A Review of Competition Provisions of the Treaty of the European Union and National Legislation and how these Impact upon the Development of Agricultural Co-operatives and their Structures

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As early as 100 years ago the conflict started in USA between competition provisions and the efforts to promote and strengthen agricultural co-operatives to the benefit of farmers. The conflict resulted in the Capper-Volstead Act from 1922 - the *"Magna Charta of Agriculture"* and later in a similar legislation in EU and in the national legislation in most EU Member States. But like the situation in USA, the original assumptions related to these acts have not always held over time and the question is if they offer any kind of protection, privilege or advantage to farmer co-operatives in today's economic environment.

Structural adaptation of agricultural co-operatives to the more intensive international competition and a market with free trade is necessary and very important for European agriculture. Such efforts should not be hindered by competition authorities with little understanding of the special characteristics of farm co-operatives. On the other hand agricultural co-operatives should not use practices which go beyond to what is necessary for a well working member organisation in combination with modern business practice and with due consideration to the specific characteristics and needs of an agricultural co-operative.

Articles 81 and 82

The competition provisions of the Treaty (now articles 81 and 82) were set up in 1957 and have not been changed since then. In the meantime they have been copied in national legislation in most EU Member States and a still closer collaboration takes place with national provisions and administration of these articles based on the interpretations from the Commission and the Court of Justice of the European Communities (the Court).

Article 81(1) prohibits agreements, decisions or practices which may affect trade between Member States and which have as object or effect the prevention, restriction or distortion of competition within

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the common market. Article 82 contains a ban against improper advantage of a dominant position.

The Commission has proposed the administration of EU's competition rules to be moved to the national competition authorities[1]. Such development is considered inevitable because the Commission is drowning in competition cases, and because the Member States by now must be assumed to be familiar with the EU regulations. However, the delegation is problematic and raises serious questions, especially as it may jeopardise the legal protection of the companies in the EU. The delegation will probably contribute further to the combination and interaction between community and national competition legislation and administration.

Regulation 26/62

According to the Treaty, the rules of competition should apply to the production of and trade with agricultural products only to the extent determined by the Council within the framework of and with due account being taken of the objectives of the common agricultural policy. This was an important element in the very complex discussions in the early sixties about the agricultural policy which included the question of replacing existing national market organisations with common market organisations, the different national market structures, free access for French and Dutch agriculture to the German market, etc.

The rules of competition were then defined in Council Regulation 26/62 applying certain rules of competition to production of and trade in agricultural products[2] (in the following mentioned as Regulation 26). This regulation was adopted together with the first common market regulations.

Regulation 26 states that the Treaty competition rules shall apply to the production of and trade in agricultural products. The general rules of competition applying to enterprises were then extended to agriculture. This relates to the implementation of articles 81 and 82, in particular all rules of procedure. Hence, Regulation 26 basically does not make any distinction between agriculture and the other economic sectors[3].

There are three derogations[4] mentioned in the regulation, which relate to article 81 (agreements between enterprises). There is no derogation with regard to article 82 (improper advantage of a dominant position). Granting derogation under article 82 indeed would have legalised the misuse of a dominant position in certain cases.

The first derogation provided under Regulation 26 relates to agreements, decisions and practices that form an integral part of a national market organisation. The second derogation applies to

agreements necessary for attainment of the objectives of the CAP set out in Article 33[5] of the Treaty. That description implies that it must be demonstrated that the agreement is necessary for attainment of all those objectives[6]. These two derogations are now of historical importance.

As a third derogation the second sentence of article 2 (1) adds that in particular Article 81(1) "shall not apply to agreements, decisions and practices of farmers, farmers' associations, or associations of such associations belonging to a single Member State which concern the production or sale of agricultural products or the use of joint facilities for the storage, treatment or processing of agricultural products, and under which there is no obligation to charge identical prices, unless the Commission finds that competition is thereby excluded or that the objectives of Article 39 of the Treaty are jeopardised".

The provision forms a legal derogation to article 81 (1). It sets out that article 81 (1) is inapplicable, which differs from the normal legal exemption in article 81 (3). As an agreement is not prohibited by any provision, there is no point in notifying the Commission and it does not presuppose any authorisation. The provision also reverses the burden of proof. It is up to the Commission and not to the enterprise to prove that the agreement put at stake the attainment of the objectives of the CAP or that there is no free competition any longer. As the wording "co-operatives" in lack of common legal definition in the Member States could create confusion and misuse, the text describes just the content of the agreement.

It was actually Germany which insisted that agricultural co-operatives were exempted from the ban on cartels, as in article 100 of the "Gesetz gegen Wettbewerbsbeschrankungen" (law against the restraint of trade, which after the war, like the German cartel law, was drafted after inspiration of the American provisions). The text of the exemption for co-operatives in Regulation 26 is finally almost identical to that of article 100 GwB. This background and the wording of the derogation illuminate the interpretation problems until the Court stated in the "Coberco-case" that it was to be considered as an independent derogation.

The Commission and most national competition authorities are not very much in favour of such special derogations or exemptions for agriculture motivated by agricultural policy considerations. They don't like to see their possibilities limited by other disposals whatsoever. The next problem is that competition rules deal with enterprises. A co-operative is first of all an association of farmers and the co-operative enterprises owned and run by the association of farmers is to consider as an instrument for the association to fulfil the co-operative purpose of the farm association.

Agreements between farmers and agricultural co-operatives are not in conflict, and are therefore by this derogation exempted from the ban on cartels, unless the Commission decides otherwise. In this case the Commission has to provide positive proof that competition has been hindered or that the aims of article 33 are endangered.

The condition, that the producers must be within the same Member State, becomes still more problematic and there are open questions in this respect. This condition was introduced in connection with the first common market organisations, which replaced the national market organisations, and the provision should be seen in the light of this. The important factor is that agreements and decisions within the co-operatives and between co-operatives are exempted from the prohibition of anti-competitive agreements and decisions. In this connection it should not be of any importance whether the members are from only one Member State. On the contrary the integration over the earlier frontiers is the most important purpose of EU and the internal market. It is also hoped that the discussions about the statute for the European co-operative might give a better understanding of this aspect.

Cases

There have only been few decisions by the Commission and the Court in relation to Regulation 26, which was consistently interpreted restrictively. The first derogation dealing with national market organisations gradually lost its importance as the common market organisations were established[7]. In the Sugar case[8], the FRUBO case[9], the Cauliflower case[10], the Aalsmeer-1 case[11], the Maize Seed case[12] and the MELDOC case[13] the Commission found that the practices in question did not form an integral part of a national market organisation. The Court of Justice dismissed the appeals filed by the parties involved in the Sugar case, the FRUBO case and the Maize Seed case.

According to the FRUBO judgement, all five objectives stated in Article 33 of the Treaty must be fulfilled for the second derogation to be applicable. In the MELDOC case, where five major Dutch dairy enterprises formed a cartel controlling the supply of liquid milk to the home market, the Commission found that the common market organisation provided the means necessary to achieve the objectives in Article 33, for which reason separate private arrangements were superfluous. The decision does not serve too well as a guideline, as the facts of the case were rather special. It appears that the cartel was of a rather aggressive nature and

directed against dairies in the neighbouring states. The fines imposed were 6.5 million ECU.

In the Champignon (mushroom) case[14], the Commission stressed the existence of a common market organisation and referred to the preamble of Regulation 26, stating that the second derogation shall only be applicable to the extent that an application of Article 85(1) would jeopardise the realisation of the objectives set down in Article 33 ... The agreement in question "does not form part of this scheme in any manner, no matter how the case is assessed". These views were repeated in the Cauliflower case and in the Maize Seed case.

In the MELDOC case, the Commission stated explicitly that the derogation in the second sentence is inapplicable "as the two conditions for granting an exemption under Article 2(1), first sentence, are not fulfilled". It was stated that the second sentence deals with a specific form of the arrangements covered by the first sentence and presupposes that the case fulfils one of the two conditions laid down in the first sentence for granting an exemption thereunder and that the case presents the characteristics described in the second sentence. This does not correspond with the actual wording of the second sentence. But it reflects the aspirations of the Commission at that time. The wording used here is an almost exact repetition of the wording used in the decision in the Milchforderungsfond[15] case the year before.

According to the Commission agriculture was then not a sector with interests meriting special attention in competition law and only a limited scope was intended for Regulation 26. The "second sentence" was not a separate provision, but an integral part of the provision in the first sentence and arrangements outside the scope of the Market Organisations should not be accepted. [16]

In the FRUBO-case the Court stated that only the conditions in the first sentence are relevant for the application of the exemption in Regulation 26. The enterprises concerned were importers and not agricultural enterprises, so that the third derogation stayed out of the picture. The Court agreed with the Commission for other reasons that the non-applicability of Regulation 26 was beyond doubt, so that it did not have to go into the relation between the derogations and rejected the claim.

In the Dutch Rennet case[17] the Commission found that Regulation 26 was inapplicable as rennet and colourings were not listed in Annex II of the Treaty. The Court of Justice dismissed an appeal by the co-operative and refused to consider a plea that rennet was a subsidiary material in the production of cheese. The limitation to agricultural products listed in Annex II of the Treaty was

also taken literally in the Danish fur case[18]. In the Armagnac[19] and Cognac[20] cases, the Commission found that these two products were industrial products.

While the "Danish Fur case"[21] was pending, the Director-General of DG Competition, stated that the Commission was obliged to omit any discrimination between co-operatives and other forms of enterprise. Nevertheless, the provisions in Article 2 of Regulation 26 "offer vast possibilities for taking into account the specific role which these types of co-operatives play within the framework of the common agricultural policy".

In a case involving the Dutch dairy co-operative CAMPINA, the Commission found that the obligation to pay a certain resignation fee constituted a substantial barrier to the members wanting to leave. The Commission found the derogations inapplicable as the obligation were not necessary for the achievement of the objectives of Article 33, but indeed were a hindrance in this respect. However, when the co-operative proposed a modification of the statutes, the Commission stated in a press release[22] that the restrictions were acceptable and that the restrictions of competition in favour of a co-operative, which is not in a dominant position in the market, are covered by the special exception provisions provided for by Regulation 26. There was no explanation to the exact distinctions between the two opposite opinions of the Commission in the same case.

The CAMPINA press release, the correspondence between the Commission and COGECA, the events around a new Aalsmeer-11 case (where the same ambivalence appeared) seem to signify a change in attitude in the Commission. The experience seems to be that patient collaboration with the Commission was more productive than confrontations at a purely legal level.

Judgement of the Court in the Coberco-case

The Judgement of the Court in the Coberco-case[23] seems important to the question if Regulation 26/62, art 2(1), second sentence, still apply. The court stated that:

- organising an undertaking in the specific legal form of a co-operative association does not in itself constitute anti-competitive conduct. This legal form is favoured both by national legislators and by the Community authorities because it encourages modernization and rationalization in the agricultural sector and improves efficiency ... However, it does not follow that the provisions in the statutes governing relations between the association and

its members, in particular those relating to the termination of the contractual link and those requiring the members to reserve their milk production for the association, automatically fall outside the prohibition in Article 81(1) of the Treaty.... In order to escape that prohibition, the restrictions imposed on members by the statutes of co-operative associations intended to secure their loyalty must be limited to what is necessary to ensure that the co-operative functions properly and in particular to ensure that it has a sufficiently wide commercial base and a certain stability in its membership.[24]

- a combination of clauses such as those requiring exclusive supply and payment of excessive fees on withdrawal, tying the members to the association for long periods and thereby depriving them of the possibility of approaching competitors, could have the effect of restricting competition.
- Such clauses are liable to render excessively rigid a market in which a limited number of traders operate who enjoy a strong competitive position and impose similar clauses, and of consolidating or perpetuating that position of strength, thereby hindering access to that market by other competing traders.
- With regard, finally, to inter-Community trade, suffice it to note that Community trade may be affected as a result of a combination of several factors which, taken in isolation, would not necessarily be decisive.
- An agreement between undertakings is to be regarded as liable to affect trade between Member States if in the light of certain considerations of law or fact it is capable of influencing the pattern of trade between Member States directly, indirectly, actually or potentially in a manner which may prejudice the aims of a single market between States.[25]

Concerning then the conditions the agreements must satisfy if they fall under Article 81(1) in order to qualify for the third derogation provided for by the Regulation 26 the Court stated:

- the actual agreement "may fall within the derogation provided for in Regulation No 26 only if the agreement providing for them concerns a co-operative association belonging to a single Member State, does not cover prices but concerns rather the production or sale of agricultural products or the use of joint facilities for the storage,

> treatment or processing of such products, and finally does not exclude competition or jeopardise the objectives of the common agricultural policy".

By this the Court stated for the first time and contrary to the earlier position of the Commission that the third derogation still exist and has to be read according to its wording. The Court is also very close to underline that the derogation presupposes anti-competitive practices, and whether or not a situation of "workable competition" also continues is less relevant. The derogation is partly based on agricultural policy considerations which prevail over the competition policy.

Danish competition legislation

The Danish national competition law was redrawn in 1997 as a copy of the European rules. Practice now follow the European system as a "one-shop-stop-system" ie the national system only deals with cases not dealt with by the European Commission. Regulation 26 is respected also in the appreciation of national cases. National merger control was added in 2000 motivated by the mergers of the bigger agricultural co-operatives (see below). As a principal rule, merger control was introduced for companies with a minimum Danish turnover of DKK 3.8 billion. The competition authorities must approve mergers and disputes concerning conditions may be brought before the courts.

At the same time the geographic market partitioning no longer only covers the Danish market. The product-market partitioning is determined on the basis of supply and demand and potential competition within the entire relevant market (which may be the entire European Union).

After the new act came into force, the Danish Competition Authority considered a number of by-laws and agreements within the co-operative sector. In most cases, a so-called "non-intervention declaration" was issued. In some cases co-operatives were ordered to reduce the withdrawal notice and the time limit for repayment of capital to members in case of resignation of membership.

The merger between Danish Crown/Vestjyske Slagterier

In 1999 the Commission accepted a merger between the two Danish co-operative slaughterhouses Danish Crown/Vestjyske Slagterier[26] on condition of certain commitments "proposed by the parties". The Commission found that the concentration subject to

certain commitments would not create a dominant position in the Danish market for the purchasing of live pigs for slaughtering and sale of meat sold through supermarkets. The parties slaughtered approximately 16 million pigs and 500,000 cattle per year and the company created (Danish Crown) was the largest slaughterhouse in Europe and the world's largest pork exporter.

The commitments concerned the obligations for the members, provision of slaughter capacity and the collaboration in the Danish slaughterhouse association "Danske Slagterier" and certain joint ownership in daughter companies.

The pig producing members should be permitted to supply up to 15 per cent of their weekly supply to competitors to the merged entity and they should be allowed to resign from the co-operative at 12 months' notice to expire on the last day any month. The parties "offered" to slaughter a certain weekly number of pigs for competitors active on the Danish market and to sell a pig slaughterhouse. The Constitution of "Danske Slagterier" should be changed in order to give a better protection to minorities and the parties should have no coordination of prices.

The Commission's handling of a merger between co-operatives

It is positive that the Commission's handling of mergers is subject to specific time limits so that such cases are not unnecessarily protracted. But if a case is problematic, the undertakings or the co-operatives seems left to the tender mercies of the Commission. The Commission can make arbitrary conditions for accepting the merger. There is a possibility of going to the European Court of Justice, but this is a time-consuming procedure that not many wish to make use of when they are in a situation where they would like a quick clarification. It is positive, however, that the European Court of Justice is in the process of establishing a fast track procedure so that the time it takes to consider a matter is reduced to approximately 12 months.

The question is if the commitments - "offered by the parties" - are adequate in the specific situation of the merger of two co-operatives. As stated by the Court in the Coberco-case it still seems to be a fact that the farmers' co-operatives enjoy a derogation from article 81 (1) of the Treaty and that the Commission only can interfere in the third derogation of Regulation 26 article 2 (1) if competition is excluded or the aims set out in article 33 of the Treaty are being endangered. If the Commission considers that the third derogation does not apply in a particular case and that article 81(1) is applicable, the Commission should comply with the procedures contained in article 2(2) of Regulation 26. This procedure is not relevant when the

parties "offer themselves" commitments to eliminate a concern flowing from a concentration.

But in contra in the context of a hypothetical merger case where the parties do not themselves offer commitments of a kind relevant to Regulation 26 the Commission would have to comply with the procedure contained in article 2(2). The third derogation should then also apply in the context of the merger control regulation and should thus not be disregarded when a merger between two or more farm co-operatives in the sense of Regulation 26 are dealt with according to the merger control regulation. This regulation seems in consequence to imply that the merging co-operatives in the sense of Regulation 26 have the choice between a refusal of the merger or freely to give up the benefits of the derogation contained in the second sentence.

The merger between MD-foods in Denmark and Arla in Sweden

MD-foods in Denmark and Arla Ekonomisk förening in Sweden decided in December 1999 to establish the common co-operative Arla Foods with effect from April 2000. The merger created the biggest dairy company in EU with 7 billion kg milk a year and a turnover of 4.9 billion Euro and as such just below the limit for Commission approval of the merger.

MD-Foods was created by successive mergers of co-operative dairies during 30 years and a preceding merger in March 1999 with the other important Danish co-operative dairy Kløver Mælk. The Danish competition authorities had accepted this preceding merger on the condition that the milk producing members should be permitted to supply up to 20 per cent of their two-weekly supply to competitors to the merged entity. A part of the transformation capacity corresponding to 180 million kg milk yearly had to be sold to a competitor and competitors were given access to the distribution system of MD Foods.

The national competition authorities in Denmark and Sweden accepted the new merger and checked on an ongoing basis whether Arla Foods complied with the promises required from the dairies in connection with the two mergers effected in 1999 and 2000. The orders from the Competition Authority concerned divestment of two specific (operational) dairy plants, access to split supplies for the co-operative members and competitor access to the distribution system of Arla Foods. In April 2001, the Competition Authority announced that Arla Foods' sale of the two dairies to serious competitors had been approved, and that the co-operative's agreements with the Competition Authority had now been fulfilled.

Furthermore the development of prices was followed and

probably will be followed very closely on the Danish and the Swedish market in the future. Here the question arises to what extent national authorities are allowed to interfere in the prices on national markets, when these prices are supposed to be a result of an EU market regulation.

Milk Marque

In the request for a preliminary ruling of the European Court of Justice in the "Milk Marque case" some very important questions are to be answered by the court[26] concerning the possibilities for the competition authorities in a Member State to intervene in the EU-market organisation and affect the prices for an agricultural product:

- Are ... Council Regulation 26/62/EEC ... to be interpreted as precluding a Member State from applying national laws such as the Fair Trading Act 1973 and the Competition Act 1998 to the manner in which producers of milk choose to organise themselves into co-operatives and conduct themselves in regard to the sale and processing of their milk ...
- Are Articles 28 to 30, EC ... and Articles 49 and 55 ... to be interpreted as precluding a Member State from applying national laws such as the Fair Trading Act 1973 and the Competition Act 1998 in such a way as to prohibit a milk producers' co-operative which has been found to enjoy market power from sending milk produced by its members to be processed by contractors on its behalf, including in other Member States, as a step being taken by the co-operative tor the purpose of exploiting its position in the market in its favour?
- Where large vertically-integrated dairy co-operatives exist and are permitted to operate in other Member States, is the general principle of non-discrimination, whether independently or as given specific effect in Articles 12 and/ or 34 EC (ex Articles 6 and 40), to be interpreted as precluding a Member State from applying national laws such as the Fair Trading Act 1973 and the Competition Act 1998 to prohibit a milk producers' co-operative which has been found to enjoy market power ....

Governments in other Member States might be submitted to a pressure from consumers and trade to introduce corresponding restrictions for co-operatives if the answers of the Court in this case is negative. National decisions will then affect prices on the

European market and one can ask if we then have an internal market. It is very difficult to see then how European authorities decide which measures are to be taken to pursuit the objectives of the Common Agricultural Policy (CAP) and the common organisation of the market and how they can "exclude any discrimination between producers or consumers within the Community"[29].

EU provisions related to agricultural market structure

EU tries in different ways to create better market structures and to leave some responsibility for market interventions to producer organisations. Such efforts influence indirectly the application of competition rules as it illustrates the clear political wish to create more powerful structures and to give agriculture a stronger competition position.

The community system for aids for the transformation and marketing of agricultural products has been in force since the start of the CAP[29]. Probably most agricultural co-operatives in EU have been in contact with the system, and the aid scheme has for many co-operatives been an important incentive to investments and rationalisation of structures.

The Commission services are working on a white book on co-operatives. It is to be hoped that this will describe the basic idea and the importance of the co-operative organisation in EU. It could contribute to a better understanding of co-operatives and to assure that due consideration is taken hereto in future community legislation. This implies that co-operatives must be flexible and structured according to the members' needs and able to adjust to the competition and other challenges from outside. Consideration should also be taken to the large variety both regarding size, structure and member relations among the European co-operatives. It is hoped that the white book will underline the need for competition authorities' acknowledgement and respect of the special nature of the co-operatives, especially the bylaw-based relationship between the member and the co-operatives.

Producer groups

The common market organisations have in few cases provisions for marketing structures (fruit and vegetables[30], fishery some market organisations of less importance) where producer organisations are encouraged and given special functions in the market regulation.

The Commission now finds it necessary to strengthen the position of producers in the market for fruit and vegetables. The

Commission underlines in a recent report[31]:

> The role of an association of producer organisations is at present limited to establishing, implementing and submitting operational programmes, while they could represent a gradual and flexible solution to overcoming the problem of the economic dimension limitation of many producer organisations. This would mean that associations of producer organisations would have to be granted the same legally established rights as its constituents, in order to comply with competition rules. The question would then be whether and how this process should be supported.

EU also promotes producer groups for specific sectors in some countries[32] and members of these groups must have the obligation to deliver all his production of the relevant product to the group. The producer group shall not hold a dominant position in the common market, unless this is necessary for the pursuit of the objectives laid down in article 33 of the Treaty.

It seems logic to allow farm co-operatives to apply the same instruments as the producer groups in order to obtain a sufficient strength and negotiating power, to apply an exclusive delivery obligation. The provisions define the relevant market as "the common market" which seems to be in contrast to the definition applied by the Commission in merger decisions.

The European co-operative statute

The idea of a statute for "European co-operative society" (SCE) which will remove barriers to the formation of transnational co-operatives as a parallel to the statute for a European Company (SE) has been under consideration since 1968. The adoption of both statutes has until now been blocked by disagreement regarding employees' representation in the deciding bodies, which was then settled for the SE-statute by the heads of state and governments at the summit in Nice in December 2000.

The Swedish presidency submitted in April 2001 a new proposal in line with the SE-statute. The purpose of the statute for the European Co-operative Society (SCE) is to provide a common European legal and voluntary basis for transnational co-operatives.

The statute is important for co-operatives in Europe and for the recognition of the importance of co-operatives in general. It will probably be appropriate for transnational co-operatives to use the statute, which will also manifest the existence and acknowledgement of co-operatives on a transnational basis. It is

necessary that the statute is voluntary and flexible tool that is applicable to the various types of co-operatives in Europe.

The statute manifests indirect the necessity for co-operatives to create transnational mergers in today's economic environment, which might also facilitate the competition authorities' acceptance of such mergers. At the same time it might give a better understanding to the fact that integration between Member States is necessary and that it is not possible any longer to maintain the condition in the third derogation in Regulation 26, that the producers must be within the same Member State.

Some might see the statute as a first step towards a harmonisation of national legislation for co-operatives. Opposite to other European countries, Denmark has no national legislation for co-operatives. Danish co-operatives still find it very important to have the possibility and freedom to adapt to new challenges without unnecessary bindings and bureaucracy. They are only regulated by the bylaws and traditions and are convinced that the independence has developed a culture of awareness and self-responsibility among members, which has benefited the adjustment and development.

The text is very detailed with specific dispositions concerning the co-operatives objective, liability, relationship to national legislation, shares and other capital issues, merger, member governance, financial matters, annual account and audit. There are in the proposal detailed regulations regarding the structure and the activities of member governance. Most of these regulations are probably fulfilled by existing co-operatives in the Member States, but detailed regulations in this field seem not to be necessary from a Danish point of view.

Conclusions

According to the first commissioner for agriculture, Mansholt, European agriculture should seek to achieve a marketing structure that corresponds to the demand side. The supply side and the demand side could then be regarded in the way same as a football match. To have a good match the strength of the two teams had to be equal. Competition and the market would not work unless the supply side adapted to the structure of the demand side.

This might seem even more relevant today. There is no doubt that more transnational co-operatives will take place in the future, but the question is whether there will be co-operatives among the leading undertakings in the individual trades when the industries in the EU member countries are gathered together. Development of the market structure and competition rules are close related and

should be both seen in the view of creating a modern and competitive agriculture.

There could be a better understanding of the fact that agricultural co-operatives based on commercial and economic considerations are the best way for the farmers to help themselves in a future market with more liberalisation and international competition. Competition authorities should also realise that co-operatives are important for the competition situation. It gives market players with another background and a better connection in the whole chain form "table to stable" with better possibilities for the farmers to adapt to the fluctuations of prices and other changes in the market.

Considering the small number until now of cases compared to the vast complex of agricultural marketing structures in the Community, the Commission have not shown the agricultural co-operatives much interest and the cases taken up by the Commission have often been conflicting national interests[33]. The conclusion may be that the competition provisions and authorities are not the problem imagined by the agricultural co-operatives, and that the responsibilities of the Commission and the Court of Justice towards the continued integration within the Union should not be underestimated.

European and national competition rules have in some cases prevented mergers or a more optimal organisation of agricultural co-operatives. Probably also a certain number of cases have been given up by the parties because of reservations or fear of bureaucratic and time-consuming administration. Necessary commitments "offered by the parties" in order to get acceptance from the authorities might in some cases seem unnecessary or very little relevance. Another point of criticism is the Commission's and national authorities' definition of the relevant market which seems not adapted to the existence of the internal market.

But the structures of agricultural co-operatives should be adapted according to the development of the market and the competition situation. Competition provisions and their administration must then not hinder a sound development of agricultural co-operatives in the future. The question is if competition authorities and legislation will have a good understanding of these needs or in the future and how the co-operatives themselves can draw attention to their special characteristics and special demands on the legislation on competition.

The experience from the Commission's handling of the cases mentioned is that knowledge of co-operatives could be better. But at the same time it is the impression that mergers between co-operatives are dealt with on easier terms than mergers between private

undertakings. This establish precedents and will to some extent have a rub-off effect on the decisions reached by some of the national competition authorities in Member States.

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Notes

1 COM(2000) 582 of 27/9/2000
2 Regulation No 26 of the Council of 4 April 1962, OJ English Special Edition 1959-62, p129.
3 Agricultural products are defined in annex II to the Treaty.
4 There have been long discussions if there are two or three "exemptions" of which the last often is mentioned as 'The co-operative exemption", which according to the Commission, was included in the second one. The Court stated the Coberco case that there are three "derogations". (mentioned later).
5 Article 39 in the preceding Treaties.
6 Case 71/74 Frubo v Commission paragraphs 24, 25 and 26.
7 Only the French production and marketing rules concerning new potatoes were found an integral part of a national organisation.
8 Case 40/73 , judgement of the Court of 16/12/75, ECR 1975 p1663. Decision of the Commission 2/1/73, OJ L 140 of 26/5/73
9 Case 71/74, judgement of the Court of 15/5/75, ECR 1975 p563. Decision of the Commission 25/7/74, OJ L 237 of 29/8/74
1O Decision of the Commission 2/12/77, OJ L 21 of 26/1/78
11 Decision of the Commission 26/7/88, OJ L 262 of22/9/88
12 Case 258/78, judgement of the Court 8/6/82, ECR 1982 p2015. Decision of the Commission 21/9/78, OJ L 286 of 12/10/78
13 Decision of the Commission 27/11/86, OJ L 348 of 10/12/86
14 Decision of the Commission 8/1/73,·oJ L 29 of 3/2/75
15 Decision of the Commission 7/12/84, OJ L 35 of 7/2/85
16 This point of view was dominated by the Common Competition Policy services in DG IV and not the agriculture services in DG VI and it should be kept in mind that DG IV has no authority in matters concerning Regulation 26, which solely deals with the CAP. The DG IV position is therefore only fully relevant where DG VI finds the special provisions of Regulation 26 inapplicable.
17 Decision of the Commission 5/12/79, OJ L 51 of 25/2/80 (Rennet was a subsidiary material in the production of cheese, which is a product listed in Annex II).
18 Case T-61/89, judgement of the Court 2/7/92. Decision of the Commission 28/10/88, OJ L 316 of 23/11/88
19 Decision of the Commission 26/7/76, OJ L 231 of 8/8/76
20 Decision of the Commission 15/12/82, OJ L 379 of 31/12/82
21 Case T-61/89, judgement of the Court of 2/7/92. Decision of the Commission 28/10/88, OJ L 316 of 23/11/88

22 Press release of 5/6/91

23 Case C-399/93, judgment of the Court of 12/12/95 (H. G. Oude Luttikhuis and others v Verenigde Cooperatieve Melkindustrie Coberco BA).

24 Case C-250/92 Gottrup-Klim v Dansk Landbrugs Grovvareselskab [1994] ECR 1-5641, paragraph 35).

25 See Gottrup-Klim, paragraph 54).

26 Commission decision of 9 March 1999 - OJ L 20, 25.1. 2000, pp1-35.

27 Case C-C-137/00

28 Art. 34(2) of the Treaty

29 Council regulations 1257/1999 and 1260/1999

30 Article 11 in regulation 2200/96 of 28/10/96

31 Report from the Commission to the Council on the state of implementation of Regulation (EC) No 2200/96 on the common organisation of the market in fruit and vegetables (COM(2001) 36 of 24/1/1)

32 Regulation 952/97, article 6(1c)

33 F ex Dutch CAMPINA versus Belgian dairies, Danish Fur Auctions versus Hudson's Bay in London, Dutch MELDOC versus German and Belgian interests and the merger cases.