettre en œuvre des accords assimilables à des ententes par le biais d'un contrôle appuyé par l'Etat et de poursuites juridiques. Les accords coopératifs appliqués par l'Etat sont examinés plus loin.

Les coopératives peuvent exiger que les agriculteurs vendent leurs produits uniquement par leur intermédiaire. Cela n'est pas nécessairement anticoncurrentiel. En particulier, lorsque les coopératives doivent s'assurer des quantités afin d'effectuer des investissements suffisants dans des biens de production requis pour l'entreposage ou la transformation, une certaine forme de volume garanti peut être nécessaire, par exemple pour garantir des prêts. De même, lorsqu'une coopérative regroupant une forte proportion de producteurs a déjà réalisé la plupart des économies d'échelle possibles et demande des droits d'exclusivité pour commercialiser le produit d'un agriculteur, la capacité des consommateurs à se procurer le produit auprès d'autres sources peut se trouver limitée.

Les risques d'effets anticoncurrentiels sont moins grands lorsque les agriculteurs ont des intérêts financiers divergents, par exemple lorsqu'ils produisent différentes variétés de récoltes ayant des utilisations finales optimales différentes. Ainsi, les oranges de Valence se prêtent davantage à la transformation, tandis que les oranges navel sont mieux adaptées à la commercialisation à l'état frais. En d'autres termes, les producteurs des deux variétés d'oranges ont des motivations financières différentes, surtout si l'on tient compte du fait que si une coopérative les réunissant destinait les oranges navel fraîches à la transformation dans le but de faire augmenter le prix des oranges fraîches, cela entraînerait une baisse du prix des oranges à jus. La divergence d'intérêt n'est pas une garantie contre les effets anticoncurrentiels mais permet de penser que ceux-ci seraient plus difficiles à obtenir que lorsque les intérêts concordent.

L'une des raisons qui motivent la création de coopératives est la recherche d'efficience. Mais il est souvent possible de parvenir à l'efficience sans mener des pratiques conjointes de fixation des prix ou de limitation de la production. Par exemple, des producteurs peuvent faire valoir que pour justifier un investissement financier risqué, ils doivent se partager des bénéfices potentiels garantis par un mécanisme de fixation conjointe des prix ou de la qualité. Cependant, s'il est possible d'effectuer ailleurs des investissements financiers risqués sans avoir recours à un tel mécanisme, les concertations à caractère anticoncurrentiel ne sont pas nécessaires. Il faudrait de préférence que les moyens mis en oeuvre pour parvenir à l'efficience soient aussi peu anticoncurrentiels que possible.

3.2 Règlements, agences ou organisations de commercialisation approuvé par l'Etat

Un règlement relatif à la commercialisation ou une organisation de marché peuvent régir la tarification et l'offre et énoncer d'autres dispositions concernant un produit donné. Les règles relatives à l'offre sont applicables à des utilisateurs spécifiques dans différentes limites géographiques. Les règlements relatifs à la commercialisation peuvent instituer des restrictions sur la quantité ainsi que sur le type de production, des prix d'achat minimums ou des mécanismes appropriés de fixation des prix. Ils s'apparentent à des mécanismes de réglementation des prix/de la quantité lorsqu'ils régissent la plus grande partie de la production d'un type spécifique de produit. Il en existe toujours dans de nombreux pays de l'OCDE. Si des producteurs autres que les agriculteurs créaient des organisations dotées de telles fonctions, leurs activités seraient souvent considérées comme illicites. Les agriculteurs pourraient bénéficier, du moins à certains égards, de la suppression du contrôle obligatoire de l'Etat sur les règlements relatifs à la commercialisation approuvés par les pouvoirs publics.[11]

Les organisations qui mettent en œuvre des activités communes poursuivent différents objectifs : stabilisation du marché, augmentation des revenus des agriculteurs, réalisation d'économies d'échelles, réglementation des normes de qualité, exercice d'un contrôle sur leurs produits par les agriculteurs, partage des risques, et suppression des problèmes liés aux comportements parasites (en particulier dans le cadre de la commercialisation d'un nom commercial ou d'une appellation commerciale). Ces organisations contrôlent parfois un nom commercial (ou une appellation commerciale) et souvent, dans ces cas, la région de production du produit concerné est définie par une limite géographique. Ces frontières géographiques limitent le nombre de producteurs et la quantité qui peut être produite, ce qui génère d'autre part des bénéfices plus élevés que d'habitude, lesquels constituent une incitation à maintenir la qualité élevée du produit et à en assurer la promotion.

Des organisations mettant en œuvre des activités communes, qu'elles soient approuvées à l'échelon fédéral ou à celui des Etats, existent dans de nombreux pays de l'OCDE, notamment en Australie (lait), au Canada (Loi sur les offices de produits agricoles, S. R., 1985, ch. F-4, art. 1 ; 1993, ch. 3, art. 2.), dans l'Union européenne (article 34 du Traité instituant la Communauté européenne), et aux Etats-Unis (*Agricultural Marketing Adjustment Act* de 1937, 7 U.S.C. § 601-74). « Les règlements relatifs à la commercialisation et les accords de commercialisation sont conçus pour contribuer à la stabilisation des conditions du marché des fruits et légumes. Les programmes mis en œuvre permettent aux exploitations agricoles de travailler conjointement à la résolution de problèmes de commercialisation. Les branches y participent volontairement et acceptent que certains aspects de leurs activités fassent l'objet d'un contrôle à l'échelon fédéral. » (USDA, 2004)

Les conditions de création d'un règlement relatif à la commercialisation varient d'un pays à l'autre. Tous les pays n'établissent pas expressément les critères applicables, mais ceux-ci doivent en général recevoir un appui réel des producteurs. Aux Etats-Unis, par exemple, « Un règlement relatif à la commercialisation peut être mis en œuvre s'il est approuvé en dernier ressort par au moins les deux tiers des producteurs concernés dans le cadre d'un référendum ou par les producteurs qui produisent au moins les deux tiers du volume des produits visés par le référendum. L'USDA estime qu'un règlement doit recevoir un appui général préalablement à la tenue d'une audience officielle. » Bien que les règlements relatifs à la commercialisation soient proposés par les producteurs, « le service de commercialisation des produits agricoles de l'USDA supervise les programmes afin de s'assurer que les règlements et les accords soient appliqués dans l'intérêt public et en conformité avec la loi .» (USDA, 2004)

Le mode de fonctionnement des organisations mettant en œuvre des activités communes avec l'autorisation de l'Etat est variable. Le rapport annuel de l'Autorité italienne de la concurrence pour 1999 décrit certaines des conditions de fonctionnement de l'Organisation commune des marchés du sucre dans l'Union européenne. « Pour assurer la continuité et la rentabilité de la production, l'Union européenne, qui

est le principal exportateur de sucre du monde, a mis en place l'Organisation commune des marchés du sucre en 1968. Dans le respect de la politique agricole commune, cette organisation garantit aux producteurs des niveaux de prix rentables et des débouchés. Dans le secteur de la betterave, il existe toutefois une limite quantitative au système de garantie. Il est établi en fixant un plafond de production réparti au prorata entre les Etats membres ; chaque membre répartit ensuite sa part entre les producteurs de sucre exerçant leurs activités sur son territoire.

Les contrats de mise en culture conclus entre les entreprises et les producteurs du secteur du sucre sont les principaux instruments de l'intégration verticale entre l'agriculture et l'industrie. La conclusion de ces contrats garantit au secteur des approvisionnements en matières premières et une utilisation optimale de la capacité par des plannings de production prédéterminés, alors que, de son côté, l'agriculture bénéficie à l'avance de garanties tant du placement de ses récoltes de betterave que de ses prix. Dans la plupart des pays européens, au cours d'une période déterminée de l'année - habituellement avant l'établissement des contrats de mise en culture - il est de pratique commune de procéder à une négociation collective entre les fabriques de sucre et toutes les organisations agricoles. Cette négociation débouche sur l'accord dénommé interprofessionnel, qui en fait régit toutes les opérations nécessaires au fonctionnement sans heurts du secteur de la betterave. »

L'évaluation des effets qu'ont sur la concurrence les organisations qui mettent en œuvre des activités communes demande que l'on examine leurs fonctions et le nombre de leurs adhérents. On verra plus loin les raisons à caractère concurrentiel, anticoncurrentiel ou indéterminé qui motivent les activités communes, de même que le degré d'adhésion que ces activités devraient engendrer.

3.3 Raisons à caractère concurrentiel

L'action coopérative favorise généralement la concurrence lorsqu'elle vise quatre principaux objectifs :

- Réaliser des économies d'échelle et de gamme
- Créer et maintenir une « marque », par exemple une appellation
- Lancer des campagnes de publicité
- Mener des recherches

Le premier objectif concerne l'efficience productive, et les trois autres, différents domaines où l'absence de coordination et le manque d'information des consommateurs peuvent conduire à une défaillance du marché. La coordination peut aider à améliorer les résultats dans ces domaines mais elle est nécessaire à des degrés variés. Ainsi, la réalisation d'économies d'échelle et de gamme exige rarement la participation de tous les producteurs. En revanche, dans le cas de la publicité partagée, la participation de la presque totalité des producteurs s'impose sans doute, pour éviter les problèmes liés aux comportements parasites.

Le fait qu'une organisation vise l'un de ces objectifs sans dépasser le seuil de participation nécessaire et ne mène pas d'autres activités en marge de ces objectifs ne signifie pas nécessairement que son comportement soit favorable à la concurrence, mais seulement qu'il est susceptible de l'être.

3.3.1 Economies d'échelle et de gamme

La réalisation d'économies d'échelle et de gamme est particulièrement importante pour les petits producteurs lorsqu'on entrevoit une possibilité de réduire les coûts. Des économies d'échelle particulièrement appréciables peuvent être réalisées en matière de transport, d'entreposage, de partage d'équipement et d'achats. Mais il est rare que l'ensemble des producteurs doive adhérer à l'organisation commune qui les recherche. De manière plus générale, la coordination des prix et des quantités n'est pas essentielle pour réaliser des économies d'échelle et de gamme. Par conséquent, ces économies ne nécessitent pas le recours à des organisations comportant un très grand nombre d'adhérents.

3.3.2 Création d'une marque, par exemple d'une appellation

Dans de nombreux pays, il existe des régions spécifiques connues pour le type ou la qualité de leurs produits agricoles. Par exemple, le jambon de Parme, produit dans la région de Parme, en Italie, est très réputé pour sa qualité. De fait, l'appellation « jambon de Parme » est protégée dans de nombreux pays, ce qui signifie qu'aucun produit ne peut être commercialisé sous cette appellation à moins d'avoir été produit conformément aux règles du Consorzio del Prosciutto di Parma. D'autres jambons peuvent avoir un goût similaire mais les producteurs de régions situées à l'extérieur de la région de Parme qui suivent les règles d'appellation applicables au Prosciutto di Parma ne sont pas autorisés à vendre leur jambon sous cette appellation.[12] Les appellations contribuent à inciter les agriculteurs d'une région à investir dans l'élaboration d'un produit et à en maintenir la réputation de qualité.

Une mention géographique ne signifie pas nécessairement qu'un produit est protégé en vertu de règles d'appellation ou qu'un pays accepte les appellations d'un autre pays. Par exemple, en anglais, « Swiss cheese » (fromage suisse ») est un générique qui décrit un certain type de fromage à pâte dure plutôt qu'un fromage provenant de Suisse.

Certaines appellations sont des marques protégées dans certains territoires en vertu d'une foule de règles différentes.[13] Dans les pays de l'Union européenne, par exemple, 603 produits alimentaires ont reçu, en septembre 2003, une protection officielle (voir Lee et Rund, 2003.)

Selon la Commission européenne, « compte tenu de la saturation des marchés, l'importance stratégique de la différenciation des produits est cruciale pour les régions rurales. Les qualités spécifiques liées aux facteurs naturels et humains offrent aux entreprises rurales la possibilité de positionner leurs produits sur des segments de marchés en leur conférant une plus grande valeur ajoutée. Cette valeur ajoutée est essentielle pour compenser les coûts de production plus élevés. »[14]

Les décisions relatives aux appellations sont normalement prises dans le cadre d'accords internationaux dont tous les pays ne sont pas nécessairement signataires. Le moment de la mise en œuvre des accords relatifs aux appellations est fixé par les pays en fonction de critères complexes, spécifiques aux produits et difficiles à généraliser.

Un facteur important dans les décisions relatives aux appellations est le degré de confusion que provoque chez les consommateurs le fait de mettre en œuvre ou non une appellation. Les consommateurs détiennent peu d'information sur les produits qu'ils trouvent dans les magasins. L'étiquetage est l'un des meilleurs moyens d'améliorer l'information dont ils disposent. Les consommateurs peuvent être induits en erreur lorsqu'un nom leur fait croire à tort qu'un produit provient d'une certaine région. Par ailleurs, si les règles d'appellation s'appliquent à un nom que les consommateurs considèrent comme « générique » – « Swiss cheese » en anglais – plutôt qu'à la production d'une localité particulière, les consommateurs risquent de se restreindre à un produit d'une localité donnée simplement parce qu'ils ignorent quels sont les substituts proches du produit commercialisé sous un nom générique. Le produit doté d'une appellation

bénéficiera alors de rentes, grâce non pas à sa réputation de grande qualité mais à l'ignorance des consommateurs.[15] Le maintien de règles différentes en matière d'appellations dans différents pays peut se justifier par l'effet prévisible d'une appellation sur les consommateurs, compte tenu des associations à partir de différents noms.

Les appellations sont souvent régies par des comités locaux de producteurs. Ces comités sont en général engagés dans des activités à caractère concurrentiel et assorties d'efforts d'amélioration et de contrôle de la qualité. Les comités d'appellations n'agissent cependant pas toujours nécessairement de manière à favoriser la concurrence. Il arrive qu'ils fixent des quotas de production et ils ont parfois été accusés de pratiques anticoncurrentielles.

En 1998, par exemple, l'Autorité italienne de la concurrence a intenté des poursuites contre les associations de producteurs de jambon de Parme et de San Daniele et de producteurs de fromage gorgonzola pour fixation des quantités de production de leurs membres.[16] Les affaires concernant les associations de producteurs de jambon sont décrites brièvement dans l'encadré 1 ci-après.

L'ampleur qui doit être donnée à la concurrence à l'intérieur d'une association de producteurs constitue un aspect important de ces affaires. Lorsque les marques d'une appellation sont reconnues par les consommateurs, comme c'est le cas des différents vignobles de Saint-Emilion, qui font partie de l'appellation Bordeaux, l'association n'a pas besoin de s'attacher de manière excessive à la tarification ou à la production parce que chaque producteur est incité à maintenir la qualité et la production et que les problèmes de parasitisme sont limités, puisque les consommateurs s'attendent à ce qu'il y ait des différences entre les produits de l'appellation. Cependant, lorsqu'il existe des marques inconnues parmi les produits d'une appellation, il se peut que des producteurs parasitent la réputation de l'appellation en surproduisant et en faisant baisser les profits des autres membres (et réduisent par conséquent les avantages qu'avait initialement procurés la réputation acquise.) Dans les affaires mentionnées, l'Autorité italienne de la concurrence a estimé qu'il importe de maintenir la concurrence au sein des associations de producteurs. Si l'on pousse plus loin le raisonnement selon lequel des contraintes sur la production sont anticoncurrentielles, on pourrait considérer que des contraintes artificielles sur la production ont pour effet de limiter la concurrence et sont également anticoncurrentielles. Se pose donc l'épineux problème de la distinction entre la volonté d'assurer des motivations fortes à innover et à maintenir la qualité, et celle d'assister à une concurrence active entre des producteurs qui n'appartiennent pas à une même entreprise.

Box 5. Encadré 1. Consorzio del prosciutto di Parma et Consorzio del prosciutto di San Daniele

« En janvier 1999, l'Autorité italienne de la concurrence a rejeté la demande que les consortiums pour la production des jambons de Parme et de San Daniele avait introduite en vue d'une prorogation de l'autorisation d'accords de production qu'ils avaient obtenue jusqu'au 31 décembre 1998, conformément à l'article 4 de la loi n°287/1990.

Après examen de la demande, l'Autorité a jugé que les conditions qui prévalaient au moment où l'autorisation originale avait été accordée n'étaient plus réunies. En juin 1996, le Règlement (CE) n° 1107/96, relatif à l'enregistrement des indications géographiques et des appellations d'origine pour le jambon de Parme et le jambon de San Daniele est entré en vigueur. Pour les produits d'appellation d'origine protégée, la production et les contrôles afférents sont régis par le Règlement (CEE) n° 2081/92 relatif à la protection des indications géographiques et des appellations d'origine des produits agricoles et des denrées alimentaires. L'Autorité a motivé son refus d'accorder la prorogation de l'autorisation par le fait que la fixation des quantités à produire était à la fois inutile et contre-indiquée au regard de l'objectif déclaré d'assurer que la production de jambon d'appellation d'origine protégée soit conforme aux méthodes prescrites, étant donné que cette tâche est aujourd'hui exécutée par des organismes désignés en vertu des législations italienne et communautaire. »

Source : Rapport annuel de l'Autorité italienne de la concurrence pour 1998

3.3.3 Publicité

L'adhésion obligatoire à une coopérative peut favoriser la concurrence, en particulier lorsqu'elle est censée contribuer au paiement des frais de publicité conjointe pour un produit donné. Dans certains pays de l'OCDE, la publicité du lait est appuyée par des organisations qui prélèvent effectivement un petit montant auprès de leurs membres pour couvrir les frais des campagnes publicitaires. Lorsque la publicité sur les aliments de marque de faible valeur nutritive est autorisée, au détriment des ventes de produits qui ont une plus grande valeur nutritive, il est raisonnablement envisageable que la politique menée par les pouvoirs publics puisse favoriser les dépenses de publicité conjointe pour les aliments qui sont meilleurs pour la santé.

Même si elles peuvent réaliser des activités publicitaires conjointes, les organisations de commercialisation ne le font pas toujours et la publicité est rarement leur activité principale. Il est difficile d'obtenir des données sur les activités de publicité des coopératives. Mais le programme américain de règlements relatifs à la commercialisation fournit certaines informations sur chaque règlement relatif à la commercialisation. Sur les trente règlements en vigueur le 5 mai 2004, quinze autorisent la publicité conjointe et treize maintiennent un certain niveau de publicité en commun. Les défaillances de marché associées à la publicité en commun ne paraissent pas constituer l'aspect principal des activités des organisations qui édictent des règlements relatifs à la commercialisation mais peuvent constituer un facteur important.

3.3.4 Recherche-développement

Comme la publicité, la recherche-développement est souvent un bien public au sens où les utilisateurs de R-D ne peuvent être entièrement exclus par l'innovateur et où le fait qu'une personne utilise une innovation n'empêche habituellement pas une autre personne de faire de même. De ce point de vue, les incitations en faveur de l'innovation privée sont souvent moindres que les avantages collectifs que procure l'innovation, et il y a donc défaillance du marché. Pour accroître les incitations en faveur de l'innovation, on pourrait peut-être envisager de constituer de grands groupes de bénéficiaires potentiels qui paieraient une taxe au titre du financement de la R-D. Le financement de la R-D pourrait également être pris en charge directement par les Etats. On pourrait enfin songer au développement et à l'investissement externes privés. En raison des contraintes considérables qui pèsent sur le financement public, il serait peut-être souhaitable de rechercher des solutions du côté du secteur privé. Comme pour la publicité, lorsque les solutions retenues font intervenir le secteur privé, il faudrait mettre en place une organisation comportant un très grand nombre d'adhérents de manière à éviter les problèmes de comportements parasites. De fait, de nombreuses organisations chargées des règlements relatifs à la commercialisation mènent des activités de R-D, bien que le financement public de la R-D dans le secteur de l'agriculture dépasse probablement celui des règlements relatifs à la commercialisation.

3.4 Activité commune ayant des effets anticoncurrentiels

L'activité commune peut viser dans certains cas à restreindre la concurrence, notamment lorsqu'elle vise à :

- Restreindre la production
- Augmenter les prix

Ces deux objectifs sont étroitement liés du fait que des restrictions de la production sont souvent utilisées pour procéder à la « stabilisation des marchés » et qu'elles conduisent généralement à une hausse des prix. Même s'il se peut que les motivations anticoncurrentielles à l'origine de l'activité commune ne

posent pas de problème en raison des gains d'efficience considérables qui sont engendrés, il s'ensuit en général une diminution du bien-être général et du bien-être des consommateurs. En d'autres termes, même si l'activité est profitable aux producteurs, elle risque de nuire davantage aux consommateurs.

3.4.1 Restriction de la production, du moins à certains circuits de commercialisation

La restriction de la production est l'un des principaux moyens utilisés par les participants à des monopoles et à des ententes pour accroître leurs profits. Dans le secteur de l'agriculture, la restriction de la production est pratiquée de différentes manières. Par exemple, dans certains pays Membres, il est arrivé que des organisations mettant en œuvre des activités communes exercent un contrôle sur la production de la quantité totale de certains produits. Dans d'autres cas, un contrôle s'est exercé sur la production de certains circuits de commercialisation par le biais de règles d'affectation de la production qui permettent aux agriculteurs de ne vendre qu'un certain pourcentage de leur production (de fruits frais, par exemple) au circuit « rentable ». Le contrôle de la production d'un produit donné doit parfois être étendu à d'autres produits connexes pour empêcher le recours à des substituts. Lorsque les producteurs s'entendent sur une production globale, ou répartissent la production entre les segments d'achat peu élastiques et élastiques, les prix peuvent grimper de manière significative.

Box 6. Encadré 2. Producteurs d'oranges de Californie et d'Arizona

Voici un exemple d'entente intervenue entre les producteurs d'oranges de Californie et d'Arizona.

En 1932, au vu de la réussite des producteurs de citrons, les producteurs d'oranges de Californie et d'Arizona ont tenté de conclure un accord relatif à la réglementation de la production. Cet accord a permis d'augmenter les prix de 20 % pendant une courte période mais est rapidement devenu inopérant, de nombreux producteurs non participants ayant réalisé d'importantes ventes sur le marché des fruits frais.

L'*Agricultural Adjustment Act* de 1933 et l'*Agricultural Marketing Act* de 1937 autorisaient la plupart des producteurs agricoles à conclure un accord visant à former un groupement de commercialisation qui établirait, pour tous les producteurs, la quantité de produit vendu suivant différents usages, le taux d'écoulement du produit sur le marché et les normes minimales de qualité applicables à ce produit. Le groupement pouvait imposer l'affichage des prix ainsi que des programmes d'inspection des produits agricoles. Les producteurs qui avaient une offre excédentaire étaient passibles de sanctions sévères. Grâce à leur immunité à l'égard de la législation antitrust, les producteurs d'oranges navel et d'oranges de Valence ont conclu des ententes qui régissaient la distribution de leurs oranges sur le marché des oranges fraîches et celui des oranges destinées à la transformation. Au début, il n'y avait qu'une seule entente. Après 1952, une entente distincte a été conclue pour chaque variété d'orange. Les règlements relatifs à la commercialisation des oranges permettaient aux comités administratifs de fixer la quantité d'oranges vendues fraîches, le moment de la commercialisation sur le marché intérieur des oranges fraîches et leur taille minimale.

Selon un des comités administratifs, la stabilité apportée par les règlements relatifs à la commercialisation avait rendu les oranges fraîches « accessibles aux consommateurs sans que leur coût soit alourdi par les problèmes d'efficience qui affectent la commercialisation non soumise à réglementation. » (*Valencia Orange Administrative Committee, Annual Report of Operations under Federal Marketing Order 22*, at 2 (1978-79)) L'analyse de l'effet des règlements relatifs à la commercialisation tend toutefois à démontrer que c'est l'inverse qui est vrai. Normalement, pendant les saisons où les conditions de culture sont optimales, le pourcentage de fruits de qualité suffisante pour être offert aux consommateurs de fruits frais augmentait. Mais pendant les bonnes saisons, les comités administratifs ont réduit le pourcentage de fruits vendus sur le marché des fruits frais en deçà du pourcentage autorisé les mauvaises saisons en ayant principalement recours à des contingents de commercialisation et à des limites qualitatives fondées sur la taille des oranges. Ces limitations ont eu pour effet de maintenir des prix élevés. De fait, même si « 85 à 90 pour cent des oranges navel et 65 à 80 pour cent des oranges de Valence étaient d'assez bonne qualité pour être commercialisées fraîches, moins de 70 pour cent des oranges navel et moins de 45 pour cent des oranges de Valence ont en général été offertes sur le marché des produits frais pendant la période comprise entre les saisons 1960-61 et 1980-81. » (Shepard, 1986). La quantité de fruits affectés à la transformation a été excessive compte tenu de la qualité.

Pour quelle raison les comités administratifs ont-ils mis en œuvre de telles stratégies ? Cela tient principalement au fait que contrairement aux transformateurs, les consommateurs de fruits frais avaient une demande très peu élastique. Par conséquent, la limitation de la production dans le segment des fruits frais devait contribuer davantage à l'augmentation des revenus de ce segment que la réaffectation de cette production vers la transformation, qui procurait des revenus moindres. Les écarts de prix entre les oranges navel et les oranges de Valence vendues pour être consommées fraîches et celles vendues pour être transformées étaient considérables : pendant la période comprise entre 1960 et 1980, le prix des oranges navel destinées au marché des fruits frais s'établissait en moyenne à 3.30 dollars la caisse et celui des oranges navel destinées à la transformation, avant récolte, à -18 cents la caisse. Le prix des oranges de Valence destinées à être vendues fraîches s'établissait en moyenne à 1.54 dollar la caisse et celui des oranges de Valence destinées à la transformation, avant récolte, à 23 cents la caisse. (Le prix avant récolte peut être négatif si le coût de la récolte, du conditionnement et de la livraison des oranges sur le marché est supérieur au prix du marché.) Ces différences de prix tenaient au fait que que les oranges de Valence étaient moins prisées des consommateurs de fruits frais que les oranges navel, et plus prisées des transformateurs. Les règles relatives à la distribution ont fait augmenter les prix des fruits frais mais ont fait baisser considérablement ceux des fruits transformés. Les comités administratifs exigeaient la vente à perte parce qu'ils estimaient sans doute que le contrôle et la prise en compte de la totalité de la production étaient une garantie contre la distribution et la vente de fruits non autorisés sur le marché des fruits frais. Le meilleur moyen d'assurer que les agriculteurs ne pratiquaient pas la vente illicite était de rendre leurs transactions observables. Même si les transactions observables concernant les fruits destinés à la transformation n'étaient pas rentables, elles permettaient de s'assurer avec plus de certitude que les fruits frais étaient vendus plus cher et que l'entente était stable.

Paradoxalement, l'entente des producteurs d'oranges n'a sans doute pas permis aux producteurs d'atteindre tous leurs objectifs. Même si, à court terme, l'entente a principalement eu pour effet d'entraîner la hausse des prix des fruits frais et la baisse des prix des fruits destinés à la transformation, l'obtention de revenus anormalement élevés a provoqué à long terme l'accroissement des entrées sur le marché de la culture des oranges. Autrement dit, l'existence de prix artificiellement élevés a mené à des augmentations de la capacité qui ont nécessité des réaffectations plus marquées vers le marché de la transformation. Celles-ci ont atteint un tel niveau que les prix des oranges navel destinées à la transformation étaient en réalité non rentables pour les agriculteurs. Les réaffectations accrues ont engendré une forte baisse des revenus des agriculteurs qui participaient au programme de répartition du marché. « Les prix négatifs des fruits transformés et la réaffectation accrue vers le traitement ont fait chuter les revenus moyens, lesquels sont passés de 4 dollars le carton au début des années soixante à moins de un dollar. » (Shepard, 1986)

« Le fait qu'une discrimination par les prix exercée par les pouvoirs publics ait engendré peu d'avantages à long terme pour l'industrie correspond tout à fait à la théorie économique. Les règlements relatifs à la commercialisation ont manifestement permis de réorienter les fruits hors d'un marché de produits frais peu élastique d'une manière qui n'aurait pu être soutenue sans réglementation. Bien que cela ait eu pour effet immédiat de faire augmenter et de stabiliser les revenus des agriculteurs, l'absence de restriction à l'entrée sur le marché a empêché à long terme les revenus moyens de dépasser des niveaux soutenables dans un contexte concurrentiel. Au contraire, en stabilisant les prix moyens, les règlements relatifs à la commercialisation ont réduit les risques courus par les agriculteurs et par là, leurs revenus à long terme. Fait plus important, les prix élevés qui avaient initialement cours sur le marché des fruits frais soumis aux règlements ont été contrebalancés par les prix anormalement bas des oranges destinées à la transformation, de sorte que l'effet à long terme manifeste de la réglementation fédérale a été d'instaurer un déséquilibre marqué dans le secteur de la transformation et une mauvaise affectation des ressources au titre de la production d'oranges. » (Shepard, 1986) Dans son modèle économétrique des règlements relatifs à la commercialisation des oranges navel et des oranges de Valence, Shepard (1986) estimait que les revenus à long terme des agriculteurs seraient de fait de 20 pour cent supérieurs si les forces concurrentielles étaient autorisées à répartir les oranges entre le marché des produits frais et celui des produits destinés à la transformation.

Les deux organismes chargés des règlements relatifs à la commercialisation des oranges ont cessé leurs activités en 1994.

(Source : Shepard, 1986)

3.4.2 Augmentation des prix des transactions

Dans certains cas, où il a été ardu d'exercer un contrôle sur la production, des accords ont été conclus dans le but d'augmenter les prix des transactions. Par exemple, en octobre 2001, un accord a été signé en France par six fédérations, dont quatre représentaient les éleveurs de bovins et deux les abatteurs bovins.

Après une action violente menée par des agriculteurs français qui ont intercepté et détruit des cargaisons de bœuf importé, les abatteurs ont consenti à limiter les importations et à adopter une « grille de prix » qui a eu pour effet d'augmenter le prix qu'ils payaient pour les bovins français. L'accord a conduit à une augmentation de 10 à 15 pour cent des prix des abattoirs. (Voir le considérant 40 de la décision de la Commission européenne (2003).)

La suppression des règlements relatifs aux prix et à la production peut avoir d'importants effets bénéfiques pour les consommateurs, tout en fournissant aux agriculteurs des paiements de stabilisation du revenu financés par une taxe perçue sur le produit déréglementé. En Australie, par exemple, après la déréglementation des prix du lait, les prix nets payés par les consommateurs ont en moyenne marqué une baisse, et ce malgré la taxe perçue pour financer les revenus des producteurs laitiers après la déréglementation. L'encadré 3 décrit l'expérience de la déréglementation des prix du lait en Australie.

Box 7. Encadré 3. Déréglementation du prix du lait en Australie

Le 1er juillet 2000, l'Australie a procédé à la déréglementation du secteur laitier à l'échelle nationale. Auparavant, les prix du lait de consommation étaient fixés par les administrations des Etats. Le lait de consommation représentait alors 18 pour cent de la production laitière annuelle. Le reste de la production laitière était destiné à la fabrication de produits laitiers comme le fromage et le beurre, dont les prix étaient déterminés par le marché international et équivalaient en moyenne à moins de la moitié du prix du lait de consommation.

A partir du 1er juillet 2000, l'industrie laitière s'est rapidement transformée. La Commission australienne de la concurrence et de la consommation (*Australian Competition and Consumer Commission* (ACCC)) a exercé un contrôle sur les prix et les profits des intermédiaires avant, pendant et après la libéralisation, car certains craignaient que les transformateurs et les détaillants du secteur laitier soient les principaux bénéficiaires de l'inititiative et que les consommateurs n'en retirent que de très maigres bénéfices.

Six mois après la modification de la réglementation, l'ACCC a procédé à un examen afin d'apporter rapidement une évaluation des résultats. Elle a constaté que les prix du lait payés par les consommateurs avaient baissé substantiellement, que les supermarchés avaient rapidement fixé des prix de vente au détail à l'échelle nationale, et que les marges des détaillants et des transformateurs avaient baissé. La crainte que les consommateurs ne bénéficient pas de la déréglementation n'était donc pas fondée.

Après la déréglementation, une grande chaîne nationale de supermarchés a annoncé qu'elle octroierait des contrats d'approvisionnement de deux ans. Cet appel d'offres a suscité une concurrence agressive entre les transformateurs qui ont présenté des soumissions. Après avoir conclu ses contrats, la chaîne de supermarchés a annoncé des prix nationaux sur sa propre marque de lait frais en contenants de un, deux et trois litres. La chaîne a opté pour une stratégie de commercialisation nationale axée sur des bas prix dans le but d'accroître la fréquentation de ses magasins plutôt que ses revenus provenant des ventes de lait.

Pendant la période comprise entre les deuxième et quatrième trimestres 2000, les prix du lait entier en supermarché ont chuté de 22 cents le litre, tous types d'emballages et de marques confondus. Les prix du lait demi-écrémé et du lait écrémé ont également chuté mais dans un moindre degré. Les magasins de proximité ont également réduit les prix des contenants de deux litres à la suite de la baisse des prix pratiqués par les supermarchés. Ils ont nettement réduit le prix des contenants d'un litre. Après la déréglementation, l'écart des prix entre les différents Etats s'est beaucoup rétréci. L'évolution des prix du lait entier est illustré ci-après.

Prix nationaux des contenants de deux litres en 2000, par type de détaillant

Trimestre (2000)	Supermarchés (marque générique) AUD/l'unité	Supermarchés (autres marques) AUD/l'unité	Magasins de proximité AUD/l'unité
Mars	2.50	2.68	s./o.
Juin	2.54	2.72	2.79
Septembre	2.30	2.60	2.75
Décembre	2.16	2.38	2.69

Source : ACCC (2001) (xvii) et ADC

Le déclin des prix de détail a entraîné celui des marges au détail. Dans les supermarchés, la marge au détail sur un litre a baissé de 19 pour cent, soit davantage que le déclin des prix de gros.[17] Dans les magasins de proximité, les volumes des ventes ont chuté d'environ 24 pour cent, les consommateurs s'étant tournés vers les supermarchés, où les prix étaient beaucoup plus bas. Après la déréglementation, les marges de profit net moyen des transformateurs de lait australiens ont diminué de 12 à 18 pour cent. Les agriculteurs ont obtenu des prix plus bas pour leurs ventes de lait de consommation au départ de l'exploitation. Pour compléter le revenu des agriculteurs, un programme d'aide a été mis en place pendant la déréglementation dans le but d'accorder aux producteurs laitiers des paiements étalés sur une période de huit ans ou un paiement de sortie exonéré d'impôt. Ces paiements ont été financés par une taxe de 11 cents le litre prélevée sur la plupart des types de lait liquide.[18]

Si on calcule les effets des réformes pour les consommateurs, « les ventes de lait en supermarché devraient, selon une estimation prudente, permettre aux consommateurs australiens de réaliser une économie d'environ 118 millions de dollars sur un an. »

3.5 Activité commune de commercialisation ayant un caractère à la fois concurrentiel et anticoncurrentiel

Le principal secteur d'activité commune pouvant avoir des effets à la fois concurrentiels et anticoncurrentiels est celui de la fixation de normes de qualité. Les normes de qualité peuvent avoir des effets positifs mais peuvent être détournées à des fins anticoncurrentielles, en particulier si elles sont ajustées par les producteurs d'une saison sur l'autre de manière à restreindre la production.

3.5.1 Normes instituées par les fournisseurs

Les fournisseurs peuvent fixer des normes de production pour rehausser la confiance des consommateurs dans la qualité d'un produit et en inciter un plus grand nombre à le consommer.

Dans la pratique, les producteurs maintiennent parfois des normes minimales de qualité dans leur propre intérêt plutôt que dans celui des consommateurs. Tel est le cas lorsque l'offre accrue d'un produit conduit à la fixation de normes de qualité plus rigoureuses qui réduisent la production commercialisable pour un usage donné. Par exemple, lorsque le temps est clément, un produit donné peut être obtenu en plus grande quantité et il est également probable qu'un plus grand pourcentage du produit sera de grande qualité. Dans ce cas, si les normes de qualité (par exemple, la taille d'un fruit) sont ajustées lors d'une bonne saison de manière que la quantité de produit « commercialisable » soit inférieure à ce qu'elle aurait été lorsque l'ancienne norme s'appliquait, la nouvelle norme a pour effet de réduire la production destinée au marché de la consommation. Les arguments voulant que la modification de la norme ait pour objectif de maintenir une offre constante à l'intention du marché des consommateurs finals induisent en erreur parce que les consommateurs ne profitent pas nécessairement de l'offre constante en question.[19]

3.6 Effets à long terme

Les hausses de prix obtenues par les organisations qui mettent en œuvre des activités communes n'améliorent pas nécessairement le bien-être à long terme des producteurs. En effet, même si les règles à caractère anticoncurrentiel limitent souvent le degré d'utilisation de la production à sa valeur optimale, elles n'empêchent pas les agriculteurs d'entrer sur le marché pour produire le produit en question. Si les revenus sont élevés dans une activité économique donnée où il n'y a pas de restrictions à l'entrée, il y aura des entrées jusqu'à ce que les revenus chutent à un niveau inférieur. Ce type de réaction en termes d'entrées a été observé dans le cas de nombreux produits, notamment les oranges de Californie et d'Arizona, comme on l'a vu à l'encadré 2. Ces oranges étaient commercialisées fraîches ou après transformation. En vertu des règlements relatifs à leur commercialisation, les prix des oranges fraîches étaient maintenus à un niveau élevé, tandis que ceux des oranges transformées sont de fait devenus négatifs dans certains cas, et à mesure que la production totale augmentait, les agriculeurs ont vu un pourcentage croissant de leur production affecté à des utilisations à faible valeur. Les revenus moyens des producteurs

d'oranges ont par conséquent considérablement chuté pendant la période où les règlements relatifs à la commercialisation étaient en vigueur. Si l'entrée est limitée, par exemple en raison de la petite superficie des terres disponibles pour la production et pour certaines appellations géographiques, le prix du terrain augmente tellement que les revenus ne sont pas exceptionnels.

D'autres formes de soutien aux agriculteurs, par exemple les paiements directs, ne créent pas les mêmes motivations artificielles à produire que les ententes.

4. Achat en situation de monopsone

Les acheteurs de produits agricoles sont de plus en plus concentrés, tant du côté de la transformation que de celui du commerce de détail. (OCDE, 2001) Dans de nombreux pays de l'OCDE, la réglementation et la législation jouent un rôle important pour la détermination de la structure et de la nature de la concurrence au niveau de l'achat de produits agricoles. Ces dernières années, le niveau de concentration entre les transformateurs et les acheteurs de produits agricoles a considérablement augmenté dans certains pays. Au Royaume-Uni, par exemple, les quatre principales chaînes de magasins d'alimentation détiendront environ 90 pour cent du marché des « distributeurs diversifiés » (*one-stop shopping grocery store)*. Aux Etats-Unis, quatre entreprises de conditionnement de viande détiennent environ 80 pour cent du marché. Cette concentration est dans une large mesure le résultat de fusions et est souvent justifiée auprès du public par des gains d'efficience. D'importantes économies d'échelle et de gamme sont assurément réalisées dans de nombreuse installations de transformation et de vente au détail. Mais les agriculteurs ont maintes fois fait valoir qu'un pouvoir de monopsone s'était exercé sur eux pour diminuer leurs revenus et accroître les risques de leurs activités agricoles. Certains chercheurs sont d'avis que le laxisme dans l'application de la législation antitrust est la cause de la concentration excessive des entreprises de détail et d'achat et que la législation antitrust devrait être appliquée plus rigoureusement contre les acheteurs que contre d'autres groupements (Carstensen, 2004 ; Taylor, 2004.) D'autres chercheurs estiment que lorsque les marges de profit sont réduites, il est inévitable que la concentration augmente pour permettre d'étaler les coûts fixes et d'assurer la compétitivité (Sutton, 2003.)

Les agriculteurs estiment souvent que leur situation économique de plus en plus difficile est à la fois due à leur pouvoir économique insuffisant et au pouvoir de marché croissant des grandes centrales d'achat et de vente. Dans certains cas, les agriculteurs ont sans doute raison d'attribuer leurs difficultés financières au grand pouvoir de négociation des acheteurs. Les acheteurs s'engagent parfois dans des actions concertées pour maintenir les prix en deçà d'un niveau qui serait défini dans un marché concurrentiel. On ne connaît pas avec précision l'ampleur de ce type d'action concertée dans le secteur agricole. Souvent, comme dans d'autres secteurs visés par la législation antitrust, les producteurs individuels ne portent pas plainte officiellement auprès des autorités car ils craignent de ne plus figurer sur la liste des fournisseurs de leur principal acheteur et d'être inscrits sur une « liste noire » par les autres concurrents. (*Competition Commission*, 2000) Bien que différentes plaintes soient portées, du moins de manière informelle, peu sont adéquatement étayées au moyen d'une preuve convaincante sur le plan économique. Etant donné que de nombreux comportement peuvent être interprétés comme favorisant ou non la concurrence, un examen minutieux est primordial.

Les exemples de comportements des acheteurs qui sont dénoncés comme ayant un caractère anticoncurrentiel sont loin d'être limités au secteur de l'agriculture. Une table ronde qui s'est tenue précédemment a examiné le pouvoir d'achat des grands détaillants diversifiés. (Voir OCDE, 1999.) Dans le secteur agro-alimentaire, les acheteurs exigent parfois qu'un certain type de graine soit utilisé par les producteurs de céréales ou une certaine race de poulet, par les aviculteurs. Par le passé, les agriculteurs ne recevaient pas ce genre d'instructions spécifiques. Mais de plus en plus, les agriculteurs, plutôt que de vendre leur production sur un vaste marché, s'associent directement à des acheteurs spécifiques. Cela les place dans une relation de plus grande dépendance que par le passé en tant que fournisseurs. En d'autres

termes, une fois qu'ils ont conclu un contrat et affecté leur capacité à la production destiné à un producteur spécifique, les agriculteurs ne peuvent pas se dissocier facilement de ce producteur. Même si cela ne satisfait pas les agriculteurs, il est de plus en plus fréquent, dans de nombreux secteurs de production, que des fournisseurs destinent des parts de leur production à des acheteurs spécifiques. Pour l'acheteur (et pour les consommateurs finals qui achètent auprès de cet acheteur) cela présente l'avantage d'accroître l'uniformité et le contrôle de la qualité.

4.1 Monopsone et monopole

Un argument parfois invoqué est que le pouvoir de monopsone doit être abordé différemment du pouvoir de monopole. (Voir Cartensen, 2004.) Les agriculteurs diront que même si la présence de quatre ou cinq vendeurs peut suffire à générer des niveaux suffisants de concurrence sur les marchés de l'offre, un nombre aussi restreint d'acheteurs principaux est par trop restrictif pour les vendeurs de produits agricoles. On peut se demander si cela est vrai ou si, au contraire, le pouvoir de marché de l'acheteur doit être traité comme le pouvoir de marché du vendeur et avec les mêmes moyens utilisés pour l'application de la législation antitrust.

Cartensen (2004) estime que des parts de marché plus faibles peuvent suffire à nuire à la concurrence dans les affaires ou l'acheteur exerce un pouvoir de marché. Mais cet argument repose en réalité sur l'idée selon laquelle une faible concentration au niveau national peut masquer une forte concentration d'acheteurs à un niveau local. Schwartz (2004) soutient que « cette observation veut simplement dire qu'il faut être très prudent lorsque l'on définit le marché géographique en cause. Mais l'avertissement vaut également lorsque l'on évalue le pouvoir de marché du vendeur. » (p. 5-6)

Cartensen (2004) affirme que comme les entreprises acheteuses concluent de plus en plus de contrats dans lesquels les paiements faits aux producteurs sont fondés sur les prix observés sur les marchés au comptant, elles ont de plus en plus de raisons d'abaisser les prix sur les marchés au comptant parce que ces prix plus bas réduisent leurs dépenses contractuelles. Ces structures contractuelles peuvent peut-être inciter les acheteurs à ne pas payer des prix de marché au comptant élevés, mais les contrats assortis de la clause de la nation la plus favorisée (NPF) créent des incitations similaires. Les contrats NPF garantissent que les vendeurs accorderont leur meilleur prix à un certain acheteur (ou que les acheteurs accorderont leur meilleur prix à un certain vendeur). Les accords NPF peuvent imposer des limites au fournisseur ou à l'acheteur. Les producteurs parties à ces contrats sont moins disposés à changer les prix des transactions qui représentent une petite partie de leur production. Notons que des affaires de concurrence relatives à des contrats assortis de la clause NPF et ne comportant pas de règle spécifique concernant le « pouvoir de l'acheteur » ont été entendues dans certaines juridiction.

4.2 Fusions de transformateurs et de détaillants

Les fusions destinées à créer des organisations de transformation et de vente au détail peuvent être motivées par les gains de productivité qui découlent de ces procédés ou par la volonté d'exercer un pouvoir de monopsone. « Un simple observateur pourrait croire que si une fusion fait baisser le prix que l'entreprise fusionnée paie pour ses moyens de production, les consommateurs en profiteront nécessairement, la logique étant apparemment qu'à partir du moment où le producteur du bien de production paie moins cher, les clients de l'acheteur de ce bien devraient également s'attendre à payer moins cher. Mais il n'en va pas nécessairement ainsi. Les prix des moyens de production peuvent baisser pour deux raisons entièrement distinctes, l'une ayant à voir avec un gain d'efficience réel qui a tendance à faire baisser les prix pour les consommateurs finals et l'autre tenant au contraire à l'exercice d'un pouvoir de marché qui diminue l'efficience et le bien-être économique, fait baisser les prix payés par les fournisseurs et peut aboutir à une hausse des prix facturés aux consommateurs finals. » (Pate, 2003)

Le tableau 1 montre qu'au cours de la dernière décennie, la concentration des détaillants en alimentation a considérablement augmenté dans de nombreux pays de l'UE et d'autres pays de l'OCDE. Des définitions différentes du marché en cause peuvent conduire à des évaluations de la concentration plus élevées encore. Par exemple, d'après le rapport détaillé de la *Competition Commission* sur les supermarchés du Royaume-Uni, (*Competition Commission*, 2000) et compte tenu d'une fusion intervenue récemment, le ratio de concentration sur cinq entreprises valable pour les distributeurs diversifiés en 2004, est supérieur à 90 pour cent au Royaume-Uni.

Table 3. Tableau 1. Concentration sur cinq entreprises (%) des détaillants de produits alimentaires et non alimentaires, Etats membres de l'UE (1993-1999)

Pays	1993	1996	1999
Autriche	54.2	58.6	60.2
Belgique+Luxembourg	60.2	61.6	60.9
Danemark	54.2	59.5	56.4
Finlande	93.5	89.1	68.4
France	47.5	50.6	56.3
Allemagne	45.1	45.4	44.1
Grèce	10.9	25.8	26.8
Irlande	62.6	64.2	58.3
Italie	10.9	11.8	17.6
Pays-Bas	52.5	50.4	56.2
Portugal	36.5	55.7	63.2
Espagne	21.6	32.1	40.3
Suède	79.3	77.9	78.2
Royaume-Uni	50.2	56.2	63.0

Source : Estimations fondées sur les données fournies par Corporate Intelligence on Retailing dans European Retail Handbook, citées par Paul Dobson (2002)

Comme on l'a vu, la concentration est également forte parmi les industries de transformation de certains pays de l'OCDE, en particulier les conditionneurs de viande. Aux Etats-Unis, par exemple, les quatre principaux conditionneurs de viande représentent 80 pour cent de l'abattage (Pate, 2003). Bien qu'il soit quelque peu malaisé d'obtenir des statistiques fiables, il ressort que de plus en plus, les entreprises d'abattage et de conditionnement ont pour pratique d'élever leur propre bétail et d'avoir recours au marché pour un pourcentage de plus en plus faible de leur approvisionnement. Aux Etats-Unis, ces entreprises possèdent ou contrôlent, par le biais de participations, de coentreprises et de contrats, environ la moitié de leur approvisionnement en viande d'abattage (Taylor, 2004).

Les autorités de la concurrence ont parfois engagé des poursuites dans des affaires de fusion ayant entraîné la concentration d'entreprises de détail et ont attentivement examiné les fusions entre entreprises d'abattage et de conditionnement. « C'est ainsi que la Commission européenne a interdit le projet de fusion entre les sociétés Kesko et Tuko, en Finlande, qui aurait apporté à la nouvelle entreprise une part de marché national de 60 pour cent. En Autriche, dans l'affaire de l'acquisition par la société Rewe de la société Julius Meinl, des cessions de magasins ont été demandés dans les régions où la nouvelle entreprise aurait contrôlé 65 pour cent des ventes ou davantage. La CE a toutefois autorisé presque telles quelles d'autres fusions qui ont entraîné une forte concentration dans l'ensemble de l'UE, notamment entre les sociétés Metro et Makro, et Carrefour et Promodès. De même, les autorités nationales de la concurrence se sont en général montrées peu disposées à empêcher ou limiter des concentrations plus importantes d'entreprises de vente au détail. » (Dobson (2002))

4.3 Bénéfices excédentaires des acheteurs

L'une des préoccupations des producteurs concerne le fait que les acheteurs compriment fortement les profits des producteurs, pour réaliser ensuite des profits élevés sur leurs propres produits. Il ne fait pas de doute que les fournisseurs ressentent davantage la pression sur les prix exercée par les très gros acheteurs que celle des autres acheteurs. L'étude sur les supermarchés réalisée au Royaume-Uni par la *Competition Commission* a constaté que les fournisseurs, qu'ils soient gros ou petits, accordaient de plus fortes remises aux grandes chaînes de supermarchés qu'à la plupart des autres acheteurs. Ces différences ne pouvaient pas s'expliquer totalement par les gains d'efficience qui découlent par exemple des livraisons effectuées par des camions chargés à pleine capacité et de l'entreposage centralisé (*Competition Commission* (2000), p. 432).

L'étude de la *Competition Commission* n'a pas disposé de données également détaillées sur les prix des fournisseurs et sur les prix de détail et n'a donc pas pu examiner de manière approfondie les prix des fournisseurs. Elle a toutefois constaté qu'en dépit du fait que les fournisseurs semblaient essuyer des pertes nettes sur certains produits, les prix fournisseurs obtenus par les principales chaînes de supermarchés étaient en gros comparables. Aucun des grands détaillants ne s'en tirait nettement mieux que les autres en termes de prix fournisseurs. En ce qui concerne les bénéfices excédentaires, l'étude a observé que les marges réalisées par les détaillants sur les produits agricoles examinés -- laitue, pommes, œufs, agneau et poulet -- semblaient comparables à celles réalisées sur les autres produits, « ce qui semble indiquer que les pertes des fournisseurs n'étaient pas causées par les prises de profits excessifs des détaillants. »[20] (*Competition Commission*, 2000, p. 448)

Box 8. Encadré 4. Etude sur les supermarchés au Royaume-Uni

A la suite de plaintes formulées par les fournisseurs, notamment des agriculteurs, concernant l'abus de pouvoir de monopsone et les prix plus élevés pratiqués dans les supermarchés du Royaume-Uni comparativement à d'autres pays, la *Competition Commission* a mené une étude approfondie sur le secteur des supermarchés au Royaume-Uni. (*Competition Commission* (2000)) Cette étude visait à établir s'il y avait abus de pouvoir de marché, et si les prix et les profits étaient plus élevés au Royaume-Uni qu'ailleurs. La *Competition Commission* a eu accès à de nombreuses informations, notamment à des documents et à des données internes des supermarchés du Royaume-Uni, ainsi qu'à des données provenant de sources extérieures et d'enquêtes qu'elle avait elle-même menées.

Cette étude a notamment permis de tirer les conclusions suivantes :

- Même au niveau national, la concentration de la participation dans les supermarchés était très élevée. Au niveau local, la concentration pouvait être encore plus forte et l'étude a estimé que dans de nombreux endroits, les supermarchés exerçaient leurs activités dans un contexte de monopole ou de duopole.

- Les prix des produits d'alimentation étaient plus élevés au Royaume-Uni qu'en Allemagne, en France et aux Pays-Bas, notamment ceux des produits vendus sous les marques de distributeur, mais aussi des produits de même marque. « Au deuxième semestre de 1999, les prix pratiqués en Grande-Bretagne étaient de 12 à 16 pour cent supérieurs à une moyenne pondérée des prix en vigueur en France, en Allemagne et aux Pays-Bas ».

- La rentabilité des grandes chaînes de supermarchés du Royaume-Uni était légèrement plus élevée qu'ailleurs. Les prix de détail étaient considérablement plus élevés alors que les profits l'étaient dans une moindre mesure, ce qui s'explique en partie par le fait que les coûts de fonctionnement sont plus élevés au Royaume-Uni qu'ailleurs, qu'il s'agisse du personnel ou du terrain. Les prix élevés du terrain, en particulier, font que la marge élevée sur les produits de gros et de détail n'est pas suffisante pour établir l'existence d'une importante activité à caractère anticoncurrentiel.

- Les principales parties (les grandes chaînes de supermarchés) pratiquaient un contrôle des prix plus agressif sur un nombre limité d'articles de référence auxquels les consommateurs s'attachent le plus. C'est sur ces principaux articles de référence que les supermarchés pratiquent les prix les plus agressifs alors qu'ils réalisent des marges considérablements plus fortes sur d'autres articles auxquels les consommateurs portent moins attention.

Bien que les données soient imparfaites à cet égard, « dans la plupart des cas, les variations de prix à court terme ont été transmises de manière assez rapide et complète entre les prix de gros et les prix de détail. » (p 93) Dans les cas où les baisses de prix n'ont pas été répercutées, la *Competition Commission* a vérifié s'« il y avait eu des augmentations de coûts en d'autres points de la chaîne de l'approvisionnement. » (p. 92) La *Competition Commission* « n'a pas exclu l'existence d'une asymétrie à court terme. » (p 260)

- Des rapports externes semblent indiquer qu'entre 1995 et 1998, la marge commerciale entre les prix au départ de l'exploitation et les prix de détail du bœuf, de l'agneau et du porc avait augmenté. Cela peut s'expliquer notamment par l'augmentation des frais de transformation résultant des règlements et des limites imposées relativement aux utilisations de certaines parties de la carcasse à la suite de la crise de l'ESB.

- D'après des rapports externes, les augmentations des prix au départ de l'exploitation ont été répercutées plus rapidement que les diminutions des prix au départ de l'exploitation, en particulier dans le cas de la viande de porc.

4.4 Fixation des prix par les acheteurs

L'existence d'une concertation entre acheteurs qui conduit ceux-ci à fixer un prix inférieur au niveau concurrentiel ou à se répartir les producteurs peut survenir dans le cadre d'enchères et de négociations particulières. Ce type d'activité est une forme d'entente entre acheteurs et est illicite dans la plupart des régimes de droit de la concurrence.

Des poursuites ont été engagées dans des affaires de fixation des prix d'additifs alimentaires comme la lysine et les vitamines, mais la fixation des prix par les acheteurs est plus rare. Les autorités de la concurrence engagent toutefois régulièrement des poursuites dans des affaires de soumissions concertées et il leur est arrivé de découvrir des activités de soumissions concertées qui ont abouti à des poursuites dans le secteur de l'agriculture.[21]

4.5 Ajustement asymétrique des prix aux coûts

Les agriculteurs et leurs représentants font souvent valoir que les acheteurs ne partagent pas équitablement les profits tirés des ventes de produits agricoles. Un abus de pouvoir de marché serait exercé par les acheteurs lorsque les prix de détail ne suivent pas de près les prix de gros. En particulier, une opinion répandue est que les baisses des prix de gros sont incorporées aux prix de détail plus lentement que les hausses, qui le sont immédiatement. Ainsi, lorsque les coûts augmentent, les détaillants maintiennent leur marge mais lorsqu'ils diminuent, ils tirent un revenu très élevé de leurs ventes, tandis que les agriculteurs ne touchent qu'une faible partie de ce bénéfice. Certains chercheurs avancent que ce décalage est un indicateur de déséquilibres dus au pouvoir de marché (Taylor, 2004). L'étude la plus approfondie effectuée sur ce phénomène, qui porte sur les produits agricoles et non agricoles, n'a pas constaté de corrélation entre asymétrie et concurrence (Peltzman, 2000). On ne dispose guère d'analyses concrètes satisfaisantes de ces allégations en ce qui concerne les produits agricoles, outre la vérification générale de l'existence de réactions asymétriques. Lewis (2004) a toutefois proposé récemment une méthode rigoureuse d'analyse des questions d'ajustement asymétrique. Cette approche a été appliquée au marché de la vente d'essence au détail mais pourrait très bien l'être également aux produits agricoles. Il existe trois théories principales de l'ajustement asymétrique.

Selon la première théorie, la coordination des prix est habituellement difficile, « mais les entreprises sont capables d'utiliser les anciens prix comme « prix cibles » pour se concerter (Lewis, 2004). Lorsque les prix de gros augmentent, les détaillants doivent immédiatement répercuter l'augmentation, sinon les ventes ne seront pas rentables. Inversement, lorsque les prix de gros baissent, la collusion est facilitée parce qu'elle consiste tout simplement à ne pas modifier les prix existants. (Voir Borenstein, Cameron et Gilbert, 1997.)

La deuxième théorie est celle de l'« incertitude variable ». Les schémas de recherche des consommateurs évoluent suivant l'évaluation qu'ils font de la volatilité. Lorsque l'incertitude croît quant à l'ampleur des hausses des prix de gros, les consommateurs ne peuvent évaluer si un prix de détail qui est modifié est spécifique à un détaillant donné ou s'il a cours sur l'ensemble du marché. Comme ils sont réfractaires au risque, ils cherchent moins en cas d'incertitude et les profits réalisés dans des conditions de concurrence augmentent. Dans ce modèle, la rapidité de l'ajustement est asymétrique puisque lorsqu'il y a une augmentation des prix de gros, les prix de détail augmentent du fait que les coûts et les marges sont plus élevés. En revanche, lorsqu'il y a une diminution des prix de gros, les marges plus élevées neutralisent la tendance à la baisse des coûts. C'est pourquoi les prix augmentent rapidement et baissent lentement (voir Benabou et Gertner, 1993.) Soulignons qu'il ne s'agit pas là d'une théorie de la collusion, mais d'une théorie selon laquelle l'incertitude, et non la collusion, conduit à des marges plus élevées.

La troisième théorie est celle du « prix de référence ». (Lewis, 2004) Selon cette théorie, les attentes des consommateurs en matière de prix de détail sont fondées sur les prix de détail qu'ils ont connus par le passé. Les entreprises établissent leurs prix différemment en se fondant sur le degré d'activité de recherche qu'elles prévoient. Lorsque les prix de détail réels pratiqués dans un magasin donné sont plus élevés que prévu, les consommateurs mènent une recherche active parce qu'ils estiment que les gains qu'ils retireront de leur recherche seront élevés. Cette recherche active assurera des marges faibles. Inversement, lorsque les prix sont légèrement inférieurs à ce qu'avaient prévu les consommateurs, les bénéfices de la recherche sont moindres et les consommateurs cherchent moins énergiquement d'autres points de vente. Par conséquent, lorsque les prix de gros baissent, les entreprises peuvent baisser légèrement leurs prix pour réduire les recherches. Cette baisse n'a pas lieu d'être spectaculaire, étant donné que comme les consommateurs ne mènent pas une recherche énergique, les détaillants n'attireront pas un nombre élevé de nouveaux consommateurs en pratiquant des prix bas. La baisse des coûts induit donc une baisse lente des prix et leur augmentation, une hausse rapide des prix. Il ne s'agit pas là d'une théorie de la collusion mais du comportement de recherche fondé sur les prix de référence.

Chacune de ces théories a des implications distinctes et vérifiables pour ce qui est de la dynamique de la fixation des prix et des coûts. Ces implications sont illustrées dans le tableau ci-dessous.

Table 4. Tableau 2. Prédictions pour des vérifications empiriques

	Modèle de recherche fondée sur l'« incertitude variable »	**Modèle de collusion fondée sur le « prix cible »**	**Modèle de recherche fondée sur le « prix de référence »**
Quand les marges bénéficiaires sont-elles élevées ?	Lorsque les prix montent et baissent	Lorsque les prix baissent	Lorsque les prix baissent
Quand les prix réagissent-ils aux variations des coûts ?	Dans tous les cas	Surtout lorsque les marges sont faibles	Surtout lorsque les marges sont faibles
De quelle manière et à quel moment les détaillants baissent-ils les prix ?	Graduellement et simultanément	Soudainement et à des moments différents	Graduellement et simultanément

Source : Adapté de Lewis (2004)

En vérifiant ces théories empiriquement dans le marché de la vente d'essence au détail, Lewis (2004) a constaté que « les marges sont élevées lorsque les prix baissent et faibles lorsque les prix montent. Les prix réagissent beaucoup plus lentement aux chocs positifs et négatifs des coûts lorsque les marges sont élevées. » Ces résultats correspondent à la théorie du « prix de référence », mais contredisent certaines des implications des théories reposant sur le « prix cible » et l'« incertitude variable ». Les faits observés dans le secteur de la vente d'essence au détail conduisent donc à penser que la dynamique de recherche des

consommateurs est principalement responsable de l'asymétrie des réactions des prix entre les augmentations et les diminutions de coûts, et l'est davantage que l'abus de « pouvoir de marché ».

Bien qu'il n'y ait pas encore de preuve manifeste de la source des asymétries possibles dans les réactions des prix lorsqu'il y a augmentation ou diminution des coûts des produits agricoles, l'existence de ces asymétries ne permet pas à elle seule d'affirmer que les acheteurs de produits agricoles abusent de leur pouvoir de marché lorsque les prix de détail diminuent lentement à la suite d'une diminution du prix au départ de l'exploitation.[22]

4.6 Intégration verticale et déplacement du risque

Les acheteurs, du fait qu'ils cherchent à accroître l'uniformité et l'homogénéité de leurs moyens de production et de leur produit fini, demandent de plus en plus aux producteurs d'avoir recours à certaines méthodes de production. Cela peut engendrer une expropriation des investissements (Williamson, 1985) liée au fait que les producteurs font des investissements en fonction spécifiquement de leur relation avec un acheteur donné. En pareil cas, il peut être nécessaire de conclure des contrats à long terme pour gagner la confiance des investisseurs. Lorsque les contrats ne fournissent pas de protection suffisante aux investisseurs, une intégration verticale complète peut survenir.[23] Dans l'industrie de la transformation de la viande, en particulier, certains types d'intégration verticale sont de plus en plus répandus. Des observateurs estiment qu'au moins la moitié des besoins des abattoirs sont maintenant couverts par des relations verticales à long terme (notamment des contrats) entre les entreprises d'abattage et de conditionnement et le fournisseur éleveur. (Taylor, 2004)

L'intégration verticale incite les entreprises d'abattage et de conditionnement à s'approvisionner de moins en moins sur le marché concurrentiel. Ces entreprises utilisent les sources d'approvisionnement internes lorsque la demande est faible et ne se tournent vers le marché qu'en cas de forte demande. Les producteurs qui choisissent d'axer leurs activités sur le marché concurrentiel sont exposés à une plus grande fluctuation de la demande et à des risques plus élevés.

Les fournisseurs présents sur le marché concurrentiel soutiennent parfois que le risque plus grand auquel ils sont exposés est dû au pouvoir de marché des entreprises d'abattage et de conditionnement. Le risque ne provient pas du pouvoir de marché mais de l'intégration verticale accrue, qui n'est pas synonyme de concentration ou de pouvoir de marché. Les fournisseurs peuvent choisir de devenir des fournisseurs captifs des entreprises d'abattage et de conditionnement ou de s'exposer à un risque élevé sur les marchés concurrentiels. Pour de nombreux producteurs, aucune de ces deux options n'est intéressante. Mais l'intégration verticale, au cœur de cette question, est l'aboutissement naturel de problèmes liés à la passation de contrats « à armes égales », aux exigences accrues d'uniformité et d'homogénéité et au besoin d'obtenir des fournisseurs une garantie d'approvisionnement. Il n'y a rien d'anticoncurrentiel en soi dans l'intégration verticale, la volonté d'uniformité accrue ou de garantie en matière d'approvisionnement.

4.7 Normes établies par les acheteurs

De plus en plus, les acheteurs définissent leurs propres normes, que ce soit à titre individuel ou par le biais de groupements d'acheteurs. (OCDE, 2003) L'introduction de normes de qualité, que ce soit par des producteurs ou par des entités intermédiaires comme les détaillants ou les transformateurs, est une façon d'améliorer l'information dont disposent les transformateurs et les consommateurs. L'introduction de normes par des acheteurs individuels est moins susceptible de poser des problèmes d'effets anticoncurrentiels que l'introduction de normes par l'ensemble des producteurs.

Les acheteurs peuvent imposer des normes qualitatives relatives aux produits qu'ils achètent tout en laissant aux producteurs le loisir de vendre à d'autres un certain pourcentage de leur produit. Etant donné

que les gros acheteurs qui fixent des normes qualitatives strictes suscitent la plus grande part des ventes des producteurs agricoles, les producteurs éprouvent de plus en plus de difficulté à écouler les produits qui ne correspondent pas aux normes énoncées.

Comme on l'a vu, les normes imposées par les agriculteurs peuvent résoudre des problèmes d'externalités créés par l'insuffisance d'information dont disposent les consommateurs, mais elles peuvent également induire des effets anticoncurrentiels (comme cela s'est produit dans le cas des tailles minimales des oranges fraîches ou des limites imposées à la quantité totale de production par les associations de producteurs de jambon de Parme et de San Daniele). Les normes établies par les acheteurs sont moins susceptibles d'avoir un caractère anticoncurrentiel. Les exigences de qualité formulées par les acheteurs peuvent traduire un souhait exprimé par les clients de voir s'exercer un contrôle sur la qualité des aliments, ou des impératifs liés aux machines de transformation. Les détaillants maintiennent leur réputation de qualité en refusant des produits de mauvaise qualité.

D'autres acheteurs, par exemple les producteurs agro-alimentaires, représentent souvent le débouché privilégié des aliments qui ne conviennent pas à la vente à l'état frais. Mais les transformateurs n'acceptent pas tous les types de produits. Par exemple, il y a très peu de débouchés pour les laitues défraîchies dans la filière transformation.

5. Conclusion

La présente note a exploré un certain nombre de questions de réglementation associées à la concurrence du point de vue des organisations de producteurs agricoles qui mettent en œuvre des activités communes et des activités des acheteurs dans le secteur de l'agriculture. Cet examen ne vise pas à faire le point sur toutes les questions de concurrence et est nécessairement restreint. Il s'est porté principalement sur les politiques et réglementations nationales, et non pas internationales, en matière d'agriculture. De nombreux facteurs influencent les politiques agricoles, notamment les attitudes sociales et le développement régional. L'un de ces facteurs qui, il y a encore peu de temps, était pratiquement passé sous silence, est la politique de la concurrence, qui peut, en général, jouer un rôle plus important dans le développement des politiques et réglementations dans le secteur agricole. L'un des meilleurs moyens d'élargir ce rôle serait de supprimer les exemptions de l'application de la législation antitrust aux activités agricoles.

De manière générale, les coopératives d'agriculteurs qui représentent un faible pourcentage de production ainsi que les associations regroupant de petites appellations qui constituent un modeste pourcentage de production dans une catégorie de produit générale sont susceptibles d'avoir un effet favorable sur la concurrence. Ces formes d'activité commune peuvent conduire à des coûts plus bas pour les agriculteurs et aider ces derniers à créer des « marques » qui peuvent éviter la perte de qualité imputable à la difficulté qu'éprouvent les consommateurs à évaluer la qualité. Ce sont là des effets favorables à la concurrence et qui ne seraient pas illicites au regard de la plupart des lois en matière de concurrence. Ces activités communes ne nécessitent donc pas d'exemptions de l'application de la législation antitrust.

Des organisations intégrant plus de participants, en particulier des organisations qui mettent en œuvre des activités communes et auxquelles l'adhésion est obligatoire, ont parfois pour seul objectif le maintien de la qualité mais il leur arrive de restreindre la production ou de réorienter les activités, ce qui fait monter les prix payés par les consommateurs. Lorsque ces organisations limitent la production et réorientent les activités, elles faussent le marché et vont à l'encontre de l'intérêt public. Beaucoup de politiques de « stabilisation du marché » ont pour effet de restreindre et de réorienter la production. Ces activités n'iraient dans le sens de l'intérêt public que dans des circonstances exceptionnelles.

Les exemptions de la législation antitrust accordées aux agriculteurs qui entraînent pour l'intérêt public un préjudice supérieur au bénéfice qu'en retirent les producteurs portent atteinte au bien-être social.

- L'activité commune favorise la concurrence lorsqu'elle vise à :
  - Réaliser des économies d'échelle et de gamme
  - Créer et maintenir une « marque »
  - Lancer des campagnes de publicité
  - Mener des recherches
- L'activité conjointe nuit à la concurrence lorsqu'elle vise à :
  - Restreindre la production, du moins à certains circuits de commercialisation
  - Augmenter les prix
- Les gouvernements jouent parfois un rôle tant dans l'organisation que dans la mise en œuvre d'activités anticoncurrentielles dans le secteur de l'agriculture. Lorsque le préjudice porté à l'intérêt public est supérieur aux bénéfices retirés par les agriculteurs, les activités gouvernementales sont assimilables à des activités d'entente. Il faudrait que les pouvoirs publics cessent de favoriser des ententes dommageables dans le secteur agricole.

Dans le même temps, il existe un danger croissant que les acheteurs de produits agricoles s'engagent dans des activités anticoncurrentielles au détriment des agriculteurs. Alors que bon nombre des activités des acheteurs qui préoccupent les agriculteurs relèvent de l'évolution naturelle de l'activité d'une société, certaines initiatives des acheteurs, en particulier les fusions, peuvent déboucher sur de fortes concentrations d'acheteurs susceptibles de nuire aux producteurs et de s'apparenter de plus en plus à une pratique de fixation des prix par les acheteurs. Pour éviter que cela ne se produise, les organismes chargés de la concurrence doivent faire preuve d'une grande vigilance à l'égard des fusions et des activités potentielles de fixation des prix.

- Les problèmes d'achat en situation de monopsone peuvent être traités à l'aide des moyens fondamentaux de lutte antitrust que sont la définition des marchés et l'analyse des effets sur la concurrence, également utilisés pour traiter les problèmes causés par les problèmes d'achat en situation de monopole. Il n'est donc pas nécessaire d'instituer des lois antitrust ou des règlements de mise en œuvre spéciaux pour traiter les problèmes d'achat en situation de monopsone.

- Les fusions de détaillants et de transformateurs peuvent être analysées attentivement en s'attachant en particulier à définir le marché géographique sur lequel sera livrée la concurrence. Dans de nombreux cas, en raison des dépenses de transport et d'entreposage des produits, les marchés géographiques sur lesquels s'achète la production agricole se situent à une échelle plutôt locale. Inversement, les marchés de distribution après transformation peuvent être beaucoup plus étendus.

- L'existence de réactions asymétriques des prix à la suite des hausses et des baisses des coûts ne signifie pas nécessairement que les acheteurs détiennent un pouvoir de marché mais peut très bien découler des comportements de recherche différents des consommateurs, induits par les hausses et les baisses de prix.

- Les acheteurs mettent en place des normes de plus en plus strictes qui influent sur les procédés de production des agriculteurs. Ces normes traduisent vraisemblablement la recherche d'uniformité et de qualité des consommateurs. Elles peuvent mener à une intégration verticale. Si celle-ci doit déboucher sur une agriculture « sociétaire », les consommateurs souhaiteront peut-être que les étiquettes comportent des informations sur les méthodes d'élevage et que celles-ci soient vérifiées par des organismes indépendants, en particulier dans le cas des produits et de la viande organiques.

NOTES

1 L'amélioration du revenu des agriculteurs est parfois un objectif explicite. Par exemple, le Traité instituant la Communauté européenne (2002) (2002/C 325/01) stipule que la politique agricole a pour but « d'assurer un niveau de vie équitable à la population agricole, notamment par le relèvement du revenu individuel de ceux qui travaillent dans l'agriculture. »

2 L'article 36 des Versions consolidées du Traité sur l'Union européenne et du Traité instituant la communauté européenne stipule : « Les dispositions du chapitre relatif aux règles de concurrence ne sont applicables à la production et au commerce des produits agricoles que dans la mesure déterminée par le Conseil dans le cadre des dispositions et conformément à la procédure prévue à l'article 37, paragraphes 2 et 3, compte tenu des objectifs énoncés à l'article 33. » Aux Etats-Unis, le Capper-Volstead Act (Public-No. 146-67th Congress) stipule que les personnes engagées dans la production agricole en qualité d'agriculteurs, d'exploitants d'une plantation ou d'un ranch, de producteurs laitiers et de producteurs de fruits et de fruits secs, peuvent agir de concert dans des associations, des sociétés ou autres groupements, avec ou sans capitaux propres, pour transformer, conditionner, manutentionner et commercialiser leurs produits dans le cadre du commerce avec d'autres Etats et avec l'étranger.

3 Voir les observations présentées du 30 octobre 1991 auprès du ministère de l'agriculture par le ministère de la justice des Etats-Unis : « Navel Oranges grown in Arizona and Designated part of California ; proposed weekly levels of volume regulation for the 1991-1992 season », numéro de registre FV-91-408PR. L'Agricultural Marketing Agreement Act (AMAA) de 1937 « exige expressément que le secrétariat d'Etat à l'agriculture tempère l'objectif d'accroissement du revenu des agriculteurs en exigeant que les intérêts des consommateurs soient également pris en compte. Pour protéger les consommateurs, le taux des ajustements des prix [effectués pour atteindre la parité] doit être compatible avec l'« intérêt public ». (7 U.S.C. § 602(2)). Les considérations de concurrence, notamment l'affectation efficace des ressources, sont généralement réputées constituer un élément important de la norme de l'intérêt public ». (p. 5-6)

4 Au Canada, par exemple, l'article 21 de la Loi sur les offices de produits agricoles stipule : « Un office a pour mission a) de promouvoir la production et la commercialisation du ou des produits réglementés pour lesquels il est compétent, de façon à en accroître l'efficacité et la compétitivité ; et (b) de veiller aux intérêts tant des producteurs que des consommateurs du ou des produits réglementés. » L'article 33, Titre II, des Versions consolidées du Traité sur l'Union européenne et du Traité instituant la Communauté européenne, stipule que la politique agricole commune a pour but, entre autres, « d'assurer des prix raisonnables dans les livraisons aux consommateurs. » Aux Etats-Unis, l'AMAA, 7 U.S.C. § 602, déclare que le Congrès entend protéger l'intérêt des consommateurs contre les prix supérieurs à ceux fixés par le Congrès. Aux termes du Capper-Volstead Act, le secrétaire d'Etat à l'agriculture doit empêcher les coopératives de relever exagérément le prix d'un produit agricole.

5 De fait, les plaintes des agriculteurs sont en partie à l'origine de l'adoption des lois antitrust. Par exemple, Libecap (1992) estime que le Sherman Act de 1890 est en grande partie issu des préoccupations exprimées par les agriculteurs. Fait intéressant, les principaux tenants de cette loi étaient des Etats qui avaient des intérêts considérables dans la production agricole et non des Etats où était principalement concentrée la population, et où auraient pu prévaloir les intérêts des consommateurs.

6 Il ne fait toutefois pas de doute que dans le cas de certains produits, des caractéristiques extérieures comme la texture, l'odeur et l'aspect peuvent fournir d'excellentes indications sur la qualité, et les consommateurs recherchent souvent ces caractéristiques organoleptiques. Plus ces indications renseignent sur les qualités d'un produit, moins les consommateurs ont de problèmes d'information.

7 Des marchés de produits exempts de restrictions sont possibles lorsque la qualité est évaluée à bas coût et avec précision à l'aide de moyens de mesure objectifs.

8 Voir Milgrom et Roberts (1986).

9 Selon Monti (2003), il est peu probable qu'un seul agriculteur ou de petites coopératives détiennent une position dominante.

10 Selon Monti (2003), certaines coopératives détiendraient des parts de marché national situées entre 64 et 90 %.

11 Graeme Samuel (1998) voit au moins quatre avantages à la réforme des organisations coopératives de commercialisation auxquelles il est obligatoire d'adhérer : 1) Elle donne aux agriculteurs la liberté de choisir les modalités de commercialisation de leur récolte, son prix et l'acheteur. 2) Elle est susceptible de réduire la part des revenus des agriculteurs engloutie dans les coûts administratifs. 3) Les agriculteurs exerceront un meilleur contrôle sur leur décisions de production, de commercialisation et de gestion des risques .4) Les agriculteurs individuels et les communautés rurales auront plus de motivations et de débouchés pour commercialiser leurs produits de manière plus innovante et investir dans des produits d'aval de plus grande valeur.

12 De fait, l'arrêt récent de la Cour européenne relatif au tranchage et à l'emballage de jambon de Parme non contrôlé par l'association des producteurs de jambon de Parme (CJCE, 2003) a estimé que l'appellation incluait le tranchage et l'emballage et que l'emballage ne peut donc s'effectuer que dans la région de production dès lors que la réglementation appuyant l'AOP (appellation d'origine protégée) l'exige, ce qui empêche les supermarchés de réduire les coûts en effectuant eux-mêmes le tranchage et l'emballage.

13 Indications géographiques en vertu de l'accord de l'OMC sur les ADPIC (Section 3, Partie I, articles 22-24), Arrangement de Lisbonne, et Appellation d'origine protégée (AOP), Indication géographique protégée (IGP) et Spécialité traditionnelle garantie (STG) au titre du Règlement (CEE) n° 2081/92 du Conseil, du 14 juillet 1992, relatif à la protection des indications géographiques et des appellations d'origine des produits agricoles et des denrées alimentaires et du Règlement (CEE) n° 2082/92 du Conseil, du 14 juillet 1992, relatif aux attestations de spécificité des produits agricoles et des denrées alimentaires.

14 http://europa.eu.int/comm/research/agro/fair/en/fr0306.html

15 Lorsque l'utilisation des termes comme « fromage de type suisse » est autorisée sur l'étiquetage, le préjudice qu'entraîne l'utilisation d'un nom générique comme indicateur géographique est légèrement atténué.

16 Les associations sont respectivement appelées Consorzio del prosciutto di San Daniele, Consorzio del prosciutto di Parma et Consorzio per la tutela del formaggio gorgonzola.

17 Après la publication du rapport, les transformateurs se sont dit préoccupés par le fait que les réductions qu'ils accordaient aux supermarchés pourraient permettre à ces derniers d'accroître leurs marges sur le lait. Après examen des chiffres correspondants, l'ACCC a estimé que ces paiements avaient largement été pris en compte et que s'ils ne l'avaient pas été, il n'en demeurait pas moins que les marges sur le lait réalisées par les supermarchés avaient diminué. (ACCC, 2001b, « ACCC Confirms Finding of Milk Monitoring Report », communiqué de presse, ACCC.

18 Après la déréglementation, le prix moyen du lait UHT a augmenté d'environ 10 cents le litre. Cela tient au fait que les prix réglementés du lait UHT au départ de l'exploitation étaient inférieurs aux prix du lait frais. Lors de l'introduction de la taxe d'ajustement de 11 cents, cette augmentation de prix était prévue. Les ventes de lait UHT ont chuté immédiatement après la déréglementation étant donné que le prix du lait frais s'est rapproché de celui du lait UHT.

19 Si les consommateurs en tirent profit, c'est vraisemblablement de manière indirecte.

20 Il convient de noter que les bénéfices excédentaires qui sont spécifiques à un produit sont rendus difficiles par le fait que la tarification des supermarchés s'applique à des produits diversifiés, ce qui donne lieu à marges faibles sur certains produits et des marges élevées sur d'autres produits.

21 Le ministère de la justice des Etats-Unis, par exemple, a eu gain de cause dans la poursuite qu'il a intentée contre des acheteurs de bétail du Nebraska pour « soumission concertée en relation avec un appel d'offres pour l'achat de bétail. Les deux personnes concernées, qui ont plaidé la culpabilité, ont écopé d'une amende et reçu l'ordre de rembourser les victimes. » (Pate, 2003)

22 Fait à noter, il n'est pas certain que les prix d'équilibre soient atteints étant donné que les chocs ont des effets durables aussi bien sur le marché de biens de consommation que sur celui des biens de production (Peltzman, 2000).

23 Pour les besoins de la présente note, l'intégration verticale renvoie à l'intégration verticale complète, comprenant la propriété et le contrôle des biens de production ainsi qu'à l'intégration « faible », caractérisée par une propriété distincte à différents stades de la production et la conclusion de contrats à long terme entre les acteurs en présence à ces différents stades.

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AUSTRALIA

I. Introduction

Competition law in Australia is generally governed by the *Trade Practices Act 1974* (the TPA), the enforcement of which is the responsibility of the Australian Competition and Consumer Commission (ACCC). However, Australia's federal structure, with a federal Australian Government and eight State and Territory governments, means that laws governing particular industries can differ across jurisdictions.

There are various intergovernmental agreements that attempt to unify competition policy across Australia. Central to this unification goal are the National Competition Policy (NCP) agreements, adopted unanimously by all Australian governments in April 1995. Specifically, under NCP, Australian governments have agreed to focus on reviewing laws and regulations to ensure that they do not unduly restrict markets and continue to serve the interests of the Australian community and businesses.

Reforms under NCP are subject to oversight by the National Competition Council (NCC), which makes an assessment as to governments' progress in implementing reforms, and makes formal recommendations to the Australian Treasurer regarding competition payments under the scheme.

II. Legislative Restrictions on Competition in Australia and Reform Objectives

Australian jurisdictions have generally restricted competition in markets for agricultural commodities in two principal ways. First, legislation may restrict entry by traders and processors. In some cases, only one entity (usually a grower-controlled marketing authority) can acquire produce from growers. Second, legislation may provide for direct controls on price or production of an agricultural commodity.

Australian governments have implemented a number of reforms through the NCP process, so as to extend the influence of competition.

III. Agricultural Marketing Reforms

Dairy Industry:

The opening up of the Australian dairy industry in 1983 to international competition following the implementation of the Closer Economic Relations (CER) agreement with New Zealand led to an adjustment process within the industry, with an increased emphasis on domestic competitiveness and gradually a focus on export markets and associated market expansion. This eventually led to certain sections of the industry seeking the removal of regulation.

The Australian dairy industry has undergone significant further reform over the past decade and since 1 July 2000 has been completely deregulated in relation to price support measures, supply and distribution.

Grains:

On 1 July 1999, statutory marketing of wheat ceased with the transfer of the single desk functions of the former Australian Wheat Board to a grower controlled company, AWBI. This company is responsible

for managing the wheat export 'single desk' arrangements through international wheat marketing and pooling services. AWBI is a wholly owned subsidiary of AWB Limited, which is listed on the Australian Stock Exchange (ASX). As such it operates under the *Australian Corporations Act 2001* and ASX listing rules.

As a consequence of these changes to Australia's wheat marketing arrangements, the regulatory and commercial functions of wheat marketing now operate separately. The Wheat Export Authority (WEA) exercises regulatory functions, while AWBI operates the commercial aspects of the wheat export 'single desk' arrangements.

There are also separate State and Territory regulations regarding the purchase of grains such as barley for bulk export. Other jurisdictions, such as the State of Victoria, have implemented reforms so that both export and domestic barley markets are now fully deregulated.

Other Reforms:

Other significant reforms that have been undertaken in the agriculture sector under the NCP process include:

- The review and reform of legislation regulating chicken growing services in several states;
- The review and reform of legislation in the States of Queensland and Tasmania regulating the marketing of eggs;
- The repeal of legislation regulating dried vine fruit production and export (Australian Government); and
- Review and reform of Queensland's S*ugar Industry Act 1991*.

These reforms have often been facilitated through industry restructuring support packages from the relevant jurisdiction.

IV. Competition Enforcement Issues in the Agricultural Sector

Mergers

Australia's merger law is set out in Section 50 of the TPA, which prohibits acquisitions which would have the effect, or be likely to have the effect, of substantially lessening competition in a substantial market in Australia, including in a region of Australia.

A number of mergers related to the agricultural industry have been considered, including recently some mergers in the grain sector. In Australia, the cost structure of this sector is such that although there are many growers, there is a high level of concentration in storage. When considering mergers in the grain sector, it is important to consider the potential for a large number of sellers to be faced with very few transport and storage options. Government regulation of exports also has the potential to affect downstream markets.

Box 9. Case study: The proposed merger of GrainCorp Ltd and Grainco Australia

In 2003, the ACCC considered and did not oppose the proposed merger of GrainCorp Ltd and Grainco Australia. This decision was based on the parties' submission that Grainco would not retain its interest in Australian Bulk Alliance, a joint venture which has interests including bulk grain storage and handling facilities.

In making its decision the ACCC considered whether the proposed acquisition would lead to a substantial lessening of competition in bulk grain storage and handling in eastern Australia and/or grain trading. GrainCorp is predominantly involved in the provision of bulk grain storage and handling services in the states of New South Wales and Victoria, whereas Grainco's operations are predominantly in Queensland. Both have grain trading operations that operate more broadly.

It was found that there was minimal overlap in the parties' storage and handling operations, emphasising the importance of geographic market definition in evaluating market power in agricultural markets.

With regard to trading, it was found that, post-merger, a number of traders would remain in the market such that the merging of the parties' trading operations was not likely to lead to a substantial lessening of competition.

As separate entities, both parties are currently vertically integrated in storage and handling, and trading. Consequently it was necessary for the ACCC to thoroughly investigate whether or not the merged entity could use information gained as a consequence of its operation of storage and handling facilities to advantage its own trading operations and/or disadvantage rivals in trading.

It was found that there are likely to be strong constraints on the merged entity's ability to use any information possessed by it in relation to these matters in an anti-competitive manner, such that the information possessed by the merged entity is of limited commercial advantage.

The ACCC therefore concluded that the proposed merger would not lead to a substantial lessening of competition in either bulk grain storage and handling, or grain trading in Australia.

Authorisation process

The TPA recognises that community wellbeing may not always be maximised by the operation of competitive markets. The authorisation process addresses this by allowing the ACCC to grant immunity on public benefit grounds for conduct that might otherwise breach the competition provisions of the TPA. In order to grant authorisation, the ACCC must be satisfied that the benefit to the public from the proposed conduct would outweigh any detriment to the public constituted by any lessening of competition. The onus is on the applicant to demonstrate that authorisation is justified.

The authorisation process is necessarily a thorough, rigorous process, given that immunity from the law is being contemplated. The ACCC is required to test applicants' claims through an open, transparent, public consultation process, which involves consulting with interested parties and those likely to be affected by the conduct including customers, competitors, suppliers, government bodies, consumer groups and trade organisations. This process will generally last several months.[1]

The ACCC generally imposes a time limit on the period of immunity when granting an authorisation. The time limit varies depending on the conduct the subject of the authorisation, the particular circumstances of the case, and any other relevant factors. The average time limits imposed are between 3 and 5 years. However, when an authorisation expires, parties are able to apply for re-authorisation of the same arrangements. Imposing time limits allows the ACCC to review whether immunity is still warranted in the light of any changed circumstances.

Public benefits and anti-competitive detriments

There are a number of circumstances in which authorisation has been granted to small businesses engaging in joint selling, most commonly referred to in Australia as collective bargaining.

The ACCC has considered a number of collective bargaining arrangements in recent years relating to the agricultural industry, in particular, the dairy, poultry and general commodity sectors. Each case raises its own issues, however there are features common to many collective bargaining applications, particularly in relation to the claimed public benefits.

In considering these applications, it is important to assess whether economic efficiency benefits arise, for example, ensuring small businesses are able to continue to provide competitive discipline in the market place. More generally, small business collective bargaining might:

- Reduce the resources needed to be devoted to the negotiation of the relevant contracts by both sides;
- Assist to counteract a reduction in price below competitive levels imposed by a monopsonist; and
- Allow small businesses input into the terms and conditions of their contract in situations where large businesses have typically imposed standard term contracts.

Similarly, many of the anti-competitive detriments flowing from proposed collective bargaining arrangements are likely to be similar in different industries purely as a result of the type of conduct. Some examples of anti-competitive detriment likely to arise are the setting of uniform terms and conditions (including price); collusion between competitors beyond that which is authorised; and the potential for parties to collectively boycott without authorisation.

However, it is generally the case that the anti-competitive effect of collective bargaining arrangements constituted by lost efficiencies, particularly in the case of smaller businesses, such as primary producers, collectively bargaining with a larger business, is likely to be limited where the following features are present:

- The current levels of competition are low;
- There is voluntary participation in the arrangements;
- There are restrictions on the coverage, composition and representation of bargaining groups; and
- There is no boycott activity.

It should be noted that authorising a collective bargaining application does not compel any party to participate in the negotiation process.

V. Issues in the Regulation/Deregulation Process

With the removal of many of the more restrictive statutory marketing arrangements, Australian farmers now face clearer market signals and are better able to move between farm enterprises and form closer linkages with their clients. With increased farmer awareness of client's needs, there has been a consequent shift in culture from producing commodities for bulk markets to tailoring products to meet the requirements of particular markets. Clients have also been able to seek out specialised producers without

being constrained by regulations associated with statutory marketing arrangements. Thus, supply chains are now characterised by end-product quality and transparent pricing signals that generate increasing efficiencies.

Associated with the removal of vesting and/or price setting arrangements, most farmers in the industries affected by reform are now facing the task of negotiating their own prices and conditions of sale rather than being subject to those prescribed by the Statutory Marketing Authorities. At the same time, price discovery mechanisms for agricultural products are declining in significance as direct contract negotiations replace traditional auction systems.

In a deregulated marketing environment, most primary producers are faced with the situation of doing business both as a buyer of inputs and supplier of outputs in highly concentrated markets.

The combination of deregulation, concentrated markets and lack of price discovery mechanisms has increased the exposure of primary producers to commercial price negotiations in which larger agribusiness companies and food retailers can leverage considerable market power in negotiating contractual arrangements for the supply of produce.

With some agricultural commodities, opportunities for spatial and temporal arbitrage improve the bargaining power of producers. The prevalence of derivatives instruments, including new products such as weather futures, allows farmers to price risk and make fully informed business decisions reflective of actual costs of production. However, risk management instruments are yet to evolve in many newly deregulated markets and perishability of products means that some farmers have limited opportunity to benefit from arbitrage opportunities.

However, the use of collective bargaining mechanisms and structural adjustment packages assist dairy producers previously reliant on price support and quota schemes to adjust to a deregulated environment, whilst the benefits of deregulation flow through to consumers.

For example, following deregulation of the dairy industry, farm numbers declined by 8.2 per cent (in 2000-01). More recently the rate of decline has levelled out at 3.6 per cent (in 2002-03), as compared to the long term average decline of around 2 per cent prior to deregulation. Meanwhile, following deregulation retail prices of milk declined by an average of around 12 cents/litre for all milk categories. This indicates that there has been some industry consolidation, allowing larger farming enterprises to make use of economies of scale. Overall, the reforms made in the agriculture sector are improving outcomes for consumers, and adding to the output growth potential of the Australian economy.

VI. The Future of the Reform Process

There remain a number of key areas where further reform may have a beneficial impact on the Australian economy. The Productivity Commission (the Commission) recently began an inquiry into the future of the NCP process. The terms of reference for this inquiry instruct the Commission to report on the impact of NCP and related reforms already implemented by Australian governments, as well as identifying areas where there may be opportunities for significant gains to the Australian economy from removing impediments to efficiency and enhancing competition, including through a possible further legislation review and reform programme, together with the scope and expected impact of these competition related reforms.

NOTES

1 A streamlined process for applications for immunity from the TPA for small businesses seeking to collectively bargain with a larger business is currently being developed. This proposed change to Australia's competition law regime stems from a recent review of the competition provisions of the TPA (the Dawson Review).

CHINESE TAIPEI

1. Description of the agricultural sector

The agricultural sector in Chinese Taipei is, by nature, on the scale of a small-scale peasant economy. While as far back as 1955 the agricultural sector contributed 29.5% of the GDP, this ratio has slowly and steadily gone down ever since. In 1965, the proportion of the GDP attributed to the agricultural sector was 23.63%, compared to12.7% in 1975, only 5.78% in 1985, 3.48% in 1995, and a mere 1.86% in 2002. The agricultural sector has, needless to say, regrettably become the most disadvantaged sector in Chinese Taipei's economy.

Meanwhile, however, the proportion of families engaged in agriculture has not decreased correspondingly. In 2001, in Chinese Taipei there were still 144,421 full-time farming families, of which no members were exclusively engaged in non-farming work, and 582,154 part-time farming families, of which one or more members were engaged in part-time or full-time non-farming work. Together there were 726,575 farming families in 2001, accounting for 10.71% of the total 6,782,168 households in Chinese Taipei. The proportion of the GDP contributed by this sector was only 1.95% in the same year.

Most agricultural products can be described as perishable, seasonal, heavy to transport, easily destroyed, and costly to maintain. These characteristics make both the supply and demand of relevant markets short in terms of elasticity, which often causes prices to rise and fall dramatically. Not in line with market demands, as a rule, farmers generally have limited production, disadvantaged market position, insufficient capital, and inadequate market information, making them highly vulnerable to the competitive agricultural market and mostly powerless in face of fast changing market conditions. In Chinese Taipei, the cobweb theory is very often quoted in explaining most farmers' difficulties in predicting where the market is heading and in which direction the market is headed.

Nevertheless, the agricultural sector is not exempted from the application of competition law. In addition to the provisions of the Fair Trade Act, the Agricultural Products Market Trading Act stipulates that the trading of agricultural products shall not dominate the market, manipulate prices, or deliberately change the quality or quantity of the products in an attempt to make undue profits." The existing legal framework does not provide a ground whatsoever for either a producer or distributor to engage in anti-competitive practices in this sector.

2. Buyer concentration (Monopsony buying)

In Chinese Taipei, neither have there been cases involving the misuse of buying power nor have merger applications been made or notifications given by large scale distributors or processors in the agricultural sector during the past years.

No regulation has been established to limit the entry of new retailers or to affect the ability and practicability of farmers' selling to non-local buyers. Although the Agricultural Products Market Trading Act requires that the first wholesale trade of agricultural products be conducted in local agricultural product wholesale markets, farmers can still sell their products directly for export, for processing, or for sale in retail markets. In practice, most farmers sell their products in their local wholesale market, while others choose such channels as direct sale, contract sale, or emerging e-commerce sale.

Price aberration

Price aberration might well result from the practices by cartels among distributors. The "perishable, seasonal, heavy to transport, easily destroyed, and costly to maintain" characteristics of agricultural products make storage and transportation extremely crucial, and at the same time, it is not feasible for individual farmers to invest in their own facilities and means. Distributors, therefore, play a key role in the preservation and delivery of agricultural products, and thus, have the advantage with regard to negotiating the terms of trading. On several occasions, the Fair Trade Commission has received complaints from farmer groups or the Council of Agriculture (the COA) alleging that distributors had been forming cartels to fix or push down farm-gate prices and later raise retail prices. This, of course, has forced the FTC to prosecute the price cartels involved.

Factors like transportation costs and elasticity of demand would have to be taken into account when reviewing the reasons for price aberrations, especially when product cost increases are very quickly reflected in retail prices, whereas respective product cost decreases are much more slowly reflected in retail prices. For example, in a good harvest year, the farm-gate prices of products could go down significantly, and sometimes even be even lower than production costs. Little difference in retail prices is found, however, since transportation costs which occupy a large share of the retail price are fixed. Besides this, the limited elasticity in demand means only a weak growth in consumption and very little incentive for distributors to increase their purchases and decrease retail prices.

3. Producer "joint-activity" organizations (co-operatives)

Considering the nature of the market and the disadvantaged position of individual farmers, it is neither economical nor realistic for the latter to trade individually in the national market. Thus, the Constitution requires that the state encourage and facilitate co-operatives. The Co-operative Act stipulates that co-operatives shall be organized in accordance with the equal and mutual assistance principle, and accordingly, be jointly operated by all members, thereby enabling them all to gain economic benefits and improve their livelihood. It also provides that the number of members and the total amount of share value of each of the co-operatives shall be changeable.

Farmers can also join their local farmer association so as to collaborate in devising measures to decrease product costs, promote production technology and product volume, and put themselves in an enhanced position to negotiate with intermediaries regarding trading terms, as well as to set up sales channels. In principle, farmer groups are organized regionally and on a voluntary basis.

To provide incentives for farmers to form or participate in farmer groups to jointly sell their products, and strengthen their position when negotiating with purchasers, the Agricultural Products Market Trading Act requires that the first wholesale trade of agricultural products be conducted in local agricultural product wholesale markets and that those markets give the products provided by farmer groups priority in handling. The wholesale trade of agricultural products in the markets could be in the form of auction, negotiation, or bid.

In addition to engaging in wholesale trade in local wholesale markets, farmers or farmer groups can still choose to sell their products directly for export, for processing, or for sale in retail markets. Where there is no local agricultural product wholesale market, farmers or farmer groups can also enter into agreement with retailers or retailer groups to ensure such a provision. For the most part, around half of all raw fruits and vegetables and more than 80% of pigs are traded through local agricultural product wholesale markets.

Intellectual property protection

Farmers in Chinese Taipei do have the right to request trademark protection for their products. According to the Trademark Act, any person that intends to exclusively use a mark to certify the characteristics, quality, precision, place of origin or other matters of another person's goods or services shall apply for certification mark registration.

To prevent a potential certification mark from being exclusively awarded to an individual against other legitimate persons' utilization, the Trademark Act prohibits any one who engages in business in connection with the goods or services from being certified as the applicant. Only a legal person, an organization, or a government agency which is capable of certifying another person's goods or services be eligible to apply for certification mark registration. In general, a certification mark is an effective way to provide consumers with relevant information, prevent other providers from infringing upon the holder's right, thus encouraging competition among competitors.

A certification mark plays a different role from that of a trademark. A certification mark distinguishes the products' place of origin, unlike a trademark which identifies an individual producer's products. The certification mark and trademark do not exclude or contradict each other and do not produce any anti-competitive effect. On the contrary, the two protection measures facilitate and promote competition among producers within the same geographic origin, and produce effects similar to those of intra-brand competition.

4. Competition Advocacy

Due to the special social, political and economic characteristics of the agricultural sector, the government commonly deploys regulations, subsidies, import relief, etc. to stabilize the supply and price of certain agricultural products which are essential in people's daily lives. The allocation of resources to the agricultural sector is only partially decided by the free market. Implementation of certain agricultural laws and regulations may, to a certain extent, restrict market competition.

The FTC is always keen to play an active role in promoting competition advocacy. If any matter stipulated in the Fair Trade Act concerns the authorities of other ministries, the FTC may consult with such other ministries in this regard. Given that jurisdiction conflicts may arise, these provisions provide channels for the FTC to consult with other government agencies and to find solutions that meet both competition and regulatory goals.

In the agricultural sector-- for example, in 2003, the COA sought the FTC's advice while reviewing the Agricultural Products Market Trading Act. The FTC, among others, was of the opinion that provisions that require that agricultural products jointly traded by farmer groups be given handling priority in agricultural product wholesale markets would likely cause competition concerns.

As most agricultural products are perishable and demand is limited, those given priority with regard to trade would have a significant impact on the value of other products in competition. For this reason, wholesale markets shall let market rules dictate. Factors like price and quality rather than the membership of farmer groups shall direct trade. Such provisions of the Agricultural Products Market Trading Act would have discriminated against farmers not joining farmer groups and would produce unfair competition.

Communications

Farmers are in a disadvantaged position in the agricultural sector, with their primary concerns including price stability and price aberrations caused by practices of some distributors, among others. In this regard, actively enforcing the competition law is deemed an effective way to meet farmers' concerns.

To illustrate this, in several cases brought to the FTC by farmers or the COA during the past few years, the FTC has successfully discovered and effectively deterred pricing cartels formed by distributors.

On other occasions, an unbalance between supply and demand, for instance, has not allowed the market to maintain stability and predictability, and this has posed great difficulties for farmers. The garlic market in 1995 exemplifies this; because of a serious short supply, the retail price of garlic wound up at NT$ 400 per kilo, while the farm-gate price was only half of that. Later on, the importation and the seasonal supply not only met the demand but also caused the price to drop. In 1996, the price fell to around NT$ 30 per kilo, less than one-tenth of the 1995 price.

In that garlic is a highly seasonal product and is difficult to preserve for more than half a year, the imbalance between supply and demand quickly led to market disorder, thus harming the interests of both farmers and consumers. In such cases, the FTC and the COA will continue to jointly hold public hearings for farmers to hear their voices, understand market mechanisms, and provide the necessary consultations so as to solve the farmers' concerns.

GERMANY

1 Buyer Concentration

1.1 Legal framework

In Germany the prevention and restriction of buying power is guaranteed by merger control under Section 35 seqq. of the Act against Restraints of Competition (ARC), abuse control under Art. 82 of the EC Treaty and Sections 19, 20 of the ARC as well as the ban on cartels under Art. 81 of the EC Treaty and Section 1 of the ARC.

One important feature which distinguishes German competition law practice from that in other countries is that demand markets are generally dealt with as a complete analogy to supply markets (so-called "mirror image theory"). The reason for this lies in the competition concept on which the ARC is based. According to the established practice of the Federal Supreme Court the objective of the ARC is the freedom of competition, with the result that the protection of competition is pursued as an institution. Whereas in other legal systems restraints of competition are assessed in some cases exclusively for their effect on customers or consumers, in German competition law practice the restriction of entrepreneurial freedom of action is the predominant factor. By applying competition law norms to demand markets according to the mirror image theory the ARC provides a relatively high level of protection for preventing and restricting buying power.

Under merger control the Bundeskartellamt basically also examines whether the merger would have created or strengthened a dominant position in buying markets (Section 36 (1) of the ARC). Even if buying markets often play only a secondary role in mergers in other sectors, demand-side aspects have in practice gained great importance especially in mergers in the so-called rural trade, food industry and food retail trade (see following examples from the meat-processing industry and rural trade).

Art. 82 of the EC Treaty and Sections 19 and 20 of the ARC standardize the prohibition of the abuse of dominant positions or market power. The level of protection provided by the ARC in some cases well exceeds the European minimum level in Art. 82 of the EC Treaty laid down in EC Regulation 1/2003 passed by the Council on 16.12.2002 (Regulation 1/03). In particular Section 20 (2) of the ARC extends the target group falling under the prohibitions of unfair hindrance and discrimination of Section 20 (1) of the ARC to companies with powerful market positions below the dominance threshold. Section 19 (2) and (4) and Section 20 (2) of the ARC make it clear that the prohibitions of abuse apply equally to the supply and demand side.

Finally the prohibition of anticompetitive agreements under Art. 81 of the EC Treaty and Section 1 of the ARC also apply to buying markets. According to the jurisdiction on Section 1 of the ARC purchasing cooperations are prohibited if they have an appreciable effect on buying markets. In its practice with Art. 81 of the EC Treaty the European Commission is more lenient with purchasing cooperations whereby it focuses on the effects of the cooperation on the range of goods which its members provide.

In Germany a strong concentration of indirect buyers of agricultural products can be observed. The ten leading companies in the food retail sector together now make up 80 per cent of the domestic market.

1.2 Selected cases

„Ostfleisch“ (“East meat”)

In August 1997 the Bundeskartellamt prohibited A. Moksel AG (Moksel) and Südfleisch GmbH (Südfleisch) from bringing their east German slaughtering plants into the planned joint venture Ost-Fleisch GmbH.

With annual turnovers of approx. 1.8 billion Euro (Moksel) and approx. 1.4 billion Euro (Südfleisch) Moksel and Südfleisch were the largest slaughtering companies in Germany. The traditional slaughtering houses of both companies were in southern Germany (Baden-Württemberg and Bavaria). They operated other operation plants in eastern Germany. These were to be combined within the joint venture Ost-Fleisch. In its prohibition the Bundeskartellamt defined various supply and demand markets. On the demand side (purchase of animals for slaughter, so-called “acquisition markets”) four markets came into question: Product-wise cattle were to be separated from pigs and the regional definition gave two separate markets, one in south Germany and another in south-east Germany. On the supply side different slaughtering product markets were defined at a national level. In the case of the planned formation of Ost-Fleisch it was to be assumed that Moksel and Südfleisch would coordinate their market behaviour on all directly and indirectly affected markets (so-called “group effect”.) The Bundeskartellamt based its prohibition on merger control regulations as well as on the prohibition of cartels (Section 1 ARC). The formation of Ost-Fleisch would have led to an appreciable coordination of market behaviour both on national slaughtering product markets and regional markets for the acquisition of animals for slaughter. Furthermore the coordination of Moksel and Südfleisch would have led to a dominant position on the demand markets for slaughter cattle and slaughter pigs in south Germany (their joint share of these markets were 58 per cent and 31 per cent respectively) and for this reason was to be prohibited under merger control. The parties concerned filed an appeal against this decision. However the Berlin Court of Appeals and the Federal Supreme Court confirmed the prohibition under Section 1 of the ARC so that an assessment of the case under merger control did not have to be decided in the last instance.

“BayWa-WLZ“

In April 2002 the Bundeskartellamt cleared the merger between BayWa AG (BayWa) and WLZ Raiffeisen AG (WLZ) only subject to conditions.

Both company groups from the so-called rural trade originate from the cooperative movement and in 2000 achieved turnovers at a national level of approx. 3.5 billion Euro (BayWa) and 0.7 billion Euro (WLZ). Due to its cooperative self-restraint BayWa was originally active only in Bavaria and WLZ only in Baden-Württemberg. As so-called central cooperatives they took on the function of wholesale for a number of smaller local cooperatives (so-called primary cooperatives). The structure has significantly changed in recent years because the central cooperatives have taken over many primary cooperatives and non-cooperative traders. Therefore BayWa/WLZ meanwhile also operate as retailers. On the demand side they buy cereal, maize, oil seeds and other field crops from farmers or primary cooperatives (so-called acquisition markets). On the supply side they sell seeds, fertilizer and pesticides, feedstuffs, tractors, building materials and mineral oil products to farmers or primary cooperatives.

On the demand side the Bundeskartellamt defined a number of local acquisition markets for grain and oil seeds on account of the high significance of transport costs. BayWa held dominant positions in the Bavarian acquisition markets and WLZ in the Baden-Württemberg acquisition markets. The dominant positions of BayWa and WLZ would have been strengthened by the merger because, inter alia, WLZ’s financial power increased and the current competition between BayWa and WLZ in the areas of activity which bordered on and in part overlapped those of the other and potential competition between BayWa and

WLZ, was eliminated. The competitive concerns were allayed by imposing obligations to divest. After the merger BayWa/WLZ had to sell between 30 and 35 trading sites to a third company.

„Metro-Allkauf“

In June 1998, after approval by the Bundeskartellamt, the Metro group (Metro) took over the allkauf group (allkauf). Metro is one of the largest trading enterprises in Europe. In 1997 the companies achieved a turnover of approx. 11 billion Euros (Metro) and 1.5 billion Euros (allkauf) in the German food trade. When comparing supplier conditions Metro discovered that suppliers who previously supplied both companies had in some cases agreed on more favourable conditions either with Metro or with Allkauf. This gave Metro grounds to approach these suppliers and to demand an adjustment of terms to the more favourable level for buyers backdated to January 1998. In addition to other companies, 20 companies from the food trade agreed to this demand and paid the difference to the end of 1998. In February 1999 the Bundeskartellamt prohibited Metro, inter alia, under Section 20 (2) and (3) of the ARC, from obliging the 20 companies to adjust their supplier conditions and to pay the respective compensatory amounts. The prohibition decision in this point was reversed in November 2000 by the Berlin Court of Appeals and in September 2002 by the Federal Supreme Court because the Bundeskartellamt should not have dealt with the payments already made in the past by way of a prohibition decision but in fine proceedings. However the Federal Supreme Court decided that the demand of a powerful buyer for a retrospective adjustment of conditions was to be judged as a forbidden inducement to grant it preferential terms so far as this was not a civil law claim and the buyer could not prove that this behaviour was objectively justified.

2 Producer “Joint-Activity” Organizations

2.1 Legal framework

The production of agricultural goods enjoys exemption from the prohibition of anit-competitive horizontal and vertical agreements, both under EC law, which takes precedence, and under the ARC. Merger control and abuse control, however, find unlimited application.

Under Art. 36 of the EC Treaty the production of agricultural goods and trade with these products is only subject to EC competition law provisions where and in so far as decided by the European Council. Such a decision was laid down in the Regulation 26/62 of 4 April 1962 which provides for an exemption area for the agricultural sector in Art.2. According to paragraph 1 (1) of the regulation, Art. 81 (1) of the EC Treaty does not apply to agreements, decisions and practices which concern the production of the products listed in Annex 1 of the EC Treaty where the agreements, decisions and practices form an integral part of a national market organisation or are necessary for the attainment of the objectives set out in Art. 33 of the Treaty (i.e.: to increase agricultural productivity, stabilise markets, assure the availability of supplies, ensure the appropriateness of consumer prices and to ensure a fair standard of living for the agricultural community). In addition, Art. 2 (1) sentence 2 of the Regulation 26/62 provides that Art. 81 (1) of the EC Treaty does not apply to certain agreements, decisions and practices of agricultural co-operatives ("co-operative privilege"). However, this only applies where the respective agreements, decisions and practices do not contain price agreements and where competition is not excluded or the objectives of Art. 33 of the Treaty are not jeopardised.

In addition, further special competition regulations are laid down in the Common Market Regulations that have been created as an extensive body of European agricultural market regulations covering almost all agricultural products; these special regulations go beyond and take precedence over the provisions of the Regulation 26/62, in particular with regard to agricultural market regulations on fresh fruits and vegetables as well as on fish products.

A provision similar to the exemption area under European law was already incorporated in the first version of German competition law in 1958 and has been only slightly amended over the years. In the 6th amendment to the ARC the exemption area was aligned with European law. Under Section 28 (1) ARC the ban on cartels under Section 1 ARC does not apply to agreements between agricultural producers and their associations as well as to certain agreements between associations of agricultural producer associations unless they contain horizontal resale price maintenance agreements and unless competition is thereby excluded. In addition, under Section 28 (2) ARC the prohibition of vertical agreements (under Section 14 of the ARC) does not apply to agreements on the sorting, labelling or packaging of agricultural products. For a definition of the agricultural products concerned Section 28 (3) ARC refers to Annex 1 of the EC Treaty. Further exemptions from the prohibition of cartels and of vertical agreements are regulated outside the ARC in special provisions.

At first sight, the practical relevance of the exemption area under Art. 2 of Regulation 26/62 and under Section 28 ARC seems rather limited. Because the supply structure on agricultural markets is often fragmented (there are 390.000 farms in Germany) in many cases anti-competitive agreements do not violate Art. 81 (1) of the EC Treaty or Section 1 of the ARC because they are not appreciable. In addition the prohibition of price agreements and of excluding competition restricts the application area of this sector privilege. Just how limited the area of application is can be seen from the fact that Section 28 of the ARC only applies to co-operatives of producers (primary co-operatives) and associations thereof (central co-operatives) if their members are exclusively agricultural producers and co-operatives of agricultural producers. For example, with regard to the sale of milk and dairy products, the privilege only applies to agreements between dairies that are members of co-operatives; agreements between co-operative dairies and "private" dairies, i.e. dairies which are not organised in a co-operative, are not privileged. In addition, the exemption area is further limited by the full applicability of merger control and abuse control.

However, there have been cases where the exemption area of Section 28 of the ARC has facilitated joint sales of agricultural products by powerful unions of producer associations. The most recent example is described below; it concerned a distribution cartel for sugar between several large sugar factories in Northern Germany. Furthermore, co-operatives, such as companies in the dairy co-operative sector, are often discussing the setting up of joint sales agencies for milk and dairy products to improve their position in negotiations with the food retail trade by strengthening their power of supply. Under certain conditions the exemption area of Section 28 ARC offers a suitable competition law basis for such projects.

2.2 Justification of exemption area

So far German and European legislators have considered the exemption area of Section 28 of the ARC necessary due to the length of the production process, the uncertainty of production success, the fragmented supply structure and the lack of flexible production adaptation to price signals, as well as for distribution policy reasons.

In the meantime the Federal Government considers distribution policies the most important factor. With the exemption under Section 28 of the ARC the government intends to enable farmers and producer associations to build up counterbalancing market power. Indirectly, this can lead to a price increase for farmers who supply raw materials because it limits the buying power of trade. Although the 6th amendment to the ARC abolished several other exemption areas the legislator adhered to Section 28 of the ARC. The current 7th amendment also intends to keep this exemption area.

2.3 Selected cases

"Beet sugar"

In March 1999 the Bundeskartellamt prohibited a distribution cartel in the sugar production industry between Nordzucker AG (Nordzucker) and Union-Zucker Südhannover GmbH (Union-Zucker). The distribution cartel was organised as a joint venture in which Nordzucker held app. 87 per cent of the shares, Union-Zucker 9 per cent and a few smaller sugar producers the rest. The sugar producers opted for a joint distribution of their products to pool their supply and to "improve market opportunities". At that time Nordzucker ranked four among sugar producers in the European Union with a turnover of app. Euro 1 billion.[1] The indirect shareholders of Nordzucker and Union-Zucker were beet sugar farmers from the respective area of activity; conversely, the beet sugar suppliers of Nordzucker and Union-Zucker were usually also (indirect) shareholders. The Bundeskartellamt identified three separate markets which, not least due to the significance of transport costs, were confined to the area of activity of the distribution cartel. On these markets the distribution cartel held market shares of more than 80 per cent in the case of industrial sugar, more than 92 per cent in the case of household sugar and app. 95 per cent in the case of liquid sugar. In the Bundeskartellamt's view the conditions for an exemption under Regulation 26/62 and under Section 28 of the ARC were not given because the distribution cartel excluded competition which was (still) possible under the European Sugar Market Regulation. The Bundeskartellamt held that competition was already excluded by the dominant position of the distribution cartel. Therefore, the joint distribution was seen as an illegal cartel under Art. 81 (1) of the EC-Treaty and under Section 1 of the ARC.

The Berlin Court of Appeals reversed the prohibition of the distribution cartel in October 2001. In the Court of Appeal's view cross-border trade was not appreciably affected by the cartel between Nordzucker and Union-Zucker and therefore Art. 81 (1) of the EC-Treaty did not apply. The Court held that although the agreements constituted a cartel within the meaning of Section 1 of the ARC the cartel was subject to the exemption area under Section 28 of the ARC. Nordzucker and Union-Zucker were both producer associations and could therefore benefit from the so-called cooperative privilege. According to the Court, the demand that competition not be excluded allowed for a higher level of concentration than the criterion of market dominance. The Court continued that competition law intervention in markets as highly regulated as the sugar market could possibly result in only insignificant support of residual competition while at the same time considerably affecting the enterprises concerned.

Plant breeder cartel "Kombiniertes System Saatgut" ("combined system seeds")

Following a complaint the Bundeskartellamt conducted abuse proceedings from July 2000 to April 2002 against the *Bundesverband Deutscher Pflanzenzüchter e.V*. (BDP, Federal Association of German Plant Breeders) and the *Saatgut-Treuhandverwaltungs-GmbH* (STV, fiduciary seeds management company). In this context the authority achieved that numerous improvements could be realized in the practice of the so-called *Kombiniertes System Saatgut* (KSS, "combined seeds system").

As a rule the original breeder or discoverer of a plant variety is entitled to so-called plant variety protection under the *Sortenschutzgesetz* (SortSchG, plant variety protection law). However, this rule only applies to a limited extent to the so-called *Nachbau*, (subsequent reproduction), i.e. the use of harvested material grown by farmers on their holdings for subsequent reproduction by the farmers themselves. A farmer who makes use of the possibility of subsequent reproduction is obliged to pay the holder of the variety protection right an adequate fee in accordance with Section 10a (3) of the SortSchG. In order to facilitate these payments Section 10a (4) SortSchG restricts the ban on cartels provided for in Section 1 of the ARC (Act against Restraints of Competition): Agreements between holders of variety protection rights and farmers on adequate fees can be based on agreements between their respective professional

associations. Similar to the provisions in Section 28 ARC or Art. 2 of Regulation 26/62 these agreements may not exclude competition in the seeds sector.

In 1996 the *Deutscher Bauernverband e.V.* (DBV, German Farmers' Association) and the *Bundesverband deutscher Pflanzenzüchter e.V.* (BDP) agreed on the KSS system which regulates the procedure and the amount of the fee for subsequent reproduction. The STV was charged with carrying out and organising the KSS system. At the time of the investigations all 68 German plant breeders participated in the KSS or the STV. Apart from this central accounting system farmers can also enter into individual agreements with the respective plant breeders on the fee for subsequent reproduction under Section 10a SortSchG (so-called "individual procedure"). According to the Bundeskartellamt's investigations, however, all 68 holders of variety property rights had commissioned the STV to safeguard their rights, even if individual farmers wished to use an individual procedure. The STV charged a uniform rate, which exceeded the KSS rates, as subsequent reproduction fee which was meant to be agreed upon "individually". Farmers were thus practically prevented from using the individual procedure and price competition was excluded in violation of Section 10a (4) SortSchG and Section 28 (1) ARC.

The abuse proceedings could be terminated after BDP and STV had committed themselves to change this practice. Agreement on these fees and their payment can now take place in four different ways:

- A farmer can enter into an individual agreement on subsequent reproduction directly with the plant breeder and pay the fee to him.

- A farmer can enter into an individual agreement with the STV as the plant breeders' representative. However, the amount of the fee will not be fixed by the STV, but by the plant breeder.

- The farmer can be assessed under the KSS system.

- If neither an assessment nor an individual agreement can be achieved, the plant breeder has a statutory claim to payment of a reproduction fee by the farmer.

3 Competition Advocacy

In Germany, competition advocacy is entrusted to the Bundeskartellamt and the independent Monopolies Commission. Under section 42 of the ARC, every second year the Monopolies Commission compiles a report in which it comments on antitrust policy issues. Additionally it delivers further expert opinions both at the request of the Federal Government and at its own discretion. The Monopolies Commission has repeatedly argued in favour of abolishing sector-specific exemptions from competition law and in favour of a comprehensive market liberalisation. The last time the Monopolies Commission argued in favour of reducing competition law exemption areas was in March 2004 in its report on the current amendment to the ARC.

Contrary to the majority of competition authorities in OECD countries the Bundeskartellamt does not have any formalised rights or duties to comment on the general legislative process. However, in individual cases the Federal Ministry of Economics and Labour now and then informally asks the Bundeskartellamt to comment on competition law aspects of legislative processes outside competition law. In its public relations work the Bundeskartellamt regularly comments on general competition issues and has, contrary to the position of the Federal Government as described above but in line with the Monopolies Commission, supported a reduction of the several competition law exemption areas. The last time it did this was in the discussion paper on the meeting of the Working Group on Competition Law in September 2003. The Bundeskartellamt doubts the need for an exemption area for the agricultural sector under Section 28 and

Regulation 26/62 in particular because it sees only limited practical relevance in it. In the discussion led by the Working Group on Competition Law during the conference in September 2003 the majority of the academics present considered it advisable to take sector-specific particularities into consideration when applying the law yet at the same time clearly spoke out against maintaining or creating "per se" exemption areas.

NOTES

1 After further mergers (inter alia with Union-Zucker) Nordzucker now regards itself as Europe's second largest sugar producer.

HUNGARY

The regulatory background of the Hungarian agricultural sector is adjusted to the Common Agricultural Policy of the European Union. The regulatory background determines the whole life cycle of a certain product from the production of the basic product till the sale of the final product to the consumer. Under the CAP the elements of the regulation relating to certain products are the same in all the member states of the EU since 1 May 2004.

If the regulation would go against Article 11 of the Competition Act prohibiting the restriction of competition than it is the task of the Ministry to ensure that the advantages of the regulation overwhelmes the disadvantages of it.

In Hungary the possibilities of market actors to determine their own business strategies is restricted. The regulatory background establishes the conditions for producing and processing in the future.

1. Buyer side concentration

The regulatory background of products has not yet affected the structure of competition. Monopsony in the processing industry has not yet appeared due to the small size and great number of market actors. Mergers are often motivated by the desire to increase economies of scope. Although it is unlikely that in the present structure such economies are not available anymore, in the case of raw materials and processing concentrations do not seem to be significantly influenced by economies of scope.

Relevant geographic markets were mainly defined as Hungary in previous cases having regard beside other factors to the actually short distances in transportation. In certain cases like the allegedly abusive behaviour of sugar factories in face of sugar beet producers even smaller than national geographic markets were to be established.

Sugar

In the case of the sugar sector concentration is higher than in other sectors of the agricultural products. However due to the sugar quota established for Hungary regulations determine the quantity of sugar beet to be processed. Processors are all aware of the fact that profitrability is closely connected to the shares acquired in the national quota as income can be effectuated on the amounts covered by the quota. As if the quantity produced does not reach the quota authorised the European Commission may reduce it, all processors have to secure the amount of sugar beet to be produced to cover its needs even in the case of extreme weather conditions. This means that sugar beet producers shall guarantee the amount necessary for the production of sugar shared by the processor in the quota.

The sugar market is oligopol both at the level of purchasing of sugar beet and at the level of processing. It is expected that the use of capacities would become more effective in order to increase competitivity and this may result in increasing concentration in the near future.

Cereals

There are several hundreds of undertakings dealing with trade and production. Depending on the actual amount harvested the market is charecterised with demand or supply. Except the last year in the last

decade the market was characterised with supply. The establishment of monopoly or monopsony in this sector is unlikely.

The regulation establishes an interventional buying-up price and encourages to selling on the free market. The intervention buying-up price contains no profit margin and its only aim is to remedy market disturbances.

The milling industry is characterised with overcapacities so the establishment of monopoly or monopsony in this sector is unlikely at this stage.

Meat

On the Hungarian meat market the number of producers and processors are both above 100. In the case of pig meat, on the most significant segment of the market, the market share of the greatest market actor is below 10%. It is expected that due to the new safety standards the number of competitors would reduce. No sanctions were imposed for the abuse of buyer power in cases concerning this market, and in the last few years not even the issue of such an abuse has arisen.

Milk

This market is severily regulated. The number of producers and processors is high and the latter level has high unused capacities. This market, like in the EU is characterised with oversupply.

Guiding prices established by the Government influenced both the meat and the milk market to a great extent. However such prices are not established anymore.

2. Associations of producers

The importance of producers associations increases since the accession of Hungary to the EU as subventions are not available for those who own only smaller areas and quotas.

However in the case of milk producers only one association dealing with common purchase and supply was established by quota owners. This association represents the 10% of the overall milk production. There are no experiences on the succesfulness of its functioning yet.

Sugar beet producers formed two associations last year.

On the market of vegetables and fruit producers there are some associations dealing with purchase, packaging and supply of products.

Due to the small number and the very recent establishment of these associations we can not provide information on the effectiveness.

The self-organisation of agricultural producers is advisable from a competition policy point of view as it establishes a vertical integration that secures a profit oriented supply activity as well which is usually the weakest point of farmers. Due to the grat number of market participants it is unlikely that a monopoly would be created in the near futura.

There were no appeals for individual exemptions for joint selling activities and we do not know whether the block exemption regulation relating to vertical restrictions of copetition were used at the establishment of certain associations. The Competition Act has a general effect in all sectors but special rules on agricultural products may revoke its effect.

3. Competition advocacy

The GVH has the possibility to opine draft legislation of the Parliament or the Ministry concerning competition on the market of agricultural products. The GVH has signaled its concerns regarding the existing regulatory background or the new legislation to be adopted. These opinions were not always taken into account by the Ministry.

There are no methodologies for the calculation of damages. However at the imposition of fines the Competition Council takes into consideration the amount of damages caused if appropriate data is available.

The GVH may initiate proceedings on complaints and may start investigations ex officio as well. It has efficient tools to defend consumers' interest against abusive and anticompetitive practices. However if disturbances are caused by inappropriate regulations or if the allegedly unfair behaviour is to be takled by the intervention of the sectoral regulator, the assets of the GVH prove to be inefficient. As it was mentioned before its competition advocacy activity is not always welcomed by the Ministry.

IRELAND

1. Introduction

In this submission, we discuss the experience of the Competition Authority ("The Authority") in matters concerning agricultural markets and policy generally and, where applicable, particular examples of monopsony buying and joint selling in agricultural goods and services.

2. Cartels

Our experience of cartels cases concerning agriculture focus on two particular sets of cartel cases. First, we have encountered several matters involving proposed concerted action to reduce capacity or output within agricultural markets. We have initiated litigation challenging proposed consolidation in beef slaughtering houses, and we are investigating similar proposals in two other agricultural markets. Given that one matter is currently *sub judice* and two others are the subject of non-public investigations, we are limited in what we can say. However, a picture of these matters can be gleamed from the public record in the beef slaughtering case.

The Beef Industry Development Society Ltd. ("BIDS")

BIDS was formed *with the assistance of a government sponsored development entity* to plan and implement a scheme to reduce capacity within the Irish beef slaughtering industry.

Previously a firm of business consultants, McKinsey & Company, had been retained by interested parties to study *inter alia* means to increase the profitability of the industry. The consultants proposed both a system of cartelisation and the reduction of industry capacity accompanied by the imposition of entry barriers. Although BIDS eschewed cartelisation, it set about planning for consolidation. Specifically it adopted a scheme under which "stayers" would buy-out the interests of "leavers." In return for the buy-out, "leavers" would exit the industry, decommission their facilities such that they could not be used again to slaughter and process beef, impose a covenant on their real estate precluding its use for the same purpose and themselves covenant not to re-enter the business for a period of years. The buy-out would be financed by a levy to be paid "stayers" on each animal slaughtered. The levy was fixed at €2 per head for the traditional kill and €11 per head above that level.

The Authority brought suit to enjoin the implementation of the proposal and to dissolve BIDS. One cannot say how the case will be argued at trial. Suffice it to say that the Authority believes that the proposal violates Section 4(1) of the Competition Act, 2002 (which very closely resembles Article 81(1) of the Treaty of Rome) and that defendants cannot show countervailing efficiencies under Section 4(5) of the Act (which closely resembles Article 81(3) of the Treaty). It is anticipated that the defendants will argue that the increased throughput of the remaining slaughtering houses will make them more efficient and by reducing the average cost per animal.

There are at least two other similar proposals affecting other Irish agricultural markets. Their sponsors doubtless will watch these proceedings unfold with interest. While this case and the related matters do not present a stark conflict between agricultural policy and competition law, the various proposals have received support from elements within the government.

Second, the Authority has encountered matters where agricultural interests have engaged in concerted conduct to thwart sales by unwanted competitors, especially imports. Again these matters have not posed a stark conflict between government agricultural policy and competition law. Unlike the BIDS matter, there is no evidence of government complicity or support for the conduct at issue.

The Authority has brought two cases in this area. Previously the Authority secured an injunction enjoining farmers from blockading milk imports. Most recently it has challenged efforts by farmers who participated in the blockade of a harbour in an effort to block the importation of grain. The court found the defendants guilty. The case is currently on appeal and will be tried *de novo* in a higher court. Accordingly, we cannot say much about the case at this point.

Although the parties in the grain blockade suggested via media comments, etc., that these efforts were in the nature of political protests over agricultural policy, the conduct at issue when far beyond a peaceful protest designed to elicit public support for some favourable programme. In both cases farmers undertook action to physically block the sellers of unwanted competitive products from going to market. The Irish courts have not adopted a law similar to the United States Noerr Pennington Doctrine, which insulates some concerted action from antitrust liability where it is designed to petition government. But even if it had done so, the physical blockades challenged in two Authority cases would not benefit from such a Doctrine as they were much more than peaceful protests designed to influence agricultural policy.

The Authority has also looked at the actions of agricultural representative bodies in this context. An example of this is the Authority's Court case against the Irish Veterinary Union ("IVU") taken in 1988. The case was settled following the IVU's undertakings to the Court that it would not recommend minimum fees to be charged by its members, and that it would inform its members that recommended fee arrangements were contrary to Irish competition law.

3. Monopolies

We have examined two broad categories of behaviour in the agricultural sector which fall within the remit of our monopolies activities:

- *first*, instances whereby producers have chosen to counter monopsony power by entering into joint contract negotiations through their representative association, the Irish Farmers Association ("IFA"), with the dominant purchaser and

- *second*, instances of alleged abuse by co-operatives of their position as the purchaser of their members product. Many of the issues examined indicate that anti-competitive behaviour may be facilitated by the manner in which the sector is regulated in the State. There are however relatively few areas where the rules prove to be in conflict with the application of competition law. Below, the two categories described above by reference to the issues of negotiation of the sugar beet contract and milk quota transfer respectively are set out.

Irish Sugar case

In the Irish Sugar case, the Authority self-initiated an investigation in November 2001 when sugar beet producers, dissatisfied with the price offered for sugar beet by Irish Sugar,[1] refused to supply sugar beet to Irish Sugar. The boycott was backed by the IFA.[2] Irish Sugar was forced to close its plants in Carlow and Mallow for a short period. The IFA and Irish Sugar sought to but could not resolve the dispute. On the 30th November, 2001 the Tánaiste, our deputy Prime Minister, and the Minister for Agriculture brokered a resolution/agreement between the IFA and Irish Sugar.[3] These events received considerable media attention.

This Agreement ("the Agreement") fixed the price paid by Irish Sugar to the sugar beet producers for the 2000 to 2004 seasons and provided the sugar beet producers would not take industrial action against Irish Sugar until 2005. The Standard Contract for the 2002/2003 Season between Irish Sugar and the individual sugar beet producers reflects the fixed price terms of the Agreement. The Authority took the view that this agreement constituted a *per se* breach of Section 4(1) of the Competition Act, 2002.

European Community Legislation

It would appear however that the behaviour described above is expressly provided for by the European Community ("EC") sugar policy is based on rules and regulations established under the EC Common Market Organisation (CMO) of sugar, established in 1968.

Recital 1 of the Regulation specifically recognises that a common organisation of the sugar market is necessary for the common agricultural policy to work properly. Moreover, Recital 2 states that the stabilisation of the sugar market is one of the aims of the Regulation. It therefore appears likely that an agreement within the trade within the meaning of the Regulation[4] – despite the fact that the agreement results in fixing the price of beet to be paid to producers – is not subject to Article 81(1) of the EU Treaty and falls outside the application of domestic law.

Insofar as Irish law is concerned, this Regulation does not constitute an exemption from the application of Irish competition law as such. Nevertheless, it is highly unlikely that an Irish court would hold that an agreement which falls within the scope of the Regulation constitutes an infringement of S.4(1).

Moreover, were the Court to reach such a conclusion, it cannot be excluded that this would constitute a breach by the State of its obligations under Article 10 of the EC Treaty. Article 10, in particular the final sentence thereof provides that Member States are required to abstain from any measure which could jeopardise the attainment of the Treaty's objectives. For the Common Agricultural Policy to function effectively, the sugar market, as a component of the CAP must be commonly organised. Agreements entered into by entities in the sugar market which, if captured by the Regulation, may constitute of a breach of the Member State's Article 10 obligation.

Milk Quota Transfer

The division has examined a number of instances in which it has been alleged that co-operatives have adopted a practice restricting transfer of producers between milk purchasers. The milk quota management system currently in place in the State, which covers both liquid and manufacturing milk, was introduced in Ireland with effect from the 1st April 2000 under the European Communities (Milk Quota) Regulations, 2000.[5]

While the economic rationale and ultimate effect of such behaviour is unclear, it appears that the milk quota transfer system provides a platform for individual co-ops to restrict the movement of producers to or among its competitors.

Other Examples

We have looked at a number of other areas where the regulatory regime in the State may have created conditions that conflict with the general principles of competitive markets, e.g., registration of cattle and artificial insemination. In both cases the Authority has discontinued its examination of the issues from an enforcement perspective:

Registration of Cattle

The Department of Agriculture has established a regime whereby there is a single, monopoly, herdbook for each breed of cattle which resides with the representative breed organisation. A number of occasions have arisen where rival organisations have been established. As problems arise for the members of these rival organisations with respect to failure to secure registration of their cattle on the herdbook the Department seeks to resolve these by encouraging the organisations to (re)merge. The division is not aware of any situation whereby the Department has authorised more than one organisation for the purposes of registration.

Artificial Insemination of Cattle

In the case of the artificial insemination of cattle, the State has only recently moved from a regime whereby the Minister for Agriculture licensed/awarded regional monopolies to seven institutions for the provision of artificial insemination services. It would appear that even with the abolition of these regional monopolies the incumbents focus their activities on their traditional monopoly regions. There have been a number of new entrants into this market contributing to a more competitive environment. However, this positive step should be viewed in light of recent moves toward consolidation in the market.

This market has a second restrictive feature worth noting whereby farmers licensed by the Department to service their own cattle are prevented from providing service outside the farm gate. While there may be some objective, e.g., animal health reasons for this, such a measure may not be proportional to achieve the system's objectives. The effect of this arrangement on the market is ambiguous.

Cooperatives

Cooperatives in Ireland benefit from special treatment under the law. The Registrar of Friendly Societies incorporates cooperatives under the Industrial & Provident Societies Acts 1893 to 1978 ("the 1983-1978 Act"). The more relevant sections of the legislation are as follows:

- Registration of a society under the 1893 Act confers corporate status on the society and
- Registration of a society limits the liability of its members to pay in event of the society being wound-up only the amount due on issued shares and
- The rules for a registered society bind the society and all its members to the same extent as if each member had subscribed his name and affixed his seal thereto and there was contained in such rules a covenant on the part of such member to conform thereto, subject to the provisions of the Act.

A society registered under the 1893 Act bears similarities to a company registered under the Companies Act, 1963 but there are also important differences: the affairs of registered companies are regulated in much greater detail than are the affairs of registered society. Therefore insofar as cooperatives must register under the Act, cooperatives in Ireland have the same structure

For our purposes, however, cooperatives are subject to the provisions of the 2002 Act. The 2002 Act defines an undertaking as "a person being an individual, a body corporate or an unincorporated body of person engaged for gain in the production, supply or distribution of good or the provision of a service".

To date, the Authority has not had to consider restrictions on competition in agreements between members of a co-operative. Under the old notification regime which existed prior to the entry into force of

the Competition Act 2002, the Authority approved a joint-selling arrangement: CA/43/95 Co-operative Dairy Society.

4. Advocacy

Our advocacy resources have not been focused on agricultural markets to date. As a result, there are no strong links between the Authority and Department of Agriculture or its agencies. Indeed, due to some of our enforcement work, which has been outlined above, farmers have questioned the role of the Authority and competition policy generally in relation to agriculture. This manifested itself most clearly in the lobbying that took place in 2001/2002 to exempt agriculture from the new Competition Act of 2002.

The situation is evolving, however, and the link between some of the Authority's work and potential benefits for farmers is beginning to receive attention. The Authority has advocated competition in the agricultural sector by addressing farmers groups. Issues covered include:

- The benefits to farmers from competition in markets for their inputs;
- Collective bargaining can be efficient when it spans a modest share of the market but is harmful to consumers and the competitive process when it covers the entire market; and
- Large buyers may have bargaining power in the short run but they are generally subject to competitive international markets and, in order to stay in business, must pay a price which ensures farmers keep producing.

We have also advocated competition in the agricultural sector, and at the same time begun to create links with the Ministry, by addressing the Department of Agriculture Consumer Panel in 2003 on food prices and restrictions on competition. A recent example of our advocacy work is a presentation to Agri-Vision 2015, an independent committee of experts appointed by the Minister for Agriculture and Food, on the need for competition and the benefits that competition can bring to the agricultural industry and consumers[6].

Competition authorities can promote competition in areas that benefit farmers, by tackling cartels and restrictions on competition, and monitoring mergers, in input markets and downstream food processing and retailing markets.

Groceries Order

We have advocated the removal of a number of restrictions on competition in the retail trade, and groceries retailing in particular. The Groceries Order, for example, is a legislative ban on below (invoice) cost selling of groceries at retail level. There is also a cap on retail space. These restrictions restrict entry and dampen price competition. Ireland now holds the unenviable position of having the highest grocery prices in the EU. Ireland's food prices have risen by more than 26% over the past seven years; at the same time, prices at the farm gate have not moved, or have even gone down. By campaigning for the abolition of these restrictions on competition in grocery retailing, the Authority is advocating the emergence of a more competitive retail sector in Ireland. This should lead to better retail prices for households and make farmers and food processors more responsive to consumer demand.

Professions Study Veterinarians

A current study by the Authority is looking at competition in the provision of services within a number of professions, including veterinary surgeons. By identifying barriers to entry and limits on rivalry

and demarcation, the Authority will focus discussion on whether such restrictions on competition are objectively justified and whether they are proportionate to any pro-consumer policy they aim to implement.

When advocating competition in any sector, examples of positive change in the past or in other countries, and quantifiable benefits, are always useful evidence.

5. Mergers

We have had two merger cases in the agricultural sector that potentially raised issues of buyer power.[7]

Beef Case

The first case concerned a proposed merger in the beef slaughtering business of one of the largest beef slaughtering business in the State[8] with nearly 20% of the national cattle kill, and a single-plant operator. The following issues were considered:

- Would the merger lead to market power being exercised by buyers (the slaughterers) against the suppliers of beef (the farmers)?

- Would the merger lead to an increase in market power at the downstream level?

On investigation we found that farmers had several alternative plants as options. Substantive market power (of the monopsony form) would therefore not be created as a result of the merger. No special agricultural or other rules were applied to this case.

On the second issue we found that the majority of beef produced goes to the export sector, where prices are determined on international markets. Given this, we determined that there would be no prospect of the merging parties raising prices as a result of the transaction. The share of the merged entity for the remaining beef produced for the domestic sector was small. Buyer power in the supermarket sector would limit any ability to garner price increases.

Mushroom Merger

The second non-notifiable merger concerned the mushroom sector. Two of the three largest mushroom producers in the State were merging. Producers essentially sub-contract to growers: they produce the compost which is the basis for mushroom production, supply it to growers, then buy back the produce and sell it on to supermarkets (again, most of this is exported). There is no contractual vertical integration, in that growers may source compost from one producer and sell their produce to another, but we found that this is rare in practice.

Would growers be 'squeezed' as a result of the transaction? Our conclusion was that they would not as:

- The incentive for producers to sell compost, which tended to fix the overall final output, ensured that producers would have a limited incentive to restrict output.

- The producers operated out of somewhat different geographical centres, and there would remain a range of choices for growers to sell their produce to.

- Third, there had developed what were known as producer organisations (POs), which operated as loose organisations of growers which sold directly to the major producers.

All these factors led to the belief that there would be no substantive creation of monopsony power in this transaction. At a downstream level, there was limited analysis as over 90% of the output sold by producers goes to the UK supermarket sector, where mushroom producers have little control over prices.

In summary, the main lessons we learn from these cases are:

- Monopsony power can arise in the agricultural sector but is only problematic if there is market power downstream.

- In the cases we have considered, we have found that there was, generally, sufficient numbers of suppliers to whom farmers/growers could sell. Our methodology for analysing this was similar to the methodology we would use in any competition case.

- Buyer power at the downstream level can reduce the incentive for monopsony power to be exerted. For instance, if downstream markets are such that processors face fixed prices, they may not exercise monopsony power upstream as it will reduce output which they could sell at a fixed price downstream. This would depend upon specific cases, and so far, given we have not found clear monopsony power, we have had not had to take a formal position on this.

- We have seen some evidence of growers/farmers grouping together to counteract any potential monopsony power.

NOTES

1 Irish Sugar is a wholly owned subsidiary of Greencore plc. Irish Sugar is the only sugar beet processor in the State. In a Commission case in the late 1980s it was deemed dominant in the State.

2 The IFA is the principal national representative organisation for Irish farmers. The IFA is an unincorporated association

3 Deliveries of sugar beet had ceased in or around the 4th November, 2001 so for over 2 weeks sugar beet was not supplied to the factories forcing their shut down. According to Irish Sugar over 600 jobs were put at risk (including 200 seasonal workers) and the cost of shutting down the factories was cIR£100,000 (unclear whether this amount for each factory)

4 The Regulation applicable for the period covered by the Agreement is Regulation No. 1260/2001 of 19 June 2001 on the common organisation of the markets in the sugar sector (OJ L 178/1 30.6.2001) ('the Regulation').

5 Article 38 (3) of the Regulations provides that a milk producer may transfer his milk quota (in whole or part) from his existing milk purchaser to another (i) during certain annual windows and (ii) provided 3 months notice is served.

Article 38 (4) prescribes that standard notices, contained in the 17th and 18th Schedule of the Regulation and respectively called Transfer Notice No 1 and Transfer Notice No 2, must be served on the existing milk processor and new milk processor.

Article 38 (6) provides that "where the producer does not commence deliveries to the new purchaser in the quarter referred to in such notices those notices shall cease to have effect". The transfer notices reflect this wording. Transfer Notice No 1, which is served on the existing milk purchaser, contains an acknowledgement by the milk producer that "I understand that this notice shall cease to have effect if I do not commence deliveries to the new Milk Purchaser in the quarter referred to in this notice".

This is also reflected in the Transfer Notice No 2, which is served on the new purchaser, and which again contains a statement by the farmer that "I understand that this notice shall cease to have effect if I do not commence milk deliveries to you in the quarter referred to in this notice".

6 Fingelton J., Agrivision 2015 – why we need competition, May 12th 2004. All speeches of the Members of the Authority are available at http://www.tca.ie.

7 The role of merger review was transferred to the Authority from the Department of Enterprise Trade and Employment by the Competition Act 2002. The Authority's merger function commenced 1st January 2003.

8 Approximately nearly 20% of the national kill. The entity also had several plants in the State.

ITALY

Competition and "Joint – Activity" in the "protected denomination of origin" industry

In recent years, the Italian Competition Authority opened a number of investigations in order to ascertain whether agreements in agricultural products and foodstuff, which had as their main object to protect a "brand" or geographical indications, were restrictive of competition[1].

In this report some of these decisions will be presented and discussed. The objective of the Authority has always been to balance the objectives of protecting and improving quality, while ensuring that competition is also maintained. Some general principles on antitrust enforcement in these sectors can be derived.

The ham industry (Prosciutto San Daniele and Prosciutto di Parma Consortia)

In June 1996, the Authority completed an investigation of the voluntary Consortia among producers of San Daniele and Parma ham, which supervise and control the quality of their respective products. As a background information on the Italian market of raw ham in 1994, Parma had a 43% share, San Daniele 12% and the rest was supplied by non protected producers.

Each Consortium had adopted a production schedule for 1995, setting a ceiling on total production and dividing it among the member companies on the basis of their "historical" market shares. The Authority stated that the definition of production ceilings and quotas should be considered agreements that restricted competition under section 2 of the Italian Antitrust Act (Law no. 287/1990). The fact that the law which creates the system for protecting denominations of origin empowered the Consortia to draw up production schedules and that the schedules were later approved by the relevant Ministries were not considered sufficient to exempt the Consortia from the application of antitrust law. In fact the ministerial approval was merely an ex-post ratification of the Consortia decision.

However, at the request of the Consortia, the Authority granted an exemption for the agreements for a period of two years under section 4 of the Act. It was pointed out that since other less restrictive instruments for controlling production quality provided by the denomination protection legislation were not yet available, quantitative controls over production could be used for another year until other less restrictive instruments for quality control would become available. In 1998 the consortia requested an extension of the granted exemptions and it was denied.

The Parmesan cheese industry (Consortia Parmigiano Reggiano and Grana Padano)

In November 1996 the Authority concluded an investigation of the two Consortia protecting Parmigiano Reggiano and Grana Padano cheeses. The two voluntary Consortia have the statutory function of promoting the products they oversee and protect, and also of programming and controlling production and marketing. On the basis of their tasks, the Consortia from 1991 to 1994 restricted competition by planning production quantities and by establishing production schedules which set the maximum total production target for each specific year and the individual production quotas for each member. Furthermore the two consortia had agreed among themselves in March 1994 to make sure that their respective market share would remain stable (51% for parmigiano reggiano and 49% for grana padano).

The restrictions were removed starting from the year 1995, when production was only limited by the availability of domestic milk with given characteristics. These changes, designed to convert the planning system based on quantities into one where the Consortia would control only quality, were considered to be in line with competition law.

The Gorgonzola cheese industry (Consorzio Tutela Gorgonzola)

In 1998 the Authority completed an investigation into the consortium for the protection of Gorgonzola cheese, aimed at verifying alleged violations of the prohibition of anti-competitive agreements. The investigation was launched following a complaint by a producer of Gorgonzola cheese concerning the Consortium's practice of fixing the total annual quantity to be produced and allocating production quotas to member firms.

The consortium was a voluntary one, with some sixty member firms located in the area where Gorgonzola, a cheese with a protected designation of origin, is produced. Before the entry into force of the system of controls provided for in Council Regulation (EEC) no. 2081/92, the Consortium had traditionally supervised the production and marketing of Gorgonzola cheese under the Italian law on the protection of denominations of origin and typical names of cheeses.

The Authority concluded that the Consortium production plans for the years from 1991 to 1998 aimed at restricting total production and dividing it among the member firms on the basis of historical market shares, did not fall within the scope of the objectives established by the law on the protection of denominations of origin and, by limiting competition among producers and the growth of more efficient firms were anti competitive. The Authority issued a cease and desist order.

The Italian Competition Authority Opinions

On several occasions the Italian Competition Authority has been called to give, or thought it necessary to give, an opinion, according to section 21 and 22 of the Italian Antitrust Act, on legislation concerning protected denominations of origin or protected geographical indications that were not in line with competition principles.

Opinions on legislation concerning protected denominations of origin

In 1995 the Authority expressed a first opinion under section 22, noting a number of provisions which imposed unjustifiable restrictions on competition in a Government Bill providing "Measures governing protected denominations of origin, protected geographical indications and certification of specificity for agricultural and food products in the implementation of Community law". In particular, this bill vested the consortia for the protection of protected denominations of origin, protected geographical indications and certification of specificity with programming powers that enabled them to adopt such measures as the imposition of production quotas, which were likely to restrict competition between undertakings producing the protected commodities. For the same reason, competition was likely to be distorted by the ancillary provisions in the bill vesting the National Committee for the Protection and Enhancement of Controlled Marks of Origin with the power to express an opinion on production programmes and schedules, and requiring the Ministry of Agriculture, Food and Forests to approve these programmes.

In the opinion of the Authority, the quota system was not necessary for the purposes of enhancing and promoting the agricultural products for which the law was proposed. These were objectives that could easily have been met using other instruments such as monitoring, controlling and supervising the quality of the protected commodities.

The anticompetitive provisions were not adopted.

Report on the rules for the protection and promotion of bergamot

Another relevant advocacy report concerned Regional Law no. 1 of 14 February 2000 "Rules for the protection and promotion of bergamot" of the Region Calabria.

This law made it obligatory for growers to join the Consortium of Bergamot, an entity established under public law to extract bergamot essence, a product that is used mainly by the perfume industry. The Authority noted that by enabling the Consortium to carry out the transformation process on an exclusive basis, the law had the potential to eliminate competition between growers and exclude other essence extraction firms from the market. In the Authority's opinion such a distortion of competition was disproportionate to the public interest objectives of promoting the product and safeguarding quality that were set out in the regional law in question.

Fact-finding inquiry into the beet and sugar sector

In July 1999 the Authority completed a general fact-finding inquiry to analyse the functioning of the market system in the beet and sugar sector. This sector has numerous highly specific structural, functional and legislative features; in particular, beet and sugar production is characterized by extensive public intervention, justified more by historic and political reasons than by the existence of any identified market failure. There is very little room left for competition and for antitrust enforcement in the sector.

In order to ensure continuity and profitability of production, the European Union, which is the world's leading sugar exporter, set up a Common Market Organization (CMO) in 1968. This, in keeping with the Common Agricultural Policy, provides agricultural producers with profitable price levels. In the beet and sugar sector there is, however, an additional distortion. A production ceiling is shared out pro-rata among the member states; each member state then divides out its share to the sugar companies operating in its territory.

Cultivation contracts between sugar companies and growers are the principal means of vertical integration between agriculture and the industry. Through these contracts, the industry is assured of raw material supplies and an optimal use of plant through predetermined production schedules, while the agricultural side enjoys advance guarantees both of placing its beet crop, and of prices. In most European countries, in a set period of the year – usually before the cultivation contracts are signed – it is common practice to conduct a collective negotiation between all the sugar factories and all the farming associations. These results in the so-called inter-professional agreement, which in effect regulates all the operations needed for the smooth functioning of the beet and sugar sector. Overall, the competition mechanisms in this sector appear to be characterized by much reduced margins of business autonomy and a low level of incentives to improve efficiency. However, the most striking anomaly is the fact that the strongest impact of a legislative framework designed basically to support the agricultural sector is actually paid up by higher prices in the vertically related industrial sector.

Under the conditions laid down by the beet associations and sugar firms in the inter-professional agreement, only distributors authorized by the associations and/or sugar factories can operate in the seed distribution market, applying uniform prices and selling conditions agreed by the two sides. This mechanism does not, however, appear to be justified by any need to safeguard the quality of the end product; all that is needed to guarantee high quality of the sugar crop, is an effective system for the certification of the origin and variety of seed sold by distributors.

The main principles arising from the Italian Competition Authority's decisions and opinions

From the enforcement and advocacy experience of the Italian Authority, it is clear that any explicit setting up of production ceiling by DOP consortia has been considered an antitrust violation. The quota allocation system, rather than being necessary for maintaining products' quality, constitutes a way to restrict competition among different producers and limit the growth of the most efficient firms. Agreements were exempted only when the objective was clearly quality improvements and the restrictions of competition were strictly necessary.

The Authority acknowledged that products are homogenous within the DOP and that consumers do not distinguish single producers, like for example in wine. The DOP is indeed a common good to be protected, but it is not necessary to restrict quantities. In fact there are different technologies and efficiencies and by restricting quantities consumers are not allowed to benefit from such efficiencies. Furthermore, while in some occasions it might be easy to set up an alternative DOP, so that more efficient producers may decide to compete with a different "brand name", in some other cases the reputation of the DOP may be too strong to be competed away.

Starting from 1998, when, under EEC law, quality controls have been entrusted by law to special entities (certification bodies), independent from the Consortia, the link between quality and quantity has been weakened. Of course there might be some quality requirements that are a substitute for quantity restrictions (for example the use of domestic certified inputs). However it would be extremely difficult, if not impossible, to distinguish quality requirements under a strict proportionality standard.

Concluding remarks

Few principles may be outlined from the main decisions of the Italian Competition Authority concerning the "joint-activity" of agricultural firms:

- In order to form and maintain a "brand", only quality matters: fixing quantity of output is often an unnecessary restriction of intra-brand competition. Restriction of intra-brand competition is a major concern when the relevant market corresponds with the brand.

- "Joint-activity" aimed at maintaining the high-quality reputation of a brand should be more rigorously analysed when the reputation of the brand is commonly recognized and quality controls may be implemented by independent certification bodies: in this case fixing quantity of output is clearly an unnecessary restriction.

- When "joint-activity" concerns more than one brand, as in the case of Parmigiano Reggiano and Grana Padano, and the relevant market is wider than a specific brand, antitrust analysis should be more severe since restrictions might affect inter-brand competition.

- "Joint-activity" aimed at financing common advertising for a given product is generally pro-competitive, unless the fund-raising system restricts intra-brand competition by discriminating between members that expand their output and members that merely confirm their historical quotas.

NOTES

1 As is well known, such agreements are regulated in the EU by Council Regulation (EEC) No 2081/92.

KOREA

I. Introduction

'The Monopoly Regulation and Fair Trade Act' stipulates that 'enterprise means any person engaged in manufacturing, service industry and others'. In the past, the MRFTA had been applied to only 12 industries, such as manufacturing industry and service industry. However, since the legal amendment in 1999, businesses in all industries, including agriculture industry, fisheries and mining industries have come to be the target of the application of the MRFTA.

However, the MRFTA stipulates, "any legitimate activity done by business or business association under other Acts or ordinance of the Acts concerned is not subject to the application of MRFTA". Therefore, the legitimate agricultural activity under other laws is excluded from the competition law application.

In addition, according to the MRFTA, "This Act is not applied to the activities of any business association, which is established for mutual-cooperation between small size businesses or consumers." However, the ultimate goal of this regulation is to promote consumer welfare by strengthening relatively weak status of small size businesses and consumers. Therefore, if such act is unfair trade activity or increases prices by unduly restraining competition, the competition law shall be applied.

All in all, in principle, competition law is applied in the agricultural sector. However, due to the exceptions of application to the Agricultural Cooperative and rules under other laws related to agricultural industry, competition law is not applied to a certain sector in the agricultural industry.

By introducing competition in agriculture and regulations related to agricultural industry, regulatory reform in this sector to enhance efficiency in distribution and production can be seen as significant task. In particular, monopsony buying of large distributors and joint sale by producer cooperative in the agricultural distribution sector pointed out by the Secretariat report are very important issue to establish fair market economic rule.

However, in Korea, two cases abovementioned have recently taken place. In particular, joint sales are still in its initial stage. Therefore, in this report, the agricultural distribution structure in Korea will be briefly touched upon. Then, the current situation of producer organization and other issues related to joint sales will be introduced. Finally, the current situation and problems of monopsony buyers will be assessed from the perspective of competition policy.

II. Korea's Agricultural Distribution Structure

Distribution structure of agricultural and fishery products connecting consumers and producers in Korea can be divided into traditional distribution structure and new distribution structure.

Traditional distribution structure is to deliver agricultural goods to wholesale market passing from producer to on-spot collecting buyer. Then, the goods are passed from the wholesale market to retail market. The wholesale market is managed by national and local governments or private businesses, which include wholesale subsidiaries overseeing the operation and auction, and intermediaries carrying out a large-scale purchase in the wholesale market.

The newly emerging distribution structure includes the direct transaction method between producers and consumers and indirect methods to deliver agricultural goods to consumers or food processing company via large distribution stores, wholesale market and distribution complex.

In most cases, these two types of distribution structure are combined in each phase. According to the statistics in 2002, in passing through the wholesale market via traditional channel, distribution margin rate is 53.7% and receipt rate of agricultural household is 46.3%. On the other hand, in passing through the distribution complex and large distribution stores, which are new distribution structure, distribution margin rate is 34% and receipt rate of agricultural household is 66%. New distribution system shows positive effects such as reduction in distribution margin and enhanced price stability in agricultural households. Characteristics of two distribution structures are as follows.

	Traditional Distribution System	New Distribution System
Channel	Members of channel: on-spot collecting buyer, wholesale market, traditional market Mutually independent and one-time transaction	Members of channel: origin distribution center, distribution complex, large distribution store Vertical distribution system: long-term and exclusive trade
Entity	Traditional merchant with small size of business	Large distribution store, origin distribution organization
Product	Non-standard products	Standard products. Differentiated and processed agricultural and fishery products
Transaction method	On-spot auction or mutual transaction	Mutual transaction under reservation, transaction under a real name
Logistics	Loading and unloading by person	Unit Load system Enhanced effectiveness in logistics system through standardization of packaging, palette and logistics mechanism
Information	Ex post calculation information	Informatization of distribution system, such as POS and EDI Usage of E-commerce, such as internet shopping

III. Producer Organization

1. Current situation of Producer Organization in Korea

As of the end of 2001, Korea's producer organization consists of : first, 17,747 local farming groups of the same crop in charge of co-production and shipment; second, 3,852 small agricultural cooperative in charge of collaborative agricultural management, such as distribution, processing and export; third, 1,356 agricultural corporation conducting business-like agricultural management; fourth, 1,245 agricultural cooperatives in charge of credit, purchasing, sales and aid; and fifth, 26 national cooperative committees per each item conducting the functions to adjust production and shipment. The producer organization above is established and managed under 'the Basic Act on Agricultural Industry and District' and 'the Agricultural Cooperative Act'.

2. How to operate producer organization

First, in terms of size, origin marketing organization by most producers is organized in small size. Therefore, it faces difficulties in nurturing differentiated brand and strategic marketing. Not only is that, but transactions with large distribution stores challenging due to difficulties in continuously ensuring large supply. As of 2002, in terms of turnover, there are only 113 organizations with more than 10 billion won. (Approximately, 1$ = 1,200 won)

Second, in terms of business management, producer organization is not systematic nor business-like management mechanism has settled. Even though the amount of co-shipment reaches 60%, its method is just about the co-delivery. As of 2002, only 145 organizations and 5% of total shipment volume have achieved a certain level of marketing and negotiating power through co-calculation. Moreover, the Agricultural Cooperative is passive in the sales business that has high risk.

Third, in terms of expertise, lack of investment and planning in product development results in the limits of creating high added value. The first processed food market does not flexibly respond to rapidly expanding market changes. Product shipment focusing on differentiation and small packaging has become the mainstream.

3. Evaluation from the perspective of competition policy

In Korea, the advantages arising from co-activities of producer organization, such as economies of scale and scope, formation and maintenance of regional brands, quality management, advertising and R&D, are partly realized only in the small number of advanced cooperatives. In most cases, due to lack of management capability and expertise and small size regional cooperatives; it does not fulfil its role as sales and marketing organization.

Unlike strong agricultural producer organization in the west, it has not grown enough to have any characteristics of anti-competitive cartels. Rather, efforts to promote efficiency through boosted capability of co-production and co-sales, and to reduce the gap of negotiating power in trading with large scale distribution stores, are needed.

IV. Monopsony Buyer

1. Current situation of monopsony buyer

With market opening of distribution service sector since 1996, large distribution stores from overseas are advancing into the Korea market. Coupled with this, domestic large companies also make inroads into large distribution business, launching dramatic changes in distribution industry. Distribution in agricultural goods is not an exception in this case. As of 2002, the ratio of traditional market to distribution stores in the overall retail market has reversed to 49:51. Such trend is likely to occur in the food market as well around 2005.

As of 2002, 209 branches of 41 companies are involved in fierce competition, including both foreign distribution stores, such as Carrefour and Walmart, and domestic stores, such as Emart and Kims Club.

2. Transaction form of large distribution centers

Purchasing pattern of agricultural goods of large distribution stores is showing the trend of origin direct transaction, central concentrated purchasing, and sophistication, leading to changes in agricultural goods distribution. All in all, positive effects of logistics cost reduction in distribution centers through the reduction of distribution margin and increase in the receipt price of agricultural households through reduction of distribution phase take place.

In addition, large distribution centers' purchasing ratio through wholesellers has decreased while the ratio of direct purchasing in the origin has increased. This requires more organized producer in the origin in order to ensure quality management, more products, and balanced negotiating power.

On the other hand, with rapid increase in turnover of large distribution centers, control of large distribution stores over small and medium sized suppliers and stores has strengthened. This is also the case

for agricultural goods. In the transaction between large distributors and intermediaries, unfair trade practices often occur. Price competition between processed food industry and large discount stores ushers in the possible contention between large distribution stores and producer organization in the future.

3. Assessment from the perspective of competition policy

Competition authority needs to boost advantages in consumer price reduction and quality improvement and maintenance while to actively restrain any unfair trade activities arising from stronger monopsony buying.

Therefore, in order to prevent any high-handed manner of large distribution center to suppliers and small stores, the KFTC made 'the Notification on the Types of and Criteria for Special Unfair Business Practices relating to Large Retail Store Business' in 2001. Based on this notification, the KFTC monitors whether large distribution stores transfer the decreased amount of margin arising from lower price sales to producers or other distributors who are in vertical relationship.

Moreover, the KFTC conducted a survey and on-spot investigation on suppliers and distributors, recommending large distributors to introduce Compliance Program.

V. Conclusion

From the perspective of competition policy, it is desirable to pursue the net increase in social welfare through efficient usage of resources. However, in many cases, agricultural policy requires the consideration of society and policies, such as improving the income distribution between urban and rural area, protection of old small size agricultural households, and soft landing of agricultural restructuring. As pointed out in the Secretariat Report, except the case when the increase in producer surplus through agricultural regulation surpasses overall social loss, it is much better to adopt income assistance policy to farmers along with introducing competition rather than protecting agricultural industry through anti-competitive regulations.

Lastly, in Korea, joint sales of producer organization are still in their initial stage. As efficiency enhanced effects are much bigger than anti-competitive effects, the government's monitoring and supervision to address any anti-competitive element is not that much required. On the other hand, as monopsony buying of large distribution centers is already at the maturing stage, it is likely to turn to unfair trade practices from fierce price competition. Therefore, monitoring, supervision, and education are required.

LITHUANIA

Buyer concentration and its impact on upstream markets.

The level of concentration among purchasers and processors of agricultural products has increased significantly in Lithuania during the last decade. The five largest retailers sold approximately 73% of all groceries in 2003, however, their share in the one-stop shopping grocery store market is significantly higher. Even though concentration among retailers is rather high, there have been no indications that consumers are paying exploitatively high prices for grocery items so far. On the contrary, the rapid growth of large-scale retailers was accompanied by falling grocery prices during the last five years. The Statistics Office of Lithuania reports the growth of food prices that is close to zero or even negative during every year since 1999. The presence of large-scale multi-product retailers not only serves the interest of consumer by providing convenient one-stop shopping opportunity but also increases competition among producers and enables consumers to afford more non-food items.

Large multi-product retailers exert downward pressure on prices in the downstream markets and do drive smaller and less efficient competitors out of the market. Nevertheless, this is a part of a competitive process and by no means is an exercise of the exploitative market power that harms consumers. The Competition Council of the Republic of Lithuania didn't receive any formal complaints concerning the exploitative behavior of the large retailers against suppliers. Market investigations showed that in general upstream price reductions are being transferred downstream to consumers. Although some suppliers complain about contractual terms imposed by large scale retailers, many producers benefit from being able to supply substantial share of their output in a much more predictable economic environment with substantially reduced risk that a buyer would default the payment or other obligations. The rapid growth of large-scale retailers in Lithuania preceded the technological restructuring and modernization in the processing level of the food supply chain. There is no evidence that buyer power made it impossible to finance required investments. On the contrary, the most prominent places on the shelves in the stores of retailers in Lithuania presently belong to those local suppliers that recently invested into their productive capacity and increased productive efficiency.

The most important sectors in processing of agricultural products in Lithuania are sugar production, dairy products and meat industry. Sugar production is the most concentrated among them. In this sector, Danisco Sugar A/S controls two factories and the third factory is locally owned by the *UAB Arvi cukrus* (private limited liability company). The two factories controlled by Danisco Sugar A/S have approximately 80% of national sugar production quota, they also purchase similar share of sugar beet from the local farmers. The latter are represented by six regional co-operatives and thereby are able to defend their interests during contractual negotiations with the two powerful buyers. Although aforementioned sector was regulated by the national laws or other national legal acts before the most recent EU enlargement, its market structure did not seem to change in any significant way after the Council Regulation (EC) No 1260/2001 of 19 June 2001 on the common organisation of the markets in the sugar sector became applicable directly.

The dairy sector is also highly concentrated. The three largest producers of milk products purchased and processed approximately 85% of all raw milk in 2003. (The five largest producers purchased and processed approximately 94% of all raw milk.) According to the experts, this industry is characterized by

significant economies of scale and scope, therefore large concentration of producers is justifiable on efficiency grounds.

Meat processing industry is much less concentrated comparing to either sugar production or dairy industry. The three largest meat processors had slightly less than 18% market share in 2003 while the twelve largest meat processors had approximately 27% market share. The experts and business consultants recommend consolidation using mergers as a way of reaching efficient scale of operation. Only six producers in 2002 were able to establish reliable long-term supply relationships with the largest local retailers by being able to meet their demands in terms of qualitative and quantitative parameters. Many producers complain about being unable to get their products on the shelves of the large international retailer chains. The main reason is an insufficient productive capacity relative to the demand of a large retail chain.

Although the sugar and dairy industries are very concentrated, producers are unable to exercise their market power because they have to compete for a place on the shelves in the stores of the powerful large-scale retailers. In the case of meat production the further market concentration should result in a more efficient scale of operation.

When looking at the food supply chain in Lithuania one might be left with an impression that technological progress, innovation and dynamism are the most prominent in downstream markets but barely visible in the very upstream markets. The retailing sector employs modern methods and rapidly adjusts to changing market conditions thanks to the harsh discipline of competition. Successful processors of agricultural products either already succeeded to modernize their production capacities or at least intend to make necessary investments and improve their competitive positions in the foreseeable future. However, agricultural producers suffer from severe structural crisis. The share of agriculture, hunting and forestry in the gross value added of Lithuania decreased from 11.3% in 1995 to 6.1% in 2003. Nevertheless, it still remains enormously high compared to any Member State that belonged to the EU before the most recent enlargement. Almost 18% of all Lithuanian working population in 2002 was employed in the agricultural sector. These numbers reveal the alarmingly low productivity in the agricultural sector compared to the other sectors of the national economy.

Currently, the three types of farms exist: agricultural companies (corporate type farms also involved in food processing), family farms and small household plots (typically operated by shareholders). Family farms dominate the other two types, they are very small on average (11.9 hectares) compared to farm size in other EU Member States and are not specialised. Inefficient farming structure, small scale of operation, lack of investment in better technology impedes overall agricultural productivity and competitiveness. The fact that GDP per capita in Lithuania makes up only 39% (measured at PPP) of the EU average can be to a large part explained by considerably higher dependency on agricultural sector that lags behind in terms of quality, productivity, efficiency and competitiveness.

If from the viewpoint of productive efficiency the farm size is too small and labour input share in the overall cost structure is too high then the exit of the substantial part of agricultural producers is inevitable in the long run. A reasonable economic policy should make such exit less painful but only the most efficient producers should remain in the long run. Although the most powerful buyers of agricultural products in Lithuania were able to depress prices (for example in the dairy industry), however, the most successful farms already succeeded with technological improvements and reduction of average production costs. This allowed them to gain competitive advantage against other farmers but the most important consequence is the improved bargaining position against powerful buyers. Such farmers can supply a large quantity of an essential raw material that satisfies certain qualitative parameters and therefore are needed as long-term partners to large-scale buyers.

Producer "joint-activity" organizations (co-operatives, marketing orders, market organizations) and the national competition law

The Competition Council of the Republic of Lithuania is not aware of the existence of any "joint-activity" farmer organization in Lithuania that would create anticompetitive harm by creating market power, limiting supply or raising prices. The only nationally authorized market organization existed in sugar sector and was replaced by the common market organization after Lithuania's accession into the EU.

The Law on Competition of the Republic of Lithuania does not provide any specific exemptions for anticompetitive behaviour in the agricultural sector. However the Law on Competition contains a clause which states that "[t]his Law shall prohibit undertakings from performing actions which restrict or may restrict competition, regardless of the character of their activity, except in cases where this Law or laws governing individual areas of economic activity provide for exemptions and permit certain actions prohibited under this Law." Therefore it is possible to introduce antitrust exemptions using other laws, however, such instances are very rare. National competition law contains very similar prohibitions to the ones that are applied in the EU because during the pre-accession years there was a need to harmonize national competition rules with the EC law.

The national competition law prohibits agreements between undertakings which have as their object or effect the restriction of competition. The Competition Council recently adopted a resolution which made clear that national competition rules apply to production and trade of agricultural products to very similar extent as it is stated in the EC Council Regulation 26. In general the Competition Council treats all agreements, decisions and practices which are *necessary* for the attainment of a fair standard of living for the agricultural community and market stabilization as deserving antitrust exemption only when there are no less restrictive means that could allow the achievement of such goals. Although the farmers' co-operatives virtually do not exist in Lithuania (except sugar beet sector), the Competition Council would not prosecute the joint-activity organizations that would use common facilities for the storage, processing or transportation of agricultural products. The same applies to the co-operation of farmers in selling their products via the co-operatives as long as such arrangements would not involve obligation to charge identical prices and would not exclude competition. In general, co-operation in various stages of production or marketing should help the participating farmers to achieve the more efficient scale of operation and increase productivity. Under current conditions it is hardly imaginable that such co-operation would attract a large number of market participants. Therefore there is no reason for being concerned about the possible abuse of market power. The Competition Council tries to make its position very clear on every possible occasion: co-operation among farmers is always welcome as long as it creates economic benefits, provides for improvements in technology, production and distribution, increases competitiveness, and does not allow to substantially lessen competition. For a large co-operative it would make sense to behave in a way similar to a dominant firm because it could exercise its market power by restricting supply or raising price. Since a small co-operative would not be able to influence market price by restricting its supply, the most likely reasons for its existence should be efficiency gains that are beneficial to society.

MEXICO

1. Recent policy developments

Over the past 10 years, the agricultural sector in Mexico has been subject of sweeping reforms in the areas of land tenure, prices, markets, and trade liberalization for most crops. Public investments, privatization, fiscal transfers, and retrenchment of state owned enterprises also impacted greatly on the sector.

Big changes also occurred in the price support and other government interventions in the economy. Guaranteed prices for most crops were eliminated, as well as input subsidies on seeds, fertilizer, pesticides, machinery and diesel fuel. The state also withdrew from procurement and marketing functions (except for corn and beans).

Another major reform was the amendment of the land tenure system, including a constitutional amendment in 1991 that permitted land transactions and in order to ensure better security of ownership rights, the government embarked in 1995 on a program of land titling. The ejidal reform was expected to develop the land market, and to capitalize agricultural activities by allowing farmers to participate in the private credit market and by promoting direct private investment.

Trade liberalization policies include the entrance to GATT in 1986 and the North American Free Trade Agreement (NAFTA) agreement of 1994. These policies produced important shifts in the agricultural sectors, increasingly linking Mexican farmers to international price movements. NAFTA became the first free trade agreement to use tariff rate quotas (TRQs) as a transition mechanism to eliminate quantitative restrictions and to move towards free trade. The Mexican government allocates TRQs through four alternative mechanisms: direct allocation, auctions, government monopoly and "first come-first served".

The sectoral policy

The Program for Agriculture, Livestock, Rural Development, Fisheries and Nutrition 2001-2006 contains the main policy guidelines of the administration. The foreword to this document, written by the Secretary of Agriculture, states that the "*main critical issues in the rural sector are the lack of most farmers of an entrepreneurial vision and the need to foster organizations oriented to satisfy the needs of the domestic market and to profit from comparative advantages in foreign markets*".

It also emphasizes that due to inefficient arrangements along the value added chain, the share of the primary producer in the price paid by the final consumer is definitely low. The new policy approach is that "*Subsidies to production and marketing should be radically transformed in order to become an additional element to foster rural capitalization and investment*"

At the end of 2001, the Law for Sustainable Rural Development was approved. It assigns several roles for agriculture: a) to improve welfare in rural areas, considering producers, rural workers and other actors of the rural society; b) to reduce regional disparities in economic development; c) to foster agricultural production in order to improve "food security" conditions; d) to preserve the base of natural resources and biodiversity by means of its sustainable use; and e) to recognize the economic, environmental, social and cultural dimensions of agriculture.

Since actions in those areas fall under the responsibilities of many Ministries, the Law provides to the Secretary of Agriculture greater executive faculties to coordinate policies and programs related with rural development. A Commission was created for this purpose, in which all Ministries and other public entities are present. Another Commission, including government officials and producer organizations, acts as an Advisory Board. The interaction between federal, state, and municipal governments, and producer organizations, is lead by a concrete action plan, the so-called National Concurrent Plan for Rural Sustainable Development.

Federal Agricultural Assistance Programs

Mexican agricultural assistance programs are essentially three: Direct Rural Support Program (Programa de Apoyos Directos al Campo, PROCAMPO) initiated in the winter season of 1993-1994; Alianza para el Campo, initiated in October 1995, and a Marketing Support Program (Programa de Apoyos a la Comercialización).

PROCAMPO provides an income subsidy to producers. When the NAFTA took effect, PROCAMPO was allowed to offset subsidies paid by the US and Canada to their agricultural sectors during an adjustment period of 15 years. Though the program's coverage is broad, it primarily supports crop producers, not livestock. In fact, the bulk of the subsidy goes to five crops—corn, sorghum, wheat, beans and cotton—mainly in three states (Tamaulipas, Sonora, Sinaloa). The subsidy is per hectare and the same for all farmers, independently of productivity and it is granted even if beneficiaries switch to other crops.

Unlike PROCAMPO, Alianza para el Campo (which accounts for some 23% of federal rural support funds) is designed to promote capitalization and raise productivity. The characteristics and operation of Alianza differ in each state, but most of its beneficiaries in the livestock sector have been large intensive livestock operations. The program's eligibility criteria include compliance with the relevant environmental regulations and standards, but this requirement has not been enforced in practice.

The Marketing Support Program and Regional Market Development grants payments to producers of some crops in areas producing surplus. In the case of most crops, the government establishes a fixed amount of subsidy on a per ton basis, considering expected prices during the marketing season. Buyers pay to producers prevailing market prices. Additionally, the government has made use of complementary programs: a) export subsidies; b) subsidies to pay storaging and financial costs; c) transportation subsidies; d) subsidies for sales intended to feed livestock; and e) promotion of purchase contracts for grains.

2. Market features

Agricultural production

Agriculture and livestock accounted for 8% of the GDP in 1990 and dropped to approximately 4% in 2001. On the other hand, its contribution to total employment decreased from 24% to 20% in 2001.

Farmers could be grouped into three categories: large, intermediate and self-subsistence (see Soloaga, 2003).

- *Large farmers* have access to irrigated lands, relatively good soils and large land plots and technology. They commonly vertically integrate storage facilities and have access to well established marketing channels, technology and credit, and most of them are able either to shift production to other profitable products. The new economic environment allowed them to maintain their profit margins. This category accounts for between 10 and 15% of all farmers and more than 50% of Mexico's agricultural land.

- *Intermediate farmers* operate under less favorable market conditions with mostly rain-fed land and producing mainly for local and regional markets. They depend upon middlemen for transport and adequate storage. Moreover, they have little opportunity to add value to the crop by selection and packaging. Lack of access to formal credit is probably the main reason for continued dependence upon intermediaries as cash-stripped small producers often have to sell their crops immediately. The credit crunch of the mid and late nineties, and other factors, affected their ability to switch to exportable products, which in turns meant reduced profits due to the falling profitability of traditional crops (i.e. corn). Main sectoral government programs focus on these types of farmers, which account for around 45% of all farmers and about 20% of Mexico's agricultural land.

- *Subsistence farmers* operate small-size plots on mostly poor quality, rain-fed soil, and slopped terrain. Their main production is for household consumption and have minimal amount- if any- of land devoted to profitable crops. They are isolated from agricultural markets because of the lack of resources to face higher transaction costs in tradable production. Moreover, these farmers are mostly being impacted by Mexico's social policy rather than by agricultural policies. This category of farmers accounts for more than 35% of all farmers but for less than 10% of total agricultural land.

Supply structure reflects on prices. Trade margins and profits in the sector differ depending of the type of producer. Large producers, can exercise some influence over prices and trade margins. Intermediate producers, on the other hand, have no bargaining power and often have to accept adverse marketing conditions. As a consequence, most agricultural markets in Mexico are not competitive.

Scarce production and marketing information is also a factor that adversely affects the functioning of agricultural markets in Mexico, with a particularly severe impact on small producers that perceive the market as little transparent.

Producer joint-activity organizations

Private organizations in the Mexican agricultural sector are basically of three types: trade associations, cooperatives and grower/shipper combinations.

Trade associations

Trade associations comprise specific commodities, geographic areas, or types of firms. CAADES (Confederation of Unions of Agricultural Associations of the State of Sinaloa) is an example in of a geographically defined association. Membership and participation in trade associations is voluntary. Trade associations provide organized communication forums for industry participants to come together to explore solutions to common problems and to advance the diffusion of information and technology within the industry.

Cooperatives

Cooperatives allow growers to come together to pool their input requirements, or to market jointly their products. In all cases, they avoid the double taxation to which corporations and their stockholders are subject.

For the large grower segment of the agricultural sector, cooperatives may have lost attractiveness because most enterprises are large enough to market their products independently. In addition, the changing nature of the buying industry has made it especially critical for marketing firms to make quick

selling decisions. This is complicated in cooperatives due to the more consensus-based approach, often putting cooperatives at a disadvantage relative to independent handlers. However, the continued existence of a large number of small growers in Mexico makes the cooperative concept still pertinent for some products. Given the very small scale of production that most small farmers have, joint marketing can be the only way, in which product conditioning, storage, packaging, presentation and promotion can attain economies of scale.

Grower-shipper combinations

These are becoming increasingly a feasible alternative to assist marketing activities of small and medium growers. The grower-shipper combination is a joint venture between shippers and growers to consolidate production and to market for a fee, often advancing cartons, controlling harvest operations and imposing quality standards. The shipper is in contact with market needs and has the capital to undertake marketing risks. This enables small growers to ship anywhere since their volumes are pooled with that of other small growers to achieve a critical mass. Sometimes multinationals act as the grower-shipper, such as Del Monte with its melon project in Guerrero, but also several large Mexican growers have expanded their operations in this way, although most of them still market only their own production. The difference between a shipper as described here and the traditional intermediary is that the shipper is essentially an agent operating for a fee. He does not take title to the product, as the traditional middleman who buys, then owns, and sells the goods.

Buyer concentration in fruit and vegetable markets[1]

Three important aspects of the buying side of the markets for fruit and vegetable products in Mexico are described below. These are commercialization, the role of supermarkets and that of the CEDA-DF (Central de Abasto).

Structure of the marketing activity

The commercialization of most agricultural products in Mexico is also dualistic. On the one hand it comprises a traditional network of intermediaries collecting products from a large number of small farmers, ultimately selling to urban wholesale markets, and on the other, a sophisticated system of well organized large scale production, collection and, often, conditioning. The latter part of the system, vertically integrated from production to wholesale, dominates the network of wholesale markets for all important products and caters to the market of large scale buyers, supermarket chains and institutions. Many of the large traders are also growers, either on owned or leased land. They may import seeds and produce seedlings for their own use and for delivery to contract growers to ensure varieties demanded, staggering supply as needed. They may also finance their most reliable suppliers.

The more traditional marketing channel is used by medium and small growers. It consists of a network of intermediaries who collect and market products from a large number of, mostly small, farmers living scattered over the country, selling to other middlemen who assemble progressively larger volumes or selling directly at urban wholesale markets. Collection and transportation often face difficult circumstances, due to the lack of appropriate packaging and means of transport, making the system inherently costly. The relationship between the producer and the first buyer in the marketing chain is frequently more complex than a simple buyer-seller arrangement. Devoid of other support structures and living in remote parts of the country, the producer often relies on middlemen not only as a purchaser, but also as a supplier of inputs, of household goods and even, of short term emergency financing. Thus, the main reason for the dependency of small farmers on their intermediary is their lack of working capital, due to chronic indebtedness, the need for basic household articles and lack of access to formal financing.

Mexican farmers are by and large not organized, cooperatively or otherwise, to jointly market their crops so as to eliminate intermediary stages in the marketing chain.

Role of supermarkets

The development of supermarkets in Mexico seems to run counter the trend observed elsewhere that places them as a prime location of consumer food purchases, and particularly of fruits and vegetables. A 1998 report on consumer attitudes and supermarkets in Mexico[2], shows that preference for supermarkets as the prime source of food has declined from 75% of consumers surveyed in 1993 to 57% in 1998. Market places, not supermarkets, are gaining importance as consumer sources for produce. Open air markets and, to a lesser extent, supermarkets are loosing clientele for fresh produce.

Nevertheless, Mexican supermarkets show developments with respect to produce marketing that are similar to those found elsewhere. Two supermarket chains have started some product sourcing directly from growers under supply contracts. Still, both chains buy an important part of their supplies from wholesalers and large scale traders, often growers as well that dominate these markets as argued earlier.

Given these trends, the impact of Mexican supermarkets on rules and regulations of the produce trade, from grading, standardization and packaging to grower contracting and cooperation will probably be less than it has been elsewhere. Impetus for change in the Mexican produce trade will have to come mainly from export market demand and from competition faced from imports.

Role of the CEDA-DF

The CEDA-DF is arguably the world's largest wholesale market for perishable agricultural products. Over 2,000 active traders handle daily arrivals of about 8,000 tons of products including 13% of the national production of fruits and vegetables, while its service area comprises about 20% of Mexico's population. This fact signals the growing importance of trading channels that by-pass this wholesale market, notably regional production markets, other wholesale markets and supermarket chains, in spite of the latter's declining clientele for fresh fruit and vegetables in the 90s. It is likely that supermarkets which still account for about 20% of products sales are shifting increasingly to direct acquisition from farmers and, thus, are by-passing the wholesale market for an increasing portion of their daily product needs. The reduction of onward shipments from an estimated 35% of all arrivals twenty years ago to 10% today is largely attributable to the growing importance of other wholesale markets, notably in Guadalajara and Monterrey and, again, to the emergence of important regional produce markets. Thus, the erstwhile dominance of the CEDA-DF and its role as national "market maker" for the perishables trade is diminishing.

Fewer than 100, or less than 5% of all traders, dominate the market, often individually for a particular product. This group of major traders includes a number of large producers as well, while those without own production maintain strong ties in the countryside. It is estimated that at least half of all produce marketed at the CEDA-DF is from producer traders, while a substantial part of the remaining half comes through channels that closely link production with trade. The combined small producers are at best a minority supply source for the CEDA-DF. Most of the remaining wholesalers buy their products from one or more of the major traders.

3. Agricultural sector and competition law

The Federal Law of Economic Competition (FLEC) does not provide exemptions specifically concerning the agricultural sector. There is only a general exemption, under article 6, for associations or cooperatives directly selling their products abroad, provided that:

- The products are the region's main income source, and are not basic products;
- The products are neither sold nor distributed in Mexico;
- Membership is voluntary and members are free to join or resign;
- Permits and authorizations issued by Federal Public Administration agencies or entities are neither granted nor distributed by such associations or cooperatives; and
- In all cases, their constitution is authorized by their corresponding local legislature.

Therefore, in general terms the FLEC fully applies to the agricultural sector. Small firms are permitted to co-ordinate some activities by joining together in "integrating companies" created under a program administered by the Economics Ministry. The program is designed to help small and medium sized firms in several economic sectors to take advantage of scale economies and purchasing efficiencies in order to attain bargaining power in the provision, commercialization, financial and technology markets. The CFC considers that firms participating as partners or shareholders in such an entity are not acting as competitors. Consequently, their price standardization practices are not considered illegal the under the LFCE. Currently, 210 integrating firms exist in the agriculture sector and eight of them are considered successful.

Several mergers among buyers and among sellers of agricultural products have been reviewed by the FCC. Relative and absolute monopolistic practices have also been investigated by the FCC, concerning both the demand and the supply side of markets. Some of the most important cases will be described in the following sections.

Furthermore, the FLEC grants powers to the FCC to undertake advocacy activities at the federal and state levels. Right from the start, the FCC has been active in its advocacy role directed at the agricultural sector. Some important activities in this regard are discussed in section 5, including the assessment of interstate barriers to commerce.

3.1 Relevant buying power cases

In 2001 the FCC conducted two investigations regarding buying power of marketing or processing firms in the markets of beans and milk and another investigation concerning absolute monopolistic practices by processing companies in the pasteurized milk market.

Dried beans

The Minister of Economics informed the FCC of claims submitted by bean producers against several marketing firms, in particular those benefiting from import quota which allegedly paid low prices to domestic producers and set high prices for final consumers.

Therefore, the FCC began an ex-officio investigation to determine whether collusive practices existed as to fixing the purchasing or selling prices of beans. Information was requested from the Ministry of Agriculture, Livestock, Rural Development, Fishing and Foodstuffs, from the governments of the States of Sinaloa, Zacatecas and Nayarit, that are the major bean producers; the Transition Liquidation Group of Conasupo; and major bean marketing firms located in major markets in the Federal District, Guadalajara and Monterrey.

The information provided showed that, in the aforementioned states, except for Sinaloa, whole-bean producers lack bargaining power in the sale of whole-beans. Intermediaries, together with shipping costs from producing regions to the regions of greatest consumption, raise the final price for beans.

Thus, trade margins were found not to be high either for specific economic agents, or when comparing consumer and producer price indices. In addition, private marketing costs were higher than those farmers faced before the removal of liquidation, transport and financial subsidies provided through Conasupo.

Volumes acquired through tariff quota amounted to 7% of annual domestic production and so were not deemed to affect first sale prices. Moreover, between 1994 and 2000, duty-free bean import quotas from the U.S. and Canada were granted through public bidding, which constitutes a market mechanism.

Thus, the data analyzed did not raise any suspicion of the commitment of absolute monopolistic practices.

Milk market

In 1996, the federal government eliminated price controls for pasteurized milk, but the product remained subject to control by state governments. Price controls were finally removed in 1998. The price of pasteurized milk was expected to increase until it caught up with the margins lost during the period of price control. Raw-milk prices were also expected to experience parallel increases. Notwithstanding, the price of pasteurized milk went up more than that of raw milk, partly due to an overproduction of the latter.

Milk supply operates in two markets: i) that for processed milk which has nationwide distribution networks and covers pasteurized, pasteurized/homogenized, ultrapasteurized and rehydrated milk and ii) that for fluid milk (raw milk) which is the main input of processed milk and has a regional dimension because of the perishable character of the product. OnThe FCC conducted an investigation in 2001 in each of these markets, as described below.

Pasteurized milk

In 2000, the FCC initiated an ex-officio investigation about a possible price fixing agreement between major producers of pasteurized and ultra pasteurized milk.

One of the pasteurizing companies voluntarily proposed a commitment to anticipate conclusion of the proceeding, under article 41 of the Regulations to the FLEC. It committed to notify prices of pasteurized milk in each presentation, and the dates and percentages of their increments, over the next three years. Moreover, the FCC imposed the following conditions on this company:

- To provide the FCC with the prices at which it buys raw milk.
- To denounce before the FCC any absolute monopolistic practices that would come to their knowledge.

The remaining companies under investigation also agreed to observe this set of commitments and the investigation was concluded in advance. The FCC determined that the commitments were adequate and viable for overseeing the market performance and for impeding monopolistic practices.

Raw milk

In another proceeding the FCC initiated an investigation into the production, industrialization and marketing of raw milk. The FCC investigated the possible agreement among pasteurizing companies to cut the purchase price of raw milk and price discrimination against raw milk producers.

The investigation revealed that the increase in pasteurized-milk prices was not due to absolute monopolistic practices but to market conditions. Moreover, the FCC found that there was no parallelism in the evolution of raw-milk prices; that pasteurizers acquired only one-third of the nationwide production of raw milk and therefore could not be considered to separately or jointly hold buying power. Since no elements existed regarding the alleged responsibility of any economic agent whatsoever, the investigation was closed.

3.2 Relevant cases involving producer associations

Three cases regarding associations among producers of agricultural imports that have been evaluated by the FCC are set out next.

Harinera Seis Hermanos vs. Cargill

In 2000, Harinera Seis Hermanos (HSH) filed a complaint challenging a commercial boycott carried out by Cargill and several firms engaged in the sale of imported grains grouped together in the Association of Suppliers of Agricultural Products (Appamex). Upon an occasional refusal to buy by HSH Cargill cancelled a contract whereby it supplied HSH with American hard wheat. Moreover, Cargill requested HSH to pay for the expenses related to the cancellation of the contract, a payment that was not accepted by HSH. Cargill informed Appamex of this matter and asked to make it known to all members of Appamex. Cargill and Appamex were found to hold substantial power in the relevant market for wheat imported from Canada and the United States, which differentiates from domestic wheat because of its high protein content.

Commercial boycotts, as all relative monopolistic practices, are considered as violations of the FLEC as long as there is an intention to displace an agent from the market. Although Cargill argued that HSH was not displaced, the intention of the practice was proven. The FCC resolved that both Appamex and Cargill were guilty of relative monopolistic practices and imposed fines on them for attempting to boycott HSH.

Consultation of the National Union of Poultry Farmers

In 2001, the National Union of Poultry Farmers consulted the FCC whether an information system on domestic poultry-product market behavior would be in violation of the FLEC.

This system was intended to help farmers make decisions on investing, planning and developing products and thus enhance marketing efficiency.

The system would integrate statistical data from each of the regional poultry markets, provided by poultry companies and report weighted prices, but not individual producers' information. Information on weighted prices sensitive to market conditions would thus become available. The system's operation and administration would be, however, in charge of competitors and not of an authority or third party. Nevertheless, it would be subject to confidentiality policies to impede using disaggregated information for other purposes than those the system envisaged.

One of the arguments in favor of this mechanism stated that the actual conditions of chicken and egg markets made price setting difficult because several factors go into prices, such as weather, season and diversity in marketing conditions.

The FCC took into account that, in some cases, efficient access to information leads to the better market performance is.

Therefore, the FCC considered that the implementation and operation of the price-information system did not violate the FLEC as long as measures were adopted to preserve the integrity of the information to avoid collusive practices.

Sugar Commercialization Trust

In September 2001, the Federal Government expropriated 27 sugar mills and grouped them into a public trust named Fondo de Empresas Expropiadas del Sector Azucarero. On January 2003, a merger notification was filed before the FCC regarding the creation of another public trust, Fideicomiso Comercializador (Fico), aimed at creating a sole commercialization channel for the joint production of the expropriated mills.

The FCC assessed the impact of the transactions in two market segments, standard and refined cane sugar commercialization, due to differences in their production technology and in demand. Refined sugar requires additional processing and is an input for several food industries, while standard sugar is sold for final consumption. The geographic dimension of the market was established as national, due to the existence of normative entry barriers that hinder imports of sugar and of high fructose corn syrup which is substitute input for sugar for industrial purposes.

The FCC considered that Fico risked becoming an agent with substantial market power because it would commercialize nearly 50% of the total domestic sugar cane yield. However, the FCC determined that the creation of Fico was necessary to commercialize sugar produced by the expropriated mills, which in turn ensures domestic sugar supply and is thus intended to reinforce a future competitive environment. Therefore, the FCC authorized the merger, subject to divestiture of Fico after a two year period, which may only be extended on justified basis.

3.3 Relevant advocacy cases

The FCC has undertaken important advocacy activities relating to the agricultural sector including the issuance of opinions about privatization schemes, prospective participants in auction processes and a proposed program of federal authorities; the review of standards; and the evaluation of barriers to interstate trade.

Opinions in privatization processes

Privatization of the Public System of Warehouses (ANDSA)

In 1995, the FCC issued its opinion regarding privatization scheme for the public system of warehouses, named Almacenes Nacionales de Depósito (ANDSA). ANDSA was the state-owned firm that operated the most important grain storage, gathering, distribution, and supply facilities in Mexico. The divestiture of ANDSA was carried out by the Inter-ministerial Commission of Divestments (CID) with the aim of modernizing infrastructure, increasing efficiency and coverage of the storage services, and encouraging private participation. The CFC, a CID member, issued its opinion about the separation and subsequent sell of ANDSA's assets to prevent anticompetitive concentrations, the emergence of unnecessary exclusive privileges or entry barriers, and the undue displacement of economic agents. As a result of a public consultation and cost-benefit analysis, the CID decided to:

- Separate storage from gathering, distribution, and commercialization.

- Allocate storage facilities to local farmer organizations to strengthen their bargain power and improve crop handling efficiency.

- Create Pantaco Internal Port and Logistics Activities Center (PICALP), following the partial divestment of ANDSA's Pantaco Unit, the largest storage center in the country.3

- Consolidate gathering, distribution, and commercialization units into three regional companies, located in the north (Seranor), west and center (ACO), and south (Alsur) which were deemed not to hold market power. These enterprises would also obtain a concession to operate strategic state-owned storage units that obliged them to provide open and non-discriminatory access.

All assets were allocated though public auctions that requested the FCC's affirmative approval to prospective participants. Main features of the creation of PICALP and the regional firms are described below.

Divestiture of Pantaco Unit

In the ANDSA system, the Pantaco Unit was responsible for the distribution and supply of grains to the Mexico City Metropolitan Area (MCMA), the major consumption center in the country. Pantaco Unit's facilities included 112 warehouses and common spaces (yards, general construction, multi-purpose building, huts, weighbridges for trains and trucks, internal streets, railway infrastructure, etc.), which share with the adjacent railroad terminal.

In 1995, the CID called for the auction of 83 out of the 112 warehouses of the Pantaco Unit and their correspondent share of the common areas. The remaining assets would remain property of ANDSA and Ferrocarriles Nacionales de Mexico (National Railroads of Mexico), the state-owned railroad enterprise that was privatized at the late nineties. The income obtained from the auction was used to create and finance PICALP, a trust to build and develop an internal port as well as to manage and carry out the logistics in common areas. This divestment scheme allowed storage, railroad transport and ancillary services to be rendered within the same area by separate specialized agents.

Fifteen prospective participants requested the FCC's favorable opinion. The relevant market corresponded to the provision of the following services: handling and storage of non-perishable goods, warehousing, custody, preservation, and logistics; either at storage warehouses or general deposit warehouses located in the MCMA. The FCC found the number of services provided by warehouses outside PICALP were less than those provided within PICALP.

Despite the lack of close substitutes for PICALP's services and the major investments necessary for constructing and combining services of this kind, market power would be strongly curtailed by the restrictions imposed on the awarding of the storage areas. Thus, under the auction guidelines, owner would operate independently and each qualifying company or group could only be granted up to 10% of PICALP's total surface. Thus the divestiture scheme prevented anticompetitive concentrations and market forces would encourage the economic agents to take advantage of the benefits of vertical integration provided by PICALP, thereby benefiting society in general and users in particular.

The FCC granted favorable opinion to 11 bidders whose participation raised no competition concerns. The participation of the remaining four bidders was conditioned. Two of them should not jointly obtain more than 10% of the auctioned areas, because one of them was the major shareholder of the other. The remaining two firms already provided custom brokerage services, and thus should refrain from linking storage services to the former services through anticompetitive practices.

Privatization of Alsur, ACO and Seranor

The three regional storage firms created from ANDSA's assets were privatized in 1997. The FCC participated in the auction design and in evaluating prospective bidders, the majority of which were already involved in activities related with the warehouse companies.

Alsur, ACO and Seranor provided public grain storage, distribution, trade, financial services, logistic and ancillary services through regional networks of storage facilities. In particular, Alsur, specialized in maize and its assets included a concession to use the grain terminal in the Veracruz port, as well as the major storage facility in the MCMA. ACO was specialized in maize, bean, wheat, and sorghum; it also had the network with the largest installed capacity in the country and full rights to operate a specialized port terminal in the Pacific coast and to build and operate another one in the Gulf of Mexico. Finally, Seranor, specialized in maize, bean, wheat and oily grains and had 25 storage units in the former Pantaco Unit and a concession to operate a port area in Baja California devoted to handle grains.

Competitors that provided the services on individual or integrated basis existed in all three relevant markets. In the Seranor case, the FCC found that the scale of its storage capacity as well as its access to port transport would not be easily substitutable; and that potential competitors faced entry barriers, including licenses and large investments.

The FCC evaluated three prospective bidders for the Alsur auction, three more for ACO, and two more for Seranor. All but two agents obtained a FCC favorable opinion. Grupo Servia and Grupo México were not allowed to participate in the Alsur and Seranor auctions, respectively because they held shares in the railroad enterprises that served Alsur and Seranor's geographical areas. This decision sought to avoid integration of the main transport means available for grains -port and railroad- with the strategic warehouse networks for the trade and supply of cereals. Furthermore, at the time that the FCC was assessing Grupo Mexico as a prospective bidder for the Seranor auction, one of its shareholders had already won the Alsur auction, thus increasing risks to competition.

Public biddings of port terminals specialized in grains

Since 1994, the granting of concessions to private agents for the public provision of port services began. The national port system that was at that time controlled by the State was modified significantly with the reforms that allowed the creation of companies named integral port administrators, that were under state control but with the possibility of being transferred to private agents. The port privatization scheme was characterized by allowing, whenever possible, competition between ports, as well as between terminals in the same port, or competition within a terminal in which various providers of services compete. In 2000, the stage of granting concessions initiated in 1994 has practically concluded with the transfer of important cargo terminals to private agents and has paved the way for another stage, that of the creation of new, more specialized terminals.

In 2001, the FCC resolved on two tenders for port installations specialized in the handling and processing of grains in the ports of Coatzacoalcos and Topolobambo. In both cases, the FCC gave a favorable opinion on the participation of the economic agents.

The evaluation of participants in tenders not only requires an analysis of their participation in relevant markets, but also that of related markets. In both tenders the FCC defined that the relevant service corresponded to maneuvering for the transfer of grains, such as loading, unloading, clearance, storage, stowage and transportation provided in the port. In the case of Coatzacoalcos, the geographical sphere of the market was the southern area of Veracruz, the States of Puebla, Tlaxcala, Tabasco, the Federal District

and the Coatzacoalcos-Salina Cruz area. In the case of Topolobampo, the area covered the States of Sinaloa and Sonora.

Review of regulations

Proposed program to remove inferior quality coffee from the market

In March of 2002, the agency in charge of regulatory reform requested the FCC's opinion on the competition effects of a program proposed by the Ministry of Agriculture, Livestock, Rural Development, Fishing and Foodstuffs, which established the elimination of a certain quota of low quality coffee produced by member coffee exporters. The CFC considered that the effects of the program would be in breach of articles 8 and 9 of the FLEC because it indented to restrict supply by competing exporters, thus reducing total coffee supply and, in consequence, increasing market prices.

Product standards

The FCC participation in the National Standards Commission (NSC), responsible for elaborating and promoting observance of Mexican Official Norms, seeks to strengthen pro-competitive standards, and to prevent them from acting as artificial barriers to entry and from unduly displacing established enterprises.

Mexican Official Standards in the agricultural sector are mainly directed to avoid phyto - or zoo-sanitarian risks. There are no compulsory standards applicable to the quality of agricultural products, but voluntary norms set grades and quality standards for specific products. However, because of their voluntary nature, they generally do not imply risks to competition.

Barriers to interstate commerce

Finally, the FCC has reviewed state and municipal regulations in order to prevent the establishment of interstate trade barriers, which often affect agricultural products. The CFC's usual practice was first to issue a recommendation urging repeal. If the state entity took no action, the CFC then issued a public declaration that the regulation constitutes an interstate trade barrier.

These barriers to interstate commerce are regulations or other actions of State authorities that are presumably aimed at the prevention of sanitarian risks or at assuring the quality of the product, but whose real aim could be to protect local producers. Generally, such authorities do not have the power to regulate sanitarian or quality aspects, being these matters responsibility of the NSC or of the federal sanitary authority. In the next section, the activities of the FCC regarding barriers of interstate commerce are briefly described.

Tomatoes

In 1999, the FCC declared the existence of interstate trade barriers in the market of tomatoes in the State of Sinaloa imposed through a decree that established a system that subjected fresh tomato entry and exit to local inspection and phyto-sanitary certification. This certification implied an additional requirement to those foreseen in federal regulations and hence unduly increased regulatory barriers in the market. Consequently, the FCC recommended the state government to revoke the above-mentioned decree.

Poultry products

Between 2000 and 2002, the FCC assessed the effects of measures to supervise and control poultry products issued by state governments in Oaxaca, Jalisco and Sinaloa. Although they aimed to prevent propagation of diseases or to guarantee size and quality standards these measures were found to

unjustifiably impede access to producers from other states and therefore to restrict supply. Recommendations were issued to the three governments and in addition a declaration of the existence of interstate barriers was issued in the case of Oaxaca.

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NOTES

1 Information in this section was obtained from Lacroix et al..

2 Prepared by the US Food Marketing Institute, in cooperation with ANTAD.

3 This complex was Mexico's largest storage center, accounting for 12% of ANDSA's capacity and 6% of the nation's entire capacity.

NETHERLANDS

1. Purchasing power - General

It is argued that SME's experience disadvantages as suppliers due to the competition-restricting behaviour of (large) enterprises that possess purchasing power. Moreover, it is argued that they should therefore be able to obtain a stronger position in relation to large suppliers and purchases through co-operation, for instance in the form of collective negotiations, subject to the proviso that this exemption for hard-core terms must remain limited to situations in which small and medium sized enterprises are economically dependent on large purchasers. Such a situation may arise if, for instance, a refusal by the dominant market parties to purchase services and products would threaten the continuity of these small and medium sized enterprises in the short term.

However, according to the May 2002 evaluation of the Dutch Competition Act (DCA), which in principle prohibits above-mentioned forms of co-operation, the introduction of the Act on 1 January 1998 has had no strong adverse effects on the development of small and medium sized enterprise sector.

Differences in size and power exist between businesses in every market and such differences in themselves are not necessarily problematic. The extent to which *purchasing power* leads to adverse effects on the prosperity of consumers is dependent mainly on whether the advantages that a business with *purchasing power* has when purchasing (for instance in the form of a lower price) are passed on to the consumer. If in addition to *purchasing power* an enterprise also has *selling power*, those advantages are not passed on and the prosperity of consumers is adversely affected. In addition, situations may arise in which an enterprise with *purchasing power* forces its suppliers to supply only to it, not only obstructing the development of those and other potential suppliers but also potentially distorting the market because competitors are no longer able to obtain supplies. At present no indications are apparent that such situations are common.

Further, it is questionable whether enterprises with purchasing power would benefit in dynamic terms from marginalizing their suppliers by forcing them into purchase prices below cost price. Many large purchasers are actually seeking possibilities to realize an improvement to the production process, together with the various links in the chain. Moreover, an enterprise with purchasing power has nothing to gain from a pricing policy that causes suppliers to leave the market, which in the most extreme case would leave only a single supplier. It should also be pointed out that 'protecting' small and medium sized enterprises may be counterproductive because it would reduce the incentive for suppliers to arm themselves against *purchasing power* (for instance by seeking out other purchasers, distinguishing themselves from other suppliers and by innovation).

When abuse of a dominant position occurs on the demand side of the market, action must be taken against it under Section 24 of the DCA. The acceptance of a dominant position (joint or otherwise) or a cartel on the other side of the market would offer no alternative. It would lead only to a redistribution of income between the enterprise having purchasing power and the co-operating suppliers rather than to lower prices for the consumer (and might even cause price increases). In addition, such a market structure would give rise to economic disadvantages, such as the homogenization of supply, as well as reducing incentives and possibilities for innovation and market entry. Permitting far-reaching co-operation between suppliers in order to offer a counterbalance to an enterprise with purchasing power would therefore almost by definition be to the detriment of the consumer.

The Netherlands Competition Authority (NMa) does focus attention on purchasing power, as is apparent from, amongst other things, various cases regarding concentration and the consultation document "NMa-agenda 2004" published in August 2003.[1] In that document it was announced that the NMa would focus additional attention on purchasing power in the year 2004.

2. Specific questions as to agriculture

(a) Producer "joint-activity" organisations

(i) *Antitrust exemptions for joint selling in agriculture*
There are no national antitrust exemptions for joint selling in the agricultural industry.

(ii) *Reasons to permit larger farmer co-operatives*
The NMa applies, also in national cases due to article 12 and 13 of the Dutch Competition Act, the Guidelines form the European Commission concerning horizontal agreements. These Guidelines give a good indication whether there is a competition problem.

(iii) *Description of 'joint-activity' organisations in the Netherlands*
Joint-activity organisations can have the form of cooperatives companies. They have the special feature that the member-owners are simultaneously significant business partners and thus closely involved in strategic developments.

(iv) *Antitrust concerns raised by joint-activity organisations through their behaviour*
The NMa did not receive any noticeable complaints regarding alleged anti-competitive behaviour by joint activity organisations in the agriculture industry. No antitrust concerns have risen in relation to behaviour by joint activity organisations.

(v) *Possibility of trademark protection (e.g. appellations) for farmer products*
Agriculture companies can, apart from generally applicable intellectual property rights, protect their products with specific intellectual property rights. Firstly, plantbreeders can apply for a plantbreeders' right. It provides the exclusive right to produce, increase and trade protected plant races. Others can carry out these acts only with approval of the holder of the plantbreeders' right or after obtaining a licence. All plant races have a proper name and can be traded only under that name. This name is a generic indication ('soortaanduiding'), which means that comparable wares and products cannot be traded under this same name or under one that resembles this name. National breeders' law is based upon a Treaty (54 member states).

Moreover, for agriculture products a protected geographic indication can be acquired. The basis for this is a European Regulation. The indication 'Parmaham' or an indication referring to or resembling this indication can only be used for products produced which have been produced in the region Parma according to the for that region specific procédé. In the Netherlands, only a few products are protected by geographic indication. Reason for this is that many Dutch agriculture products are not typically linked to a region.

(vi) *Recent changes in rules governing "joint-activity" organisations*
Since the introduction of the Dutch Competition Act in 1998, which brought the same system as in the EU, no changes in competition law appeared affecting "joint-activity" organisations".

(vii) *Notable competition or regulatory cases in recent years dealing with issues of "joint-selling"*
There are no recent major cases in the agriculture industry regarding issues of "joint selling".

(b) Competition Advocacy

(viii) *Advocacy role Competition Authority in development and evaluation of agricultural regulations and laws, co-operation between policy bodies*
Representatives of the NMa periodically meet with representatives of the Ministry of Agriculture, Nature Management and Fisheries to discuss at an early stage possible conflicts between agriculture policy items and competition law. During these meetings the NMa can make clear what is and what is not allowed under competition law. Moreover the NMa can be asked to advice on questions relating to the introduction of competition in the market.

Moreover the Ministry of Economic Affairs can function as 'liaison' between the Ministry of Agriculture and the NMa in specific cases. In 2003 the NMa imposed Dutch, German and Danish shrimp fishers and shrimp traders several fines totalling € 13,8 million. Prices and the supply of shrimps were totally divided between almost al fishers (united in several bonds) and traders. In this case the NMa made clear what is and what is not allowed under competition law and made clear that price fixing agreements and agreements by which output is restricted, do not benefit from the exemptions laid down in Regulation 26 (this was supported by the European Commission). This case drew the attention of Parliament and of the Ministry of Agriculture. Parliament tried to persuade the Minister of Economic Affairs to overrule the NMa in this case – it was argued that the fishers would go bankrupt if they had to pay the fines. It was difficult for the Ministry of Agriculture, but it supported the Minister of Economic Affairs not to bow for this lobby. In this case, the Ministry of Economic Affairs had examined the decision of the NMa and the national and European competition law, compared this with the national and European fishery regulation and shared this with the Ministry of Agriculture (The decision of the NMa was merely based on European law.).

(ix) *Public role competition authority in advocating competition in agricultural sector*
The NMa has no public role in advocacy on competition in the agricultural sector.

(x) *Appropriate criteria for judging harm in competition cases related to agriculture*
The Netherlands do not have experience with calculating damages in violations of competition law.

(xi) *How can agencies effectively address competition concerns of farmers, such as bid-rigging*
Purchasing power is one of the priorities of the NMa for the year 2004. The NMa is currently preparing a consultation document regarding buying power. With this document, the NMa gives farmers, amongst other "small" business, the opportunity to bring forth their competition concerns.

NOTES

1 See www.NManet.nl

NEW ZEALAND

Introduction

This paper responds to the invitation to make a written contribution to the June roundtable on competition and regulation in agriculture: monopsony buying and joint selling. In doing so, it sets out the more general context in which New Zealand has approached the regulation of the agricultural sector. In this context it is worth noting that successive New Zealand governments have sought to progressively regulate agriculture under mainstream competition policy frameworks and under generic competition law. While some of the issues involved have been complex and politically contentious, New Zealand's experience in this respect has been generally positive. In particular, some agricultural sectors have experienced gains in dynamic efficiency as producers, processors and retailers have sought to adopt new products, technologies and organisational forms.

The paper is arranged in two parts. The first part discusses the application of New Zealand's competition law to the agricultural sector. The second part briefly discusses industry-specific regulation of domestic agricultural markets with a particular focus on dairy and pipfruit. Tables are outlined giving a chronology of regulatory reform of the domestic agricultural sector in New Zealand.

Part one: Agriculture and the Commerce Act

Importance of agriculture to New Zealand economy

Agriculture in New Zealand is predominately pastoral based with the major sectors being dairy, meat, and wool. Dairying and wine are the fastest growing sectors in recent times.

Farming and horticulture continue to be significant export earning industries for New Zealand. Agricultural exports accounted for about 44 percent (FOB) of merchandise export receipts in 2003, reaching almost $13 billion, while horticulture exports accounted for over 7 percent of export receipts, or $1.9 billion.

In 2003, agriculture (including horticulture, to farm gate) provisionally constituted approximately 6.3% of nominal gross domestic product. Agriculture contributes about 16.5% of real gross domestic product, including downstream industries.

Interface with the Commerce Act

The agricultural sector is subject to New Zealand's competition law, the Commerce Act 1986.

Key provisions of the Commerce Act

The purpose of the Commerce Act is to promote competition in markets within New Zealand for the long-term benefit of consumers.

The key restrictive trade practices in the Commerce Act are:

- A prohibition against entering into or enforcing arrangements that have the purpose, effect or likely effect of substantially lessening competition (section 27);

- A provision deeming arrangements between competitors that control or maintain price to be per se illegal, unless the arrangement relates to certain limited exemptions (section 30); and

- A prohibition against persons with a substantial degree of market power from taking advantage of that power for anticompetitive purposes (section 36).

In addition, the Commerce Act prohibits mergers or business acquisitions that have the effect or likely effect of substantially lessening competition (section 47).

Authorisation from the Commerce Commission is available on application to any person proposing to enter into an arrangement or acquisition that may substantially lessen competition. The Commission may authorise that arrangement or acquisition if the public benefit from that arrangement outweighs the associated anticompetitive detriment. The Commission may impose conditions on restrictive trade practice authorisations but may only accept structural undertakings for authorisation of mergers and acquisitions.

An authorisation has the effect of making that arrangement or acquisition immune from the relevant prohibitions in the Commerce Act. Authorisation is not available for taking advantage of a substantial degree of market power (section 36).

Agricultural exemptions from Commerce Act

There are currently two specific exemptions from the Commerce Act for the agricultural sector. These limited exemptions are contained in the Meat Board Act 1997 and the Pork Industry Board Act 1997[1]. The exemptions relate to arrangements for setting levies by the Boards for the purpose of funding their industry-good activities, and in the case of the Meat Board, the exemption extends to the Board's administration of export tariff quota arrangements.

The treatment of the merger transaction between the two major dairy cooperatives in New Zealand, which resulted in the formation of Fonterra Cooperative Group Limited, is discussed in more detail in Part Two of the paper.

More generally, although it has not been used, there is an exemption in the Commerce Act for entering into arrangements that relate exclusively to the export of goods from New Zealand or the supply of services wholly outside New Zealand, so long as that arrangement is furnished to the Commerce Commission within 15 working days of being entered into. No arrangements have been furnished to the Commerce Commission under this provision. It is also likely that this exemption is redundant, as the specified arrangements do not impact on domestic markets to which the Commerce Act applies.

Features of agricultural markets

In 1991, the New Zealand government carried out a review of the application of the Commerce Act to primary products.

Submissions to the review identified some particular features of markets for primary products relevant to a competition analysis. These were:

- Instability of markets – supply of agricultural products is subject to a range of exogenous risks making the markets relatively volatile. These risks include:

- Price risk – market prices are often volatile such that the prices prevailing at the time of harvest or yield are often unknown when investment or production decisions are made; and

- Yield risk – the volume and quality of products from a given investment are variable and often affected by uncontrollable factors such as weather and disease.

- Perishable nature of products – the importance of timely harvesting at maturity and the perishable nature of the many of the products post harvest, imposes a limited window for sale of the product before value is lost.

- Information difficulties – there are some information asymmetries between buyers and suppliers:

- Buyers often have difficulties in assessing the quality of goods post harvest. This has the potential for low quality producers to adversely affect the price buyers are willing to pay to higher quality producers. This problem is often addressed by minimum quality standards or branding.

- Producers often have difficulty in obtaining information about the markets in which they operate, including information on trends, consumer preferences and future demand. This may create the risk of exploitation by middlemen. However, this risk is reduced where forward markets exist, or where information about price and supplies are available electronically at low cost.

- Export orientation – agricultural production in New Zealand is predominately exported. For example, over 95% of dairy production and over 90% of lamb production is exported. Therefore, markets are also vulnerable to various trade risks, such as changes to international regulatory environments and currency fluctuations.

These factors were seen to contribute to agricultural markets that are characterised by many weak sellers and, often, few large buyers. This can place farmers in a weak negotiating position and vulnerable to oligopsony or monopsony power.

Producers have sought to address these features through contractual arrangements and producer or marketing organisations. Producer cooperative companies are common place at the wholesale level in many agricultural markets. In some cases these organisations or arrangements are supported by regulation.

The review team assessed various Commerce Act decisions and Commerce Commission authorisations and concluded that generally the Commerce Act could deal with these features of agricultural markets. The following is a brief discussion of the manner in which the Commerce Commission has considered these issues.

1. Instability of Markets

In Re Grape Growers Council (Decision 263)[2] the Commission identified the advantages and disadvantages of price stability:

'Price stability reduces uncertainty and risk and makes planning for the future simpler. However the effects can be beneficial overall only if the more stable prices provide an accurate reflection of market signals' (paragraph 34.3).

2. Information Difficulties

The difficulties which individual producers may have in assessing market conditions were considered in Re Grape Growers Council where the Commission recognised that improvements to the flow of market information could constitute a public benefit. The exchange of information, and price recommendations by trade associations and grower organizations, do not necessarily contravene the Act. The application of the Act to such practices will *vary* depending on the purpose and effect of the arrangements. Section 32 of the Act exempts price recommendations by industry associations with 50 or more members from the price fixing provisions of section 30 providing certain conditions are observed.

3. Export Orientation

A fundamental issue has been whether an anticompetitive practice or merger was necessary to improve export performance. In several cases the Commission found that the export benefits were substantial and contributed to the decision to grant authorisation. For example, this was central to the authorization decision in Re Kiwifruit Exporters Assn (Decisions 221 & 238).

In NZCDC/Auckland Co-operative Milk Producers Ltd (Decision 216) the Commission recognised export benefits but considered that they flowed from the efficiency enhancing effects of the merger. The Court put particular emphasis on international competitiveness in New Zealand Co -operative Dairy Co Ltd & Anor v Commerce Commission. The Court gave "considerable weight to the benefits flowing from the merger which assist with the process of rationalisation of this vital export industry." (1991) 3 NZBLC 102,088.

4. Weak Sellers

The Commission has considered equality of bargaining power in two of its decisions. In Re Kiwifruit Exporters Assn the Commission noted the unusual nature of contracting in the industry which meant that growers, who decided which coolstore to use, were not involved in the price setting process for kiwifruit, the price of which embodies the pooled coolstore charges. The exporters negotiated on behalf of the growers despite having only an indirect interest in keeping charges for coolsorage down. As a result one of the conditions of authorization was that growers be directly represented on the panel which set coolstore prices.

The Commission commented in Re Kiwifruit Exporters Assn and Re Grape Growers Council that arguments relating to equality of bargaining power may have little substance. Imbalances of bargaining power often have more to do with demand and supply conditions in different phases of the business cycle. In Re Grape Growers Council the Commission found that the imbalance arose in large part from the existing oversupply of grapes, rather than the structure of the industry. It stated that if there were a closer balance, growers would be able to bargain with other wineries to seek higher prices. The Commission therefore declined to consider this as a public benefit.

Examples of other Commerce Commission proceedings relating to agricultural markets

Monopsony buyers - supermarkets.

The Commerce Commission has considered the concentration of buyers in wholesale food markets, and in particular, the competitive impact of supermarkets[3]. These decisions related to a proposed merger between the second and third largest parties in the supermarket sector, which was characterised by 3 large firms.

The main focus of the Commission's decision was on retail markets. However, in respect of wholesale markets, the Commission noted that over the past ten years there has been a significant shift in power between manufacturers, including agricultural wholesalers, and supermarkets. It recognised that

manufacturers such as Heinz Watties do not have the same power over supermarkets as they once did. Rather, supermarkets now hold a lot of influence over suppliers. In some cases, supermarkets have vertically integrated into food manufacture (e.g. Progressive Enterprises owns its own meat processing plant and Foodstuffs[4] its own milk company).

However, there would appear to be a degree of mutual reliance on each other; manufacturers need supermarkets as a distribution outlet, while supermarkets need the brands to draw customers into the shop. This applies to firms with strong, established brands, including Heinz Watties, Goodman Fielder, and the milk companies. Supermarket house brands are providing competition at the lower end of the market.

The strong export orientation of agricultural producers and, to a lesser extent, the availability of other distribution channels (such as the route trade and specialist shops[5]) were also identified as major constraints on the monopsony power of supermarkets. The importance of supermarket channels for some categories of agricultural suppliers is outlined below.

Approximate proportion of food products sold through NZ supermarkets as proportion of total food produced:

Wine	35%+
Meat	>20%
Fruit and Vegetables	65-70%
Dairy Products	>8%

Meat companies price fixing case – *Commerce Commission v Taylor Preston Limited, et al (1998)*

In the late 1990s the Commerce Commission conducted extensive investigations into the meat industry. The meat industry had just emerged from a long period of stability protected by supplementary minimum prices and fixed schedule prices, into an hitherto unknown, fiercely competitive market in which some well established companies failed. Over this period, most export meat products were spot traded, exposing the meat companies to significant uncertainty.

As a result of these investigations, nine major meat companies acknowledged in the High Court contravention of s 27(1) of the Commerce Act[6]. This involved, in most cases, that between 1992 and 1995 the companies arrived at understandings that were likely to have the effect of lessening competition in the market. The companies held regular meetings, approximately 90 in total, to discuss maximum prices for livestock procurements. The understandings involved not only the incumbent giants, Affco and Richmond, but also new entrants who would otherwise have been expected to ensure competitive prices.

The Court found that the extent and nature of the loss suffered could not be measured. It noted that there was room for the view that the effect of the understandings was limited and that competitive market forces worked anyway. This assessment was based on the fact that frequently there was an oversupply of slaughter capacity and an under-supply of stock, so that competition for what was available quickly took over. There was however a perception by the suppliers of livestock that they were being disadvantaged.

The High Court found it appropriate to impose the highest total and individual penalties provided by the Commerce Act at the time. However, the Court noted the circumstances in which the breaches had taken place. The Court suggested that the meat companies failed to grasp the significance of the changes in a deregulated market. In particular, that with deregulation came the Commerce Act with its emphasis on efficiency in the use of resources and its prohibitions against interfering with the competitive market by which those resources were allocated.

Part two: Industry-Specific Regulation

This part discusses various industry-specific regulatory issues, with particular focus on the dairy industry and domestic market regulation. As noted in the introduction, the general approach adopted by successive New Zealand governments has been to seek to remove sector specific regulation for agriculture and integrate all sectors into the mainstream of New Zealand's competition regulation. While this process is ongoing, it can also be seen as nearing completion. For a more complete overview of developments in individual sectors, see appendix 3.

Regulation of dairy industry

The regulation of the dairy industry in New Zealand is worthy of particular discussion.

Period 1900s - 1999

The New Zealand dairy industry from its outset was based on farmer-owned cooperative dairy companies. Most of New Zealand's milk was processed into butter and cheese, and later also into milk powder, and exported to Britain (with the associated abnormal market conditions existing there during wartime and immediately following). The early focus of regulation of the industry was to achieve higher prices and more stable prices for farmers. Single desk marketing arrangements were first introduced in 1922 with mixed success.

Following Britain joining the EU, the Dairy Board (the then single desk exporter) sought to diversity its export markets and products. Frustration with the level of earnings derived from the agricultural sector led to increased government intervention over the period 1963 to 1984[7]. From an early reliance on loan schemes and fiscal concessions, the apparatus of intervention slowly built up to include input subsidies, subsidised loans, subsidised stabilisation credits and direct price support.

Sweeping reforms in the 1980s included the abolition of price controls, financial assistance schemes, and many other changes. The New Zealand Dairy Board was retained but its functions and accountability arrangements were refined. These refinements included clearly establishing the ownership of the Board by allocating shares in the Board to dairy cooperatives giving farmers more control of the Board. Shares were allocated to the cooperative dairy companies in proportion to product supplied for export and were owned by the cooperatives on behalf of farmers who supplied milk to these cooperatives.

Rationalisation of industry

The industry has also been marked by substantial rationalisation, particularly through merger activity. Mergers were subject to the Commerce Act and overseen by the Commerce Commission. The outcome of this activity was the emergence of two major market players – New Zealand Dairy Group and Kiwi Cooperative Dairies Limited - which together accounted for about 85 percent of total dairy production in New Zealand.[8]

At the same time, the dairy industry was characterised by the concentration and consolidation of dairy production on a limited number of sites. For example, Kiwi consolidated much of its North Island activity on a single megasite at Hawera, while Dairy Group consolidated its dairy processing activities on four or five "super" sites in the central North Island. The emergence of larger dairy processing plants, and the consolidation of plants on fewer sites, reflected in large part the presence of economies of scale and of scope in the processing of dairy products.

1999 proposed reforms

In the 1998 Budget the National Government announced that all statutory producer boards, including the Dairy Board, should provide the Government with plans for deregulation. Despite undergoing reform in the 1980s, the dairy industry remained highly regulated in terms of its structure, marketing and commercial arrangements. Issues of pricing, capital mobility and governance combined to restrict the options of industry participants and distort their incentives. As a result, the industry was considered unlikely to be maximising the return on its substantial capital investment (at the farm, processing or marketing levels) or exploiting its full scope for innovation in the face of changes in technologies and markets.

Considerable pressure was mounting within the industry for the removal of the Dairy Board structure. Only co-operative companies were able to hold shares in the Dairy Board, all exports of dairy products had to be marketed through the Board, and the Board's pricing behaviour was exempt from the Commerce Act 1986. These factors increasingly conflicted with industry objectives. The Dairy Group and Kiwi were moving off shore with acquisitions in Australia. Tatua, a small co-operative, was pursing its own niche market and high value strategy. These companies were all attempting to expand into new markets. However under the regulatory environment, none could adequately control their overseas marketing – a key element of each company's business.

In response to the Government's invitation, the dairy industry sought to merge the 2 major dairy co-operatives and integrate the operations of the Dairy Board into the new company. The Government agreed to facilitate the industry restructuring through full deregulation provided that the merger was subject to oversight by the Commerce Commission under the Commerce Act 1986.

The dairy cooperatives submitted an application for authorisation of the merger in June 1999. The Commission subsequently released a draft determination. A key concern of the Commission was the impact on domestic markets and that the proposal would give the merged company potential control of all milk produced by farmers.[9] The downstream effects of this on consumers were considered to be significant. In addition, the Commission did not accept many of the benefits claimed by the applicants. In particular claimed benefits of economies of scale from export marketing were not substantiated given the counterfactual of the status quo with the Dairy Board.

On the basis of the draft determination, the applicants withdrew their application and the Government's proposed deregulation reforms were halted due to lack of industry support.

2001 reforms

In December 2000, the two major dairy cooperatives approached the Labour Government with a revised proposal for restructure of the dairy industry. Mindful of previous Commerce Commission concerns, the dairy cooperatives proposed a package of measures to mitigate the risks of market power being held in key domestic New Zealand dairy markets. The companies argued that the merger should not be referred to the Commerce Commission as in its view the Commission was not able to easily take into account the interface between the merger and the regulatory framework for the industry.

After receiving extensive advice from officials, the Government accepted the two companies' proposal, subject to conditions. The Government noted that, unlike the Commerce Commission, it could impose behavioural undertakings on the merged entity by regulation to mitigate the competition concerns. By this means the Government considered that it would be able to address many of the detriments previously identified by the Commission.

The Dairy Industry Restructuring Act 2001

In September 2001 Parliament authorised the merger of New Zealand Dairy Group, Kiwi Cooperative Dairies Limited, and the New Zealand Dairy Board to form Fonterra Cooperative Group Limited. The Dairy Board's statutory marketing privileges were revoked and the export regime liberalised. Fonterra is a cooperative company. Shares are priced at "fair value" and are owned by supplying farmers in proportion to milk supplied to the company.

The Dairy Industry Restructuring Act 2001 ("the DIRA") imposed various obligations and constraints on Fonterra for the purposes of facilitating competition in New Zealand dairy markets, particularly the market for farmers' raw milk. The regime is aimed at ensuring that farmers are both free to leave and free to join Fonterra.

Regulating for open entry and exit of farmers to Fonterra is the heart of the regulatory package. Because of Fonterra's near monopoly status and its associated market power it may have both the incentive and the ability to create barriers to new milk suppliers joining the co-operative or switching from Fonterra to other processors. One of the possible mechanisms available to Fonterra for this purpose would be manipulation of the milk price and its own share value. It could, for example, use returns from equity investments to cross-subsidise the price to farmers for processing milk, making entry of a competitor more difficult and discouraging suppliers from switching to another company. This in turn would give Fonterra's management a degree of protection from competitive pressures.

To mitigate this risk the Government has regulated to provide for open entry to Fonterra for any farmer wanting to supply Fonterra at its posted share price, as well as open exit from Fonterra. Under this system, Fonterra faces strong incentives to set market clearing milk prices and share prices. If Fonterra sets the milk price too high or share price too low it would face an influx of milk. If it set the milk price too low or its share price too high, it would face a loss of suppliers to its competitors (or out of the industry).

In addition, the Government moved to provide for competition in the domestic market for dairy products by requiring Fonterra to sell its shares in New Zealand Dairy Foods (NZDF), one of the two main domestic marketers of dairy products. Regulations are also in place to ensure that NZDF and other domestic companies can gain access to raw milk from Fonterra at a fair price. Currently an access regime exists for processed milk to be supplied by Fonterra to independent processors (at a price based on Fonterra's payout to its suppliers).

The Commerce Commission is responsible for monitoring compliance and enforcing the DIRA. Parties concerned with Fonterra's behaviour can approach the Commission directly. Fonterra is also fully subject to the Commerce Act. In addition, the Crown levies Fonterra to cover the Commission's costs of enforcing the DIRA. This provides a financial incentive for Fonterra to act in a way that minimises the number of complaints to the Commission.

Regulation of pipfruit exports

The regulation of the pipfruit export industry is also worthy of particular mention. New Zealand pipfruit exports earn between $360 million to $480 million per year (excluding processed fruit), making it New Zealand's second largest horticultural export industry (after kiwifruit). Marketing of pipfruit is fully deregulated, (in domestic markets in 1994 and export markets in 2001), and subject to the Commerce Act. The following is a brief summary of the reforms.

Period 1890s – 1999

New Zealand began exporting pipfruit in the 1890s but did not achieve substantial production volumes until the 1920s. For the purposes of aiding the fledging industry, the Fruit Export Control Board was set up in 1925 and from 1926 it began exporting fruit to Britain. The outbreak of World War Two saw the government take control of pipfruit marketing, and in 1949 the Apple and Pear Marketing Act created the Apple and Pear Marketing Board ("the Marketing Board". The Marketing Board functioned as a single-desk exporter of apple and pears and was required to purchase apples at prices fixed in accordance with the Apple and Pear Marketing Act 1948.

The single desk exporting system in the post-war period enabled New Zealand to achieve critical mass in pipfruit marketing, prevented price competition by New Zealand exporters, and helped lift quality standards. The New Zealand pipfruit industry also benefited greatly through its investment in innovation, including the development of new pipfruit varieties such as Royal Gala and Braeburn, through on-orchard productivity, and the early introduction of Integrated Fruit Production.

Over time New Zealand's ability to compete profitably in export markets was challenged by the emergence of strong competitors such as Chile, and the loss of premiums as other countries became major producers of varieties that New Zealand had formerly dominated. Advances in controlled atmosphere technology meant that pipfruit could be kept longer in storage condition, thereby eroding the out of season "window" in the Northern Hemisphere. Changes in consumer preference also meant that pipfruit had to compete against substitute products such as other fruit and snack-bars.

While single desk exporting was overwhelmingly supported by growers up until the late 1990s, there was always a minority of growers who supported liberalisation of the regulatory framework. In 1993 the Board's Act was amended to permit independent exporting, through consents awarded by the Board. The local market was deregulated in 1994 because of factors such as dissatisfaction from retailers with the Board's servicing of this market, and because of the difficulty in restricting orchard gate sales.

The 1999 restructure

Faced with government pressures for deregulation[10], and in the context of successive years of poor returns, debate over the performance of the Marketing Board led to restructuring of the legislative and regulatory framework for pipfruit exporting in 1999.

Major changes to the legislative regulation of the export of apples and pears were implemented by the Apple and Pear Industry Restructuring Act 1999 and associated regulations.

On 1 April 2000, this legislation converted the Marketing Board into a company (ENZA Ltd) registered under the Companies Act, with shares that were fully tradable at least among growers, and established a regulatory body, the New Zealand Apple and Pear Board ("the Board"). The Board had the task of appointing the Apple and Pear Export Permits Committee ("the Permit Committee"), an independent body charged with considering applications and approving permits for the independent export of pipfruit. However, the Board's main role was to monitor and enforce mitigation measures imposed by the Apple and Pear Export Regulations that protected ENZA's shareholders and grower suppliers from any monopsony abuse by ENZA of the privileged export right (modified single desk) that it retained after the new legislation was enacted.

The mitigation measures included rules on:

- Non-discrimination between suppliers other than on commercial grounds;

- Non-diversification on certain of ENZA's business functions, without approval by shareholders; and

- Information disclosure to shareholders on financial performance.

As a result of the 1999 restructuring ENZA ceased to carry out industry good activities on behalf of the pipfruit industry as a whole, for example R&D and market access. Pipfruit Growers New Zealand Incorporated (PGNZI) assumed responsibility for these generic industry good activities[11], and funded them through a levy raised under the Commodity Levies Act 1990.

ENZA's share price was depressed by the financial difficulties of growers and the industry in general, and by constitutional limits on share trading. This allowed two corporate investors (Guinness Peat Group and FR Partners) to win control over ENZA's board in 2001. These two investors were minor suppliers of pipfruit and their control over ENZA's board led to a divergence between the organisation's governance and the supply of pipfruit to ENZA. By late 2000 there were significant uncertainties in the relationships between ENZA and its grower suppliers, and these were compounded by disputes between ENZA and growers over liability for foreign exchange losses which ENZA sought to deduct from growers' 2001 returns.

The industry also experienced problems with the export permit system with ENZA threatening court action and some potential exporters left disappointed at having their applications rejected.

The 2001 deregulation

In response to issues facing the industry the Government initiated a review of the regulatory framework and conducted an extensive consultation with the industry. This process cumulated in an announcement by the Government in May 2001 that pipfruit exporting would be deregulated.

Whereas in 1999 the great majority of growers opposed the removal of the single desk, that same majority supported the 2001 legislation. The Apple and Pear Industry Restructuring Act Repeal Act 2001 came into force on 1 October 2001, fully deregulating pipfruit export marketing. The Board was dissolved and its assets transferred to ENZA. The Permit Committee was also dissolved and permits vested in those already holding a permit from the previous year.

Since deregulation

The announcement of deregulation in mid 2001 had an immediate impact on exporter behaviour, creating an incentive for export permit holders to expand their exporting business and for new businesses to enter the market. Under deregulation ENZA was likely to have a smaller volume of pipfruit to export. This is likely to have created an incentive for ENZA to speed up the cutting of costs out of its business. This seems to have led to a positive impact on grower returns in 2002.

Prior to deregulation ENZA managed its post-harvest businesses on an arm's length basis from its exporting operations. Deregulation enabled ENZA to achieve more vertical integration between these businesses. It is worth noting that deregulation not only helped create the pressures for ENZA to reduce its costs but also gave it the commercial freedom to merge with Turner and Growers[12], creating a major fresh produce exporting business for New Zealand. Prior to deregulation, ENZA was restricted from becoming more diversified and other exporters were restricted from diversifying into pipfruit other than through being an export permit holder. These restrictions were artificial, as evidenced by mergers and acquisitions in the fruit export industry since pipfruit exports were deregulated.

While the long term impacts of deregulation cannot be assessed in such a short period, the following observations can be made.

Deregulation has allowed a proliferation of new exporters and post-harvest operators to emerge in the market. Some of these new exporters emerged from being independent exporters under permits issued by the Permit Committee under the 1999 legislation, and this meant they had developed good skills and market linkages. A number of new or low profile exporters have become significant export players in a remarkably short time frame.

Removing the divisive political conflict over single desk marketing has allowed growers, post-harvest operators and exporters to focus on markets and customers. For example, while ENZA in the past marketed only a limited range of fruit grades, new exporters have either been more flexible or have identified niches for grades that may have been juiced at a loss to the grower.

There are indications that exporters have become more responsive to growers, and exporters competing for pipfruit supply have put upward pressure on returns to growers. The restructuring of ENZA has reduced it cost structure, and its merger with Turners and Growers creates a fruit exporting business with economies of scale and global marketing capability. Economies of scale are likely to be a continuing consideration for the industry, with an expectation that the export market will be increasingly dominated by a small number of large exporters, with a larger number of niche markets.

The provision of industry good services, including research, market access, crop forecasting and other industry good services, continues to be addressed. To this extent, the Plants Market Access Council[13] (PMAC) and the PGNZI have a significant role to play.

Regulation of domestic markets[14]

Regulation of key consumer goods, such as town milk, eggs and wheat, were introduced in New Zealand during the World Wars to encourage production and stabilise prices. Centralised marketing authorities were established to administer extensive regulation relating to quotas, prices, and quality controls.

In 1984, the government evaluated the regulations covering the production and marketing of agricultural and horticultural goods for the domestic market. It concluded that the regulations distorted resource allocation and therefore should be removed. The distortions included: excess production of eggs, excess capacity in the flour milling industry, poor location of production for eggs and wheat, and reduced efficiency and innovation such as in the packaging of milk.

Rapid deregulation took place in the domestic industries. The wheat and egg industries were the first, followed by the town milk industry, or fresh milk market. Many other products including potatoes, honey, raspberries, hops, tobacco, apples, pork and poultry were also deregulated.

Once the process began, external forces ensured that the pressure for reform was maintained. The main external forces included the Closer Economic Relations (CER) agreement with Australia, and the implications for wheat imports. A full chronology of regulation and deregulation of domestic markets is outlined in appendix three.

Conclusion

This paper has presented New Zealand's experience with monopsony buying and joint selling in the context of New Zealand's overall approach to regulation of the agricultural sector. While these issues used to be often dealt with under industry-specific regulation, they are today generally handled under generic

competition legislation ie the Commerce Act. Despite some initial misgivings by industry groups, the Act has generally proved robust in dealing with these areas. In specific cases (particularly dairy), additional regulation has been required to provide for competitive pressure to be exerted. While the process of reform in New Zealand is nearing completion, it will be important for New Zealand's regulatory institutions (particularly the Commerce Commission and the Courts) to continue to build experience and expertise in dealing with issues affecting the agricultural sector.

APPENDIX ONE

Summary of Commerce Commission decisions

The New Zealand Grape Growers Council Incorporated [Decision 263]

In 1990/91, the New Zealand Grape Growers Council Incorporated, on behalf of grape growers, sought authorisation of a trade practice involving the collective negotiation and fixing of grape prices between growers and themselves and between growers and processors, via elected representatives. This was an existing practice, and application was only sought after the Commerce Commission had notified the parties of potential competition concerns.

At the time of the application, the wine industry in New Zealand produced approximately 70,000 tonnes of grapes per year, producing about 54 million litres of wine. Approximately 90% of grape production was sold domestically. The industry was made up of 554 independent grape growers. Three wine companies were responsible for either producing, or contracting for the production of, approximately 85% of grapes in the domestic market. Exports were mainly sourced from company-owned vineyards.

The domestic markets were subject to fluctuations in price, quantity, and variety of grapes and wine produced, due to small market size, climatic conditions and changing consumer preferences. Production also required high cost capital investments by both growers and processors, with a time lag to harvest of at least three years. Contractual arrangements were generally long term, with a very limited spot market. Standard contracts provided for the grower to supply, and the company to accept purchase, of an agreed quantity of grapes produced from certain vines. Generally the company also had first option on production in excess of the agreed quantity. Prices were set by formula using a benchmark grape variety (Muller Thurgau) and sugar content, with deductions and premiums as specified. At the time of the application, there was evidence of oversupply of grapes.

The Commerce Commission considered that the collective negotiation of contracts was likely to substantially lessen competition. The Commission considered that collectivity had the effect of increasing the price of grapes. However, there was no evidence that it was substantially higher.

Shifting to the public benefit analysis, the Commission considered the detriments from the arrangement to be that the overall price of grapes was increased, and, by dulling price signals, incentives for individual growers to innovate and produce the varieties and quality of grapes required by the market place were reduced. This was seen to have a significant detrimental impact on the industry.

In terms of benefits, the Commission found small savings from the reduced cost of negotiating prices collectively. It also accepted some information benefits, on the basis that the growers' committee could be expected to be more informed as to market conditions than most individual growers. However the Commission did not accept price stability and equality of bargaining power as benefits. Price stability was seen to cushion growers from market signals. It was also noted that if price stability was desirable, then it could be reflected in individual contracts if the parties so wished.

The Commission also discussed equality of bargaining power and outlined its view that exact equality of bargaining power was not required for efficient negotiations. As a general rule it would be necessary to show that the buyer was in a position of such strength as to be able to exercise monopsony power. The Commission did accept that grape growers were in a relatively weak bargaining position, but it argued that this arose from the current oversupply of grapes rather than monopsony power.

The Commission declined authorisation.

New Zealand Cooperative Dairy Company Ltd/Auckland Cooperative Milk Producers Ltd (Decision216) 26 April 1988

NZCDC and ACMP were the only suppliers of milk to the Auckland market and competed with each other, and other companies in products such as yoghurt and cultured milk products. While the Milk Act 1988 placed considerable constraints on the ability of the firms to compete with each other, the ability to supply supermarkets meant that there was some potential for competition between the two. Other firms could only compete in the face of a significant cost disadvantage. The Commission calculated that the cost advantage from transport costs over the nearest competitor would be about 5 cents per litre.

The applicants claimed public benefits from efficiencies in two areas. The first of these was the elimination of duplicate facilities. Both Auckland milk processing plants were working at around half capacity. By merging, the company hoped to process all milk for the Auckland market at one plant. The second claim was that the merger was necessary to put into effect a scheme for integrating the production of town milk with manufacturing milk supply. This scheme would enable the company to produce town milk cheaper and more efficiently than schemes then in place. The company estimated that the combined effects of these efficiencies would be a cost saving of around 8.5 cents per litre of milk.

The applicants also claimed a number of export-related advantages including the sharing of export technology, co-ordinated marketing, increased exports of a wider range of value-added products and generally increased export competitiveness. The Commission found that the merger would result in efficiency gains and that the export-related benefits derived from these efficiency gains.

The Commission accepted these claims and granted an authorisation despite recognition that any benefits arising would be likely to be retained by the suppliers to NZCDC.

New Zealand Kiwifruit Exporters Association & Ors (Decision 221) 15 September 1988

The Kiwifruit Exporters Association, acting as agent for the kiwifruit growers and the Kiwifruit Coolstore Association, applied for authorisation of a national collective pricing agreement for the coolstorage of export kiwifruit. This agreement was part of a complex set of arrangements for the export of kiwifruit Growers sent fruit to a particular coolstore for storage awaiting export. Exporters, acting as agents for the growers, would collect fruit from the coolstore and consign the fruit to export destinations. While the grower selected the coolstore, largely on a basis of convenience factors, the exporter was responsible for paying the coolstores. A system of pooling returns was operated to ensure that growers whose fruit was stored for a lengthy period were not disadvantaged relative to those whose fruit was exported early in the season.

The applicants and supporters of the application suggested & long list of interlinked benefits. Key elements of the claims were:

- Equalisation of bargaining power between the more than 3000 growers, represented by exporters, on the one side, and the 148 cool-stores on the other,
- Reduction of administration costs and efficiency of bargaining;
- Steady returns to cool-stores and other encouragements to invest in improved facilities;
- Benefits relating to the operation of the export pooling scheme; and
- The facilitation of the flow of fruit to export markets.

For this case the Commission had the advantage of experience of seasons both with and without the presence of a collective pricing agreement. The Commission found that there was a rough parity of bargaining power between exporters and cool-stores even without the agreement; that greater efficiency and savings of costs would have been possible under competitive conditions; that the agreements had not had the effect of encouraging appropriate investment because the agreement limited the benefit to the cool-store of investing in improved facilities; and that the export pooling scheme did not require the collective agreement to operate.

The Commission accepted that the agreement helped to create conditions where the effective planning of exports over the whole season was possible. This finding was critical and resulted in the Commission authorising the agreement subject to certain conditions. In balancing the detriments and benefits of the agreement the Commission noted that

> "This case has some unusual features. First, the agreement essentially enables growers to combine through the exporters and redress the lack of bargaining power which they have as against cool-storers. Secondly, there are relatively few domestic implications in the agreement as it relates entirely to the cost of cool-storage of kiwifruit for export ... and supplements an export marketing cartel which is perfectly lawful in terms of the Act' (paragraph 6.2)

Later in the year the Kiwifruit Marketing Authority, which had licensed exporters and set standards for export cool-stores was disbanded and replaced by a Kiwifruit Marketing Board. The marketing board operated as a single desk seller. The board purchased export fruit from the growers prior to entering the cool-store and maintained control over all steps from there to the export market. The Commission re-examined the authorisation in light of the creation of the board and determined that the detriments were which it had identified with the previous agreements retained. The existence of the board to control the export of the fruit removed the public benefit of facilitating fruit flow and growers withdrew the support for the arrangement The Commission therefore withdrew its authorisation.

New Zealand Cooperative Dairies Ltd/Waikato Valley Dairy Cooperative Ltd (Decision 264) 23 May 1991

This application related to a proposed merger of the New Zealand Cooperative Dairy Company, a member of the New Zealand Dairy Group, with Waikato Valley Cooperative Dairies Ltd. While both companies were primarily producers of dairy products for the export market, NZ Dairy Group had a dominant position in the supply of fresh milk in the area from Auckland to Taupo. Waikato Valley was the only other large dairy company in the region. The companies competed to a greater or lesser extent in other product markets, particularly the purchase of raw milk from farmers.

The companies claimed significant efficiencies arising out of the merger, improving both farmer incomes and export returns. In addition, there was a concern that Waikato Valley would collapse in the absence of the merger. The companies submitted that the collapse of Waikato Valley would make many farms supplying the company unviable.

The Commission declined to clear or authorise the merger. The companies appealed the case to the High Court where the decision was overturned, at least in part on the basis of additional information on the sources of the claimed increased export returns and more definite evidence that the collapse of Waikato Valley was impending. The *New Zealand Co-operative Dairy Companv Ltd & Anor v Commerce Commission* (1991) 3 NZBLC 102,059.

APPENDIX TWO

Constraint posed by cooperative ownership

The Commerce Commission has considered the competitive effects of agricultural producer cooperatives in a number of decisions.[15] Of particular interest, the Commission examined the extent to which cooperative ownership may provide a constraint on the market power of a cooperative where competition in the market is limited.

If a cooperative attempts to exercise market power by decreasing its payout or increasing its costs, the supplier shareholders are potentially able to constrain these actions. The High Court in the New Zealand Cooperative Dairy Company & Anor v Commerce Commission (1991) 3 NZBLC 102,059 considered that:

> "…Dominance is a measure of market power. In this instance such market power could only be exercised against the interests of the suppliers. The suppliers are in a position through ownership of the company to prevent or at least curtail the exercise of any such power by the merged entity, whose ability and motive to exploit suppliers would be restricted accordingly. Against this the Commission no doubt balanced the fact that the merged entity would have such a cost advantage over its competitors that it could to some extent use its payout advantage to retain suppliers who were dissatisfied with its performance. Some waste, inefficiency or inappropriate investment could go unchecked so long as its payouts comfortably exceeded those of its competitors."

The Commission concluded that while suppliers may impose some constraint on inefficiencies within traditional producer cooperatives, this constraint may not be strong.

Traditional cooperatives require that suppliers hold shares in the cooperative in proportion to the product supplied. Shares have nominal values and the payment to farmers for the product supplied is bundled up with the returns on capital. These features of traditional cooperatives mean that the entities do not face market disciplines imposed on publicly traded companies. Such disciplines include:

- The transparent valuation of the company that is established by the price at which shares are traded,
- The threat of takeover,
- Unbundled returns on capital and products to enable benchmarking, and
- The concentrations of ownership interest that are associated with detailed monitoring of the entity's efficiency.

Rather, the cooperative structure limits incentives for monitoring by the fact that any individual's interest in the entity is restricted to its share of input. Because this is small, so is the incentive to invest in monitoring small for any individual and for the entity as a whole.

The bundled payments to farmers may limit the availability of transparent information to benchmark the performance of the firm. This is particularly a concern when there are no comparable competitors.

In addition, traditional cooperatives may create barriers to exit by suppliers by restricting the withdrawal of the suppliers' capital on exiting the company. Common practices of dairy cooperatives were to delay full payment on exit by up to 5 years.

APPENDIX THREE

Table 5. Chronology of regulation and deregulation of domestic industries

Town Milk	
1943	Appointment of Milk Commissioner to inquire into measures needed to ensure adequate supplies of good quality milk at reasonable prices
	Report recommended price controls and industry reorganisation
1944	Establishment of 44 milk authorities to achieve these objectives
1953	Authorities merged into newly established New Zealand Milk Board
1967	New Act and establishment of a Milk Prices Authority to determine margins paid to milk treatment stations and vendors
	Zoning and vendor licensing transferred to the Board
1980	Milk Act - Milk Prices Authority abolished and its functions transferred to the Department of Trade and Industry
	Town milk producer price set by Minister of Agriculture on a formula indexed to the manufacturing milk price. Producers had production quotas.
	40 milk treatment stations – mostly producer controlled – 16 largest accounted for 70% of industry capacity and were surveyed to set processing margins - formula allowed full cost recovery plus a 15% return on total assets. A special allowance paid to the smaller stations to ensure viability.
	Protection from competition within local milk districts and guaranteed returns led to inefficient use of capital resources and little impetus for change. Town milk processing costs were estimated to be double those of the manufacturing sector.
	1125 vendors employed by the Milk Board. Frequent adjustments between adjacent rounds was required to ensure equity
November 1984	Announced that the consumer price subsidy on milk would cease from March 1985.
1985	Industries Development Commission reviewed the town milk industry
	Reported that there were no longer the problems of supply, quality and distribution that the existing controls had been designed to address.
	Recommended substantial deregulation of the industry at all levels except home delivery services from 1 September 1986
	Led to amalgamations and closures of milk processing facilities
	NZ Dairy Board acquired 40% of Auckland Milk Company - the Commerce Commission approved the acquisition although expressed concern at the conflicting roles of the Dairy Board as a participant and regulator of exports.
1986	Controls on packaging forms and sizes removed – led to cartoned milk appearing in supermarkets
1987	Milk Board and Dairy Board's plan accepted by Government. It provided for processors to negotiate supply contracts with any suppliers, removed linkage to manufacturing milk price, processors assumed responsibility for home delivery services within a specified area, (in direct competition with supermarkets and bulk sales). Some controls on supermarket prices remained.
	Milk Board implemented the plan providing for deregulation of production, licensing of processors, transfer of vendors to processor control, and pricing requirements.
	NZ Co-operative Dairy Company acquired the other 60% of Auckland Milk Company. The merger was approved by the Commerce Commission subject to the minor divesting of some non-essential product monopolies. It concluded that the detrimental effects of town milk dominance were offset by rationalisation gains and cost savings. It cautioned the new company would not be able to justify future milk retail prices at or above the level of other processors. Thus the largest dairy manufacturer, the largest town milk company and the Dairy Board were brought together.
1988	Milk Act abolished the Milk Board and established a three member Milk Authority to make provisions for continued home delivery. It licensed milk processors and determined retail price differentials.
	Provision made for the expiry of the Act on 31 March 1993.
1990	Town milk quotas ceased in Auckland to be replaced by a winter milk contract scheme – premiums for specified quotas in May, June and July with manufacturing price paid for milk provided in other months. Introduced contestability into previously protected supply sector.
	Consumers faced rapidly rising prices which were attributed to the boom in international dairy commodity prices

Eggs	
1933	Establishment of the Poultry Board to organised the production of eggs
1937	Powers to fix wholesale and retail egg prices legislated to the Marketing Department.
	Variations of these arrangements continued.
1953	Authority established to market eggs
1980	Merged with Poultry Board – functions to promote and organise the industry; regulate and control production, marketing and distribution; and promote efficiency.
	Production characterised by quotas (entitlement scheme), regional distortions and high surplus egg disposal costs.
	Large numbers of very small producers, most eggs sold to licensed marketing agents, retailers forced to buy from agents in geographically defined areas.
	Farmgate prices set on the basis of an annually adjusted four-yearly cost of production survey. Cost-plus pricing with regulated wholesale and retail mark-ups.
	Imports of eggs and egg products prohibited.
1984	Industries Development Commission review of the egg industry
	Reported that a more market-oriented approach would be in the collective interest of producers, distributors, growers and consumers.
1985	Recommendations included a reduction in retail prices, transferability of entitlements, freedom from price controls and egg sourcing restrictions after six months.
1986	Partial deregulation of egg industry – all controls over marketing and pricing of eggs and grade definition regulations were rescinded. Production controls remained but entitlements freely transferable and maximum entitlement holding limits abolished.
	Positive free market values of entitlements provided compensation and incentives to producers wishing to exit the industry. Sped up the movement of high cost small producers out of the industry. Traded quota prices gradually reduced from maximums of $15 per bird licence to $8 per bird licence. Removal of maximum holding limits enabled exploitation of economies of size in production.
1988	Full deregulation – removal of production controls. Poultry Board abolished.
	Initially only limited retail price competition as many egg distributors were producer controlled. Decline in wholesale prices of eggs (of around 25%) captured by retailers once controls on margins lifted. Problems of regional surpluses and shortages addressed.
	Consumers benefited from an increased range of both eggs and sales outlets. But evidence suggested that while deregulation was successful in reducing market distortions the interim situation to 1990 was still characterised by substantial wealth transfers. Prices to consumers had not fallen to any significant degree. Wholesalers and retailers increased their margins while producer returns fell due to price cutting to secure increased market share.

Wheat	
1933	Establishment of the Wheat Purchase Board. Had power to purchase all wheat and fix prices to the grower and millers. But no control over imports.
	Milling trade dominated by collective agreements amongst most millers.
1936	Wheat Committee formed to take over sole responsibility for buying and selling of all wheat including imports.
1939	Price controls introduced generally and extended to wheat, flour and bread sectors
1962	Commission of Enquiry into the industry
1965	Establishment of the New Zealand Wheat Board under the Wheat Board Act 1965
	Functions: to control acquisition and marketing of wheat and flour generally; to encourage wheat growing and use of wheat grown; to ensure adequate supplies of wheat and flour; and to promote the orderly development and greater efficiency of the wheat and flour-milling industries
	Key decision was the purchase price of wheat, a price set to recoup the costs of the Wheat Board, as this triggered other decisions such as the consumer price for flour. Each flour miller paid the calculated cost of processing (including 15% return on capital), which was independently calculated for each mill. Pricing policy designed to encourage domestic production of wheat and therefore self-sufficiency.
	Most wheat grown in South Island and half shipped to the North Island for milling. Shortfalls in production met by Australian imports.
	Grower price set a full season in advance. Millers obliged to accept New Zealand wheat for milling, even though there were inherent quality problems.
	Other regulations pertained to accounting practices, payment methods and small packaging price differentials.
1980	Deregulation commenced with bread being removed from price control. Baking immediately became more competitive and innovative as different types of bread were produced and marketed. (Hot Bread Shops opened). Bakers sought higher quality flour in response to consumer demand for quality, causing deregulation pressures to become more acute.
1981	New Zealand wheat price became based on a three-year rolling average of quoted FOB Australian standard white price.
1983	Closer Economic Relations agreement with Australia necessitated a review of administrative pricing and import control. Prospects of direct flour imports and the 1981 wheat price policy change signalled that self-sufficiency was no longer the primary policy objective
	Review of industry by Department of Trade and Industry
1984	Industry changes announced including abolition of the flour quota and removal of price controls on flour, bran and pollard from 1987; Board's role to be restricted to trading in wheat and meeting mills' specifications from that date; and a review to be undertaken of the Board's role past 1 February 1989 when it would lose monopoly rights
1985	Government asked Board to report on its marketing plan for wheat from 1987-1989. Government subsequently accepted the Board's own recommendations that it cease trading and disband on 31 January 1987
1986	Board replaced wheat pricing formula with an index system and adopted a weekly average price, set up a system of grower pools, and intervened to provide a floor price against falling world wheat prices.
	Flour prices were still controlled during the transition to a free market system.
1987	Flour millers were able to contract directly with growers for 50% of supplies in the 1987 season, while the Board made a taxpayer-funded loss of $18 million for the last harvest under its control by trying to leave the industry with a low flour price and a high wheat price.
	Wheat Board control ended on 1 February 1987 when regulatory controls were removed and the Board was dissolved on 30 April.
	Price of wheat fell immediately from floor price to world market prices.
1988	Millers offered growers fixed price contracts.
1989	Both fixed and variable price contracts offered (variation of 10% above or below fixed price contracts)
	Arable farming had declined in profitability over 1985-1988 mostly due to the impact of increasing interest rates and interest charges on debt.
	Review of price setting in the deregulated flour milling industry – found that each mill had adopted a pricing procedure fitting its own particular market conditions. Flour pricing became intensely competitive. Significant excess capacity in the milling industry led to mergers and plant closures.
	Processing sector is now demand-driven – bakers sourcing flour on both quality and price. Flour quality has increased with much of this due to change of variety.

NOTES

1 These boards are non-trading boards carrying out industry-good activities for their respective industries.

2 A summary of the Commerce Commission decisions referenced is outlined in appendix one.

3 Progressive Enterprises and Woolworths (NZ) Limited, Decisions 438 and 448 (2001).

4 Foodstuffs constitutes 3 separate cooperative companies trading under a common banner. The 3 companies are the largest supermarket retailer in New Zealand.

5 The route trade includes dairies and gas stations and specialist shops like the Mad Butchers.

6 See Commerce Commission v Taylor Preston Limited and others (1998) 6 NZBLC 102,598.

7 The following is stated with reference to "Farming without Subsidies New Zealand's Recent Experience", edited by Ron Sandrey and Russell Reynolds, 1990, a MAF Policy Services Project.

8 If Northland Dairy Cooperative was included, these 3 dairy companies were responsible for 95 percent of total dairy production. Northland subsequently merged with Kiwi.

9 A more detailed discussion of the Commission's concerns regarding cooperative ownership is outlined in appendix two.

10 As discussed in reference to dairy, in the 1998 Budget the Government announced that all statutory producer boards should provide the Government with plans for deregulation.

11 To ensure the research components of the industry could be developed in a commercial manner, in January 2000 PGNZI established a limited liability company, NZ Pipfruit Ltd, to manage the grower's R&D and Technology Transfer functions. The establishment of the company, with obvious very close ties with PGNZI left the latter organisation clear to concentrate on the policy and representative issues of the industry while NZ Pipfruit Ltd could concentrate on the technology issues. The company is 100% owned by New Zealand pipfruit growers through the PGNZI.

12 Turners and Growers is a major wholesaler and distributer of locally grown and imported produce.

13 The PMAC focuses on the key areas of; market access improvements, integrating New Zealand's export assurance systems, and providing strategic drive and direction for the process of market access and official certification.

14 Aspects of Reform in NZ Agriculture, MAF website.

15 NZ Dairy/Waikato Valley (Decision 264), Kiwi/Moa-Nui (Decision 267), and Ravensdown/SouthFert (Decision 279).

NORWAY

1. Monopsony buying

1.1 Agricultural sector – downstream seller power

Competition is limited in large parts of the agricultural sector in Norway. One reason is that Norway has a strong system of import protection, which to a high degree shields national players from effective competition from imports at all stages of the chain. In addition public regulations represent barriers to competition. Further, agricultural policy allows market collusion among producers through the system of agricultural co-operatives. At the same time, negotiations between the government and the collective bargaining organizations on farm-gate prices, quantity restrictions and subsidies have the effect of putting the market mechanism partly out of action.

Marketing cooperation is very common in agricultural markets in Norway. Co-operatives restrict or eliminate competition between upstream producers by joint price setting and joint output limits/quantity-setting. In many cases co-operatives also limit competition downstream by erecting barriers to new processing businesses and restricting the opportunities for small competitors to grow. The result is that many agricultural downstream product markets are characterised by a high degree of concentration and lack of competition. The co-operatives Tine BA (raw milk/dairy), Norsk Kjøtt (meat), Norske Felleskjøp (concentrated cattle foods) and Prior Norge BA (poultry) all have considerable market power. Competition seems to be weak in both the Norwegian dairy, meat and grain sector. The co-operatives' market shares are highest in the dairy industry, close to 100 percent in the upstream market and some less in the processing stage of the chain. In the meat sector the number of competitors is higher, especially in downstream markets.

Many co-operatives in Norway have high market shares and high percentage of production capacity in all markets in which they operate. This is mainly caused by government-induced policy. The government and the legislative authorities actively promote such co-operatives, for instance by exemptions from the antitrust law.

The price and welfare effects of marketing co-operatives depend, among other things, on their functions, market position and features of the markets they operate in. A monopoly is normally harmful to economic welfare but co-operatives do not necessarily behave as investor owned monopolies. For instance, the ability of marketing co-operatives to charge monopoly prices or price discriminate depends on their ability to restrict output, or to allocate output between inelastic and elastic purchasing segments. Agricultural co-operatives in Norway are often equipped with the possibility to restrict output in one or another way.

We would also like to point out that the degree of vertically integration is high in the Norwegian agricultural sector. The co-operatives organize a high percentage of all farmers. Thus the co-operatives have virtually absolute control of the key factor in the upstream market. At the same time, the co-operatives face limited competition in the downstream processing markets. Downstream competitors are dependent on supplies from the co-operatives to be able to compete, meaning that there is a potential for the co-operatives to raise rivals' costs. The prices on raw material is negotiated and regulated by the authorities. It has proven to be a demanding task for the agricultural authorities to monitor the pricing of

primary products, for instance in the dairy sector. Vertical integration also enables the co-operatives to finance aggressive pricing strategies in competitive markets by means of higher margins in other markets. This enables targeted price cuts, which makes it very difficult for small rivals to compete.

Partly because of these reasons, the NCA in 2003 blocked a vertical merger between one of the agricultural co-operatives in the grain sector and one out of two domestic producers of flour.

In the recent years, there has been increased attention to the poor state of competition in the dairy products market. The market structure in the dairy sector is highly concentrated. In particular, the farmer-owned company Tine BA has a dominant position. Tine BA is a vertically integrated player. Its operations range from the purchase and collection of milk as a primary product, to the sale of processed dairy products to shops and supermarkets and the food industry. The company has a dominant market position at all stages of the production chain. Tine BA and its subsidiaries are owned by more than 20,000 milk producers, i.e. nearly all the milk farmers in Norway. Through milk farmers' close historical ties to and ownership of the dairy co-operatives, Tine has virtually absolute control of the primary input in the production of all types of dairy products, namely raw milk. Control of the primary product is also strengthened through the milk quota system in Norway that restricts new entry of farmers and expansion with existence. The result is that Tine receives about 98 per cent of all raw milk supplied by the farmers.

Under the current regulations, Tine is obliged to supply its competitors with a certain amount of milk. In the past few years, two relatively small competitors have entered the dairy sector. The company Synnøve Finden produces cheese, while the company Q-meieriene produces milk for human consumption, yoghurt and sour cream. Although Tine's market shares are less than 98 percent for some manufactured products the company has a dominant position and market power in all the markets that make up the core areas of dairy production.

The NCA regards the protection of the fragile competition being built up in the dairy sector and other agricultural sectors as an important task. In the long term, it will help bring about greater efficiency for the benefit of consumers and society as a whole.

1.2 Buyer power

As pointed out by the OECD secretariat in its background note, buyers of agricultural products are increasingly concentrated both for processing and retailing. In Norway, for instance, the top 4 grocery chains have about 100 percent of the one-stop shopping grocery store market. Also the processing industries are highly concentrated in Norway, mainly due to the farmer-owned co-operatives' high market shares in processing activities. In Norway buyers' purchasing power compared to farmers' limited seller power is a common argument for the government-endorsed marketing orders and market organization. This is also an argument in favour of antitrust exemptions for agricultural activities.

Since the middle of the 1980s, there has been a dramatic increase of concentration in the grocery sector. Historically, the Norwegian food industry was dominated by some large undertakings, while the grocery market consisted of several retailers and shopkeepers. The structure of the grocery retail business has changed dramatically, with a drop in the number of smaller local stores, and a sharp increase in the number of supermarkets and shopping centres. Almost 100 per cent of groceries are sold through shops, which today are concentrated into four grocery chains: Norgesgruppen, Ica Norge, Coop Norge and Reitan Narvesen. The formation of these chains has been an important impetus to retail competition and efficiency, though the NCA has pronounced that further concentration of sales outlets might jeopardise competition. The umbrella chains' market shares have remained relatively stabile for the last decade. However, the grocery sector face increased competition from services trade (kiosks, petrol stations, etc.).

Furthermore, it is worth mentioning that the German grocery chain Lidl is about to enter the Norwegian grocery market.

Lack of available store locations is one of the main exogenous barriers for new entrants in the retail business. There are different types of regulations with different objectives that control the establishment of retail/grocery stores and the development of this sector. Local and urban planning rules are sometimes used to reduce competition in the sector. The influence of local lobbies towards local authorities may make entry particular difficult for outsider (or foreign) companies. Lidl has experienced this in a few local areas in relation to their establishment in Norway. Furthermore, in the period 1999-2003 a national regulation temporarily forbid the building of shopping-centre over 3000 m3 outside towns and densely populated areas. The regulation is expected replaced by local and regional planning acts, entering into force in 2004

The service trade had earlier an advantage in relation to opening hours. From January 1, 2003 retailing shops are no longer constrained by limits on opening hours on working days, although they must still be closed on Sundays and holidays. In the public hearing to the amendment of the law, the NCA argued in favour of abolishing the constraints on opening hours on working days. The NCA also advocated that there should be no constraints on opening hours on Sundays and holidays. These amendments may contribute to fiercer competition between service trade and the traditionally grocery shops.

The Norwegian grocery chains have been both horizontally and vertically integrated during the last years. Today only 4 major chains remain. There has been a substantially increased integration between wholesaling and retailing activities. To some extent these developments include production of grocery products (private labels). The retail chains also form international alliances. The integration of distributors and retailers into chain-store companies has led to the realization of substantial efficiency gains in distribution of groceries from producer to end-users. On the other hand the integration may be a barrier to entry as regards non-integrated suppliers and distributors. Even though increasing vertical integration provides grocery chains with control in distribution of a number of different groceries, the suppliers of agricultural products, i.e. the farmer co-operatives, still remain in control of both processing and distribution. The three co-operatives Tine BA (dairy products), Norsk Kjøtt (meat) and Prior (poultry) cooperate through the company Landbrukets Ferskvaredistribusjon AS, which distributes agricultural products to grocery chains and other costumers. This collaboration leaves the companies with substantially control over their products throughout the distribution chain.

The growing vertical integration in the grocery sector has also led to the introduction of several private labels. However, the percentage of private labels is low in Norway compared to European grocery trade, with less than 10 percent private labels in three out of four grocery chains.

Even though horizontal integration has given the grocery chains significant negotiation power (buyer power) in relation to suppliers of goods, this buyer power is often met by considerable seller power of manufactures with high markets shares and strong brands. In the agricultural sector there are several co-operatives that have considerable strong market power in downstream markets.

Retailer chains often enter nationwide contracts with a few suppliers within each product category. All Norwegian grocery chains consider selling and distributing the premium national and international brands as important. Less known brands has the latest year met increased competition from low-price private brands. Sometimes the chains refuse to distribute the lesser-known brands, in other occasions they only promote these brands as supplements to the compulsory range of groceries. As a consequence it can be difficult for small and local suppliers to get their brands into one or more of the grocery chains. The NCA has received complaints from small suppliers who find it difficult to get into groceries assortment.

Competition between the grocery chains has focused on prices and this has promoted the introduction of relatively low-priced shop concepts. At the moment, however, there is an increasing focus on full range concepts. Several of the chains have shop concepts that prioritise quality and variety above low prices.

All in all, it appears that the formation of the four chains in the grocery market has contributed to enhance competition and efficiency, which has benefited consumers in the form of lower prices. Chain organization of retail sales has led to greater efficiency in distribution through economics of scale. There has probably been a certain amount of rationalisation and efficiency gains at all stages of the chain of production. However, it is a potential risk that the considerable concentration in the market reduces the umbrella chains' incentive to compete with each other. The NCA thus has made it clear that it will be concerned if further concentrations take place.

The increase of concentration has given the grocery chains a stronger position compared to the suppliers in the food industry, including the farmers' co-operatives. Buyer power may to some extent countervail upstream seller power, thus enhancing economic efficiency and consumer welfare.

1.3 High prices in Norway

A study made by Norwegian Agricultural Economics Research Institute (NILF) and ECON Analysis (ECON) [1] shows that in 2000 the consumer meat, dairy and egg prices were significantly higher in Norway than in our neighbour countries Sweden, Finland and Denmark. The extensive Norwegian border trade in Sweden illustrates these differences. The border trade is considered a problem to Norwegian retailers along the border and Norwegian agriculture in general. Both farmer co-operatives and retail chains mutually accuse each other for contributing to the high consumer prices. Farmer organizations accuse retail chains for using both their buying power and selling power, while trade organizations accuse farmer co-operatives for using their selling power. There seems to be no safeguard conclusions to this discussion.

2. Producer co-operatives

2.1 The antitrust exemption for joint selling

On 1st of May 2004 the new Competition Act entered into force. In the new Act agricultural industry's antitrust exemption for joint selling is continued.

The Government may exempt certain markets or industries from all or part of the Act by regulation. According to Section 3 the Government shall provide for exemptions from Section 10 and 11 that are *necessary* to implement agriculture and fisheries policies. Section 10 prohibits agreements between undertakings that restrict competition and section 11 prohibits abuse of dominant position. The exemptions imply that the prohibitions in Sections 10 and 11 Act do not prevent collaboration or restraints in connection with the sale or supply of Norwegian agricultural products from producers (farmers) or producers' organizations in agriculture.

The exemption says that section 10 and 11 do not apply to agreements, decisions, concerted practices or single acts made by farmers or their organizations that *correspond* with law or provisions of laws that control production or sale of agricultural products, or agreements between the state and farmers' organizations that regulate production or sale of agricultural products. Thus, producers are allowed to jointly sell their products. No sunsetting clause gives the Competition Authority option to overrule the exemption. However, agreements, decisions and concerted practices, or single acts that *do not* correspond with agricultural laws and regulations or agreements between state and trade organizations that regulate agricultural production or sale, are to be examined under the competition legislation.

The exemption reflects a consensus in Norwegian agricultural policy that the antitrust exemption for joint selling is needed to carry out particular goals in the agricultural industries. The rationale for the exemption is to protect producer income, and thereby maintain Norwegian agriculture and national supply, carrying out food safety, regional considerations such as settlement patterns, cultivated landscape etc. In addition the co-operatives' equalization system of producer and processing income and prices is considered important to settlement patterns across the country. It is considered that without equalization system, farming and processing in rural areas would no longer be profitable. Regional policy thus has extensive influence over the agricultural policy. The strong focus on producer welfare and promotion of agricultural objectives is strongly rooted in Norwegian agricultural policy, though recent governments have focused more on consumer welfare, and induced changes in agricultural policy towards more competition, lower prices and wider assortment.

2.2 The co-operatives' impact on the agricultural markets

The huge Norwegian co-operatives in milk, grain, poultry and meat sector are "joint activity" organizations as they organize joint activities of producers, buyers and sellers and marketing order duties.

Each year the state and the farmer organizations negotiate on target prices on primary products, which the co-operatives have the right to obtain by their strategies in the market place on behalf of their members. These target prices function as ceilings or maximum prices, and therefore also protect consumers to a certain extent. To obtain the target prices, the co-operatives are given rights and duties as market regulators by the official authorities. The market regulation role involves the authority to set prices or stabilize the market. The latter is done mainly by restricting output, but also by encouraging production if prices get to high. The different measures include export, storage, supporting other end-uses, etc. Farmers fund the market regulations themselves by paying a fee per unit of the primary product.

The vertically integrated producer co-operatives dominate the agricultural industries, and have large market shares both in collection, distribution and processing of primary products. The co-operatives are organized by product. Each of the agricultural sectors is thus dominated by one co-operative, except in the grain sector where there are 4 independent regional co-operatives with at tight collaboration. The co-operatives have strong positions in their markets, due to large market shares and strong trademarks. Further, their market regulator duties and rights enhance their dominance compared to their competitors. The vertical integration of co-operatives almost implies a need for entrants to establish themselves as vertically integrated companies. This may work as a barrier to entry. Import restrictions, quotas and other output regulations effectively limit the quantity of raw milk, meat, grain, poultry and eggs available to competitors in these markets. The production of primary products is constrained by quotas and other output restrictions, which means that each farmer has a limit on his production. The co-operatives organize the majority of the farmers. Thus the co-operatives have advantages compared to their competitors in access to domestically produced raw material. This is most visible in the dairy industry, which is the highest concentrated and regulated industry.

2.3 Competition problems due to co-operatives

The exemption is considered important to promote agricultural policy goals, and exists mainly to increase producer welfare. As the co-operatives' ability to effectively exercise their regulatory responsibilities depends on their degree of market power, one may argue that the goal of maintaining producer income by marketing orders and joint selling exist at the cost of consumer welfare. Norwegian prices on processed goods are high and assortment narrow compared to the neighbour countries. A move towards stronger competition is difficult in a system where one of the market participants is presumed to have considerable market power due to its role as a market regulator. In the long run, this paradox calls for alterative ways to organize the agricultural industries.

Due to the antitrust exemption for joint marketing, the focus of competition policy enforcement has been on agricultural companies' conduct towards competitors and customers, especially in downstream processing industries. The NCA has also considered competitive harmful effects of several mergers. The NCA has been concerned that competition will be undermined where a marketing co-operative also have regulatory responsibilities. The co-operatives have an obligation to supply competing companies with unprocessed products, as part of their marketing order duties. Competitors have complained that they pay a higher price on the primary product than the co-operative, giving the vertically integrated co-operative a competitive advantage in processing. Further, the market regulator role involves keeping supplementary production capacity, which as well may work as a barrier to entry.

2.4 The NCA`s supervision of mergers and acquisitions - examples

During the last decade the NCA has denied or conditionally approved several mergers and takeovers upstream and downstream in the agricultural sector.

In 1997, the Norwegian co-operative of meat producers (Norsk Kjøtt), acquired Yggeseth, a sales and meat cutting company. The market for deliveries of cut meat to the food processing industry was characterised by barriers to entry and a significant restriction of competition. The NCA imposed Norsk Kjøtt to sell Yggeseth. The decision was appealed to the Ministry of Labour and Government Administration, which repealed the intervention. The Ministry emphasised that an intervention would contradict regional policy goals, as there was substantial risk of a shut down of the local cutting mill if the merger was not accepted or Yggeseth bought by another company.

In the grain sector, four regional purchasing organizations collaborate through Norske Felleskjøp. Together, they are a dominant player in the grain sector. In 2000, the NCA approved the Norske Felleskjøpet`s takeover of the concentrated cattle feed business of Stormøllen AS and the acquisition of half the shares in Statkorn AS. However, the approval was subject to several conditions, including the sale of two concentrated cattle feed facilities. Fellekjøpet appealed to the Ministry of Labour and Government Administration regarding some of the terms in the Authority's decision. Following the appeal the companies were ordered to sell one cattle feed facility and a block of shares in another mill. The NCA has followed up its decision closely in order to ensure that the organizations fulfil the conditions. Experience shows that this is a time-consuming task. It took almost two years from the NCA's decision until the conditions were met.

In 2003, the NCA blocked the acquisition of Norgesmøllene by Felleskjøpet Øst Vest BA (FKØV). The former firm is the largest out of two manufacturers of consumption flour in Norway, while the latter is a co-operative supplying cereal grain product, concentrated cattle food, machinery, and other input to agriculture. FKØV is the largest purchaser of grain for consumption flour. By acquiring Norgesmøllene, FKØV would obtain a stronger position in the distribution chain, ranging from grain production to the sale of flour to households. The decision was appealed to the Ministry of Labour and Government Administration. As of May 2004, the final decision is still pending.

The NCA has considered several cases concerning the competitive practices of the dairy co-operatives, including the merger between Tine and the ten dairy companies in the Tine co-operative. In 2002, the NCA approved the merger between the Tine dairies. Local farmers owned the independent Tine dairies. The joint national co-operative, Tine BA, was owned by these ten dairies. The NCA imposed several conditions for its approval of the merger. Tine accepted the conditions without appeal: to deliver raw milk to competing dairies, to make the regulations about joining and leaving Tine more flexible, to sell two production facilities, to sell dairies that Tine shuts down, and to refrain from imposing competition-limiting conditions on those sales. In 2003, Tine announced two dairy plants for sale.

2.5 Intervention in anti-competitive practices - examples

In 1999, the NCA has in two occasions intervened in respect of the Norwegian egg and poultry co-operative's terms for the slaughter of chickens and other fowl. In large parts of the country the Norwegian Egg and poultry Co-operative (Prior) is the only enterprise slaughtering fowl. Some of the co-operative's regional organizations were offering egg producers different terms for the slaughter of fowl depending on whether they supplied their eggs to the egg co-operative or to the co-operative's competitors. The NCA found that the differentiated conditions had a restraining effect on competition between egg packing plants. A decision was therefore taken to prohibit Prior from setting different terms for the slaughter of fowl depending on where the producers supplied their eggs.

In 2003, the NCA intervened against loyalty clauses in an agreement on supply of cheese between Tine and the processing industry. The loyalty rebates made it difficult for suppliers with smaller scale of production to compete on deliveries of cheese to the industry even if they are completely competitive. Because of the dominant position of Tine, the NCA found that the agreement had the effect of restricting competition contrary to the aim of the Competition Act. The NCA forbade Tine to set such conditions in their co-operation agreements.

In 2002, the NCA reported the flour producers Cerelia AS and Stormøllene DA to The Norwegian National Authority for Investigation and Prosecution of Economic and Environmental Crime (Økokrim) for price collaboration. The market for flour for human food production is highly concentrated in Norway. Norgesmøllene and Cerelia are the Norway's only two producers of flour for human consumption.

3. Competition Advocacy

3.1 The Norwegian Competition Act

A new Competition Act entered into force on 1st of May 2004. The Act is partly harmonized with EU competition rules and includes prohibitions against cartels and abuse of dominance. The objective of the Act is to further competition and thereby contribute to efficient utilisation of society's resources. When applying the Act, special consideration shall be given to the interest of consumers.

3.2 Competition advocacy for regulatory reform

The NCA has been active in the promoting of competition in the policy-making and regulatory processes in the agricultural sector. The Competition Act explicitly authorises this activity. The NCA shall "call attention to any restrictive effects on competition of public measures and, where appropriate, submit proposals aimed at furthering competition and facilitating market access by new competitors."(Sec. 9). If the Competition Authority so requires, a response from the public body responsible for the measure must be made within the deadline specified by the Competition Authority. The response must include, inter alia, a discussion of how competition concerns will be dealt with. This function of "calling attention" on its own initiative permits the NCA to offer a critical assessment of regulations and decisions made by the Ministry of Agriculture.

Other advocacy functions include "hearings," that is, comments on proposals, participating in working groups and committees, and writing reports. When submitting comments on proposed rules and actions, the NCA appears on its own behalf. In 2001 the NCA published a general assessment of policies in the agricultural sector. The report was intended to provide a foundation for further work about agricultural products and processing, concentrating on the dairy industry. The NCA's report concluded that the problem of high prices in Norway would be best met by liberalising imports of food products.

3.3 Critical assessment of the role of market regulators

In many of the expert opinions submitted by the NCA the last years, it was called for the need to reconsider the necessity of the various market regulations in agriculture. The dominant suppliers Tine, Prior, Norsk Kjøtt, and Norske Felleskjøpet are regulators of the milk, poultry, eggs, meat and grain sectors, respectively. The NCA has proposed to transfer the responsibilities of market regulation to an independent state authority.

A new market system for grain was introduced on 1st of July 2002, and Norske Felleskjøpet was appointed as the market regulator in the grain sector. As market regulator, Norske Fellskjøpet is responsible for regulating the supply of grain in the market. The quantity supplied must be regulated to ensure that the price of grain on average during the year is equal to the negotiated prices. The NCA was critical to the fact that Norske Felleskjøpet was assigned the role of market regulator. Among other things, this will give the co-operative a competitive advantage, partly because of problems with asymmetric information in favour of the regulator compared to its competitors in different markets.

3.4 Proposals aimed at increasing competition in the dairy market

It is an important task for the NCA to monitor competition in the dairy market. The dairy trade is strongly concentrated and the rules related to the market regulation are non-transparent and complicated. The NCA believes it necessary to remove barriers to entry and relax regulations in order to create stronger competition and improved efficiency in the dairy trade. The NCA has been working in several contexts to analyse the effects of the extensive and complex regulations that govern the dairy sector.

On the 1st of January 2004, a new regulation - the milk marketing order system - came into force. The most important change is that Tine`s competitors now get access to considerably larger supplies of raw milk from Tine. The new regulation also implies separate accounts of Tine's activities in the sectors for raw milk and dairy production, respectively. The NCA has recommended the following on the new regulation in the milk sector:

2. The price-discrimination or equalisation regime should be abolished

The NCA believes that the price equalisation system should be phased out. In practice the system implies that the price set on raw milk varies according to end use, which means a price discrimination between different uses of milk. This regulation causes misallocation in the production and consumption of dairy products through its complicated system of taxes and subsidies. The regulation implies that any new entrant must offer a wide range of products in order to compete with Tine. The NCA finds that the market should determine production and prices to a larger extent. Despite of the NCA`s recommendations, the price equalisation system is upheld in the new regulation that came into force 1st of January 2004.

3. Tine`s obligation to supply competitors with raw milk should be unlimited.

The most important change in the new regulation of the milk market is that Tine`s competitors now get access to considerable larger supplies of raw milk from Tine. The NCA has addressed this important issue several times. It is important because the quota regulation on raw milk effectively limits the quantity available. Tine receives almost 98 per cent of the total production of unprocessed milk in Norway, obtaining almost complete control of the supply of milk producers. The quota regulation also limits the possibility for the establishment of dairies based on delivery from own farmers.

4. Separation between Tine`s vertical activities

Tine is the dominant player both in the market for buying and selling of raw milk and in a number of markets for processed products like cheese, consumption milk, butter and cream. The new regulation system for milk implies separate accounts between Tine`s activities in the sector for raw milk and the dairy production. This will facilitate the monitoring of Tine's business practices, aimed at preventing discriminatory treatment of smaller competitors in downstream markets. In the NCA`s opinion, competition would be enhanced if Tine`s handling of raw milk were structurally separated from its dairy processing activities.

NOTES

1 Norwegian Agricultural Economics Research Institute (NILF) and ECON Analysis (2002). Price differences in Nordic food markets. NILF-memorandum 2002-38.

SWITZERLAND

Is monopsony buying somehow different from monopoly power?

Buyer power is an important topic in Swiss competition policy. The effects of monopoly power have been intensively investigated and are well understood whereas matters are less clear with respect to monopsony buying. It seems that standard textbook theory of monopsony buying is hardly a reliable guide for competition authorities in their decisions. More recent theoretical work focuses on the ability of monopsonistic retailers to discriminate between different suppliers.

Although the abuse of both seller and buyer power are considered under article 7 of the Federal Act on Cartels and Other Restraints of Competition (Act on Cartels), the economic implications of buyer power differ fundamentally from those of seller power. Producers and retailers, who are both part of the production process, are supposed to serve the needs of consumers. Competition constantly forces both producers and retailers to react to the changing preferences of consumers. Thus, contrary to producers, consumers have to be taken as exogenous in the production process. Therefore the economic implications of buyer power differ from those of monopoly power. The aim of the Act on Cartels is not to protect small suppliers, but the competition process as a whole.

The ability of retailers to use buyer power differs between different products. For many agricultural raw products there are alternative distribution channels like catering. One example is the meat market. Only about 50% of the Swiss meat production passes through the retail trade. The remainder is consumed in restaurants, hotels, cafeterias (of firms, hospitals, schools etc.). On the other hand, the suppliers of processed products are very often multinational firms that dispose of satisfactory outside options. It is thus essential to judge cases of buyer power by a rule of reason.

The Swiss Competition Commission dealt several times with buyer power. In an early decision (merger between Migros and Globus in 1997) it applied the so-called mirror theory. According to this theory a dominant position in the procurement market can only arise as a result of lacking competition in the sales market. The Swiss Competition Commission abandoned the mirror theory in her decision on the merger case Coop/Epa in 2002. According to this decision, which was confirmed in the merger case Coop/Waro in 2003, a dominant position on procurement markets can arise even if the correspondent retail markets are comparatively competitive. Yet, the Swiss Competition Commission emphasized the close relationship between sales and procurement markets in its recent decision concerning the Swiss pork market.

The Swiss Competition Commission considers the protection of an efficient competition, and thus indirectly the avoidance of possible detrimental effects on consumers, as its aim, not the protection of small business. However, buyer power is still a topic of interest in Swiss antitrust litigation that certainly deserves further investigation.

Geographic market definition for farmer products

The prevailing regulatory conditions have an important impact on the competitive pressure that Swiss producers of farmer products and processing plants face. In agriculture, Switzerland is still pursuing a policy characterized by a high level of border protection and internal support (production subsidies and

decoupled direct payments). The import of nearly all farmer products is strictly regulated by tariff rate quotas and tariffs.

This fact can be demonstrated by means of some examples: In 2003, the portion of the domestic production in the meat sector was as follows (source: Proviande): beef 90,9%, calf 96,5%, pork 92,9% and poultry 42,7%. Until 2003 the right to import meat products was – with a few exceptions – linked to domestic production. Only firms that transformed domestic slaughter cattle into meat products were allowed to import a specified quantity of foreign meat. Since January 2004 the import rights are increasingly distributed by means of auction mechanisms what has to be considered as a competition-friendlier method. For vegetable food, the portion of domestic production is about 60% on average. Import quotas differ fundamentally between different kinds of vegetable food. Many plants are not cultivated in Switzerland at all or only during certain seasons due to the prevailing climatic conditions. Retailers procure these products mainly on international markets. For other vegetable products, such as potatoes, the import quotas are extremely modest. Import quotas are still linked to domestic production for some of these products (e.g. potatoes). Similarly, the milk market is effectively protected by tariffs against any foreign competition. About 20% of the Swiss milk production is exported in form of cheese and milk powder, the latter with the help of export subsidies. Nevertheless, in recent years some important changes have occurred. A noteworthy example is the cheese market that gradually will be opened towards the European Union until 2007.

These facts show that until now, the geographic market for most farmer products has at most been national. It can not be excluded that due to the liberalization a wider geographic market definition may become appropriate in the future. For most farmer products a narrower market definition, i.e. the definition of small regional markets, does not seem to be appropriate either. Switzerland only extends over a relatively small area. Even living slaughter cattle or perishable products like fruits can be transported at relatively low costs to and from the remotest parts of Switzerland within a few hours. As the experience shows, producer prices for homogenous products do not vary significantly within Switzerland. Thus, a special treatment of products that are perishable and costly to maintain does not seem to make much sense in the case of Switzerland. All in all, a national market definition seems to be appropriate for most farmer products that are cultivated in Switzerland.

This view was confirmed in a number of merger and antitrust cases: In 2004, the Swiss Competition Commission considered the procurement of and the commerce with pork as national markets. The analysis of the price movements over the past few years showed that the Swiss pork market behaves independently from the European pork markets. On the other hand, pork prices are almost the same within all parts of Switzerland. In 1998, the Swiss Competition Commission judged the merger between Bell and SEG in the Swiss poultry industry. Although the quantitative importance of imports is considerable in this market, import quotas were linked to domestic production at that time. Imported poultry was thus much more a complement than a substitute for Swiss poultry. That's why the Swiss Competition Commission considered a national market definition as appropriate. The processing of milk products was considered by the Swiss Competition Commission in the merger cases Toni/Säntis in 1999 and Emmi/Swiss Dairy Food in 2002. According to these decisions, the markets for milk and for most processed milk products (like yogurt, cream, ice-cream, butter, milk powder) are national markets. The only exception so far is the cheese market. In 1999, the Swiss Competition Commission considered a European market definition as appropriate. Three years later it decided that the time is not ripe yet for such an assessment. It distinguishes now between different sorts of cheese (hard cheese, semihard cheese, soft cheese) and considers the geographic market for all these sorts as national.

Regulations that limit the entry of new retailers

There are some regulations that inhibit competition in the Swiss retail sector (e.g. import restrictions and other agricultural regulations, restrictions in connection with building permits, restrictions on opening times, national exhaustion in the Swiss patent law). These regulations normally are equally valid for incumbents and for entrants. This means that they not always constitute entry barriers (in the sense of Stigler). However, it is clear that these regulations have manifold impacts on competition in retail trade.

Foodstuffs are traditionally the most important part of the assortments of retailers. As food prices are on average about 30% higher in Switzerland than, e.g., in Germany, a first glance may suggest that entry of low-price retailers is a very likely scenario. Alas, due to the import restrictions mentioned above the possibilities of entrants to sell cheaper imported products and thus undercut the prices of incumbent retailers is limited. Established retailers like Migros and Coop have occupied the most favorable points of sale, have long-term relationships with suppliers or are partly vertically integrated with food processors (e.g. Migros with Micarna and Optigal, Coop with Bell). The Swiss retail trade is characterized by modest growth rates or even stagnation. Thus, under present conditions entry of new firms that change the present market structure fundamentally seems not to be very likely.

However, in the past years some entries of foreign retailers have taken place (e.g. Carrefour). This shows that entry into the Swiss retail industry is still possible and considered economically favorable by entrants. On the other hand, entries that have taken place recently are on relatively modest scale and have taken place by acquiring existing small retailers. The leading retailers Migros and Coop constantly hold market shares of more than 30% each. The current situation in Swiss retail trade seems to be quite stable with Migros and Coop firmly holding their strong market positions. It can be argued that not only producers, but also incumbent retailers profit from public restrictions on international trade. However, the price setting of Swiss retailers is also restricted by foreign retailers that have not entered the Swiss market directly but dispose of retail outlets close to the Swiss frontier.

In the present context it seems appropriate to limit the discussion on agricultural regulations that hinder competition in the retail sector, although other restrictions (building permits etc.) may be equally important. Apart from import restrictions, there are many other agricultural, veterinary and public health regulations that influence the production process (e.g. with respect to animal protection, quality requirements, hygiene, product declaration). In Switzerland, the production costs of farmer products are – even without cost generating regulations – comparatively high due to topographic and climatic conditions and expensive input factors. There is a widely held view that the Swiss agriculture is bound to concentrate on high quality products that face less competition from foreign mass products. Many agricultural regulations are thus designed to promote product quality. Article 104 of the Swiss Federal Constitution also gives Swiss agriculture ecological and spatial planning aims. This leads to an impressive number of regulations that also have to be taken into account by downstream firms. In some of these areas efforts for a harmonization towards the European Union have taken place. It is expected that entry barriers will further diminish in all stages of food production.

Clearly, the prevailing regulations have been taken into account by the Swiss Competition Commission in the past retail merger decisions (Migros/Globus, Coop/Epa and Coop/Waro). However, as these mergers did not fundamentally change the market conditions (especially not in the sense of an emergence or reinforcement of a dominant position), the Swiss Competition Commission finally gave up its initial antitrust concerns in these cases. Particularly, it came to the conclusion that there is no joint dominance in Swiss retail trade. It seems that the concentration in Swiss retail trade progresses with other means than mergers. Lasting sources of structural change are the internal growth of leading retailers and the exits of fringe competitors such as butcher's shops.

Economies of scale and scope in various processing activities

Regulations that prevent entries of new firms or limit imports – in connection with the small size of the Swiss market – lead to inefficient structures in various processing industries. Thus, many firms in the food processing industry probably hardly reach the minimum efficient scale. On the other hand, the scope of the processing activities of small firms is often considerable. There are many small firms that produce a high variety of products in comparatively modest quantities. Thus, it is not surprising that several mergers have taken place recently in meat and milk processing and in retail trade. Most processing industries and retail trade are highly concentrated in Switzerland, although the firms involved normally are relatively small compared to the principal European players. One example is Emmi which is clearly the number one in the Swiss cheese production. In meat processing the three major firms Bell, Micarna and Carnavi have combined market shares of about 55%. These firms produce almost exclusively for the small Swiss market and are thus "dwarfs" compared to some European meat processing firms. An opening towards the European market would certainly enable (and force) many processing firms to reach a more efficient scale.

Price aberrations between producer prices and retail prices

It has to be distinguished between short-run asymmetric price transmission and long-run price aberrations. There is a study of the Federal Institute of Technology in Zurich on short-run asymmetric price transmission. In this study it was shown that there is indeed an asymmetric price transmission in the Swiss pork market. However, in this study it was also pointed out that this does not necessarily mean that there is an unusual high degree of market power in that industry.

As the relationship between short-run asymmetric price transmission and market power is far from clear, the Swiss Competition Commission concentrated in previous investigations on long-run price aberrations between producer prices and retail prices. Specifically, in a recent investigation it considered the diverging development of consumer and producer prices in the Swiss pork market. According to calculations of the Swiss agriculture authority the gross margin of the processing industry and the retail sector for meat products has increased by more than 30% within a few years. These calculations do not reveal whether price aberrations occur in the processing industry or in the retail sector. However, as the investigation showed, the increase in the gross margin is to a large extent caused by changes in consumer preferences (trend towards convenience and label products etc.) and new regulations that led to an increase in processing, marketing and distribution costs.

In Switzerland there is no evidence so far for the widespread view that price aberrations between producer prices and retail prices are caused by high concentration or a lack of competition in the retail sector or in the processing industry.

Bid rigging among purchasers of farmer products

Farmer products in Switzerland are usually not sold by means of auctions (one important exception being the auction mechanisms that are nowadays widely used by the Swiss government in order to distribute import quotas of farmer products) but by direct negotiations between retailers or processing plants and producers. Although retailers and processing plants very often dispose of a higher bargaining power than producers, these negotiations generally take place under free market conditions. However, there are very often prices recommended by joint-activity organizations that influence the outcome of these negotiations. In many cases, price transparency is very high among buyers and sellers of farmer products. Information on prices of other firms is widely used strategically during negotiations. However, there are so far no clues for bid rigging behavior among purchasers or importers of farmer products in Switzerland.

Description of producer joint-activity organizations

Joint-activity organizations play a key role in the prevailing Swiss agricultural policy. Most farmer products or product groups are represented by joint-activity organizations. An important exception constitutes the meat market. One example of a joint-activity organization is Swisspatat that represents the interests of potato producers and dealers and also of the potato processing industry. Joint-activity organizations and other similar organizations often dispose of public mandates for specified tasks. Under certain conditions measures of joint-activity organizations can be declared as mandatory for all the firms in that market, i.e. not only for its members. The aim of the regulation is to encourage joint efforts of the agricultural enterprises to better promote and market their products. At present, seven organizations benefit from an extension decision of the Swiss Federal Council to non-members, most of these decisions supporting collective measures of joint promotion of agricultural products.

Antitrust concerns with respect to joint-activity organizations arose in the cheese market some years ago. The main concern consisted in recommended prices published by the joint-activity organizations Emmental and Gruyère that were effectively observed by most firms. The joint-activity organizations finally changed their behavior. However, the agricultural law has changed meanwhile. This means that the publication of indicative prices is protected by the agricultural law since January 2004 under certain conditions.

Antitrust exemptions for joint selling

The Swiss agricultural law in connection with article 3 of the Act on Cartels contains antitrust exemptions for joint-activity organizations. These exemptions are enumerated in article 8 of Swiss agricultural law. Thus, joint-activity organizations are allowed to take measures that improve the product quality or increase the quantity sold. Furthermore, joint-activity organizations can promote measures that "adjust the offer to the needs of the market". An example for such a measure is the financing of the transformation of milk to milk powder in order to support the milk price. As mentioned above, Swiss agricultural law also makes it possible for joint-activity organizations to publish recommended prices. The application of these recommended prices is voluntary for the suppliers. Consumer prices are excluded from this regulation. It seems questionable whether these regulations, albeit protected under agricultural legislation, are economically desirable as in some instances they may protect inefficient and anticompetitive outcomes.

These regulations are part of the Swiss agricultural law. Some measures of the agricultural law bear potential conflicts with the aims pursued by the Act on Cartels. Thus, there can not be excluded that mainly producers or processing firms and retailers profit from these regulations and that these regulations in some cases even inflict harm on competition and on consumers.

Although there are exemptions for several activities of joint-activity organizations, there are no such exemptions for joint selling. In the Swiss antitrust act there are no per se prohibitions, neither for horizontal nor for vertical price fixing. Thus, joint selling will have to be judged case by case. Joint selling may be economically desirable as long as competition is not notably restricted and transactions costs can be lowered.

Intellectual property protection

Under certain conditions, there is the possibility to gain intellectual property protection for clearly defined products that are typical for a specified region, so-called AOC (Appellation d'Origine Contrôlée) and IGP (Indication Géographique Protégée). Examples are Gruyère, Vacherin Mont-d'Or, Tête de Moine, Saucisse d'Ajoie and Eau-de-vie de poire du Valais. Under the condition that these protections are handled

reasonably, they do not raise any serious antitrust concerns. However, it cannot be excluded that well organized groups of producers may try to abuse an intellectual property protection with the aim of restricting competition in this way. These fears have not materialized yet. AOC and IGP are based on a free entry principle for all the enterprises in the production area which respect the code of practice of the product, and there is a reliable formal procedure with two appeal instances what limits the probability of misdirected decisions. A recent and disputed case is that of Raclette du Valais. The intellectual property protection assigned to Raclette du Valais will have to be judged by the appeal instances as Raclette producers of other areas felt disadvantaged by the decision of the Swiss agriculture authority.

Advocacy or other role in the development and evaluation of agricultural regulations and laws

The Swiss Competition Commission is not in a position to override agricultural regulations and laws. However, an important task of the Swiss Competition Commission is to observe agricultural markets and to advise the Swiss agriculture authority in the development of the agricultural law. Some of these statements are published and hopefully have a non-negligible impact on the competitiveness of agricultural markets. Whenever the competition authority disagrees on a regulation project of the agriculture authority it has the right to write a report to the Swiss government who will base its final decision on the reports of the two authorities.

Competition or regulatory cases

The most important competition cases are already mentioned above. These and some other cases and statements of the Swiss Competition Commission are listed below. The complete texts can be found in the publication "Law and Policy on Competition" (RPW) http://www.weko.admin.ch/publikationen/00212/index.html?lang=fr). The decisions are published in either German or French.

There were no objections against most merger cases in the retail sector and the food processing industry, although some of them were approved only after phase 2. The two exceptions are the merger between Bell and SEG and the takeover of Swiss Dairy Food by Emmi. The merger Bell/SEG was approved only under the condition of selling a plant because of an otherwise arising joint dominant position of Bell and Optigal. In the merger Emmi/Swiss Dairy Food the failing firm defense doctrine was applied. Noteworthy is the investigation on the pork market where it could be shown that the two leading firms Bell and Micarna do not enjoy a joint dominant position.

Meat processing	
Merger Bell/Vulliamy (no objections)	RPW 1997/1, pp. 54
Merger Bell/SEG (structural remedies)	RPW 1998/3, pp. 392
Merger Schlachtbetriebe St. Gallen (no objections)	RPW 2003/3, pp. 552
Tests for mad cow disease (no abuse of dominant position)	RPW 2003/4, pp. 753
Merger Carnavi/Sutter (no objections)	RPW 2004/1, pp. 136
Pork market (no joint dominance)	RPW 2004/2 (not yet published)

Milk processing	
Merger Toni/Säntis (no objections)	RPW 1999/1, pp. 93
Interprofession du Gruyère (behavioral adjustment)	RPW 2002/1, pp. 62
Interprofession Emmentaler (behavioral adjustment)	RPW 2002/3, pp. 424
Merger Cremo/Swiss Dairy Food (no objections)	RPW 2003/1, pp. 212
Merger Emmi/Swiss Dairy Food 1 (failing firm defense)	RPW 2003/3, pp. 529
Merger Emmi/Swiss Dairy Food 2 (failing firm defense)	RPW 2003/4, pp. 778
Merger Emmi/Swiss Dairy Food 3 (failing firm defense)	RPW 2003/4, pp. 786

Retail trade	
Merger Migros/Globus (no objections)	RPW 1997/3, pp. 364
Merger Coop/Epa (no objections)	RPW 2002/3, pp. 505
Merger Coop/Waro (no objections)	RPW 2003/3, pp. 559

Statements to the Swiss agricultural law or regulation	
Statement to changes of agricultural regulation	RPW 1998/4, pp. 573
Statement to changes of agricultural law	RPW 2002/1, pp. 174
Statement to changes of agricultural regulation	RPW 2003/3, pp. 611

Other cases	
Animal nutrition (alleged abuse of dominant position)	RPW 1997/2, pp. 175
Artificial insemination of cattle (abuse of dominant position)	RPW 1999/1, pp. 75

UNITED STATES

Buyer Concentration (Monopsony Buying)

Claim: monopsony buying is different from monopoly power. Should market power for buying be treated in much the same way, using the same antitrust enforcement tools, as market power for selling?

Monopsony is the mirror image of monopoly, focusing on the buying side of the market rather than the selling side. One example of the exercise of monopsony power is a situation in which a purchaser with market power reduces the quantity it purchases in order to force down the per unit price it pays. As with an exercise of market power on the selling side, an exercise of monopsony power can lead to production cutbacks and harm overall economic efficiency. Accordingly, U.S. antitrust enforcers analyze mergers and conduct involving buyer market power in the same manner as mergers and conduct involving seller market power, with an ultimate focus on efficiency and overall economic welfare in both kinds of situations.

Historically, exemptions from antitrust enforcement have been created for labor unions and for agricultural cooperatives, in part based on the assumption that industrial employers and agricultural processors have monopsony power. The economic theory behind these two exemptions is sometimes termed "countervailing power." According to the countervailing power theory, efficiency and consumer welfare may be enhanced by allowing exercise of monopoly power on the selling side if there is monopsony power on the buying side. The exemption from antitrust review for agricultural cooperatives, discussed below, arguably makes it easier for cooperatives to form, to enter the market, and potentially to vertically integrate forward in competition with processors, if individual farmers perceive that processors are exercising monopsony power. In more conventional economic treatments, when a monopolist faces an monopsonist, the result is indeterminate and depends on the relative bargaining skill of the organizations.

A casual observer might believe that if input prices are reduced, the savings will be passed along to – or at least shared with – final consumers. But that is not necessarily the case. If input prices fall as a result of a true economic efficiency, that will tend to lead to lower prices for consumers. In contrast, the exercise of monopsony power in the input market tends to depress input prices below competitive levels – which will depress incentives to produce the input, and reduce its supply below competitive levels, thereby resulting in reduced product availability and potentially in higher prices for consumers. Antitrust enforcers must distinguish these two different kinds of situations, so that we can pursue enforcement actions as warranted against the latter, but not against the former.

We more commonly come across alleged competitive harm on the side of selling power, but we are vigilant for potential monopsony problems as well. Some have suggested that monopsony can potentially produce anticompetitive harm at lower levels of concentration than monopoly, although this claim is unproven.

The Department of Justice and Federal Trade Commission included a panel discussion on monopsony in a merger enforcement workshop we held in February 2004.[1] One of the participants on that panel, Marius Schwartz, professor of economics at Georgetown University and former economics director of enforcement at the Antitrust Division, stated:

> I know of no economic reason to justify different antitrust treatment of the formation of market power on the buying side than on the selling side. The reasons offered to justify differential treatment turn

out, on closer look, to apply equally to seller power or to derive from other characteristics of the environment than the buyer/seller distinction.

Geographic market definition: markets for some long-life products will be different from those for others that are more perishable or costly to maintain. How small are geographic markets for various agricultural products?

The U.S. antitrust agencies consider proper market definition on a case-by-case basis, primarily according to areas within which it is competitively feasible to ship the product or input involved. The Horizontal Merger Guidelines and other guidelines issued by the antitrust agencies are equally applicable to the different production stages in agricultural markets as well as industrial markets. Indeed, Merger Guidelines market definition tests have been applied in the agricultural literature to agricultural commodities.

Localized markets for perishable products have been found, for example, in merger cases involving the bread industry and other baked goods. Localized markets have also been found in the cases of various fruits and vegetables sold to processors that may be engaged in competition in broader downstream markets.

Mergers that increase concentration in processing and retailing may be motivated by productive efficiencies. Are there economies of scale and scope in various processing activities? Have you quantified any of these economies? Are there economies of scale and scope in retailing activities? Have you quantified any of these economies? Is there a point beyond which such economies are no longer realized?

The U.S. antitrust agencies consider possible efficiencies on a case-by-case basis including vertical integration, scale and scope economies, and diseconomies. For example, in evaluating and understanding changes over time in the geographic markets in the soft drink industry, the largest user of corn syrup in the U.S., the FTC found that geographic markets were increasing in size in part because of substantial increases in scale economies for both canning and bottling of soft drinks. These economies coupled with improved transportation fostered consolidation of earlier extremely localized bottling and canning operations. Scale economies have also been noted as a rationale for the consolidation of meat packing and fruit and vegetable processing operations.

Should monopsony concerns differ between agriculture goods for processing (e.g. cattle sold to meat processors and sugar beets sold to sugar processors) and agriculture goods that are not processed before retailing, e.g., raw fruits and raw vegetables. Why should there be a difference between processed and unprocessed goods?

The U.S. antitrust agencies consider monopsony concerns on a case-by-case basis. *See* discussion below of the Cargill/Contentental Grain transaction.

Alleged price aberrations: a) farm-gate prices fall while retail prices rise; b) product cost increases are quickly reflected in retail prices while product cost decreases are more slowly reflected in retail prices; c) profits of intermediaries and retailers have increased while farm-gate prices have been pushed down. Claims of price aberrations should take account of the length of the supply chain. If the length of the chain (number of intermediaries between farmer and retailer) is large, do price aberrations claims make sense?

There are a number of possible reasons why there might be differences in price movements as between different levels in the production and marketing chain. Explanations, for example, may include differences in economies of scale, contract duration, contract types, degree of vertical integration, hedging

activities, demand elasticities, and degrees of competition at different levels of production in an industry. The U.S. antitrust agencies would consider evidence of such differences on a case-by-case basis, along with other relevant evidence.

Have you received claims of price aberrations? What is the evidence of such claims? What conclusions have you reached on the legitimacy of deducing market power from such evidence? If market power exists on processing on purchasing side, what is the appropriate remedy?

Claims of what the question refers to as price aberrations have been made on various occasions, both in general and with respect to specific commodities, such as retail milk and meat prices. There are a number of possible reasons why there might be differences in price movements as between different levels in the production and marketing chain. The U.S. antitrust agencies would consider evidence of such differences on a case-by-case basis, along with other relevant evidence. While market power might be one potential factor in explaining such differences in a particular instance, the mere presence of market power, whether on the selling or buying side, is not in and of itself a violation of the U.S. antitrust laws. And, as noted above, there are numerous possible explanations for these price changes that are unrelated to the existence or exercise of market power.

Sectoral regulators may also study such issues. For example, the USDA studied the effect of buyer concentration in the meatpacking industry in the early 1990s.

When the number of buyers, the routes to end-customers, and the possible locations for sale of farm products are limited, the chance of bid rigging in buying farmer products increases. Have you investigated or prosecuted bid-rigging among purchasers of farmer products? How can you find out if bid-rigging is occurring? Are there any regulations that might increase the chances of bid-rigging (or in fact require uniform pricing)? Is meat processing more likely to encounter bid rigging than other forms of agricultural output? If so, why? What penalties have bid-riggers faced?

The Antitrust Division successfully prosecuted two cattle buyers in Nebraska a few years ago for bid-rigging in connection with procurement of cattle for a meat packer, after an investigation conducted with valuable assistance from the Department of Agriculture (USDA), which was investigating some of the same conduct under the Packers and Stockyards Act. Both individuals pled guilty and were fined and ordered to make restitution to the victims, who included cattle producers in their role as sellers to the cattle buyers.

The Antitrust Division has successfully prosecuted dozens of corporations and individuals for bid rigging in the sale of dairy products to public school districts, the military, and other public institutions. These prosecutions involved bid-rigging on the selling side, not the buying side.

To assist in uncovering bid-rigging in agricultural markets, in 2002 then-Assistant Attorney General Charles James designated the assistant chief of the Antitrust Division's Chicago Field Office to be a special point of contact for USDA for criminal matters. This designation is intended to facilitate the forwarding of information regarding possible bid-rigging and other anticompetitive conduct to the Division for criminal investigation, as well as to provide training for agents of USDA's Office of the Inspector General in detecting possible bid-rigging in USDA procurement.

Have there been any notable competition or regulatory cases in recent years, whether under competition laws or laws with similar effect, that have dealt with the issues of monopsony that affects the agricultural sector? Please summarise the cases and results. Are the proceedings final?

In 1999, the Antitrust Division challenged Cargill Inc.'s proposed acquisition of Continental Grain Company's grain business. The resulting consent decree protected competition in the purchase of grain

and soybeans from farmers in a number of local and regional markets, as well as competition in the futures markets, by requiring Cargill and Continental to divest a number of grain and soybean storage facilities in the Midwest, the West, and the Texas Gulf. Cargill and Continental were not only buyers of grain and soybeans in various local and regional domestic markets, but also sellers of grain and soybeans in the United States and abroad. While the Division looked at the potential effects on competition in both the "upstream" and "downstream" directions, the challenge was based entirely on concerns about effects in the "upstream" market, where Cargill and Continental were buying from farmers.[2]

Producer "joint-activity" organizations (coops, marketing orders, market orders)

Please describe whether there are any antitrust exemptions for joint selling in the agricultural industry in your country and the nature of those exemptions. What rationale is used to justify the antitrust exemption? Are there any sunsetting clause in these exemptions? Are the market conditions that led to their creation still present? Do these exemptions help consumers? Do these exemptions help producers?

The Capper-Volstead Act, enacted in 1922, authorizes agricultural producers to organize into cooperatives to collectively process, prepare for market, handle, and market their products without being subject to antitrust scrutiny. The authorization covers only cooperatives composed entirely of producers of agricultural products, and its protection does not extend to predatory or coercive conduct, or to mergers or collaborations with non-covered entities.

The rationale for exempting agricultural cooperatives from the antitrust laws goes back at least as far as the enactment of the Clayton Act in 1914. Based on the principle "that the labor of a human being is not a commodity or article of commerce," section 6 of the Clayton Act provided that the antitrust laws would not apply to labor unions or to nonprofit agricultural cooperatives. During the agricultural depression following World War I, interest among farmers in forming cooperatives grew, and cooperatives increasingly came to the conclusion that they needed to be able to sell stock to raise capital in order to adequately serve their members. States began amending their laws to permit formation of cooperatives in the capital stock corporate form as well as the nonprofit form. Because section 6 of the Clayton Act applied only to nonprofit cooperatives, consideration was given in Congress to extending the same treatment to capital stock cooperative corporations, leading to the enactment of the Capper-Volstead Act in 1922, which immunizes capital stock cooperative corporations, with certain restrictions designed to ensure that the essential nature of the cooperative is preserved.[3]

The Agriculture Marketing Agreement Act of 1937 authorizes the Department of Agriculture to issue marketing orders governing permissible conduct in marketing certain agricultural commodities, including milk, fruits, vegetables, and tobacco. In *United States v. Borden Co.* , 308 U.S. 188 (1939), the Supreme Court held that conduct approved by the Secretary of Agriculture in a valid marketing order or agreement under that Act is to that extent shielded from antitrust scrutiny, but that conduct outside the scope of the marketing order is fully subject to antitrust scrutiny.[4]

There is no sunset provision in the Capper Volstead Act.

Please state reasons that may exist to permit large farmer cooperatives? When might such cooperatives cause competition problems? Could small cooperatives cause competition problems? What regulations govern cooperative activities? Can cooperatives limit output?

In enacting the Capper-Volstead Act, Congress did not place any limit on the permissible size of an agricultural cooperative. Provided the cooperative meets the requirements of the Act regarding its organization and membership, it is authorized to engage in the activities described above without regard to

its size. The Secretary of Agriculture is authorized, however, to issue a cease and desist order against a cooperative that is found after a hearing to have monopolized or retrained trade "to such an extent that the price of any agricultural product is unduly enhanced thereby."

Also see the response to the first question. It is also worth noting that cooperative activity can lead to economic efficiencies, particularly if procurement transaction cost savings and procurement economies are present.

Please describe "joint-activity" organizations in your country. Are any endorsed or operated with government regulatory oversight? If the organizations are highly inclusive, was the competition authority consulted in the process of establishing the organization and the regulations that govern it?

Cooperatives organized in accordance with the Capper-Volstead Act and marketing orders issued pursuant to the Agriculture Marketing Agreement Act of 1937 are described above. These are authorized by statute and are immunized from antitrust scrutiny, and do not involve consultation with U.S. competition authorities.

Have any joint activity organizations raised antitrust concerns through their behavior?

In *United States v. Borden Co.*, 308 U.S. 188 (1939), the Supreme Court held that conduct approved by the Secretary of Agriculture in a valid marketing order or agreement under the Agriculture Marketing Agreement Act of 1937 is to that extent shielded from antitrust scrutiny, but that conduct outside the scope of the marketing order is fully subject to antitrust scrutiny. Furthermore, the Court has found that when validly organized cooperatives collude with those who are not producers (such as processors and distributors) within the Capper Volstead's ambit, that conduct would not be shielded from antitrust either. Outside the scope of these two exempted areas, U.S. antitrust enforcement agencies have brought numerous enforcement actions over the years.

Do farmers have the ability to gain intellectual property protection, comparable to trademarking, for their products? By what mechanism are these trademarks (e.g. appellations) enforced? What domestic legal protections are accorded to such trademarks? Are these protections procompetitive, anticompetitive, or competitively neutral? Might the answers differ for products that include individual brands within the appellation and those that do not have individual brands? Are competitors who produce products that are functionally equivalent allowed to state that their products are similar to the trademarked product? (E.g. if the trademarked product were called Paris Ham, would a competitor be able to advertise their product as "Produced in accordance with the rules for Paris Ham," or "like Paris Ham"?) If such claims are not permitted, does that prevent consumers from receiving information that would be relevant for their purchases?

In general, agricultural producers have the same ability to obtain intellectual property rights for their products as inventors and manufacturers in other market sectors. Their ability to do so is governed by U.S. intellectual property law, and would not be a matter for competition authorities unless their conduct in obtaining or enforcing these rights ran afoul of the antitrust laws.

Have there been any changes in rules governing "joint activity" organizations in recent years? If so, what have these changes been and how have they affected producers, intermediaries and consumers?

Applicable law regarding agricultural cooperatives and agricultural marketing orders area has not changed recently.

Have there been any notable competition or regulatory cases in recent years, whether under competition laws or laws with similar effect, that have dealt with the issues of "joint seller activity"?

Cases involving joint activity among sellers comprise the overwhelming bulk of all cases brought under section 1 of the Sherman Act.

Competition Advocacy

In the regulatory and legal process, does the competition authority have an advocacy or other role in the development and evaluation of agricultural regulations and laws? What links exist, if any, between the ministries of agriculture and the competition authorities? Are staff ever exchanged? How does formal cooperation and informal cooperation work? How would disputes between policy bodies be addressed? Discussions of specific policies or cases would be helpful.

A Memorandum of Understanding Relative to Cooperation with Respect to Monitoring Competitive Conditions in the Agriculture Marketplace between the Departments of Justice and Agriculture and the Federal Trade Commission was signed in August, 1999 [available at http://www.usdoj.gov/atr/public/guidelines/3675.htm]. This memorandum was written to describe longstanding practices of cooperation and exchange of information between and among the three agencies regarding agriculture competition matters.

Does the competition agency or another organization play a public role in advocating competition in the agricultural sector? What are the best ways to undertake such a role? What kinds of evidence are necessary for public advocacy in agriculture?

The Antitrust Division engages in competition advocacy with respect to agriculture as appropriate. For example, earlier this year the Division filed a post-hearing brief with USDA opposing a proposed marketing order for hops under the Agricultural Marketing Agreement Act of 1937. Hops is an agricultural product used in making beer. The Division was concerned that the marketing order would have anti-competitively restricted the supply of hops. The brief is available at http://www.usdoj.gov/atr/public/comments/202477.pdf.

What are the appropriate criteria for judging harm in competition cases related to agriculture? Possibilities could include producer welfare, consumer welfare, and some combination of the two.

U.S. antitrust enforcement agencies have considered a variety of appropriate measures of economic efficiency and welfare in our previous agriculture investigations and enforcement actions. Examples include consumer welfare, as well as distortions in production decisions resulting from the exercise of monopsony power. Antitrust analysis also considers the potential for efficiencies to offset consumer harm directly or to foster increased competition that benefits consumers, as described in the Horizontal Merger Guidelines issued by the antitrust agencies. In agriculture-related cases, antitrust enforcement may be subject to the Capper-Volstead Act or the Agricultural Marketing Act of 1937, as explained above.

How can agencies effectively address competition concerns of farmers, such as bid-rigging, and interact with farmers? What does your agency do in order to meet with farmers and hear their concerns?

In recent years, the Antitrust Division has supplemented its regular enforcement activities with special outreach to the agricultural community, including meeting with producers and interested groups in Washington, D.C. and around the country. Antitrust agencies also work, through their representation on interagency working groups, with the USDA in overseeing research into possible anticompetitive practices within the agricultural sector.

NOTES

1 The papers can be accessed online at http://www.ftc.gov/bc/mergerenforce/presentations/index.html.

2 See Competitive Impact Statement at http://www.usdoj.gov/atr/cases/f2500/2584.htm and U.S. Response to Public Comments at http://www.usdoj.gov/atr/cases/f4100/4172.htm.

3 See National Broiler Marketing Ass'n v. United States, 436 U.S. 816 (1978); Report to the President and the Attorney General of the National Commission for the Review of Antitrust Laws and Procedures (Jan. 22, 1979) at 254-255.

4 However, an FTC probe of whether one large agricultural cooperative was acting outside the scope of its order was terminated by legislation preventing the FTC from conducting further investigations of this type.

EUROPEAN COMMISSION

The status of agriculture under EC law in general and under EC competition law in particular, is specific. This is reflected by the fact that the establishment of a common agricultural policy is listed among the most important objectives of the European Union (Article 3 (c) of the EC Treaty), alongside the creation of a system ensuring that competition is not distorted (Article 3(g)). These objectives are therefore on an equal footing. It does not mean that they are necessarily in contradiction. The CAP has certainly contributed to the development of competition in the sector of agriculture within the European Community by replacing national markets with Community wide markets and national marketing organisations by common market organisations. It is also true that a certain number of rules which are aimed at stabilising markets or ensuring minimum revenues to farmers could be seen as limiting the full extent of the competition process in agricultural markets. In any case, the fact that agricultural markets in the European Union are regulated does not mean that agriculture is exempted from the application of EC competition law. As will be shown in this paper, EC competition law is in fact largely applicable to this sector, and the Commission has a policy of actively implementing it.

I. Buyer power (monopsony)

There are very few cases of alleged abuses of buying power under Article 82 EC,[1] and apparently none involving the power of large retailers or processors with respect to farmers. The analysis of such cases under Article 82 EC would raise the generally difficult question of proving unfair prices. In fact, the issue of buying power under EC competition law has mostly been raised in the context of merger control.

In two cases at least, the Commission implicitly considered the possible effects on farmers of buying power by a merger. These were the *Danish Crown/Vestjyske Slagterier* case[2] and the *Danish Crown/ Steff Houlberg* case,[3] which concerned mergers between Danish slaughterhouses. In the first case, the Commission concluded that the transaction, as initially planned, would lead to the creation of a dominant position on the Danish market for the purchase of live pigs for slaughtering. Interestingly, the Commission declared that it was not concerned about the possibility that the merged parties might extract monopsonistic profits from its suppliers, but only because the parties were cooperatives and the suppliers were their members. Such profits would have been shared out back to the farmers-members in the form of bonuses. It can be assumed that the issue of monopsonistic profits extracted from farmers would have been raised in that case by the Commission if the merging processors had been normal firms. If the problem of monopsonic exploitation was not addressed, the Commission did consider the issue of the reduction of the choice of farmers for the sale of their pigs: after the mergers, farmers dissatisfied with the commercial strategy or the level of profits of their co-operatives would no longer have the alternative of joining a competing cooperative. These competitive concerns were solved through remedies.

Turning now to a more general discussion of buying power under EC competition law, it must be said that the emphasis paid in the *Danish Crown* case on the direct effect of buying power on the supplier is the first step in the analysis. In fact, the Commission is concerned about the impact of the enhanced buying power of the merged entity on companies supplying that group because, as the Commission focuses on consumer welfare, it generally considers the indirect effect that this buying power might have on the consumers in the downstream market. For instance, in *Rewe/Meinl*,[4] and *Carrefour Promodes*,[5] which concerned the mergers of large retailers, the Commission developed the "spiral theory". According to this theory, a company which obtains a leading position in a procurement may enter a spiral whereby the improved terms negotiated in purchasing markets enable the company to win large share of downstream market, enabling it to negotiate better terms in the procurement market and so on, leading in the end, to the

elimination of competitors in the downstream market. This effect will depend on the position of the merged group with respect to its competitors in the downstream market, and on whether these competitors can get similar terms of supply or find that their costs are raised.

II. Producer "joint activity" organisations (co-operatives, market organisation)

Before analysing the type of practices of cooperatives and farmers' organisations, it is necessary to describe the extent to which EC competition law is applicable to the agricultural sector.

The general principles concerning the application of competition law to joint activity organizations.

Article 36 of the EC Treaty explicitly grants the Council the power to determine the extent to which EC rules on competition would apply to the production and trade in agricultural products. The Council used this power by adopting Regulation 26 of 1962[6]. In its article 1, the Regulation establishes the principle that competition rules are generally applicable to the agricultural sector,[7] unless the three exceptions laid down in its Article 2 are applicable.

Therefore, EC competition law is fully applicable to joint activity organisations, unless they fulfil one of the exceptions contained in Article 2 of Regulation 26/1962. These exceptions are the following:

- The first exception of Article 2 paragraph 1 excludes the application of Article 81 in relation to agreements, decisions and practices which form an integral part of a national market organisation. This exception is very limited since most national market organisations have been replaced by common market organisations. This exception has been applied only once by the Commission, to the French market organisation of potatoes.[8] In that case, the French legislator gave producer groups the power to adjust price levels of new potatoes and bring the production and marketing of potatoes into line with market requirements. The Commission considered that the agreements and decisions taken by these private producer groups satisfied the criteria of the exception, since the constitution of these groups and their decisions and agreements were placed under the direct control of the French authorities.

- The second exception to the application of article 81 concerns agreements, decisions and practices which are "necessary for the attainment of the objectives set out in article 33' (i.e. the objectives of the Common Agricultural Policy[9]). The Commission has adopted a restrictive interpretation of this exception, which is fulfilled only if the parties could demonstrate that the application of Article 81 EC in a specific case would actually run counter to the objectives of the CAP. In fact, the objectives of the CAP are generally adequately provided for by the arrangements made in the common market organisations. As a result, it is unlikely that any additional private action, which would be contrary to Article 81, can be found to achieve the goals of the CAP.

- The third and final exception is of particular interest to the questions raised in this working group since it provides that Article 81 does not apply to agreements, decisions and practices of either farmers, farmers' associations or associations of farmers' associations, which belong to a single member State. This provision is not a blanket exemption for farmers' cooperation, since it also provides that the arrangements may not involve an obligation to charge identical prices and that the Commission must also be satisfied that the arrangements do not exclude competition, and may not jeopardise any of the goals of the CAP.

It should be emphasised that none of these exceptions concern Article 82 EC. A producers' organisation in a dominant position will therefore be fully subject to this provision.

To be exhaustive on the question of the application of EC competition rules to producers' organisations, it should be mentioned that Regulation 26 does not contain all the exceptions which may be applied to producers' organisations. A certain number of Common market organisations, like for instance the one dealing with fruit and vegetable[10] contain certain provisions on "interbranch organisations and agreements", i.e. agreements between producers, processors and traders of the agricultural products concerned. Such agreements are also exempted from the application of Article 81 EC. However, these exemptions are subject to conditions that very much limit their scope. First, only agreements the objectives of which are listed in the said CMOs are covered by the exemptions. These objectives include for instance the coordination of research and market studies, the promotion of conservation and environmentally sound production, the adjustment of products to market requirements and consumer tastes. It must be underlined that such objectives rarely cause a threat to competition. Second, these CMOs contain a list of agreements which in any case will not be exempted from Article 81 EC. This list includes for instance price-fixing and market partitioning arrangements, or discriminatory agreements. It is likely therefore that this type of exemptions concerns agreements that would not raise issues under Article 81 EC anyway.

Having outlined when EC competition law is applicable to cooperatives and producers' organisations, it is necessary to determine which of their activities may be exempted from the application of EC competition rules, or may, on the contrary be found to be in breach of these rules.

Joint selling

These cooperatives, the members of which are mostly micro-enterprises perform a certain number of tasks in the collective interest of their members. They carry out joint purchases, some R&D, but their most important activity consists in the joint sales of the products supplied by their individual members.

Commercialisation agreements may raise some concern about possible price-fixing activity. [11] However, arrangements whereby farmers selling through a co-operative receive proportionally the same realised price for their products cannot be considered as cartel-like behaviour. If it were otherwise, it would probably be impossible for agricultural cooperative marketing arrangements to benefit from the exemption laid down in Article 2(1) of regulation 26 or to be found compatible with Article 81 EC. In fact, a certain number of judgements of the European Court of Justice and decisions of the Commission have confirmed that under certain conditions, cooperative joint selling activities do not fall under EC competition rules. In *Oude v. Verenigde Cooperative Melkindustrie*,[12] the European Court of Justice had to assess the compatibility with competition rules of the statutes of a milk processing cooperative which obliged its members to sell all their production to it, and to pay a fee when withdrawing from it. In that judgement, the Court recognised that cooperatives encourage modernisation and rationalisation in the agricultural sector and improve efficiency. For these reasons, it concluded that the restrictions imposed on the members of the cooperative could fall outside Article 81 of the EC Treaty, if they were necessary to ensure that the cooperative functions properly and in particular that it has a sufficiently wide commercial base and a certain stability in its membership.[13] This judgement implicitly recognised that joint selling activities may not be restrictive of competition.

However, neither the Court nor the Commission have given a blanket exemption to joint selling cooperatives. Again in the *Oude* case, the Court observed that these restrictions imposed on the members of a cooperative could have the effect of restricting competition, if a number of similar cooperatives enjoyed a strong competitive position and implemented similar restrictive clauses, thereby hindering access to that market by other competing traders. In that case, the exemption laid down in Article 2(1) of Regulation 26 would only apply if this cumulative effect had not the effect of excluding competition or jeopardising the objectives of the CAP. Interestingly, the Court noted that these restrictions imposed on the members of cooperatives may indeed jeopardise one of the objectives of the CAP, namely that of increasing individual earning in the agricultural sector, since farmers active in that sector would not be able

to benefit from competition in purchase prices for their products from different processors or dealers.[14] The Commission adopted a similar position in the *Campina* case,[15] which again concerned an obligation for farmers to deliver their entire milk production to their cooperative, and the existence of a resignation fee. The Commission concluded that this exclusive supply obligation could benefit from the special exemption for cooperatives laid down in Article 2(1) of Regulation 26 because Campina, the cooperative in question, was not in a dominant position. However, it concluded that the resignation fee, which had the effect of compelling members for an indefinite period to deliver their entire production to Campina, was caught by Article 81 EC and could not benefit from the exemption laid down in Regulation 26, since it had the effect of jeopardising the objectives of the CAP.

To conclude on this point, one can say that the joint selling activities of cooperatives are generally viewed positively under EC law. This is in part the result of the exemption in favour of cooperatives expressly mentioned in Regulation 26. This is also the result of the fact that, in the own words of the European Court of Justice, cooperatives can have a pro-competitive role by rationalising the sales of farmers which are usually micro-enterprises with little commercialisation facilities. In that case, they do not raise any concern under EC competition rules at all. However, when a cooperative is in a dominant position, or when the cumulative effect of cooperative exclusive dealing arrangements restrict competition on the market, then the exemptions laid down in Regulation 26 cannot be applicable, and EC competition law will apply. This leads to the conclusion that the exemptions foreseen in Regulation 26 are of limited effect, and generally cover arrangements and activities that in any case would not raise any competition concerns under EC law.

Price fixing and other cartel-like activities

The relatively positive stance of the Commission and the European Court towards cooperatives does not extend to cartel like practices of cooperatives and associations of farmers. Agreements between such associations to fix minimum prices or allocate quantities are unlikely to benefit from the exemptions laid down in Regulation 26 and will normally be caught by Article 81 EC. For instance, in the *Meldoc* case,[16] the Commission investigated a horizontal agreement between cooperatives, firms and associations of milk producers which introduced a quota system, consultation on prices and mechanisms to restrict imports from other Member States. None of the exemptions foreseen in Article 2 of Regulation 26 were applicable. In particular, the third type of exemption concerning cooperatives or associations of cooperatives was not applicable since one of the parties to the agreement was a private firm. Even if this agreement had been concluded between farmers' associations only, it would probably not have benefited from this exemption, since these types of arrangements tend to exclude competition and jeopardise the objectives of the CAP. All the parties were found to be in breach of Article 81 EC and were fined.

Similarly, agreements between producers or associations of producers on the one hand, and dealers or processors or associations thereof on the other will generally be caught under Article 81 EC, unless they can benefit from the limited exemption laid down in certain common market organisations and described above. The Commission has always been firm with this type of arrangements: in the *Cauliflower* case,[17] as early as 1978, the Commission concluded that an agreement between cauliflower producers' associations and dealers limiting the right of dealers to obtain supplies from other sources could not be exempted and was caught under Article 81 EC. Much more recently, and more significantly, in 2003, the Commission investigated an agreement between French federations of cattle farmers on the one hand and federations representing cattle slaughterers, by which the cattle slaughterers undertook to pay a minimum purchase price for beef, and suspend imports of beef into France.[18] The Commission concluded that this agreement could not benefit from the exemptions laid down in Article 2 of Regulation 26. In particular, even in the context of the serious crisis that the beef sector was experiencing at the time, such an agreement fixing minimum prices could not be seen as necessary to attain the objectives of the CAP, such as the stabilisation of markets (Article 33(1)c) of the EC Treaty). As a result, the parties to the agreement were found to have

breached Article 81 EC and were imposed significant fines.[19] It may also be interesting to mention that the Commission is currently investigating alleged price fixing agreements involving producers and processors of another agricultural product in certain Member States, thereby showing its willingness to track cartel-like practices in the agricultural sector.

III. Competition advocacy

It is clear that agricultural markets in the European Union market are highly regulated under the common market organisations which include minimum intervention prices, quotas, tariff protection. Some of these rules could be perceived as having the effect of limiting full competition between economic actors. However, in the context of the progressive renewal of CMOs, the European Commission is endeavouring to make them more market oriented. This role can be two-fold.

First, the Commission is generally in favour of the removing from CMOs provisions that tend to limit the proper functioning of markets. For instance, it is currently putting forward proposals to reform the CMO for sugar by removing such competition limiting provisions as national quotas. These national quotas, one of the few remaining ones in CMOs, tend to partition markets along national lines and therefore prevent competition between competitors from different Member States.[20]

Secondly, and that is an area in which DG Competition, thanks to its experience and expertise, has a more specific role to play, the European Commission is trying to avoid provisions in new CMOs that could encourage firms to engage in anticompetitive practices. For instance, DG Competition noted in the course of one its investigations that the provisions of a CMO that aimed at promoting quality by basing the premium on the market price of the product (since price is supposed to reflect quality) was in fact encouraging producers to collude in order to determine the premium they would receive. This provision was removed by the Commission. Similarly, in relation to a case in which the Dutch competition authority found that organisations of fishermen and wholesalers were fixing minimum prices for shrimps and infringed Article 81 EC, the Commission plans to introduce a provision in the CMO for fishery products that would limit the possibility for producers' organisations to conclude national and international agreements. This provision should ensure that cartels between too powerful producers' organisations do not emerge.

NOTES

1 Article 82 of the EC Treaty prohibits abuses of dominant position that affect trade between Member States.

2 Commission decision of 9 March 1999, case M.1313, not yet reported.

3 Commission decision of 14 February 2002, case M. 2662, not yet reported. This case raised similar issues as the Danish Crown/Vestjyske Slagterier, but the part of the merger that concerned Danish markets only (including the effect of the transaction on the purchase of pigs from farmers) was referred to the Danish authorities.

4 Commission decision of , case M.1221, OJ 1999 L 274/1.

5 Commission decision of 25 January 2000, case M.1684, not yet reported.

6 Regulation 26/1662 concerning the application of competition rules to the agricultural sector. OJ B of 20 April 1962, p. 993-994.

7 Defined as the agricultural products listed in Annex I to the EC Treaty.

8 Commission decision, New Potatoes, OJ 1988 L 59/25.

9 These objectives are to increase agricultural productivity, to ensure fair standards of living for the agricultural community, to stabilise markets, to assure availability of supplies, and to ensure that supplies reach consumers at reasonable prices.

10 Council Regulation (EC) n° 2200/96 of 28 October 1996 on the common organisation of the market in fruit and vegetables, Articles 19 and 20. OJ 1996 L 297/1.

11 The general position of the Commission concerning commercialisation agreements is set out in its guidelines on the applicability of Article 81 of the EC Treaty to horizontal cooperation agreements. OJ 2001 C 3/2.

12 Judgement of the Court of 12 December 1995, Case C- 399/93, [1995] ECR I-4515, § 12.

13 Idem, § 14

14 Idem, §§ 27 and 28.

15 XXIst Report on Competition Policy, pp 66-67.

16 Commission decision of 26 November 1986, Meldoc, OJ 1986 L 348/50.

17 Commission decision of 2 December 1977, OJ 1978 L 21/23. See also Case 71/74, Frubo v. Commission [1975] ECR 563.

18 Commission decision of 2 April 2003, French beef, OJ 2003 L 209/12.

19 The FNSEA, the main producers' organisation, was fined EUR 12 million. This case is currently on appeal before the Court of First Instance.

20 See for instance the criticisms made by Commissioner Monti on the CMO for sugar in his recent speech given on 13 November 2003 at Cogeca Conference in Helsinki, "The Relationship Between the CAP and Competition Policy: Does EU Competition Law Apply to Agriculture?", available at http://europa.eu.int/ comm/competition/speeches/index_speeches_by_the_commis- sioner.html

SUMMARY OF DISCUSSION

The **Chairman,** Alberto Heimler, started the roundtable by noting that the discussion would address issues and practices that are strictly antitrust oriented (joint selling and monopsony buying.) More controversial items (income support and price fixing) would not be addressed on this occasion. He stated that agricultural policy has developed without concern for principles of competition policy. Contrary to what happens in most other sectors of the economy, the "lobby" of competition authorities has remained silent with respect to regulatory distortions in agriculture. The major reason is that agricultural policy is effective in presenting itself as promoting non-economic objectives, so that competition is widely considered not to be the most appropriate solution. However, while the objectives may be non-economic, the instruments used are certainly economic, such as (a) price support policies so that farmers are paid a higher price than they would normally get; (b) widespread subsidies for capital investment; (c) risk reduction interventions, like subsidized insurance, disaster relief, etc..

These instruments in any other sector of the economy would doubtlessly be restrictive, but agriculture is treated differently. As the submission from the European Commission states, and many Member States also claim, regulation in agriculture has the objective of stabilising markets and ensuring minimum revenues to farmers, subject to the constraint that prices for consumers are not too high. Given this framework, antitrust enforcement, although of course possible, has often played a small role.

The Chairman organised the roundtable around three broad subjects: the issue of tariffs and import quotas in agriculture including export exemptions, monopsony buying, and joint selling.

Tariffs and import quotas

The submission from Switzerland argues that: "Switzerland is still pursuing a policy characterised by a high level of border protection and internal support (production subsidies and decoupled direct payments). The import of nearly all farmer products is strictly regulated by tariff rate quotas and tariffs. Food prices are on average about 30% higher in Switzerland than in Germany." The Chairman asked the delegation from Switzerland whether it was the result of agricultural policy or of a weakened competition in the retail sector or of both. He was also enquiring about possible prospects for change.

The delegate from **Switzerland** explained that the price difference still exists at each level of production, processing and retailing but certainly not uniquely in agriculture. On each level the costs are higher than in Germany, where there are different economics of scale, whereas in Switzerland the market is very small and closed mainly due to certain agricultural regulations and the high market power in retailing and processing.

Price differences are highly debated in politics and in press. There was a conference a few weeks preceding the roundtable on this issue. The common belief is that the price difference is only a consequence of the lack in competition. The Swiss competition authority has to explain that these differences can often be explained by regulations. The delegate mentioned however that even though some of these differences are in agriculture, they are more generally related to the food sector.

The **Chairman** turned to Norway and highlighted from their submission that competition is limited in large parts of the agricultural sector in Norway. One reason is that Norway has a strong system of import protection, which to a high degree shields national players from effective competition from imports at all stages of the chain. In 2000, the consumer meat, dairy and egg prices were significantly higher in Norway

than in neighbouring countries. The extensive Norwegian border trade illustrates these differences as it is considered to be a problem to Norwegian retailers along the border and Norwegian agriculture in general. Most of all, in Sweden, Finland and Denmark, meat, dairy and egg prices are influenced by EU agricultural policy and could be even lower. The Chairman asked whether such high price differences lead to changes in policy in Norway.

The delegate from **Norway** admitted that a recent study showed that food prices are higher in Norway that in its neighbouring countries. The protection of the Norwegian farmers is possibly the principle explanation for this. Farmers are permitted to organise joint firsthand sales to stipulate prices. These joint sales have high market shares, approximately 100% in many markets. In order to protect and preserve the income of Norwegian farmers, there is a political wish for them to exercise market power. They are integrated in the downstream markets, and protected by natural import barriers and also by import quotas and tariffs. The retail sector is more competitive, but there is always room for improvement. Price declines that have occurred recently also indicate a high level of competition.

There has been very little protest from consumers about the present state, which suggests a strong support for the present agricultural policy, and there has been no demand to repeal the present exemptions. Competition is restricted both upstream and downstream. Upstream competition in this case is the farmers and the way they organise the sales of their product. Downstream production has different levels. The subsequent level is where the co-operatives are integrated. Further down there is the retail sector which operates independently from the co-operatives.

The basic means to protect farmers' income is to restrict upstream competition. There is growing political interest in stimulating competition downstream. Downstream competition improves productive efficiency, creates new products and raises consumer welfare but is hampered by considerable vertical integration of the co-operatives. Competitors depend on supply from the co-operatives that give the co-operatives considerable market power towards their competitors and ability to raise rivals' costs etc.. Increased downstream competition is beneficial for consumers and is not always bad for farmers since it will stimulate demand and innovation.

The **Chairman** noted that high agricultural prices are a problem not because they originate from restrictive regulation but because neighbouring countries have lower prices. Lower prices in Germany and in Sweden are a very powerful description of the negative impact of restrictive regulations. Of course when such comparisons are unavailable, the benefit of competition can be only guessed or hypothetically defined. In the EU the prices are more or less the same everywhere hence the benefits of competition are more difficult to identify and they become speculative as it is difficult to show where low prices would exist.

The Chairman then turned to Australia and remarked that in Australia there have been important developments in recent years in the move towards the elimination of export exemptions for agricultural products. He asked the Australian delegate to introduce their experience.

The delegate from **Australia** noted that the 1994 Trade Practices Act contains an exemption with respect to anticompetitive conduct that relates exclusively to the export of goods and services from Australia. It reflects the philosophy that export arrangements are presumed necessary in the public interest and the public interest overwhelmed or overtook any anticompetitive detriments that might arise from those arrangements. That philosophy applied to export arrangements and was then applied to domestic selling arrangements so that single 'export desks' evolved into single 'selling desks' both domestically and in an export sense.

The 1993 review of competition policy led to a series of unprecedented federal and state agreements in 1995, where they asked two fundamental questions (1) are these anti-competitive arrangements really in the public interest? and (2): is there a less anti-competitive way of achieving the same public interest? The government established a series of agreements that subjected all these arrangements to those two simple tests. The test needed to be conducted in a very objective and transparent fashion. Both the domestic and export desk arrangements and other vesting arrangements and anti-competitive arrangements relating to the farming sector were surveyed.

Potato growing in Western Australia is a good example where the regulation in place indicates the number, the type and the variety of potatoes that can be grown. This extraordinarily regulated environment was subjected to a rigorous examination. There was a payment put in place that the Commonwealth government agreed to pay to the state governments. The Commonwealth government provided a series of competition payments between 800 million to a billion dollars each year and there is a whole series of anticompetitive arrangements that then faced objective tests of whether they were in the public benefit.

Agricultural arrangements were and are being subjected to objective review; as a result, most of them have been removed or are in the process of being removed. For example in the area of grains not only have domestic vesting arrangements and domestic single desks been removed but some export disks are being eliminated. There are some extraordinary results of this. In Victoria for example there was deregulation introduced and other grain traders were permitted to enter the market to move grain off the farm and into the export market. Some farmers for example in the still of the night transported their grain over the border into Victoria, so that they could take advantage of dealing with other competing grain traders who could obtain better prices either domestically or for export.

As the markets were opened, the farmers have been able to see the advantage of introducing competition both in domestic sale but also for export arrangements. This induced a greater political push for these arrangements to be unwound at both the state and federal level. There has been some resistance, for example in the area of rice growing. A 1995 review clearly said that the fact that the moment rice was harvested, it was vested into a single marketing authority was not acting in the interests of the Australian consumer. But rice regulations still have not been eliminated.

In the area of grain growing, across the states there has been a trend towards deregulation, removal of both single exporters and single markets in a domestic sense. Even though a review had indicated 2-3 years ago that it was to benefit of the Australian public that single exporters should be gradually removed, the Commonwealth government resisted that review at that time.

Farmers are increasingly beginning to question the benefits of having a monopoly buyer or a monopoly vesting arrangement and a monopoly seller out of Australia, and begin to question whether there may not be more advantageous arrangements by permitting some competition to arise in respect to the export of wheat from Australia. Farmers have realised the benefits of opening up the export markets and domestic markets to competition and they recognise that the process has now worked to the benefits of farmers generally.

The National Competition Council has supervised this process of reform and is still doing so. There is currently a review of the outstanding reform issues and future reform issues and it could be expected that the remaining issues relating to export of grains, particularly in the area of wheat, will be the subject of study by the Productivity Commission in the not too distant future. The whole process of agriculture marketing in Australia is going to be opened up to more competition and recurring benefits will be realized.

The forces behind opening the market to competition stem from a remarkable cultural change that has occurred in Australia over the past 4-5 years. Governments who had previously resisted opening up various markets to competition are now saying that competition proved to be good in a whole range of areas including in the area of agricultural marketing. The ACCC worked with governments to facilitate the process and gradually introducing reform in a quiet and more gradual process.

All export arrangements are now subject to a proper independent public interest test. Export licensing has now been opened up and particular state farmers are beginning to see the benefits that they can get higher prices for their grain and their wheat. They are starting now to examine the issue of selected growing, that is growing grains to suit particular export orders that might be put in place beforehand.

The OECD **Secretariat** made a brief presentation covering the main points of the background note

Monopsony buying

The **Chairman** noted that many submissions (e.g. Germany, US) refer to the mirror image theory that dominance on the demand side should be analogous to dominance on the supply side. In practice however, with the partial exception of Germany, monopsony power, under a consumer welfare standard, is problematic only if associated with market power downstream. As the Dutch submission argues, it is questionable whether enterprises with purchasing power would benefit in dynamic terms from marginalizing their suppliers by forcing them into purchase prices below cost.

The German submission contains a thorough discussion on the different approaches to antitrust, the consumer welfare standard, and the freedom to compete standard. This discussion provides an explanation of many decisions by antitrust authorities which formally apply a consumer welfare standard, but effectively are pursuing the freedom to compete.

Under a freedom to compete standard intervening against buyer power is much easier. However while a consumer welfare standard is directly linked with economic theory, in the sense that behaviour is prohibited when it damages consumers, a freedom to compete standard leads to greater uncertainty and may lead to prohibitions that would also block technical progress and innovation. The Chairman asked the German delegation about the application of the freedom to compete standard to buyer power and about the elements that are taken into consideration in order not to impede pro competitive developments. He also asked whether the presented cases had been decided differently under a consumer welfare standard.

The **German** delegate explained that the question had already been presented when Germany was examined last year by the Competition Committee. Demand markets are generally dealt with in complete analogy to supply markets. The reason for this lies in the competition concept of the Competition Act (ARC), which says that it is a clear objective to protect the freedom of competition with a result that the freedom of competition is pursued as an institution. As a general rule the economic theory behind the ARC is the fact that working competition serves consumers and produces the best results for consumer welfare. That means that the target of protecting competition includes the protection of consumers and may go beyond it.

There might not be contradiction between the theory of protecting competition on the one side and the protection of consumer welfare on the other side. The idea behind the ARC suggests that one is included in the other. The relation between the freedom of competition and the protection of consumer welfare can also be seen from the fact that there have been some exemptions in German law from the prohibition of cartels. For example buyer-cooperation may be allowed if it enhances the welfare of consumers. Sometimes there might be a slight difference between the two targets and if that is the case the first priority is consumers.

As to the cases that have been mentioned in the contribution, they probably would not have been decided in a different manner under a consumer welfare theory regime. All these cases in the end come to the result that consumer welfare has been taken into account. As there is no difference between the two targets, consumer welfare and freedom of competition, it also should be shown in practical examples.

The **Chairman** noted that the last line of the German submission stated that the Bundeskartellamt would be in favour of the elimination of exemption in the agricultural sector. He asked the German delegate to elaborate briefly on this.

The **German** delegate responded that there is a disagreement between the Bundeskartellamt and the Ministry of Economics and Agriculture. The Bundeskartellamt is of the opinion that agriculture does not need to be exempted, but the practical relevance of that exemption is minor.

The **Chairman** moved back to the issue of cooperatives and Norway. He noted that according to the Norwegian submission cooperatives have a central role, with almost 100% market share in many product markets. The Competition Authority in Norway considers that cooperatives have a number of competition restriction effects limiting competition upstream and downstream. He asked whether these developments had occurred because of a too lenient regulation or for other reasons. He also asked what a competition authority could do besides advocating for change and for the elimination of market power.

The delegate from **Norway** mentioned that cooperatives in Norway are stronger than in most other countries. The new Competition Act preserved the exemption for agricultural co-operatives and first-hand sales. It was the result of a broad consensus to protect the income of farmers, to maintain national supply of agricultural products, to carry out food safety, to ensure regional policy objectives like dispersed settlement patterns or to maintain a cultivated landscape throughout the country. The reasons for the regulations date back to the 1930s when farmers suffered because of the depression. The system has been maintained, but recent governments have focused more on consumer welfare. They have induced changes towards more competition, lower prices and wider assortment, typically in the form of stimulating increased downstream competition.

The process is moving slowly and strong measures are called for. There is a movement, for instance, with respect to the cooperatives' obligation to deliver milk. Milk cooperatives have a larger obligation to deliver milk to their competitors in their dairy market. The delegate addressed the question whether exemptions are really beneficial for the farmers. He stated that it largely depends on whether the co-operatives have the control of the total quantity of the products, which is the case in Norway, where the government stipulates quotas for the farmers, at least with respect to milk production.

Under the present system there are negotiations each year between the state and the farmers' organisations on the target prices that the co-operatives shall try to achieve. They do that by stipulation of prices by export sales to obtain high domestic prices, if the production is too high compared to domestic demand. It seems necessary to vest someone with the authority to act as a market regulator.

The authority's main concern is to stimulate downstream competition in the processing stages of the chain of production. The problem is the vertical integration of co-operatives into the downstream production. A vertical disintegration of the co-operatives would be required but is not likely to be possible. The rivals therefore depend on supplies from the cooperatives in order to compete in the downstream processing markets. It is very important that the prices that they have to pay for these supplies are fair and comparable with the internal price within the cooperative. Import barriers in the form of quotas and tariffs will probably be lowered leading to more imports in the future.

The **Chairman** added that the regulation started in the 1930s. The Norwegian example implies how difficult it is to eliminate regulation once it is in place and it becomes almost irremovable. It is easier to advocate for competition when new regulations are introduced but it is difficult to advocate for competition when eliminating such long and structural types of firms and behaviour.

The Chairman then turned to the European Commission and the issue of buyer power. The European Commission does not have many cases on buyer power. However, in the report reference is made to the so called spiral theory: monopsonistic power would determine lower purchase prices, which would then result in lower selling prices that would exclude competitors and lead, eventually, to higher prices for consumers. He asked whether this theory is too speculative, especially if used for merger control.

The delegate from the **European Commission** explained that it does not have many cases on buyer power, largely because the Common Agricultural Policy (CAP) provides a guaranteed price for intervention. The European Commission submission refers to the slaughterhouse mergers in the pig sector. By this merger slaughterhouses would have had about 80% market share of the pigs' slaughter in one country. The argument was that it would lower output rather than achieve greater efficiency. This was an issue of consumer damage rather than giving the various pig farms the choice of having the freedom to sell to whoever they wanted.

As regards the sceptical comment on the spiral theory, in European Commission merger cases there is one situation that is foreseen, where the standard is the elimination of competition, where in the procurement market there is somebody with a very strong position who is able to obtain greater cost efficiencies. The question on the seller side is whether that is a competitive sector or not. If the seller does not have any margins then there is little point in asking for a price which is below the competitive cost.

The more likely situation in European Commission merger decisions in the retail sector is raising rivals' cost in a situation where as the result of the merger there is a strong position in the final selling market, the retailing market and also in the procurement market. Given the market sector there, a concentrated procurement market could possibly raise the rivals' cost because the merged entity may obtain some favourable conditions which the sellers then compensate by raising rivals' costs. The European Commission has not had a case in which the spiral theory has led to any prohibition. The 'raising rivals cost' argument has led to obtaining or requesting that merging parties divest either upstream joint purchasing activities or downstream selling activities.

The **Chairman** then turned to the United States and stated that in 1999, the Antitrust Division challenged *Cargill Inc.*'s proposed acquisition of *Continental Grain Company*'s grain business. He noted that according to the submission, the challenge was based entirely on concerns about effects in the "upstream" market, where Cargill and Continental were buying from farmers. He asked the delegates from the US how remedies were identified in this case. He also requested a more detailed analysis of geographic markets, especially, since the remedies were on the local market level.

The delegate from the **United States** explained that the difficulty in the Cargill and Continental case was that the issue was not monopoly power because Cargill and Continental sell grain in international markets, but that they buy grain in the United States on regional and local markets. Farmers who are growing the three chief grains (corn, wheat and soybeans) are at issue here. Farmers who have to have to transport their corn or wheat to an elevator have limited geographic options for doing that.

The merger resulted in considerable interest and the agricultural community helped by advising what to do. The Antitrust Division explained its analysis in public documentation, such as a complaint, a competitive impact statement, and a response to comments. In a sense, it was like a bank merger with a great number of local markets and the relief was similar to relief in banking mergers, with local

divestitures. The Antitrust Division required divestiture on a number of grain elevators that have access to rail, river ports or seaports, depending on how the farmers in the particular area get their grain to buyers. Eventually about 11 or 12 facilities were required to be divested in 7 different states. He added that the approach to monopsony and the approach to monopoly in a particular merger case is very case specific.

The **Chairman** then returned to the European Commission and inquired about cooperatives and Regulation 26/1962. He asked whether a modernisation would follow the recent market changes in agriculture, as the size of firms in the agricultural sector and the technology is much different now. The Chairman introduced three exemptions for the application of article 81 from Regulation 26: (1) participation to national market organisations; (2) agreements necessary for attaining the objective of CAP; and (3) article 81 does not apply to agreements with members belonging to a single member State. The agreement should not involve an obligation to charge the same price, should not eliminate competition and should not jeopardize the objectives of CAP. He asked the European Commission delegate if there was any prospect that such regulation be changed, eliminating national boundaries, as after modernisation it would seem to be even more important.

The delegate from the **European Commission** noted that the European Commission submission shows that the above exceptions do not limit the activity of prosecuting anticompetitive behaviour for price fixing or output reduction. These rules to the national market organisation have only been used once. As the common market rules came into force many of the national market organisations simply disappeared. The application of the exceptions as regards private agreements necessary for attaining the objective of CAP is extremely narrow. The Council fixes the minimum price as part of the CAP that is applied in a way that limits competition.

The application of competition rules needs to ensure that many of the mechanisms do not go beyond what is really necessary. For example if market prices are used as a proxy for quality, and if CAP subsidies aimed at improving the quality of agricultural products are based on prices, this will encourage the participants in the market to coordinate on prices.

Associations of producers or agreements between producer associations and processor associations should be very strictly limited to pro-competitive purposes. While that is certainly something one could that could be reviewed in the future, modernisation is not planned in that sector.

The **Chairman** then noted that Ireland's report discusses the sugar sector, which was cited by a number of submissions of European Union Member States. The Irish contribution notes that sugar is restrictively regulated and the Italian submission gives a description of the regulation in the sugar market which shows market shares that are being implemented and there are agreements among sugar beet farmers and production quotas. The interesting aspect of these restrictions is that they are pervasive both on input markets (sugar beets) and on the supply side, which could be reason why they have lasted so long. Ireland provides an interesting discussion of a sugar case, criticising the European Commission rules, but without being able to solve their competition concerns. The Irish submission represents an important sign of the tension between European Commission agricultural policy and competition enforcement. He asked the Irish delegate whether the case is actually being investigated.

The **Irish** delegate stated that in the Irish sugar market farmers collectively negotiate prices with the monopoly sugar company which is a monopsony in the buying market and a monopoly in the selling market. Many delegates may be aware of the Commission case, *Irish sugar*, which relates to the import of sugar into Ireland. The deputy Prime Minister who is the Minister for Enterprise, Trade and Employment negotiated the price fixing arrangement with the president of the Farmers' Association, who subsequently joined the deputy's party, and a minister in the government.

The area is very political but this is not the reason why there has not been a court case. The chief executive of the sugar company stated that the price of sugar to consumers was determined solely by the import price. Although sugar beet was 65% of the total costs of the sugar monopoly, it did not matter what price was negotiated with farmers in terms of the price of sugar on the final market. In this situation there was an illegal cartel selling to the sugar company with no effect on the consumers in the final market. It was a question of the distributional rents between the monopsony buyer and the cartel. There was no clear consumer benefit from taking an action and it was likely that any action would have been against the farmers and the Competition Authority would have been identified in the public mind as taking on the side of the large monopoly player.

The delegate stated that the case was considered to be too complicated to take to court. Should there have been any demonstrable effect on the final market for consumers, the Competition Authority would certainly have taken the case. He also asked the United States about the discussed case, Cargill-Continental. He noted that he could not see the harm to the consumers that actually motivated the intervention. He asked how the consumers were going to be affected by that merger if the markets were international. He also inquired whether this was an additional criterion.

The delegate from the **United States** stated that the Antitrust Division does not go to the court to explain if something is good or bad for consumer welfare, only whether the merger under Section 7 of the Clayton Act substantially lessens competition. More precisely whether the result of the merger likely to create or enhance market power by the merging firm or facilitate this exercise. In the case at issue the merger would have done that. The purpose of antitrust laws is not to create low prices but to maintain competitive prices, and that is what the Antitrust Division was doing.

The **Chairman** noted that people are concerned when input prices decrease but at a retail level they do not decline or the contrary situation where input prices remain constant but at the retail level prices increase. This concern exists especially in agriculture. The KFTC monitors whether large distribution stores transfer to consumers their lower purchase prices. He asked the Korean delegates what their action would be if they found that retail prices are not reduced as much as had been expected.

The **Korean** delegate explained that the notification system is designed to prevent the large retailers from taking part in unfair trade practices towards small suppliers, not the consumer, by using the superior position. Therefore the large retailers are free to sell at a price of their will. It is up to the retailer whether they reflect the low purchasing price in the consumer price because the Korean agricultural retail market is very competitive. However if the large retailers unjustly force their small suppliers to participate in price discount for example, such a practice would be subject to notification.

The **Chairman** then turned to Lithuania and noted that in Lithuania the level of concentration among purchasers and processors of agricultural products has increased significantly in recent years. The rapid growth of large-scale retailers was accompanied by falling grocery prices during the last five years, implying that strong competition among retailers serves consumers well. The Lithuanian submission reports however that the agricultural sector continues to be fairly underdeveloped with small farms still supplying the majority of domestic production. Usually development in agriculture follows from the developments downstream as important retailers sometimes lead to developments, technical progress innovation and greater concentration. He asked what impeded the modernization of agriculture and whether there was a regulatory problem.

The delegate from **Lithuania** noted that one of the most cited facts concerning the development of agriculture is that the agricultural sector contributes approximately 6% to the GDP but approximately 18% of the population is employed in agriculture. This disproportionality reveals low labour productivity, extreme inefficiency, and structural problems of the economy. The regulatory regime does not impede the

exit of producers, as those problems are of macro and institutional nature. The economy does not produce enough employment opportunities for people moving out of the agricultural sector, despite the fact that the economy has grown by approximately 9%. On the other hand many people employed in agriculture are at such an age that it is too late to change their occupation. There was a very inefficient and unsuccessful land reform which is still unfinished. Often lands do not have clear owners, which is one of the reasons for the inefficient scale of production.

The **Chairman** then opened the discussion for comments and suggestions on buyer power. The argument of the two standards, consumer welfare and freedom to compete, has already been mentioned. In Germany the freedom to compete standard is transparently put out, which is not the case in other countries. It may be that the type of cases they do is very similar, but with a consumer welfare standard, this is a little more difficult to argue.

Linda Fulponi from the OECD Directorate for Agriculture explained that the Agricultural Directorate in general does not deal with competition issues. The buyer power issue is brought up repeatedly in Agricultural Committee meetings and it is of particular interest also to farm groups. Given the large power of retailers and processors, they feel that they cannot compete and negotiate a price. The Agricultural Directorate has been trying to explain that to some extent this is part of the normal competitive process which has effect in agriculture as very tiny micro-firms become integrated into the economy of modern industrialisation.

It is likely that increasing concentration is followed by a certain amount of power but it is not necessarily an abuse of market power. It becomes very difficult to untangle from retailers like Metro or Tesco whether or not they actually pass through a decrease in price because in Tesco's way of pricing they price 30000 food products. One could suggest that agricultural policy should undertake some review in important issues (such as buyer power) by the competition policy people to see whether or not there is a certain amount of coherency. Buyer power manifests itself in other ways with implications for standards and norms that are imposed.

The Agricultural Directorate is undertaking a study in the agricultural sector which says that there is a whole set of legal standards and specific standards. Tesco and Metro seem to be collaborating through different initiatives to set up a common standard, which would explain that this is for economic efficiency reasons as it permits them to source from different parts of the world, to reduce costs as well as the people that are supplying the goods because they do not have to have repetitive auditing reports on monitoring. These are private voluntary standards. A number of farmers are stating to have the problem of competing for price and negotiating a smaller farmer. Even the cooperative over the substantial size negotiate with a whole cooperative of retailers which have a centralised procurement and there is a set of additional requirements being imposed.

One could say that this is the price of doing business in modern society. The Agricultural Directorate is trying to look at this issue both from the point of view of its impact on the structure of the agricultural sector and the whole food-chain, which has undergone in the past 10-15 years a substantial structural transformation and one of the economic/welfare effects of both the producers and consumers to see what the implications are over time of this growing concentration across the globe not just within a particular country.

The **Chairman** stated that quality standards on the selling side may raise competition concerns even though quality standards in general are usually not considered to be anticompetitive as long as their objective is to improve quality and they do not lead to collusion. However sometimes quality standards can lead to quantity reductions if they are organised in certain ways.

The delegate from **Mexico** commented that this problem is related to distributional issues in the agricultural sector. It is probably more relevant for developing countries. The question is to what extent one can affect agricultural policy to redistribute income. This might affect the general consumer in a way that would probably be considered to be against the general principles of competition policy. One has to decide whether to sacrifice some of the competition principles for a more equitable distribution of income. Competition policy has very little to say about these matters as it tends to concentrate on consumer welfare in preference to other considerations. The agricultural sector is a special sector in this regard because distribution matters are very important.

The delegate from **New Zealand** noted that in New Zealand agriculture constitutes around 16-17% of real GDP that the dairy sector alone has 7% of GDP and generally constitutes around 50% of exports. There is recognition in New Zealand that the sector has to be efficient and cannot be subsidised or supported by other sectors of the economy. For that reason there has been a general acceptance over time of the application of competition policy and law to agriculture.

There is an example for monopsony buying in New Zealand given that agricultural producers are often quite large compared to the economy as a whole. The main concern is that policy makers have been the monopsony buyers of the agricultural co-operatives themselves vis-à-vis the members. The example of the dairy market in New Zealand shows that the two largest dairy cooperatives constituting around 95% of the industry reached a political accord with the government to merge. The Competition Authority's main concern was that the new cooperative would have monopsony power for buying farmers' milk, particularly with respect to new farmers that wanted to enter the market. This could result in the manipulation of share price and milk price in order to keep the milk price high and the share price low, and then simply have a moratorium on entry into the cooperative as it owns all the producing facilities in the country.

The Competition Authority enforced a whole regulatory system in respect to that one company alone. The company was required to take any new entrants and not to restrict entry. This would mean that if it does try to keep the milk price high it will be flooded with a group of other farmers switching over to dairy because it would be much more profitable to do so. This will hopefully provide for competition for farms producing milk.

Another delegate from **New Zealand** followed up on the comment from Germany about the principle of freedom to compete and noted that it could result in the same outcomes as applying the consumer welfare principle. There is at least a risk that it could lead to an argument for protecting particular competitors that may not be efficient and able to compete efficiently in the market. In this case it would certainly not be consistent with consumer principle in the way it is applied in New Zealand. She asked the German delegate whether it has been the experience in Germany that the principle has led to an argument to protect inefficient competitors.

The delegate from **Germany** reacted that the objective of the ARC is clearly not to protect certain competitors or certain firms but to protect free and independent competition as a whole. If there was a case which protects only a certain competitor, the Bundeskartellamt would have to rethink the result and see whether, from a broad perspective, it really benefited competition.

The delegate from the **Netherlands** commented on the remarks made by Linda Fulponi. The delegate stressed the ex-ante thinking about buying power. He noted that all the contributions made by the countries are looking backward and have not dealt with cross-border arrangements between retailers or processors. When markets grow more international, one has to look at international or cross-border buying power. So although the point raised by Linda Fulponi about buyer established standards by the retailing companies has implications for producers, the producers from low-income countries have to be considered

as well. These are the real main topics for the future, cross-border arrangements between many retailers and many processors.

The **Chairman** added that the Agricultural Directorate is working thoroughly on these matters and there should also be a discussion to clarify the competitive effect of such quality type standards or agreements, even though they are cross-border. They do not seem to be anticompetitive but they have to be looked at with greater care.

Joint Selling

The **Chairman** proceeded to discuss joint selling issues and reminded delegates that under EU rules the creation of cooperatives can be considered efficient and a cooperative within a single Member State does not even violate article 81. The *ENZA case* in New Zealand shows that the elimination of joint selling in export markets led to substantial benefits. Deregulation helped to create the pressures for ENZA to reduce its costs but also allowed ENZA to become more diversified. It allowed competitors to enter into the market of fruit by specialising certain specific grades or products. For example, while ENZA marketed only a limited range of fruit grades, it became more flexible after deregulation, identifying niches for new grades. The Chairman asked the New Zealand delegate whether these were expected developments and who was in favour of such change, who was in the political agenda, who pushed for it and what the political reason for deregulation was.

A delegate from **New Zealand** replied that there is not a simple answer to that because there are several ways of reform in the sector. The government of New Zealand has realised the need for an efficient agricultural sector and the importance of fully exposing it to competition policy and law. There has been a single seller in the sector, underwritten by legislation which eventually became ENZA. Growers that were unhappy with that arrangement wanted to specialise in growing a different type of apple and pushed for some reform. These were growers of organic apples, growers of kosher apples and there were some growers who wanted to use branding to differentiate their product.

In 1991 the government essentially undertook a process in the agricultural sector to explain that the sector should not be reformed under general competition policy. That led in the case of the apple sector in 1999 to partial deregulation whereby the ENZA was split from the regulatory body the Apple and Pear Board, which was given the job of licensing competitors. Meanwhile shares were made tradable at least as far as apple growers were concerned. This caused the setting up of corporate companies that would proceed to buy a big proportion in their shares. So the growers lost control of the organisation and felt it was not operating in terms of the grower benefits. This led very quickly in 2001 to a push for total deregulation in the industry which occurred rapidly.

In New Zealand the government has no problem with cooperatives as long as other company forms are allowed to compete. Since the reform began, there has been a much wider variety of products developed both within ENZA and by other competitors with significant efficiencies occurring in the industry. ENZA has now merged with the large fruit and vegetable marketing organisation Turners and Growers to provide a more significant marketing base for its members. Thus the benefits have been significant both for those within and outside ENZA and nobody now doubts the need for reform, but at the beginning it took significant government determination to kick off the process.

The **Chairman** highlighted the statement from the Hungarian contribution that the accession to the EU led to an increasing importance for producers associations. He asked the Hungarian delegate about the changes since the accession.

The **Hungarian** delegate admitted that the agricultural sector became a bit more regulated as Hungary joined the European Union and now it is governed by the general rules of the Common Agricultural Policy. These rules replaced and adjusted the previous national rules. With the accession the level of competition has increased and now the competition that affects farmers and other market actors is more intense. This is partly due to the lack of horizontal concentrations on the level of farmers and due to the lack of vertical concentration as well. So the Hungarian Competition Authority considered that the role of producers' association would be more important in the near future as farmers will have to face competition that arises through the accession to the single market. The Competition Authority has investigated some price fixing cartels, for example in the bakeries sector, and realised that those undertakings that took part in this cartel were not aware of the prohibition of the Competition Act so the Competition Authority has organised some courses for bakeries as they requested.

The **Chairman** stated that price fluctuations in agriculture usually depend on imbalances between supply and demand. Garlic, for example, is a highly seasonal product and is difficult to preserve for more than half a year. The contribution from Chinese Taipei argues that the imbalance between supply and demand may quickly lead to market disorder. For example in 1995, as a consequence of short supply, the retail price of garlic increased by more than 10 times, while the farm-gate price was only half of that. Later on, imports and the new domestic harvest caused the price to drop back to its original level. He asked the delegate from Chinese Taipei what the solution should be.

The **Chinese Taipei** delegate explained that the Fair Trade Law of Chinese Taipei does not provide exemptions to the agricultural sector. In theory the law is applicable to all the activities in the agricultural sector. In terms of the garlic market there is insufficient domestic supply. The consumption pattern is typical: before the Chinese New Year the consumption of garlic is high. This is also the time when all the domestically produced garlic has to be harvested and put into the marketplace for consumers, so in short periods of time there is a tremendous increase of garlic prices. This means a big price difference between the farm gate price and the retail price, with the retail price is twice as high as the farm-gate garlic price. The FTC undertook an investigation whether there was a price cartel formed by the distributors of garlic but found no hard evidence to make its case and decided not to do anything.

The Council of Agriculture has a price-stabilisation mechanism that has a reference table, which provides a mix of the amount of imported garlic. The agricultural agencies are trying to use the leverage of garlic imports to stabilise the prices in the domestic market. Ideally this is not a perfect regulatory measure because the agricultural agency is conducting some kind of micro-managing of the garlic market and the level of garlic is determined by the table of imports and the level of import prices. In the absence of any evidence of price cartel, the FTC published a hands-off approach. This measure still represents some intervention on part of the government. Both the FTC and the Council of Agriculture have to balance the interests of protecting garlic farmers on one hand and of stabilising the garlic price on the other hand.

The **Chairman** next focused on the report from Italy. He underscored that a very important aspect of joint selling in agriculture concerns denomination of origin consortia and "brand" type consortia. If there is no joint selling there is an effort on the part of the consortia itself to fix the total quantity produced by that consortia. This is mentioned in the Swiss report and is discussed in the Italian report. The importance of the fact is that presumably there is also inter-brand type of competition, so fixing quantities within a consortium especially when the product is not differentiated might not be cause for alarm. This is the case for example with *Parma ham* or *San Danielle ham*. There is no differentiation among different producers, the product is identified according to the standard use, and every producer is undifferentiated within the consortia. The chairman was wondering whether this should raise any concerns about such fixing quantities on the part of the consortia given the inter-brand competition that would discipline producers. He asked the Italian delegates to comment on the *Parmesan cheese* and *Grana Padana* cases.

The **Italian** delegate remarked that 36 out of 645 products whose domination of origin is protected in Europe are Italian. This means that Italy and France are the most important European producers of protected 'denomination of origin' products. In recent years the Italian Competition Authority completed a number of investigations in order to ascertain whether agreements aimed at protecting a brand or a geographical indication were restricting competition. Most of the investigations focused on the consortia operating within the ham and the cheese industries. In these two industries the protected "denomination of origin" products played a crucial role. For instance the total export of *Parmigiano Reggiano* and *Grana Padano* (the Italian parmesan cheese industry) increased by 14% in 2003 and by 89% in the last five years. The trend registered in the ham industry by San Danielle and Parma ham is roughly the same.

The first investigations into the joint activity in the agricultural industry were completed by the Italian Competition Authority in 1996 and concerned both the ham industry and the parmesan cheese industry. This was followed in 1998 by another investigation against the Gorgonzola consortium, the Italian blue cheese. In these cases the main concern was mainly the restriction of intra-brand competition deriving from the fixing of the output level.

The two consortia have the function of promoting the products they protect and also programming and controlling production and marketing. On the basis of their tasks the consortium from 1991 to 1994 restricted competition by planning quantities of output and by establishing production schedules which set the maximum total output target for each specific year and the individual production quotas for each member. Furthermore, the two consortiums had agreed among themselves to make sure that their respective market share would remain stable (51% for Parmigiano Reggiano and 49% for Grana Padano). The restrictions were removed in 1995 when production was only limited by the availability of domestic milk with given characteristics. These changes were designed to convert the planning system based on quantities into one where the consortium would control only quality that is considered to be in line with competition law.

A principle of the Italian Competition Authority concerning the joint activity of agricultural firms specifically in the parmesan cheese industry is that in order to form and maintain a brand, only quality matters. Fixing quantity of output is a necessary restriction of intra-brand competition and restriction of intra-brand competition is a major concern when the relevant market corresponds with the brand. Secondly, when restrictions concern inter-brand competition as in the case of Parmigiano Reggiano and Grana Padano, the competitive problem is particularly serious and antitrust analysis should be extremely severe.

The main principle on this point is that a more detailed analysis is needed of when quality controls can be implemented by independent certification bodies. In other terms in this case, fixing quantity of output is considered a restriction. Concerning a case that was opened at the end of 2003 against a consortium protecting Grana Padano, the present investigation focuses on quantity limitation and the restrictions of intra-brand competition which might derive from a fund-raising system aimed at financing common advertising. The proceeding is still in progress but the principle that can be stressed from the opening of this case is that joint activity aimed at financing common advertising of a given product is generally pro-competitive unless the fundraising system restricts intra-brand competition by discriminating between members that expand the output and members of consortium that merely remain with their historical quotas.

The **Chairman** added that in the cheese case the market share of Parmigiano Reggiano and Grana Padano was quite high even though the relevant market was wider than the single consortium; they shared the market 50% each. Such consortia are voluntary in the sense that in order to be called Grana one does not have to participate in the consortium, as a producer could produce on its own. There are alternatives to

the consortium for producing such types of cheeses in the sense that aggressive or more efficient producers can produce and distribute outside the consortium.

Turning to the Netherlands, the Chairman stated that the Competition Authority (NCA) periodically meets with representatives of the Ministry of Agriculture to discuss, at an early stage, possible conflicts between agriculture policy items and competition law which is unique among the submissions. The contribution also refers to the shrimp case, where Dutch, German and Danish shrimp-fishers and shrimp-traders were colluding to restrict quantities of shrimps. He asked how the system worked and whether the case was brought up by Germany, Denmark or the EU.

The delegate from the **Netherlands** explained that the investigation of the Dutch Competition Authority started in 1999 when they found that Dutch, German and Danish fishermen organisations met on a regular basis with shrimp traders. During these meetings they agreed upon minimum prices paid to the fishermen by the traders and they agreed upon the maximum quantity of shrimp that fishermen were allowed to catch in a week. According to the fishermen these agreements were necessary to keep the fishermen in business otherwise they would have gone bankrupt as there was structural overcapacity. During the investigation the Dutch competition authority stayed in close contact with the German and Danish competition authorities.

The delegate noted that the European Commission supported the view of the Dutch competition authority saying that the agreements were not covered by the exemptions laid down in Regulation 26. So price fixing agreements and agreements limiting production are not exempted. The shrimp traders and the organisation of fishermen were in the end fined a total amount of almost 40 million euros.

The **German** delegate added that the shrimp case has undergone an investigation in Germany as well but the case is still pending. This case was one of the first cartel cases with a successful exchange of information, something that should become normal now within the ECN.

The delegate from the **European Commission** followed up by stating that the European Commission was not involved as it was investigated in a national case. The lesson from this case was to consider adopting a new regulation reforming the existing common market for shrimps and seafood products, clarifying the extent to which EC competition rules are applicable to international agreements between producer organisations.

The **Chairman** turned to Mexico and noted that the Mexican submission points out the existence of a very important wholesale market for fruits and vegetables in Mexico that has worked quite effectively in stabilising markets in agriculture and allowing farmers access to the wider markets, eliminating a lot of trading within the sector that sometimes goes to the detriment of the actual producer. He asked the delegate from Mexico whether the extensive advocacy activity in the field of agriculture was decided by the Competition Authority or was requested by the government or the parliament and what the results had been so far.

The delegate from **Mexico** noted that one of the foci of competition advocacy for the Commission was to promote competition in all the sectors. The Commission has been very active and there are usually very effective opinions on the design and implementation of regulations. In the agricultural sector the Commission has the power to issue opinions for participants in privatisation. Examples include storage units, terminals for railroads and the privatisation of ports that affect the competition elements in agriculture.

A market center in Mexico City serves the produce demands for about 20% of the total population in Mexico, which is Mexico City. However, there are important competition issues there, because a few of

the owners of the establishment concentrate the market. Some producers have been efficient, especially the large ones, but the small producers in Mexico do not have direct access to these markets. One key trend is that the role of agriculture in GDP has dropped dramatically in the last 10 years (in 1990 agriculture made up 8% of the GDP whereas in 2001 it is only 4%) caused mainly by the opening to imports and the drop in prices. However, agricultural participation in labour force has dropped only from 24% to 20%.

About 50% of the agricultural land is controlled by 15% of the producers who are relatively large and very sophisticated so they have access to all the markets and there are no issues of purchasing powers of the marketers that weaken their position. There are a lot of small producers that do not have access to the markets. So called 'integrated companies' allow small producers to get together and structure a company to market their production. The competition authority does not consider these companies as anticompetitive because all the members of the companies are considered as partners and shareholders. At this moment there are 210 integrated companies in the agricultural sector, each of them relatively small without important market power. This figure might help small producers to get to market and overcome the power of intermediaries.

The delegate also elaborated on the issue of the expropriation of sugar mills in Mexico. Two years ago the government expropriated 27 sugar mills that represented 50% of the production of sugar in Mexico. They were expropriated so that the government would commercialise some of the production in Mexico. This had to be authorised by the Competition Commission, which decided to authorise it. The domestic market was considered as relevant market. It was authorised as there was an urgent need to stabilise.

General Discussion

The delegate from the **United States** commented on paragraph 16 and 62 of the Secretariat's paper. In paragraph 16 the paper says that homogeneity of agricultural products makes profits low. In the US's view, homogeneity is certainly a factor but there are other factors. Productivity in agriculture has significantly outpaced increase in demand which resulted in an increase of output. Different jurisdictions deal with that in different ways. One way to deal with that would be to decrease output by having more farmers exit the market. In the US there is no statutory program that prevents that. There are a variety of statutory programs that make it attractive to stay in the market and if at some point there was in fact a significant exit then the output relative to demand probably would go down and profits might increase inducing that some farmers come back. The other related point in paragraph 62 is the question about what permits or defeats farmer cartels. Once again the disincentive to exit, at least in the DOJ's view, tend to defeat these cartels, because as the output goes up, people cheat on the cartel.

The **Chairman** ended the Roundtable noting that it did not address the most controversial items of agricultural policy, income support and price control, but there were some references to these issues in many submissions and there was some discussion about the restrictive effects of import quotas and export exemptions. The roundtable was split up in two parts, monopsony buying and joint selling. The monopsony buying part confirmed the fact that in most cases there is an antitrust violation in monopsony buying only if there is also seller market power. Competition authorities usually are not concerned about monopsony buying, thinking that if there is no selling power then it is just a matter of redistribution and there is no antitrust concern.

Furthermore the Dutch report mentioned that monopsony buying leads to lower input prices. While this might not occur in the long term if there is an eventual exit from the market of a supplier, such an exit would be a rare situation. There are very few buyer power cases, not only in agriculture, but in general.

The problem is different in case of joint selling. This is reflected by the cooperative example of Norway and by the fact that in some countries where there was joint selling especially on the export part, it was inefficient even for the farmers themselves. If this is the case and regulation does not protect those that are supposed to be protected, then it is much easier to overcome. The ENZA case shows that the elimination of such restrictions led to the growth of ENZA market shares in export markets and also led to the possibility of entering into the market of competitors of ENZA leading to benefit agriculture in general.

Finally, the quality consortia was an early case of international co-operation, as the USFTC was also concerned that the control of quantities was increasing prices too much for Parma and San Danielle ham in the US markets as well. There are problems with quality consortia because these quantity restrictions may end up being introduced with some other means of control of input and sometimes the quality standards can be excessive with respect to what is necessary. However competition authorities do not have the tools nor the analytical possibilities to understand whether control of inputs is really essential for quality or not.

The Chairman concluded that antitrust enforcement has many possibilities in agricultural markets, especially in joint selling, quality consortia and the like. Antitrust authorities have significant potential to advocate for reform.

COMPTE RENDU DE LA DISCUSSION

Le **Président**, M. Alberto Heimler, ouvre le débat en indiquant que la table ronde fera porter sa réflexion sur les enjeux et les pratiques tendant à avoir un caractère strictement anticoncurrentiel (en l'occurrence, les groupements de ventes et les situations de monopsone) et que les aspects plus polémiques (soutien au revenu et fixation des prix) ne seront pas examinés. Il fait remarquer que l'évolution de la politique agricole s'est faite sans égard aux principes de la politique de la concurrence. Contrairement à ce qui se passe pour la plupart des autres secteurs d'activité, le « lobby » que constituent les autorités de la concurrence est resté silencieux face aux distorsions réglementaires observées en agriculture. La principale raison en est que la politique agricole met efficacement en avant le fait qu'elle sert des objectifs non économiques et qu'en conséquence, l'application des règles de la concurrence n'est généralement pas considérée comme la solution la plus adaptée. Si les objectifs ne sont pas économiques, il n'en demeure pas moins que les instruments utilisés le sont, entre autres (a) les mesures de soutien des prix grâce auxquelles les agriculteurs perçoivent un prix plus élevé que celui qu'ils obtiendraient normalement ; (b) des subventions massives aux investissements en capital ; (c) des interventions réduisant les risques, comme la bonification des cotisations d'assurance, les paiements au titre des calamités, etc.

Appliqués à tout autre secteur de l'économie, ces instruments seraient sans aucun doute restrictifs, mais l'agriculture est un cas particulier. Comme l'indique la contribution de la Commission européenne, et comme l'affirment de nombreux Etats membres, la réglementation relative à l'agriculture vise à stabiliser les marchés et garantir aux agriculteurs un revenu minimum sous réserve que les prix à la consommation ne soient pas trop élevés. Dans ces conditions, l'application du droit de la concurrence, même s'il est naturellement envisageable, joue souvent un rôle mineur.

Le Président structure cette table ronde autour de trois grands thèmes : les droits de douane et les contingents d'importation, notamment les exemptions au régime d'exportation, les situations de monopsone et les groupements de ventes.

Droits de douane et contingents d'importation

La contribution de la Suisse précise que : « La Suisse continue de poursuivre une politique caractérisée par un niveau élevé de protection aux frontières et de soutien interne (subventions à la production et paiements directs découplés). L'importation de la quasi-totalité des produits agricoles est strictement réglementée par le biais de contingents tarifaires et de droits de douane. En Suisse, les prix des produits alimentaires sont supérieurs d'environ 30 % en moyenne à ceux de l'Allemagne ». Le Président demande à la délégation de la Suisse si le niveau élevé des prix alimentaires résulte de la politique agricole ou s'il est la conséquence d'une faiblesse de la concurrence dans le secteur du commerce de détail, ou si ces deux éléments se combinent. Il souhaite également savoir si des modifications sont envisagées.

Le délégué de la **Suisse** explique qu'on constate toujours cet écart de prix à tous les stades - production, transformation et commerce de détail, mais qu'il n'est nullement spécifique à l'agriculture. Quel que soit le stade considéré, les coûts sont supérieurs à ceux enregistrés en Allemagne, où les économies d'échelle sont différentes, alors qu'en Suisse, le marché est très étroit et fermé, principalement à

cause de certaines réglementations agricoles et du pouvoir de marché élevé dont disposent les secteurs de la vente de détail et de la transformation.

Que ce soit sur la scène politique ou dans la presse, ces écarts de prix ne laissent pas de susciter des débats. Une conférence a justement été consacrée à cette question quelques semaines avant la tenue de cette table ronde. Pour l'opinion publique, ces différences de prix proviennent uniquement d'une absence de concurrence. L'autorité suisse de la concurrence doit expliquer que ces différences tiennent souvent aux réglementations en vigueur. Le délégué suisse précise toutefois que même si l'on observe certains écarts de prix dans le secteur agricole stricto sensu, ils concernent plus généralement le secteur alimentaire.

Le **Président** se tourne vers la Norvège et souligne que, d'après sa contribution, la concurrence est peu développée dans de vastes segments du secteur agricole norvégien. Cette situation tient, entre autres, au puissant système de protection des importations, qui protège très fortement les opérateurs nationaux d'une véritable concurrence extérieure à tous les stades de la filière de production. En 2000, les prix à la consommation de la viande, des produits laitiers et des œufs étaient sensiblement plus élevés en Norvège que dans les pays voisins. Le commerce frontalier très développé reflète bien ces écarts, qui pénalisent les détaillants implantés le long de la frontière, et l'agriculture norvégienne en général. Ce sont surtout la Suède, la Finlande et le Danemark qui, pour ces trois groupes de produits, affichent des prix dictés par la politique agricole de l'Union européenne et pratiquent même des prix encore plus bas. Le Président demande si l'existence d'écarts aussi importants incite la Norvège à modifier sa politique.

Le délégué de la **Norvège** reconnaît qu'une récente étude a effectivement montré que les prix des produits alimentaires sont plus élevés en Norvège que chez ses voisins. Il est probable que ce sont avant tout les mesures de protection des agriculteurs norvégiens qui sont à l'origine de cet état de fait. Les exploitants agricoles sont en effet autorisés à s'entendre pour organiser en commun une première vente destinée à fixer les prix. Ces ventes représentent d'importantes parts de marché, qui avoisinent 100 % sur de nombreux marchés. Désireux de protéger et maintenir les revenus des agriculteurs norvégiens, les décideurs publics souhaitent que ceux-ci exercent un pouvoir de marché. Les agriculteurs sont intégrés aux marchés d'aval et protégés par des barrières naturelles à l'importation, ainsi que par des contingents d'importation et des droits de douane. Le secteur du commerce de détail est plus concurrentiel, mais des améliorations sont toujours possibles. Les récentes baisses de prix indiquent également que la concurrence y est vive.

Les consommateurs n'ont guère réagi à la situation actuelle, ce qui semblerait indiquer qu'ils sont nettement favorables à la politique agricole suivie, d'autant qu'aucune demande de suppression des exemptions en vigueur n'a été formulée. La concurrence est bridée aussi bien dans les secteurs d'amont que dans ceux d'aval. En amont, la concurrence concerne les agriculteurs et les modalités d'organisation de la vente de leurs productions. En aval, la production s'opère à différents niveaux, le premier étant celui où s'insèrent les coopératives et, en bout de chaîne, celui du commerce de détail, qui fonctionne indépendamment des coopératives.

Pour protéger les revenus des agriculteurs, il est classique de restreindre la concurrence dans les activités d'amont. Au demeurant, les pouvoirs publics cherchent de plus en plus à encourager la concurrence en aval car elle permet d'améliorer l'efficacité productive, de stimuler l'innovation et d'accroître le bien-être des consommateurs mais elle est réduite par l'intégration verticale des coopératives Les entreprises rivales dépendent des coopératives pour leurs approvisionnements, ce qui confère à ces dernières un énorme pouvoir de marché vis-à-vis de leurs concurrents et une capacité à accroître les coûts pour leurs rivaux, etc. Le jeu de la concurrence est favorable pour les consommateurs et n'est pas toujours défavorable aux agriculteurs parce qu'elle peut stimuler la demande et l'innovation.

Le **Président** fait observer que le niveau élevé des prix agricoles pose problème non pas parce qu'il résulte d'une réglementation restrictive, mais parce que les prix sont moins élevés dans les pays voisins. Le faible niveau des prix en Allemagne et en Suède illustre parfaitement l'impact négatif que peuvent avoir des réglementations restrictives. Naturellement, lorsqu'on ne dispose pas de telles comparaisons, on ne peut que conjecturer ou émettre des hypothèses sur les avantages d'un environnement concurrentiel. Dans l'UE, les prix sont plus ou moins identiques partout, et il n'est donc pas simple de cerner quels sont les avantages apportés par la concurrence, lesquels relèvent plutôt de la conjecture tant l'existence de bas prix est difficile à démontrer.

Le Président se tourne vers le représentant de l'Australie et observe que ce pays a connu d'importantes évolutions ces dernières années en ce qui concerne la suppression des exemptions dont bénéficient les exportations de produits agricoles. Il demande au délégué australien de décrire la situation.

Le délégué de l'**Australie** rappelle que le Trade Practices Act de 1994 prévoit une exemption des règles relatives aux comportements anticoncurrentiels, qui concerne exclusivement l'exportation de biens et services australiens. Cette disposition reflète la logique selon laquelle les accords d'exportation sont présumés nécessaires à l'intérêt général, celui-ci primant ou l'emportant sur les préjudices à la concurrence qui pourraient découler de ces accords. Cette logique a ensuite été appliquée aux accords de vente sur le marché intérieur, de sorte que les « bureaux d'exportation » uniques sont devenus des « bureaux de vente » uniques, qui opèrent aussi bien pour les échanges intérieurs que pour l'exportation.

L'examen de la politique de la concurrence réalisé en 1993 a débouché sur une série sans précédent d'accords conclus en 1995 au niveau fédéral et des Etats, pour lesquels deux questions fondamentales ont été posées : (1) ces accords anticoncurrentiels vont-ils réellement dans le sens de l'intérêt général ? et (2) existe-t-il des moyens moins anticoncurrentiels d'obtenir les mêmes avantages pour la collectivité ? Les pouvoirs publics ont mis en place un ensemble d'accords soumettant tous ces dispositifs à deux tests simples, qui devaient être conduits de manière tout à fait objective et transparente. L'exercice a porté aussi bien sur les dispositifs créant des bureaux de commerce intérieur et extérieur que sur d'autres dispositifs institutionnels et sur des accords anticoncurrentiels concernant le secteur agricole.

Le secteur de la pomme de terre d'Australie occidentale est pratiquement un cas d'école, puisque la réglementation en vigueur précise le nombre, le type et la variété des pommes de terre pouvant être cultivées. Cet encadrement très strict a été soumis à un examen rigoureux. Un paiement a été mis en place, que le gouvernement fédéral a accepté de verser aux gouvernements des Etats. Le gouvernement fédéral a ainsi versé chaque année au titre de la concurrence un total de 800 millions à un milliard d'AUD, et tout un éventail d'accords anticoncurrentiels a ensuite été soumis à des tests objectifs visant à déterminer s'ils présentaient ou non un avantage pour l'intérêt général.

Les accords conclus par le secteur agricole ont été et continuent d'être soumis à un examen objectif, avec pour conséquence l'annulation, effective ou en cours, de la plupart d'entre eux. Dans le secteur céréalier, par exemple, non seulement les dispositifs institutionnels et les bureaux uniques mis en place pour les échanges intérieurs ont-ils été supprimés, mais encore certains bureaux d'exportation ont été démantelés. Les résultats ont parfois été spectaculaires. Dans l'Etat de Victoria, où la déréglementation a permis l'entrée sur le marché d'autres négociants pour assurer les opérations d'enlèvement à la ferme et d'exportation, on a ainsi vu certains agriculteurs d'autres Etats passer leur production céréalière de l'autre côté de la frontière à la faveur de la nuit, afin de pouvoir faire affaire avec des négociants concurrents susceptibles d'obtenir de meilleurs prix, soit sur le marché intérieur, soit à l'exportation.

Avec l'ouverture des marchés, les agriculteurs ont pu se rendre compte de l'avantage que présentait l'introduction de la concurrence non seulement pour le commerce intérieur, mais également dans les accords à l'exportation. Les décideurs publics étaient donc fortement incités à démanteler ces accords, tant

au niveau fédéral qu'à celui des Etats. Il y a eu une certaine résistance, comme dans le secteur de la riziculture. Bien qu'un examen mené en 1995 ait clairement mis en évidence le fait que l'existence d'un seul office de commercialisation de la production rizicole ne va pas dans le sens de l'intérêt du consommateur australien, les réglementations en vigueur n'ont toujours pas été supprimées.

S'agissant du secteur des céréales, la déréglementation s'est relativement imposée dans les différents Etats, de même que la suppression des exportateurs uniques et des marchés uniques pour les échanges intérieurs. Toutefois, il y a deux ou trois ans, un examen a conclu qu'il serait dans l'intérêt des consommateurs australiens de supprimer progressivement les exportateurs uniques, mais à l'époque, le gouvernement fédéral n'a pas suivi cette recommandation.

Les céréaliers s'interrogent de plus en plus sur les avantages que leur procure l'existence d'un monopsoneur ou un dispositif institutionnel monopolistique et un vendeur détenant un monopole sur les exportations, et se demandent s'il ne serait pas plus avantageux de trouver des accords autorisant une certaine concurrence pour l'exportation du blé australien. Ils se sont rendus compte de l'intérêt que présente l'ouverture à la concurrence des marchés d'exportation et des marchés intérieurs et reconnaissent que cette nouvelle approche a été bénéfique à l'ensemble des agriculteurs.

Le National Competition Council est chargé de superviser le processus de réforme. Les efforts de réforme portent actuellement sur l'examen des points encore non résolus et sur les aspects à aborder, et il est probable que la Productivity Commission lancera prochainement une étude sur les autres questions concernant l'exportation des céréales, en particulier du blé. L'ensemble du processus de commercialisation des produits agricoles australiens va être plus largement ouvert à la concurrence, avec à la clé une moisson régulière d'avantages.

Cette évolution vers une ouverture du marché à la concurrence s'explique par le remarquable changement culturel survenu en Australie au cours des quatre ou cinq dernières années. Les gouvernements qui avaient jusqu'alors traîné les pieds à l'idée d'ouvrir certains marchés à la concurrence reconnaissent désormais qu'elle a eu du bon dans toute une série de domaines, et notamment la commercialisation des produits agricoles. L'ACCC (Australian Competition and Consumer Commission) les a aidés à mettre en place le processus et à instaurer graduellement la réforme sans précipitation.

Tous les accords à l'exportation sont désormais soumis à un test spécifique indépendant portant sur leur intérêt pour la collectivité. Le régime des licences d'exportation est maintenant plus ouvert, et les agriculteurs de certains Etats commencent à se rendre compte qu'ils peuvent ainsi obtenir des prix plus élevés pour leurs céréales et leur blé. Ils commencent à s'intéresser à l'idée de cultures à la demande, autrement dit à faire des choix de production en fonction de commandes à l'exportation passées à l'avance.

Le **Secrétariat** de l'OCDE présente brièvement les principaux points exposés dans la note de synthèse.

Situation de monopsone

Le **Président** fait observer que de nombreuses contributions (dont celles de l'Allemagne et des Etats-Unis) font référence à la théorie de l'effet-miroir, selon laquelle il devrait y avoir analogie entre situation dominante du côté de la demande et situation dominante du côté de l'offre. En pratique, cependant, à l'exception partielle de l'Allemagne, le pouvoir de monopsone n'est contraire au bien-être des consommateurs que lorsqu'il s'accompagne d'une position de puissance sur les marchés d'aval. On peut néanmoins s'interroger, comme le fait la contribution des Pays-Bas, sur la capacité des entreprises disposant d'une puissance d'achat à tirer parti sur la durée d'une marginalisation de leurs fournisseurs en les forçant à accepter des prix inférieurs à leurs coûts de production.

La contribution de l'Allemagne examine en détail les différentes approches concernant les pratiques monopolistiques, le bien-être des consommateurs et la libre concurrence. Elle explicite notamment de nombreuses décisions prises par les autorités de la concurrence, qui appliquent théoriquement le principe du bien-être des consommateurs, mais vont en réalité dans le sens d'une libre concurrence.

Dans un contexte de libre concurrence, il est plus aisé de trouver des parades à la puissance d'achat. Néanmoins, alors que la notion de bien-être des consommateurs est directement liée à la théorie économique en ce sens qu'un comportement est interdit dès lors qu'il porte préjudice aux consommateurs, le principe de libre concurrence, aux contours plus flous, peut conduire à des interdictions susceptibles de bloquer le progrès technique et l'innovation. Le Président demande à la délégation de l'Allemagne de donner des détails sur l'application de ce principe dans le cas de la puissance d'achat et sur les éléments à prendre en considération pour ne pas entraver des évolutions favorisant la concurrence. Il souhaite également savoir si les affaires présentées auraient débouché sur des décisions différentes en se basant sur le principe du bien-être des consommateurs.

Le délégué de l'**Allemagne** explique que cette question a déjà été soulevée l'année dernière lors de l'examen de l'Allemagne par le Comité de la concurrence. Les marchés de la demande sont généralement traités par stricte analogie avec les marchés de l'offre conformément au concept de concurrence défini dans la loi sur la concurrence (ARC), aux termes de laquelle protéger la libre concurrence est un objectif évident ayant pour conséquence l'institutionnalisation du principe de la liberté de concurrence. En règle générale, la théorie économique sous-tendant la loi sur la concurrence veut qu'une véritable concurrence soit favorable au consommateur et optimale en termes de bien-être des consommateurs. Autrement dit, la préservation de la concurrence a pour finalité première de protéger les consommateurs, mais peut avoir une vocation plus large.

Il n'y a pas nécessairement contradiction entre la théorie de la protection de la concurrence et la protection du bien-être des consommateurs. Selon la logique ayant présidé à l'élaboration de la loi sur la concurrence, la seconde est contenue dans la première. On peut également considérer que la relation entre libre concurrence et protection du bien-être des consommateurs s'explique par certaines exemptions à l'interdiction des ententes prévues dans le droit allemand. La coopération entre acheteurs peut ainsi être autorisée, par exemple, si elle accroît le bien-être des consommateurs. Il existe parfois une légère différence entre les deux objectifs et, dans cette hypothèse, la priorité est donnée aux consommateurs.

Quant aux affaires mentionnées dans la contribution de l'Allemagne, il est probable qu'elles n'auraient pas donné lieu à des décisions différentes dans un régime fondé sur la théorie du bien-être des consommateurs. Il apparaît au final que dans toutes ces affaires, le bien-être des consommateurs a été pris en compte. Etant donné qu'il n'y a pas de divergence entre les deux objectifs, à savoir bien-être des consommateurs et liberté de la concurrence, il faudrait aussi trouver des exemples concrets le mettant en évidence.

Le **Président** fait remarquer que la dernière ligne de la contribution de l'Allemagne mentionne que le Bundeskartellamt (Office fédéral de la concurrence) serait favorable à la suppression de l'exemption dont bénéficie le secteur agricole. Il demande au délégué allemand de préciser succinctement ce point.

Le délégué de l'**Allemagne** indique en substance que les positions du Bundeskartellamt et des ministères de l'Economie et de l'Agriculture divergent. Le Bundeskartellamt estime en effet que l'agriculture n'a nul besoin d'une exemption, mais en pratique, l'intérêt que présente cette exemption est mineur.

Le **Président** revient sur la question des coopératives en Norvège. Il note que selon la contribution de ce pays, les coopératives jouent un rôle central, puisqu'elles détiennent près de 100 % des parts de

nombreux marchés des produits. L'autorité norvégienne de la concurrence considère que les coopératives exercent des effets restreignant la concurrence en amont et en aval. Le Président se demande si ces évolutions sont dues à une réglementation trop clémente ou s'il existe d'autres explications. Il demande également ce que pourrait faire une autorité de la concurrence en dehors du fait d'encourager le changement et la suppression du pouvoir de marché.

Le délégué de la **Norvège** précise que dans son pays, les coopératives sont plus puissantes que dans la plupart des autres pays. La nouvelle loi sur la concurrence maintient l'exemption dont bénéficient les coopératives agricoles et les premières ventes. Il existe en effet en Norvège un large consensus pour protéger le revenu des agriculteurs, maintenir l'offre nationale de produits agricoles, garantir la sécurité des aliments, veiller à la réalisation d'objectifs régionaux comme le maintien d'habitats dispersés, ou encore la préservation d'un paysage cultivé sur l'ensemble du territoire. Il faut remonter aux années 30, époque où les agriculteurs ont beaucoup souffert de la dépression économique, pour comprendre les raisons qui ont présidé à l'élaboration de cette réglementation. Le système a été maintenu, mais les récents gouvernements se sont davantage préoccupés du bien-être des consommateurs. Leur action a consisté à introduire davantage de concurrence, à faire baisser les prix et à diversifier plus largement l'offre de produits, généralement en stimulant la concurrence dans les activités d'aval.

L'évolution est lente et des mesures énergiques sont nécessaires. Un mouvement se dessine, par exemple, dans le cas de l'obligation qu'ont désormais les coopératives laitières de livrer du lait à leurs concurrentes sur le marché. A la question de savoir si ces exemptions sont réellement favorables aux agriculteurs, le délégué indique que cela dépend largement de la maîtrise qu'ont les coopératives des quantités totales produites, ce qui est le cas en Norvège, où les pouvoirs publics fixent des quotas de production, tout au moins pour ce qui concerne la production laitière.

Le système en vigueur prévoit des négociations annuelles entre l'Etat et les organisations d'agriculteurs sur les prix indicatifs vers lesquels les coopératives doivent tendre. L'opération consiste à fixer les prix pour les ventes à l'exportation afin d'obtenir des prix intérieurs plus élevés lorsque la production dépasse largement la demande interne. Il apparaît nécessaire d'attribuer à une entité les compétences de régulation du marché.

La principale mission de cette autorité sera de favoriser la concurrence dans les activités d'aval aux différents stades de la filière agroalimentaire. Ce qui pose problème, c'est l'intégration verticale des coopératives dans la production aval. Une désintégration verticale des coopératives serait nécessaire, mais il est peu probable qu'elle soit envisageable. Les entreprises rivales dépendent donc des approvisionnements des coopératives pour se livrer concurrence sur les marchés agroalimentaires d'aval. Il est très important que les prix à acquitter pour ces approvisionnements soient équitables et comparables aux prix internes pratiqués par les coopératives. Les barrières à l'importation prenant la forme de contingents et de droits de douane seront probablement abaissées, ce qui entraînera à terme un accroissement des importations.

Le **Président** ajoute que cette réglementation a été mise en place dans les années 30. L'exemple de la Norvège met en évidence la difficulté d'abrogation d'une réglementation une fois que celle-ci est en place car il est quasiment impossible de la supprimer. Il est certes facile de prôner la concurrence lorsqu'on instaure une nouvelle réglementation, mais ça l'est beaucoup moins lorsque l'on cherche à éliminer certains types d'entreprises et de comportements durablement installés.

Le Président se tourne ensuite vers le représentant de la Commission européenne et aborde la question de la puissance d'achat. Peu d'affaires portant sur ce sujet ont été traitées par la Commission européenne. Néanmoins, dans son rapport, il est fait référence à la théorie de la « spirale » : le pouvoir de monopsone conduirait à abaisser les prix d'achat, qui entraîneraient à leur tour une baisse des prix de vente ayant pour

effet d'exclure les concurrents et, au bout du compte, à une hausse des prix à la consommation. Le Président demande si cette théorie a un caractère trop spéculatif, en particulier dans le cas du contrôle des opérations de concentration.

Le délégué de la **Commission européenne** explique que si les affaires de puissance d'achat sont relativement rares, c'est en grande partie parce que la Politique agricole commune (PAC) fixe un prix d'intervention garanti. La contribution de la Commission européenne mentionne l'opération de concentration des entreprises d'abattage dans le secteur porcin. Cette fusion aurait permis à ces entreprises de détenir quelque 80 % du marché de l'abattage de porcins dans un pays. L'argument invoqué consistait à dire que cette fusion restreindrait la production sans pour autant entraîner de gains d'efficience. Le problème posé concernait davantage les préjudices que cette opération causerait aux consommateurs que le choix, pour les entreprises d'abattage, de vendre librement à qui elles le souhaitaient.

A propos du commentaire sceptique sur la théorie de la « spirale », il convient de dire que dans les affaires de fusions traitées par la Commission européenne, on a prévu le cas où, dans une logique d'élimination de la concurrence, une entité détient une très forte position sur le marché des commandes publiques, position qui lui permet d'obtenir un rapport coût-efficacité plus élevé. Vue sous l'angle des vendeurs, la question qui se pose est celle de savoir s'il s'agit d'un secteur concurrentiel ou non. Si le vendeur n'a aucune marge, il n'y a aucun intérêt à demander un prix inférieur au coût concurrentiel.

Les décisions prises par la Commission européenne concernant les opérations de concentration dans le secteur du commerce de détail sont probablement motivées par le renchérissement des coûts des concurrents lorsque la fusion confère à l'entreprise une position forte sur le marché de la vente finale, sur le marché du détail, ainsi que sur le marché de la commande publique. Etant donné la spécificité du secteur considéré, la concentration du marché de la commande publique est susceptible d'accroître les coûts pour les concurrents dans la mesure où l'entité fusionnée peut éventuellement obtenir des conditions favorables que les vendeurs compensent ensuite en augmentant les coûts des entreprises concurrentes. La Commission européenne n'a pas eu à traiter d'affaire dans laquelle la théorie de la spirale a débouché sur une quelconque interdiction. L'argument du « renchérissement des coûts des concurrents » a conduit à obtenir ou demander que les parties à la fusion cèdent soit des activités amont d'achat en commun, soit des activités de vente en aval.

Le **Président** se tourne ensuite vers le représentant des Etats-Unis et indique qu'en 1999, l'Antitrust Division a contesté la proposition d'acquisition, par *Cargill Inc.* de la firme *Continental Grain Company*. Il fait observer que, selon la contribution des Etats-Unis, cette action reposait entièrement sur des préoccupations relatives aux effets sur le marché « amont », où les deux sociétés, Cargill et Continental, s'approvisionnaient auprès des agriculteurs. Il demande aux délégués des Etats-Unis selon quel processus des solutions ont pu être trouvées dans cette affaire. Il souhaite par ailleurs que soit donnée une analyse plu détaillée des marchés géographiques, en particulier dans la mesure où les parades suggérées concernaient le marché local.

Le délégué des **Etats-Unis** explique que la difficulté, dans l'affaire Cargill/Continental, a résidé dans le fait qu'il ne s'agissait pas d'un problème de pouvoir de monopole, puisque Cargill et Continental vendent des grains sur les marchés internationaux, mais que ces deux sociétés achètent leurs produits aux Etats-Unis sur les marchés régionaux et locaux. Les agriculteurs concernés ici sont ceux qui produisent les trois principales cultures de grains, à savoir le maïs, le blé et le soja. En effet, ceux qui doivent transporter leur production jusqu'à un silo n'ont guère de choix au niveau géographique.

Cette fusion a suscité un intérêt énorme, et la communauté agricole s'est impliquée en formulant des conseils. L'Antitrust Division a présenté son analyse dans des documents rendus publics : plainte, déclaration d'impact sur la concurrence et réponse aux commentaires formulés. La situation a été plus ou

moins identique à celle d'une fusion bancaire impliquant un grand nombre de marchés locaux, la compensation étant analogue, c'est-à-dire la cession d'actifs locaux. L'Antitrust Division leur a demandé de se défaire d'un certain nombre de silos ayant accès au rail, ainsi qu'à des ports fluviaux ou maritimes, en fonction du mode de transport adopté par les agriculteurs de la région pour convoyer leur production jusqu'aux acheteurs. Au final, 11 ou 12 installations ont dû être cédées dans 7 Etats différents. Le délégué ajoute que, pour chaque fusion, l'approche adoptée en cas de monopsone ou de monopole est définie au cas par cas.

Le **Président** se tourne alors vers le représentant de la Commission européenne, à qui il demande des précisions sur les coopératives et le Règlement 26/1962. Il demande si les récentes évolutions des marchés agricoles déboucheront sur une modernisation, étant donné que la taille des entreprises du secteur agricole et les technologies employées sont maintenant très différentes. Le Président évoque trois exemptions à l'application de l'article 81 de ce Règlement : (1) la participation à des organisations nationales de marché ; (2) les accords indispensables pour atteindre l'objectif fixé par la PAC ; et (3) la non-application de l'article 81 aux accords passés entre membres appartenant à un même Etat de l'UE. L'accord ne doit pas stipuler d'obligation de facturer un prix identique, ni conduire à l'élimination de la concurrence ou porter atteinte à la réalisation des objectifs de la PAC. Il demande aux délégués de la Commission européenne s'il y a de bonnes chances de voir ce règlement modifié dans le sens d'une suppression des frontières nationales, car après cette révision, cet aspect prendre encore plus d'importance.

Le délégué de la **Commission européenne** fait observer que dans sa contribution, la Commission européenne indique que les exceptions mentionnées ne limitent en aucun cas la possibilité d'intenter une action en justice pour comportement anticoncurrentiel d'entente sur les prix ou de limitation de la production. Ces règles applicables à l'organisation des marchés nationaux n'ont été utilisées qu'une seule fois. Avec l'entrée en vigueur des règles relatives au marché commun, nombre d'organisations nationales des marchés ont purement et simplement disparu. En ce qui concerne les accords privés nécessaires pour atteindre l'objectif de la PAC, l'application de ces exceptions est extrêmement étroite. Le prix minimum fixé par le Conseil dans le cadre de la PAC est appliqué de manière à limiter la concurrence.

L'application des règles de la concurrence impose de veiller à ce que de nombreux mécanismes n'aillent pas au-delà de ce qui est strictement nécessaire. Par exemple, si, sur de nombreux marchés, les prix sont plus ou moins indicatifs de la qualité des produits, les opérateurs y intervenant seront incités à coordonner leurs prix.

Les associations de producteurs ou les accords entre associations de producteurs et associations de transformateurs doivent être très strictement limités à des objectifs pro-concurrentiels. Ces dispositions mériteraient certainement d'être revues un jour, mais pour l'instant, il n'est pas prévu de les moderniser.

Le **Président** note ensuite que le rapport présenté par l'Irlande évoque le secteur sucrier, qui a été cité dans diverses contributions d'Etats membres de l'Union européenne. La contribution de l'Irlande indique que le régime du sucre est restrictif, tandis que la contribution de l'Italie donne une description de la réglementation de ce marché qui précise les parts de marché concernées, les accords entre betteraviers et les quotas de production. Ce qui est intéressant dans le cas de ces restrictions, c'est qu'elles s'imposent aussi bien au marché des facteurs de production (betterave à sucre) qu'à l'offre, raison pour laquelle elles ont pu perdurer aussi longtemps. L'Irlande présente une discussion intéressante sur le secteur sucrier et critique les règles établies par la Commission européenne, sans toutefois avancer de propositions concrètes pour remédier aux problèmes de concurrence. Sa contribution témoigne bien de la tension qui existe entre la politique agricole de la Commission européenne et le contrôle des règles de concurrence. Il demande au délégué de l'Irlande si cette question est actuellement à l'étude.

Le délégué de l'**Irlande** indique qu'en ce qui concerne le marché irlandais du sucre, les agriculteurs négocient collectivement les prix avec l'entreprise détenant le monopole sur le sucre, qui est un monopsone sur le marché des achats et un monopole sur celui des ventes. Nombreux sont certainement les délégués qui ont connaissance de l'affaire *du sucre irlandais* dont a été saisie la Commission à propos des importations sucrières en Irlande. Le Premier ministre adjoint, qui est par ailleurs ministre des Entreprises, du Commerce et de l'Emploi, a négocié un accord de fixation des prix avec le Président de la Farmers' Association, qui a ensuite adhéré au parti auquel est affilié le Premier Ministre et s'est vu confier un ministère au sein du gouvernement.

Ce domaine est très politique, mais ce n'est pas la raison pour laquelle il n'y a pas eu d'action en justice. Le Directeur général de la société sucrière a affirmé que le prix du sucre à la consommation était déterminé uniquement par le prix à l'importation. Bien que la betterave à sucre représente 60% des coûts totaux du monopole sucrier, le prix négocié avec les agriculteurs n'avait en fait aucune incidence sur le prix du sucre sur le marché final. L'entente illicite sur le prix de vente à la compagnie sucrière n'avait donc aucune conséquence pour les consommateurs du marché final. Il s'agissait en l'occurrence d'un problème de rente de répartition entre le monopsoneur et les entreprises faisant partie de l'entente. Aucun avantage manifeste pour les consommateurs n'aurait découlé d'une action en justice, et il était même probable que celle-ci se retournerait contre les agriculteurs, avec pour conséquence une opinion publique convaincue que l'autorité de la concurrence s'était rangée aux côtés du grand monopole.

Le délégué irlandais précise que cette affaire était jugée trop complexe pour être portée devant un tribunal. S'il avait pu être effectivement démontré des incidences sur le marché final à la consommation, l'autorité de la concurrence se serait certainement saisie de l'affaire. Le délégué demande également aux Etats-Unis des précisions sur l'affaire Cargill-Continental évoquée précédemment. Il indique qu'il ne voit pas pour quelle raison le préjudice aux consommateurs a été retenu pour motiver l'intervention. Il s'interroge sur les retombées qu'aurait cette fusion sur les consommateurs s'il s'était agi de marchés internationaux. Il aimerait par ailleurs savoir si cela pourrait constituer un critère additionnel.

Le délégué des **Etats-Unis** précise que l'Antitrust Division ne porte pas une affaire devant le tribunal pour expliquer si telle action est bonne ou mauvaise pour le bien-être des consommateurs, mais seulement pour indiquer si la fusion envisagée au titre de la section 7 de la loi Clayton porte une atteinte sensible à la concurrence, ou plus exactement si la fusion risque de conférer à l'entreprise absorbante un pouvoir de marché, de renforcer ce dernier ou d'en faciliter l'exercice. Dans l'affaire évoquée, c'est précisément ce à quoi aurait abouti la fusion. La législation antitrust n'a pas pour finalité de créer des prix bas, mais de maintenir des prix concurrentiels, et c'est ce à quoi s'attache l'Antitrust Division.

Le **Président** fait remarquer que les consommateurs sont concernés lorsque les prix des facteurs de production baissent, mais que cette baisse n'est pas répercutée sur les prix de détail, ou inversement, lorsque les prix des facteurs de production demeurent constants, mais que les prix augmentent au niveau du commerce de détail. Cette préoccupation est particulièrement vraie pour les produits agricoles. En Corée, la KFTC est chargée de contrôler si les grands magasins de distribution répercutent sur les consommateurs les baisses des prix d'achat. Il demande aux délégués de la Corée quelles seraient les mesures prises s'il apparaissait que les prix de détail n'étaient pas abaissés autant qu'on pouvait le prévoir.

Le délégué de la **Corée** explique que le système de notification est conçu pour empêcher que les grands détaillants exploitent leur position sur le marché au détriment des petits fournisseurs, mais non des consommateurs, en adoptant des pratiques commerciales déloyales. Les grandes surfaces sont donc libres de fixer les prix à leur guise. Il leur appartient de décider de répercuter ou non une baisse des prix d'achat sur les prix à la consommation, car le marché coréen de la distribution des produits agricoles est très concurrentiel. Néanmoins si, par exemple, les grandes surfaces profitaient de leur position pour imposer aux petits fournisseurs des remises sur les prix, cette pratique ferait l'objet d'une notification.

Le **Président** se tourne ensuite vers le représentant de la Lituanie et indique que dans ce pays, le niveau de concentration des acheteurs et transformateurs de produits agricoles a sensiblement augmenté ces dernières années. La rapide croissance des grandes surfaces s'est accompagnée au cours des cinq dernières années d'une chute des prix des produits d'alimentation générale, signe que la vivacité de la concurrence entre les détaillants est favorable aux consommateurs. Il ressort de la contribution de la Lituanie que le secteur agricole continue d'être relativement sous-développé, l'essentiel de la production intérieure étant encore assuré par des exploitations de petite taille. En règle générale, le développement de l'agriculture est lié aux mutations des secteurs d'aval, et des segments importants de la distribution agissent parfois comme moteurs d'évolution, apportant progrès technique et innovation, et entraînant une concentration du secteur. Le Président s'interroge sur les raisons qui empêchent la modernisation de l'agriculture et si celles-ci peuvent être d'ordre réglementaire.

Le délégué de la **Lituanie** fait observer qu'en ce qui concerne le développement de l'agriculture lituanienne, l'une des caractéristiques les plus fréquemment relevées est que le secteur agricole contribue approximativement à hauteur de 6% au PIB et qu'il emploie environ 18% de la population. Ces chiffres sont révélateurs d'une faible productivité du travail, d'une très grande inefficience et de problèmes structurels. Le régime réglementaire n'est pas une entrave à la sortie des producteurs, car ces problèmes sont d'ordre macroéconomique ou institutionnel. En dépit d'une croissance de l'activité économique d'environ 9%, les débouchés sont trop peu nombreux pour permettre aux opérateurs de quitter le secteur agricole. Par ailleurs, un grand nombre des personnes employées dans l'agriculture ont atteint un âge qui ne leur permet pas de changer d'activité professionnelle. La réforme agraire, qui n'est toujours pas achevée, a été très inefficace et inopérante. Beaucoup de terres ne sont pas clairement affectées à un propriétaire particulier, ce qui explique en partie l'inefficience de l'échelle de production.

Le **Président** ouvre alors le débat en sollicitant commentaires et suggestions au sujet de la puissance d'achat. L'argument faisant appel aux deux logiques, celle du bien-être des consommateurs et celle de la libre concurrence, a déjà été mentionné. Si le principe de la libre concurrence est clairement affiché en Allemagne, ce n'est pas le cas pour d'autres pays. Il est possible que les types de problèmes qui se posent soient relativement similaires, mais dans le cas du bien-être des consommateurs, il est un peu plus difficile de le démontrer.

Linda Fulponi, de la Direction de l'alimentation, de l'agriculture et des pêcheries de l'OCDE, explique que les questions de concurrence ne sont généralement pas abordées par la Direction. La question de la puissance d'achat est régulièrement soulevée lors des réunions du Comité de l'agriculture et intéresse aussi tout particulièrement les milieux agricoles. Ces derniers estiment en effet que, compte tenu du pouvoir énorme dont disposent les détaillants et les transformateurs, ils ne sont pas en mesure de lutter et de négocier un prix. La Direction de l'agriculture a tenté d'expliquer que, dans une certaine mesure, cette situation relève du processus concurrentiel normal, dont les effets se font sentir en agriculture avec l'intégration de micro-entreprises dans l'économie industrielle moderne.

S'il est probable que la concentration génère un certain pouvoir, il ne s'agit pas nécessairement d'un abus de position dominante. Dans le cas de distributeurs tels que Metro ou Tesco, il est très difficile de déterminer s'ils répercutent effectivement les baisses de prix car le nombre de produits référencés est considérable, 30 000 produits alimentaires chez Tesco par exemple. Il pourrait être intéressant de confronter les conclusions des spécialistes de la politique agricole et de la politique de la concurrence sur quelques aspects importants (comme la puissance d'achat), afin de voir s'il existe une certaine cohérence. La puissance d'achat se manifeste aussi sous d'autres formes, ce qui n'est pas sans conséquence pour les principes et normes imposés.

La Direction de l'agriculture a lancé une étude sur le secteur agricole en partant du principe qu'il existe tout un ensemble de normes juridiques et de normes spécifiques. Tesco et Metro semblent collaborer

à travers différentes initiatives pour établir une norme commune, ce qui permettrait de justifier cette alliance par des objectifs d'efficience économique dans la mesure où elle leur permettrait de bénéficier d'approvisionnements en provenance de différentes parties du monde, de réduire leurs coûts, ainsi que leurs fournisseurs, car il ne serait plus indispensable de procéder régulièrement à des audits. On parle dans ce cas de normes volontaires privées. Un certain nombre d'agriculteurs se disent confrontés à la difficulté de lutter pour fixer les prix et d'avoir à négocier avec de plus petits producteurs. Même les coopératives dépassant la taille critique doivent négocier avec une coopérative générale de distribution, qui dispose d'une centrale d'achat et impose toute une série de conditions supplémentaires.

On peut considérer que, d'une certaine façon, ces contraintes représentent le prix à payer pour faire du commerce dans nos sociétés modernes. La Direction de l'agriculture cherche à étudier quel impact cette problématique peut avoir sur la structure du secteur agricole et de l'ensemble de la filière agroalimentaire, qui a subi au cours des dix à quinze dernières années une transformation structurelle importante, et quel est son effet sur l'activité économique/le bien-être des producteurs et des consommateurs, afin de déterminer quelles seront à terme les conséquences de cette concentration, qui ne se réduit pas à un pays, mais s'étend à l'ensemble de la planète.

Le **Président** indique que les normes de qualité peuvent soulever des problèmes de concurrence du côté de l'offre, même si l'on ne considère pas de façon générale que ces normes soient anticoncurrentielles dès lors qu'elles visent à améliorer la qualité et ne donnent pas lieu à collusion. Néanmoins, il arrive parfois que les modalités d'établissement des normes de qualité entraînent des réductions quantitatives.

Le délégué du **Mexique** estime qu'il s'agit là d'un problème de répartition et qu'il se pose probablement davantage dans les pays en développement. On peut toutefois se demander dans quelle mesure la politique agricole peut servir des objectifs de redistribution des revenus. Les consommateurs risquent en effet d'être affectés d'une manière qui serait probablement considérée comme antinomique des principes généraux de la politique de la concurrence. Il faut donc décider si une répartition plus équitable des revenus mérite de sacrifier certains de ces principes. La politique de la concurrence n'est pas très éclairante à cet égard car elle privilégie de manière générale le bien-être des consommateurs. De ce point de vue, le secteur agricole est un cas particulier car les questions de répartition y sont particulièrement sensibles.

Le délégué de la **Nouvelle-Zélande** fait remarquer que dans son pays, l'agriculture représente 16 à 17 % du PIB en termes réels, le secteur laitier s'arrogeant à lui seul 7 % du PIB, et qu'elle assure généralement quelque 50 % des exportations. On admet en Nouvelle-Zélande que le secteur agricole doit être efficient et ne saurait être subventionné ou soutenu par les autres secteurs d'activité. C'est pour cette raison que l'opinion publique en est venue à accepter l'application de la politique et du droit de la concurrence à l'agriculture.

La Nouvelle-Zélande est propice aux situations de monopsone, car les exploitations agricoles y sont souvent de très grande taille par rapport à l'ensemble de l'économie. Le principal problème réside dans le fait que les décideurs publics se sont trouvés en situation de monopsone par rapport aux coopératives agricoles elles-mêmes. L'exemple du secteur laitier néo-zélandais montre que les deux plus grandes coopératives laitières, qui détenaient environ 95 % du marché, ont conclu avec le gouvernement un accord les autorisant à fusionner. L'autorité de la concurrence était avant tout préoccupée par le fait que cette nouvelle coopérative disposerait d'un pouvoir de monopsone pour l'achat du lait, en particulier auprès des éleveurs désireux d'entrer sur ce marché. Cette situation était en effet susceptible de conduire à une manipulation, d'une part, du prix des actions afin de le maintenir à un bas niveau et, d'autre part, du prix du lait pour qu'il demeure élevé, pour déboucher finalement sur la suspension pure et simple des entrées dans la coopérative, puisque celle-ci aurait détenu toutes les unités de production du pays.

L'autorité de la concurrence a développé un dispositif réglementaire spécifiquement applicable à cette entreprise. Celle-ci a été contrainte d'accepter de nouveaux entrants et de ne pas restreindre l'accès au marché. Autrement dit, si cette entreprise tente malgré tout de maintenir un prix du lait élevé, elle sera envahie par une multitude d'éleveurs convertis à l'élevage laitier en raison de la meilleure rentabilité de cette activité. Ces dispositions devraient introduire une certaine concurrence parmi les exploitations laitières.

Un autre délégué de la **Nouvelle-Zélande** revient sur le commentaire de l'Allemagne concernant le principe de la libre concurrence dont l'application, estime-t-il, pourrait déboucher sur les mêmes résultats qu'avec le principe du bien-être des consommateurs. En tout état de cause, il risque de justifier la protection de certains concurrents susceptibles de ne pas être efficients, ni en mesure d'être compétitifs sur le marché. Dans ce cas, cette approche ne serait absolument pas compatible avec le principe du bien-être des consommateurs tel qu'il est appliqué en Nouvelle-Zélande. La déléguée néo-zélandaise demande au délégué de l'Allemagne si l'application du principe de la libre concurrence a effectivement permis de justifier la protection de concurrents inefficients.

Le délégué de l'**Allemagne** indique en réponse que l'objectif de l'ARC n'est absolument pas de protéger certains concurrents ou certaines entreprises, mais de préserver globalement une concurrence libre et indépendante. S'il apparaissait que cette loi protège ne serait-ce qu'un seul concurrent, le Bundeskartellamt aurait à repenser le dispositif pour voir si, d'un point de vue général, il est réellement favorable à la concurrence.

Le délégué des **Pays-Bas** formule des commentaires sur les observations faites par Linda Fulponi. Il insiste plus particulièrement sur la réflexion a priori concernant la puissance d'achat. Il fait remarquer que toutes les contributions présentées par les pays concernent des situations antérieures et qu'aucune n'a abordé la question des accords transfrontaliers conclus entre distributeurs ou transformateurs. Lorsque les marchés s'internationalisent, on doit prendre en compte les dimensions internationale ou transfrontière de la puissance d'achat. C'est la raison pour laquelle, même si l'aspect soulevé par Linda Fulponi concernant les normes relatives aux achats établies par les commerces de détail a des incidences sur les producteurs, il faut néanmoins prendre également en compte les producteurs des pays à bas revenu. Les principaux thèmes à aborder ultérieurement sont effectivement les accords transfrontières entre de nombreux distributeurs et de nombreux transformateurs.

Le **Président** ajoute que la Direction de l'agriculture étudie ces questions de manière exhaustive et qu'il conviendrait d'avoir un débat permettant de déterminer l'effet concurrentiel de ces normes ou accords portant sur la qualité, même s'il s'agit de dispositifs transfrontières. Certes, ils ne sont pas a priori anticoncurrentiels, mais ils méritent une analyse plus fine.

Groupement de ventes

Le **Président** ouvre ensuite le débat sur les questions relatives au groupement de ventes et rappelle aux délégués que dans le cadre de la réglementation de l'UE, la création de coopératives peut être jugée efficiente et que l'existence d'une coopérative dans un seul Etat membre ne constitue pas même une violation de l'article 81. En Nouvelle-Zélande, *l'affaire ENZA* montre que la suppression des groupements de ventes à l'exportation a eu des retombées positives considérables. La déréglementation a contribué à contraindre ENZA à réduire ses coûts, mais lui a également permis de se diversifier davantage. Les concurrents d'ENZA ont en outre pu pénétrer sur le marché des fruits en se spécialisant dans certaines qualités ou certains produits. Une fois la déréglementation mise en place, ENZA, qui ne commercialisait jusqu'alors qu'une gamme limitée de qualités de fruits, a su gagner en souplesse et trouver des créneaux pour de nouvelles qualités. Le Président demande au délégué de la Nouvelle-Zélande si ces évolutions avaient été anticipées et qui y avait été favorable, quels étaient les acteurs principalement visés par l'action

publique, qui faisait pression en ce sens et quelle était, au plan interne, la justification d'une déréglementation.

Un des délégués de la **Nouvelle-Zélande** indique qu'il n'existe pas de réponse simple à cette question, parce que la réforme de ce secteur peut être menée selon des approches différentes. Le gouvernement néo-zélandais s'est rendu compte qu'il était indispensable de disposer d'un secteur agricole efficient et que celui-ci soit totalement régi par la politique et le droit de la concurrence. Le secteur de la pomme ne comptait qu'un seul vendeur, devenu ultérieurement la société ENZA, auquel un monopole avait été conféré par la loi. Les producteurs qui n'étaient pas satisfaits de ces dispositions voulaient se spécialiser dans la culture d'un type de pommes différent et exerçaient des pressions en faveur d'une réforme. Il s'agissait, entre autres, de producteurs de pommes biologiques et de pommes casher, et de certains autres producteurs désireux de différencier leurs produits en créant une marque.

En 1991, le gouvernement a lancé une campagne d'information destinée à expliquer qu'il n'y avait pas lieu de réformer le secteur en lui appliquant les principes généraux de la politique de la concurrence. Ce processus a conduit, en 1999, à une déréglementation partielle du secteur de la pomme, ENZA étant dissociée de l'organisme de réglementation « Apple and Pear Board », qui a été chargé de délivrer des licences aux concurrents. Entre-temps, les actions étaient devenues échangeables, tout au moins celles détenues par les producteurs de pommes. On a alors vu fleurir les sociétés coopératives, qui ont commencé à acheter une grande partie des actions des producteurs. Du coup, les producteurs ne contrôlaient plus l'organisation et estimaient que celle-ci ne privilégiait plus leurs intérêts. Cette situation n'a pas tardé à entraîner une déréglementation totale de la filière, qui a été mise en place très rapidement en 2001.

En Nouvelle-Zélande, les coopératives ne constituent nullement une préoccupation pour les pouvoirs publics dans la mesure où aucune autre forme sociétaire n'est autorisée à pénétrer sur le marché. Depuis le début de la réforme, on a constaté une sensible diversification des produits développés aussi bien au sein d'ENZA que chez d'autres concurrents, qui s'est accompagnée d'importants gains d'efficience. ENZA a fusionné avec la grande entreprise de commercialisation de fruits et de légumes, Turners et Growers, ce qui a permis d'accroître significativement le potentiel de commercialisation de ses membres. Les retombées positives ont donc été considérables tant pour ENZA que pour les autres acteurs de la filière, et personne ne doute plus désormais de la nécessité d'une réforme, alors qu'au départ, il a fallu aux pouvoirs publics faire preuve d'une forte volonté pour engager le processus.

Le **Président** souligne que la Hongrie a mentionné dans sa contribution que son adhésion à l'UE avait conféré aux associations de producteurs une importance croissante. Il demande au délégué de la Hongrie d'exposer quels sont les changements intervenus depuis l'adhésion de son pays à l'UE.

Le délégué de la **Hongrie** admet que la réglementation du secteur agricole s'est quelque peu améliorée depuis l'adhésion de la Hongrie à l'Union européenne et que le secteur est désormais régi par les règles générales de la Politique agricole commune. Ces règles ont remplacé, en la complétant, la réglementation nationale appliquée jusqu'alors. L'entrée dans l'UE a accru la concurrence, qui est aujourd'hui plus vive pour les agriculteurs et les autres acteurs du marché, ce qui s'explique en partie par l'absence de concentration horizontale au niveau des producteurs, mais également à une concentration verticale insuffisante. C'est la raison pour laquelle l'autorité hongroise de la concurrence estime que le rôle des associations de producteurs gagnera en importance à court terme, étant donné que les agriculteurs devront affronter la concurrence suscitée par l'entrée dans le marché commun. L'autorité de la concurrence s'est intéressée aux ententes sur les prix, par exemple dans le secteur de la boulangerie, et s'est ainsi rendue compte que les entreprises impliquées n'étaient pas conscientes des interdictions prévues par la loi sur la concurrence. Elle a donc organisé des formations en conséquence, comme le souhaitaient ces entreprises.

Le **Président** précise que dans le secteur agricole, les fluctuations des prix dépendent généralement de déséquilibres entre l'offre et la demande. On peut citer le cas de l'ail, par exemple, qui est un produit hautement saisonnier difficile à conserver plus de six mois. Dans sa contribution, le Taipei chinois explique que le déséquilibre entre l'offre et la demande peut rapidement perturber le fonctionnement du marché. C'est ainsi qu'en 1995, suite à une pénurie, le prix de détail de l'ail a été multiplié par plus de 10, alors que son prix au départ de l'exploitation était inférieur de 50 %. Par la suite, les importations et la nouvelle récolte nationale ont permis au prix de l'ail de retrouver son niveau initial. Le Président demande au délégué du Taipei chinois quelle parade pourrait être trouvée à ces difficultés.

Le délégué du **Taipei chinois** explique que la loi nationale sur la concurrence loyale ne prévoit pas d'exemptions pour le secteur agricole. En théorie, cette loi s'applique à toutes les activités du secteur. En ce qui concerne plus précisément le marché de l'ail, l'offre intérieure est insuffisante. La structure de la consommation est tout à fait caractéristique : avant le nouvel an chinois, la consommation d'ail est élevée, et c'est également l'époque où toute la production doit être récoltée et mise sur le marché, d'où une hausse vertigineuse des prix de l'ail en un laps de temps extrêmement court. Ce phénomène entraîne un écart de prix énorme entre le prix à la sortie de l'exploitation et le prix de détail, ce dernier étant deux fois plus élevé que le premier. La FTC (Commission de la concurrence loyale) a lancé une enquête pour déterminer si les distributeurs d'ail avaient formé une entente, mais faute de preuves tangibles, elle a décidé de ne rien faire.

Le Conseil de l'agriculture dispose d'un mécanisme de stabilisation des prix qui, grâce à un système matriciel, permet de déterminer les volumes d'ail importés. Les offices de commercialisation des produits agricoles cherchent à jouer sur les importations pour stabiliser les prix sur le marché intérieur. D'un point de vue théorique, cette mesure réglementaire n'est pas parfaite, puisque l'office de commercialisation opère une certaine forme de micro-gestion du marché de l'ail en déterminant les volumes d'ail en fonction du tableau des importations et du niveau des prix à l'importation. Ne disposant d'aucune preuve d'entente sur les prix, la FTC a opté pour une approche non interventionniste, laquelle constitue malgré tout une certaine forme d'intervention publique. Il appartient à la FTC et au Conseil de l'agriculture de trouver un équilibre entre la protection des producteurs d'ail et la stabilisation du prix de l'ail.

Le **Président** évoque ensuite le rapport établi par l'Italie. Il souligne que dans le secteur agricole, un aspect très important des groupements de ventes concerne les consortiums formés autour d'appellations d'origine ou de marques. S'ils ne vont pas jusqu'à grouper leurs ventes, les consortiums tentent de fixer eux-mêmes le volume total de la production. Cet aspect est mentionné dans la contribution de la Suisse et discuté dans celle de l'Italie. Il est probable qu'il existe également une concurrence entre marques et, par conséquent, qu'un consortium fixe les volumes de production, en particulier si le produit n'est pas différencié, ne devrait pas être considéré comme alarmant. On peut citer à cet égard l'exemple du *jambon de Parme* et du *jambon San Danielle*. Il n'existe en effet aucune distinction entre les différents producteurs, le produit est identifié en fonction de son utilisation courante, et il n'y a aucune différenciation entre les producteurs appartenant à ces consortiums. Le Président se demande si, compte tenu de cette concurrence entre marques propre à discipliner les producteurs, l'absence totale de différenciation devrait susciter ou non des craintes quant au bien-fondé de la fixation des quantités produites par les consortiums. Il demande aux délégués de l'Italie de présenter plus en détail l'affaire du *Parmesan* et du *Grana Padano*.

Le délégué de l'**Italie** fait observer que sur les 645 produits protégés par la réglementation européenne sur les appellations d'origine, 36 sont italiens. En fait, l'Italie et la France sont les producteurs les plus importants, au niveau de l'Union européenne, de produits bénéficiant d'une « appellation d'origine ». Au cours de ces dernières années, l'autorité italienne de la concurrence a mené un certain nombre d'enquêtes visant à s'assurer que les accords destinés à protéger une marque ou une indication géographique ne portaient pas atteinte à la concurrence. Pour la plupart, ces enquêtes ont visé les consortiums des filières

jambon et fromage. Dans ces deux filières, les produits protégés par une « appellation d'origine » jouent un rôle déterminant. A titre d'exemple, les exportations totales de *Parmigiano Reggiano* et *Grana Padano* (qui représentent le secteur du parmesan italien) ont progressé de 14 % en 2003 et de 89 % sur les cinq dernières années. L'évolution observée dans la filière jambon pour le San Danielle et le Parme est à peu près identique.

Les premières enquêtes menées par l'autorité italienne de la concurrence sur les activités communes dans le secteur agroalimentaire portaient sur la filière jambon et la filière parmesan ; elles ont été achevées en 1996. Elles ont été suivies en 1998 par une enquête sur le consortium Gorgonzola, le fromage bleu italien. Dans un cas comme dans l'autre, l'autorité de la concurrence était essentiellement préoccupée par la restriction de la concurrence intra-marque qu'impliquait la fixation du niveau de la production.

Ces deux consortiums ont pour objectif de promouvoir les produits qu'ils protègent, mais aussi d'en programmer et maîtriser la production et la commercialisation. C'est ainsi qu'entre 1991 et 1994, le consortium a restreint la concurrence en planifiant les volumes produits et en établissant des calendriers de production fixant un objectif annuel total maximum, ainsi que les quotas individuels de production pour chacun de ses membres. Par ailleurs, les deux consortiums se sont entendus pour faire en sorte de maintenir stable leurs parts respectives du marché (51 % pour le Parmigiano Reggiano et 49 % pour le Grana Padano). Ces restrictions ont été levées en 1995 car la production n'était alors limitée que par l'offre nationale d'une qualité de présentant des caractéristiques précises. Ce changement stratégie devait permettre de passer d'un système de planification des volumes à un système de contrôle de la seule qualité, jugé conforme au droit de la concurrence.

Un des principes retenus par l'autorité italienne de la concurrence concernant les activités communes des entreprises agroalimentaires, en particulier dans la filière parmesan, est que pour créer et préserver une marque, seule la qualité compte. Il est indispensable de limiter la concurrence intra-marque en fixant le volume de la production, et cette restriction est particulièrement préoccupante lorsque le marché visé correspond à la marque. Deuxièmement, lorsque les restrictions concernent la concurrence intra-marque, comme dans l'affaire du Parmigiano Reggiano et du Grana Padano, le problème de concurrence qui se pose est particulièrement grave et son analyse doit être extrêmement rigoureuse.

Ce qu'il est essentiel de retenir ici, c'est qu'il est indispensable de déterminer plus précisément à quel moment on peut faire intervenir des organismes de certification indépendants pour un contrôle de la qualité. En d'autres termes, la fixation des volumes de production est considérée dans ce cas comme une atteinte à la concurrence. Concernant la procédure ouverte fin 2003 contre un consortium créé pour protéger le Grana Padano, l'enquête portait sur la limitation des volumes et les restrictions de la concurrence intra-marque auxquelles était susceptible de conduire un mécanisme de collecte de fonds destiné à mutualiser le financement de la publicité. Cette procédure est toujours en cours, mais elle permet de mettre en évidence le principe suivant : une activité conjointe ayant pour but d'avoir un budget commun pour financer la publicité d'un produit donné est généralement proconcurrentielle, pour autant que le système de collecte de fonds ne restreigne pas la concurrence intra-marque en établissant une discrimination entre les membres du consortium augmentant leur production et ceux qui se contentent de remplir leur quota de référence.

Le **Président** ajoute que les parts de marché respectives du Parmigiano Reggiano et du Grana Padano sont relativement élevées alors même que le marché correspondant est plus large que ce que peut absorber un seul consortium ; ces deux produits se partagent en effet 50 % du marché chacun. La formation de tels consortiums relève d'une démarche volontaire en ce sens que, pour pouvoir utiliser le nom de Grana, il n'est pas indispensable de faire partie du consortium, un producteur pouvant en effet avoir sa propre production de Grana. La production de ce type de fromage ne passe pas obligatoirement par un consortium

et, en conséquence, des producteurs dynamiques ou plus efficients peuvent en produire et le distribuer en dehors du consortium.

Se tournant maintenant vers le représentant des Pays-Bas, le Président mentionne le fait que l'autorité néerlandaise de la concurrence rencontre régulièrement des représentants du ministère de l'Agriculture afin d'examiner à un stade précoce d'éventuels conflits entre certains aspects de la politique agricole et le droit de la concurrence, élément d'information que la contribution des Pays-Bas est la seule à relater. Celle-ci fait également état de l'affaire des crevettes, dans laquelle a été révélée une collusion entre pêcheurs et négociants néerlandais, allemands et danois pour restreindre les quantités de crevettes mises sur le marché. Le Président demande quelles sont les modalités de fonctionnement de ce système et si la procédure a été engagée par l'Allemagne, par le Danemark ou par l'UE.

Le délégué des **Pays-Bas** explique que l'enquête menée par l'autorité néerlandaise de la concurrence a débuté en 1999, après la découverte que les organisations néerlandaises, allemandes et danoises de pêcheurs se réunissaient régulièrement avec les négociants en crevettes. Au cours de ces réunions, il était décidé des prix minimums payés aux pêcheurs par les négociants, de même que la quantité maximale de crevettes que les pêcheurs étaient autorisés à capturer chaque semaine. Aux dires des pêcheurs, ces accords étaient indispensables pour pouvoir rester en activité, faute de quoi ils auraient fait faillite en raison des surcapacités structurelles. Au cours de l'enquête qu'elle a conduite, l'autorité néerlandaise de la concurrence est restée en contact étroit avec les autorités de la concurrence de l'Allemagne et du Danemark.

Le délégué fait observer que la Commission européenne a abondé dans le sens de l'autorité néerlandaise de la concurrence, en estimant que ces accords n'entraient pas dans le cadre des exemptions prévues dans le Règlement 26, autrement dit les accords de fixation des prix et de limitation de la production sont contraires à la réglementation. In fine, les négociants en crevettes et les organisations de pêcheurs ont été condamnés à une amende s'élevant au total à près de 40 millions d'euros.

Le délégué de l'**Allemagne** ajoute que l'affaire des crevettes a également donné lieu à une enquête en Allemagne, mais que la procédure est toujours en cours. Il s'agit là de la première affaire d'entente ayant bénéficié du système d'échange d'information, dont l'utilisation devrait se généraliser au sein du Réseau européen de la concurrence (ECN – European Competition Network).

Le délégué de la **Commission européenne** complète ces propos en indiquant que la Commission n'était pas impliquée dans la mesure où il s'agissait d'une affaire nationale. Il ressort de cette affaire qu'il faudrait envisager de proposer une nouvelle réglementation visant à réformer le marché commun de la crevette et des produits de la mer, laquelle clarifiait le point auquel les règles concurrentielles sont applicables aux accords internationaux entre les organisations de producteurs.

Le **Président** se tourne vers le délégué du Mexique et indique que dans sa contribution, le Mexique souligne l'existence d'un très important marché de gros pour les fruits et légumes, dont le fonctionnement tout à fait efficace a permis de stabiliser les marchés agricoles et de faire accéder les agriculteurs à des marchés plus vastes, et d'éliminer de nombreux échanges opérés au sein du secteur, parfois au détriment du producteur initial. Il demande au délégué du Mexique si l'intense activité de sensibilisation du secteur agricole a été décidée par l'autorité de la concurrence ou si elle a été demandée par le gouvernement ou le Parlement, et enfin quels ont été les résultats obtenus jusqu'ici.

Le délégué du **Mexique** précise que l'un des objectifs de la campagne de sensibilisation menée par la Commission est d'encourager la concurrence dans tous les secteurs d'activité. La Commission a été très active et a généralement émis des avis très utiles pour la conception et la mise en œuvre de la réglementation. En ce qui concerne le secteur agricole, la Commission est compétente pour statuer sur les

entités impliquées dans le processus de privatisation : installations de stockage, terminaux ferroviaires et ports importants pour la compétitivité du secteur agricole.

Il existe à Mexico un grand marché de produits alimentaires qui doit répondre aux besoins de quelque 20 % de la population totale du Mexique, à savoir l'agglomération de Mexico. Ce marché soulève néanmoins de gros problèmes de concurrence, car il est concentré aux mains de quelques-uns des propriétaires de l'établissement. Certains producteurs se sont montrés efficients, en particulier les gros producteurs, mais les petits producteurs mexicains ne peuvent accéder directement à ces marchés. Parmi les grandes tendances observées, on constate que la part de l'agriculture dans le PIB a spectaculairement chuté au cours des 10 dernières années (puisqu'elle représentait 8% du PIB en 1990, contre seulement 4 % en 2001), un recul essentiellement imputable à l'ouverture du marché aux importations et à la baisse des prix. En revanche, la part de l'agriculture dans l'emploi a régressé de 24 % à 20 % seulement.

Quelque 50 % des terres agricoles sont détenues par 15 % des producteurs, dont les exploitations sont de taille relativement grande et dotées d'équipements ultra-modernes, de sorte qu'ils ont accès à tous les marchés et ne risquent pas d'être mis en difficulté par des distributeurs disposant d'une puissance d'achat. Par contre, les petits producteurs n'ayant aucun accès aux marchés sont très nombreux. Ils peuvent cependant se regrouper et créer des entreprises, les « sociétés intégrées », qui commercialiseront leur production. L'autorité mexicaine de la concurrence ne considère pas que ces entreprises portent atteinte à la concurrence dans la mesure où tous leurs membres sont soit le statut de partenaire, soit celui d'actionnaire. A l'heure actuelle, le secteur agricole compte 210 sociétés intégrées qui, bien que de taille relativement faible, disposent d'un important pouvoir de marché. Compte tenu de leur nombre, elles devraient permettre aux petits producteurs d'accéder aux marchés et de résister au pouvoir des intermédiaires.

Le délégué du Mexique évoque également plus en détail la question de l'expropriation des sucreries au Mexique. Il y a deux ans, le gouvernement mexicain a exproprié 27 sucreries qui assuraient 50 % de la production nationale de sucre. Cette mesure avait pour objectif de permettre aux pouvoirs publics de commercialiser une partie de la production sur le marché intérieur. Il fallait toutefois que cette procédure soit autorisée par la Commission de la concurrence, qui a statué en faveur de cette opération. Elle a en effet jugé que le marché intérieur était un marché pertinent. L'autorisation d'exproprier a été accordée car il était urgent de stabiliser ce marché.

Débat général

Le délégué des **Etats-Unis** revient sur les paragraphes 16 et 62 du document établi par le Secrétariat. Le paragraphe 16 indique que l'homogénéité des produits agricoles a pour conséquence des profits relativement bas. Le point de vue des Etats-Unis est que si l'homogénéité entre effectivement en ligne de compte, il existe cependant d'autres facteurs. Dans le secteur agricole, la productivité s'est accrue sensiblement plus vite que la demande, ce qui s'est traduit par une augmentation de la production. Face à cette situation, les solutions adoptées par les différents pays varient. Une des solutions envisageables consisterait à diminuer la production en incitant davantage de producteurs à sortir du marché. Aux Etats-Unis, aucun programme réglementaire n'empêche cette éventualité. Il existe divers programmes réglementaires incitant à rester en activité et si à un moment donné, on assistait à une sortie massive du secteur, il est probable que l'équilibre de l'offre et de la demande serait rompu et que les profits pourraient augmenter, incitant certains agriculteurs à revenir dans le secteur. On trouve au paragraphe 62 un autre point lié à cette question, à savoir ce qui incite ou non à la formation d'ententes entre agriculteurs. Les mesures décourageant la sortie du secteur, tout au moins du point de vue du ministère américain de la Justice, tendent à faire obstacle à ces ententes car dès lors que la production remonte, les producteurs essaient de contourner l'entente.

Le **Président** clôt la table ronde en faisant observer que celle-ci n'a pas examiné les aspects les plus polémiques de la politique agricole, en l'occurrence le soutien aux revenus et le contrôle des prix, mais que de nombreuses contributions y ont fait référence et que l'on a plus ou moins abordé la question des effets restrictifs des contingents d'importation et des exemptions à l'exportation. Deux thèmes avaient été retenus pour cette table ronde, la situation de monopsone et le groupement de ventes. En ce qui concerne les achats en situation de monopsone, les débats ont permis de confirmer que dans la plupart des cas, il n'y a infraction au droit de la concurrence que dans les cas où le vendeur dispose également d'une puissance de marché. De façon générale, les autorités de la concurrence ne s'intéressent pas aux questions de monopsone, car elles estiment que s'il n'y a pas de puissance de marché, il s'agit alors simplement d'une question de redistribution et que la concurrence n'est pas en jeu.

Le rapport établi par les Pays-Bas mentionne par ailleurs que la situation de monopsone tire à la baisse le prix des facteurs de production. Il est peu probable que ce soit le cas à long terme, et il est relativement peu courant qu'un fournisseur en vienne à quitter le marché. Les affaires de puissance de marché sont très rares, non seulement dans le secteur agricole, mais aussi de façon générale.

Le problème est différent dans le cas des groupements de ventes. C'est ce qu'a mis en évidence l'exemple des coopératives en Norvège et le fait que, dans certains pays où étaient pratiqués des groupements de ventes, en particulier à l'exportation, cette démarche s'est révélée inefficiente, y compris pour les agriculteurs. Dans ce cas, et si la réglementation ne protège pas ceux qu'elle est censée protéger, il est plus facile d'y remédier. L'affaire ENZA montre que la suppression de ces restrictions a certes permis à l'entreprise d'accroître ses parts de marché à l'exportation, mais elle a aussi offert la possibilité aux concurrents d'ENZA de pénétrer sur le marché, ce qui a été globalement bénéfique pour le secteur agricole.

Enfin, les consortiums créés autour de la qualité ont très tôt donné lieu à une coopération internationale, car l'USFTC s'inquiétait également de voir que la maîtrise des volumes entraînait une hausse des prix trop importante du jambon de Parme et du San Danielle sur les marchés des Etats-Unis. Ces consortiums posent problème dans la mesure où les restrictions quantitatives risquent finalement de s'accompagner d'autres moyens de contrôle des facteurs de production et où, parfois, les normes de qualité peuvent aller au-delà de ce qui est strictement nécessaire. Néanmoins, les autorités de la concurrence ne disposent ni des outils, ni des capacités analytiques pour pouvoir déterminer si le contrôle des facteurs de production est réellement essentiel pour la qualité ou non.

En conclusion, le Président estime qu'il existe de nombreuses possibilités d'application des règles de la concurrence aux marchés agricoles, entre autres dans le cas des groupements de ventes et des consortiums axés sur la qualité. Aussi les autorités de la concurrence ne manquent-elles pas d'arguments pour militer en faveur de la réforme.