

SPIRIT AND LIMITS OF THE EUROPEAN AND FRENCH (NEW?) APPROACH ON PRODUCTION CONTRACTS, INTERBRANCH AND PRODUCERS ORGANISATIONS

ESPRIT ET LIMITES DE LA (NOUVELLE?) APPROCHE EUROPÉENNE SUR LES CONTRATS DE PRODUCTION, LES ORGANISATIONS DE PRODUCTEURS ET LES INTERPROFESSIONS

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I. Introduction

The topic of “business and contracts in agriculture: agribusiness legal profiles” is very broad and may be understood differently according to the country or continent we are from, or the level (macro or micro) where the research is conducted. In this paper, there was not the ambition to embrace every legal issues. I chose another way: to overcross part of the European and French regulation on Common Organisation Of Agricultural Markets in order to highlight those legal issues that seem to make sense or that may give rise to debates.

As stated by the UE, “The Commission proposal for the

Multiannual Financial Framework (MFF) for 2014 – 2020 (the MFF proposal)¹⁽¹⁾ sets the budgetary framework and main orientations for the Common Agricultural Policy (CAP). On this basis, the Commission presents a set of regulations laying down the legislative framework for the CAP in the period 2014 – 2020, together with an impact assessment

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⁽¹⁾ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions A budget for Europe 2020, COM(2011)500 final, 29.6.2011.

Abstract (EN)

From the Single CMO Regulation (Council Regulation (EC) No 1234/2007 of 22 October 2007 establishing a common organization of agricultural markets and on specific provisions for certain agricultural products), the European common law is looking for a new challenge when the French law has been already partially reformed (Law n° 2010 – 874 of 27th of July 2010 and Décret n° 2010 – 1753 of 30th of December 2010). In both cases, Legislators would like to firstly fight against the dispersion of organizing farmer's concentration in front of food processors (agro processing industry) and supermarkets (food distribution sector); secondly, they try to make the contracts more transparent requiring writing forms. Thus, it deals with the way farmers (farmers or producers Organizations) organize their relationships: what are the opportunities and limitations, what are the new points and specificities in this institutional law? It also deals with contracts requirements, options and freedom the partners may have. Overall this paper may represent a way to think about the meanings and the spirit of the common organization of agricultural markets reform: will it be the good answer face to the successive agricultural economic crises; it is not sure...

Keywords (EN)

agricultural markets, competition law, contracts, farmer's concentration/integration farmers or producers organizations, farming contracts, food chain governance, freedom of contract, Interbranch Organizations, Single Common Market Organisation (CMO), transparency of contract

Résumé (FR)

Depuis l'OCM unique, le droit communautaire (règlement 1234/2007, COM(2010)728, PAC 2020) cherche sa voie alors que le droit français a déjà été partiellement réformé (Loi n° 2010 – 874 du 27 juillet 2010, Décret n° 2010 – 1753 du 30 décembre 2010). Dans les deux cas, les législateurs cherchent d'une part à éviter la dispersion en organisant la concentration des producteurs agricoles faces aux centrales et circuits de distribution, d'autre part à rendre les relations entre partenaires plus transparentes par le biais de contrats écrits. Il s'agit donc d'observer en premier lieu comment profession agricole s'organise (organisations de producteurs), quels sont les avantages et les limites, les éventuelles nouveautés ou particularités de ce droit que l'on pourrait qualifier d'institutionnel. En second lieu, il faut s'intéresser aux modalités contractuelles proposées, aux clauses obligatoires et aux options offertes aux cocontractants. L'ensemble de ces recherches devrait permettre de réfléchir au sens et à l'esprit de la réforme de l'organisation commune de marché et des relations contractuelles au sein des organisations de producteurs: est-ce une bonne réponse aux crises agricoles successives; ce n'est pas certain...

Mots clef (FR)

Marchés agricoles, Droit de la concurrence, Contrats, Concentration/intégration des agriculteurs, Organisations de producteurs, Contrats de production, Gouvernance de la filière agroalimentaire, Liberté contractuelle, Organisations interprofessionnelles, Organisation commune de marché (OCM) unique, Transparence contractuel

of alternative scenarios for the evolution of the policy.”

One of the new regulations concerns the common organisation of agricultural markets. The «Single CMO Regulation» COM (2011) 626 should replace Council Regulation (EC) No 1234/2007 that has been consolidated by Commission Regulation COM (2010) 799 and modified recently by Regulation (EU) No 261/2012 on contractual relations in the milk and milk products sector.⁽²⁾ Currently, Proposal is debated in the parliament and will be discussed by the European Council as the area of Agriculture is now under Co-decision procedure. Thus we will fund our work on a subject that might be changed.

In this new regulation, two main considerations may be underlined. On one hand, The European Commission try to strengthen the space and the role of farmers' associations (or Producer Organisations) and Interbranch Organisations; on the second hand, the Commission expresses its desire to clarify contracts between different operators of the agri-food chain. In other words, the reform strengthens the current legal system.⁽³⁾

Two years ago, with the law n° 2010 - 874 of the 27th of July 2010 “de modernisation de l'agriculture et de la pêche”, French government has done a similar reform that deals with Producer Organisations and Interbranch Organisations and mainly promote written contracts. From now on, rules are settled in the code rural (c. rur.).⁽⁴⁾ This new Regulation aims to improve the legal system which includes also a Regulation on “integration contracts” and which regulates content of contracts between farmers and firms when they create a dependency link.⁽⁵⁾

We have to underline the hypothetical link between the French approach and the European reform. Until now European Law System contained rules on Producer and Interbranch Organisations but implementation is limited to few food sectors (fruits and vegetables mostly) and Commission or Court of Justice often sanctioned collective agreements because of competition law.⁽⁶⁾ With the new «Single CMO

Regulation», European Commission seems to have changed its mind and presents a less restrictive position on associationism or collective agreements in agriculture. Is it due to French influence or to the necessity to move on face to economic crisis of agriculture? Maybe both...

These reforms give opportunity to think more generally about contracts and common organisation in agri-food chain. Therefore, if one of the goals of that study is to bring a range overview on the European and French legal system on contracts and associationism or co-operation, the main aim is to highlight the legal problems that might be linked to the politic choices in order to promote such legal tools.

Professor Iannarelli from the Law School of the University of Bari has already done a great - maybe the major - part of the job. Following the line of his research, particularly on Competition Law, producer and Interbranch Organisations⁽⁷⁾, he has recently published a paper based on a contribution he has done for the UNIDROIT in Roma in 2011⁽⁸⁾. As for example Lorvellec and Carrozza had try to express⁽⁹⁾, he shows how contracts and associations have taken part in the modernisation of agriculture, especially in organizing the agronomic know-how transfer⁽¹⁰⁾, and specify criteria of a contract farming or a production contract.

If I will use part of those arguments, I would like to follow a specific way to analyze contracts and associationism in Agri-Food Chain: what reveal the study of European and French legal system on contracts, producer and Interbranch Organisations in Agri-Food Chain, are the political choices and the economic models that are prevalent and give guidelines to understand the legal aspects. This observation is not surprising: contracts and common Organisations are modalities to regulate economic and social relationships.⁽¹¹⁾ Therefore, in a first part, we will try to highlight the different choices that found the legal system on contracts, producer

(Case COMP/C.38.279/F3 - French beef).

⁽²⁾ European Commission, 2011, Proposal For A Regulation Of The European Parliament And Of The Council Establishing A Common Organisation Of The Markets In Agricultural Products (Single CMO Regulation), COM(2011) 626 final/2.; Council, Regulation (EC) No 1234/2007 of 22 October 2007 establishing a common organisation of agricultural markets and on specific provisions for certain agricultural products (Single CMO Regulation), Official Journal L 299, 16.11.2007; European Commission, 2010, Proposal For A Regulation Of The European Parliament And Of The Council Establishing A Common Organisation Of Agricultural Markets And On Specific Provisions For Certain Agricultural Products (Single CMO Regulation), COM (2010) 799. Regulation (EU) No 261/2012 Of The European Parliament And Of The Council of 14 March 2012 amending Council Regulation (EC) No 1234/2007 as regards contractual relations in the milk and milk products sector, Official Journal L 94, 30.03.2012.

⁽³⁾ See Recitals (85) and (90), COM (2011) 326 final.

⁽⁴⁾ Articles L551-1 to L551-8 c. rur. For Producer organisations; Articles L631-1 to L632-4 for Interbranch Organisations and Articles L631-24 to L632-26 for written contracts .

⁽⁵⁾ Article L. 326-1 to L. 326-10 c. rur.

⁽⁶⁾ See for eg. Commission Decision 2003/600/EC of 2 April 2003 relating to a proceeding pursuant to Article 81 of the EC Treaty

⁽⁷⁾ Iannarelli A., 2011, Profili giuridici del sistema agro-alimentare tra ascesa e crisi della globalizzazione, Cacucci Editore, 328 p.. Iannarelli A., 1997, Il regime della concorrenza nel settore agricolo tra mercato unico europeo e globalizzazione dell'economia, Rivista di Diritto Agrario, I, 416.

⁽⁸⁾ Iannarelli A., 2011, Contractual relationships and inter-Firm Co-operation in the Agri-food Sector, Rivista di Diritto alimentare, Anno V, numero 4, Ottobre-Dicembre 2011, 1-14 (<http://www.rivistadirittoalimentare.it/>).

⁽⁹⁾ Carrozza, 1984, La tipizzazione dei contratti agro-industriali, Rivista di diritto civile, II, 570, n° 4 ; Lorvellec, 1990, Les contrats agro-industriels , in “La terre, la famille, le juge. Etudes offertes à H; D. Cosnard”, Economica, 57 - 76 (Also published in 2002 in «Ecrits de droit rural et alimentaire», Dalloz, 314 - 330). Lorvellec, 1998, L'agriculteur sous contrat, in A. Supiot (dir.), Le travail en perspective, LGDJ, coll. Droit et Société”, 179 - 197 (Also published in 2002 in «Ecrits de droit rural et alimentaire», Dalloz, 331 - 350).

⁽¹⁰⁾ “Under these contracts, potential buyers secure a network of suppliers of raw materials and, at the same time, promote the modernisation of agricultural structures through the supply of particular inputs (technologies and knowledge), while orienting the farmers' productive choices” (see above Iannarelli A., 2011, Contractual relationships, 2).

⁽¹¹⁾ La contractualisation est un «mode de régulation sociale» (See above Lorvellec, Les contrats agro-industriels, 316).

and Interbranch Organisations in Agri-Food Chain and constitute the spirit of it. But, spirit is not enough; law principles and tools might be implemented in order to reach political objectives without success or with partial success. In other words, there are various internal and external limitations that may affect the legal system. That is what we would like to question in a second part.

II. Spirit

The spirit of the European and French reforms, as well as the spirit of the current legal system on co-operation in agri-food sector might be revealed at least by four political choices translated in law and those are: to institute food chain Governance, to maintain legal autonomy of farmers, to avoid farmers dispersion in organizing concentration, to make partnerships more transparent.

2.1 To institute food chain Governance

The Governance concept was one of the favourite themes of social science literature these two last decades.⁽¹²⁾ If its definition is still subject to debate and depends on the case or the relationships it has to be implemented, some common characteristics seem to be approved unanimously: at least, we can say that governance is a dynamic process where private and public operators are involved together and interact with each other. In accordance with this definition, the local considerations or the concept of public participation is not a major preoccupation for us even if it is a fundamental point for studies concerning for example the local implementation of environmental policies. Moreover, the governance concept that makes sense for us in this paper is close to a French concept called "cogestion" that is used to qualify the French agricultural policy and law and that promotes a private (firms or firms Organisations) and public (State or representatives of the states) collaboration at different stages.⁽¹³⁾

The French and European Law on agri-food Organisation comply with this concept of governance: on the one hand, the European Union and member States have not only a normative function but become real economic partners in the global process of co-operation; on the other hand, private operators have not only an economic and isolated role but they have to participate in order to state the common rules of the agri-food chain. In other words, the normative and economic roles are shared by State and private operators that

have to move together in order to build together.⁽¹⁴⁾

Indeed, the European Union and States shall recognize producer Association or producer, processor and buyer Associations ("Interbranch: production of, trade in, and/or processing")⁽¹⁵⁾; they can also provide them with finances (public aids or intervention)⁽¹⁶⁾ in case of recognition and turn the private decision into law (extension).⁽¹⁷⁾ Thus, by law, producers, processors and traders may get together not only for domestic economic strategy but also to discuss about the way to discipline the agricultural markets under state control and pursuant to legal principles.⁽¹⁸⁾

It might be underlined that this legal background is not based on a pure free market approach. Legislators have built the law in accordance with a regulated market model that aim to promote and manage the agricultural sector. This law and economic model, based on contracts models and common agreements, has led to and continue to lead to a standardization of law and agronomic practices as Lorvellec said.⁽¹⁹⁾

2.2 To maintain legal autonomy of farmers

Relationships between producers and other private operators are regulated by "contract farming (or production contract, or out grower schemes) [that] can be defined as a system for the production and supply of agricultural and horticultural products by farmers or primary producers under advanced contracts. The practice of contract farming entails the contractor providing farmers with improved seeds, technical advice, in-kind credit, and market services. Farmers produce a specified quantity and quality of crop that is sold exclusively to the contractor, usually at a predetermined price."⁽²⁰⁾ To summarize, we can say that farming contracts organize before the production the exclusive sale of agricultural prod-

⁽¹⁴⁾ The normative role might vary (see above Iannarelli A., 2011, Contractual relationships, 12).

⁽¹⁵⁾ For eg. Articles 106, 107, 108, COM(2011) 626 final/2.

⁽¹⁶⁾ «Without public financial support, it is extremely unlikely that a modern, economic form of "associationism" can take off in countries where farmers are socially and economically weak and where bargaining power is neatly tipped in favour of their contractual counterparties»: see above Iannarelli A., 2011, Contractual relationships..., 14. See for eg; PART II -TITLE I on "Market Intervention", COM(2011) 626 final/2.

⁽¹⁷⁾ Articles 110, COM(2011) 626 final/2: "1. In cases where a recognised producer organisation, a recognised association of producer organisations or a recognised interbranch organisation operating in a specific economic area or economic areas of a Member State is considered to be representative of the production of or trade in or processing of a given product, the Member State concerned may, at the request of that organisation, make binding for a limited period of time some of the agreements, decisions or concerted practices agreed on within that organisation on other operators acting in the economic area or areas in question, whether individuals or groups and not belonging to the organisation or association."

⁽¹⁸⁾ See more particularly: Articles 106 c) and 108 c), COM(2011) 626 final/2 (see below for more details).

⁽¹⁹⁾ See above Lorvellec, Les contrats agro-industriels, 322.

⁽²⁰⁾ See above Iannarelli A., 2011, Contractual relationships, 1.

⁽¹²⁾ See for eg, Smouts M.-C., 1998, «Du bon usage de la gouvernance en relations internationales», *Revue internationale des sciences sociales*, 155. The author defines governance with four factors: «la gouvernance n'est ni un système de règle, ni une activité mais un processus ; la gouvernance n'est pas fondée sur la domination mais sur l'accommodement; la gouvernance implique à la fois des acteurs privés et des acteurs publics; la gouvernance repose sur des interactions continues».

⁽¹³⁾ On «cogestion» and governance, see Bodiguel (Luc), *L'agriculture, entre crise de l'eau et enjeux politiques*, in «Gouvernance et partage de l'eau. Bassin-versant de Grand-Lieu», Bodiguel M. (Dir.), Presse Universitaire de Rennes, 2007, 204 p., 79 - 107, ISBN 978-2-7535-0393-9.

ucts.⁽²¹⁾ But, we will see below that these contracts may be more complex and may not be produces sale contract only.

These farming or production contracts came from practice, from food processors and traders, but have been or sometimes are promoted by law:

This choice has been expressly recognized by French law in 1964 (22), now integrated in the “Code rural” (23): during legislative debates, the Parliament decided to set a legal protection for the farmer under Farming Contract (called “contrats d’intégration”); the option was the following: to implement Labour Law which was and is still quite protective (minimum pay, paid holidays...) or to prefer a mandatory information system that looks like protection for consumers. The second way was chosen. This political and legal choice lead Lorvellec to say that “between farmer and salaried employee, there is not room for a leaf of the Code Rural”(24), even if there is no legal barrier to classify a Farming Contract in the Labour Contract category.⁽²⁵⁾

French government has also required written contracts for every agricultural sector.⁽²⁶⁾

European Union also do this choice when it promotes contracts in the COM (2011) 626. This choice is more timid than the one in France but several pro-

visions are in favour of this promotion: written contract mandatory (Article 104) and bargaining power given to Producer Organizations in milk sector (Article 105) as the role of the Interbranch Organizations in drawing up standard forms of contract (Article 108 iii) or the one of the Producer Organizations in “concentration of supply and the placing on the market of the products produced by its members” (Article 106 ii).

Therefore, law organized the relationships between farmers and processors as if there were two independent operators even if in practice and in law, farmer has few possibilities to decide for himself. This representation of farmer is the point we would like to underline: law is based on the purely theoretical⁽²⁷⁾ socio-economic model of an independent farmer which is free to negotiate with processors and traders.

2.3 To avoid farmers dispersion organizing integration/ concentration

In accordance with what we explained on “food chain governance”, the European Union, as French Government and Parliament, think that they should intervene in order to balance the relationships between farmers and other operators of the agri-food chain. Following this line, they try to promote the constitution of horizontal and vertical Organisation, called producer and Interbranch Organisations. Plans are clear for the EU: “Producer Organisations and their associations can play useful roles in concentrating supply and promoting best practices. Interbranch Organisations can play important part in allowing dialogue between actors in the supply chain, and in promoting best practices and market transparency”.⁽²⁸⁾ More generally, French Parliament stated in 1999 that Agricultural Policy aim to strengthen the organisation of agricultural markets, of producers and agri-food chain.⁽²⁹⁾

Since Treaty of Rome, the European Union has established a legal background for the producers and other agri-food chain operators⁽³⁰⁾, but the implementation was limited to some sectors or products.⁽³¹⁾ The main change was brought

⁽²¹⁾ On contracts, see below.

⁽²²⁾ Loi n° 64 - 678 du 6 juillet 1964 tendant à définir les principes et les modalités du régime contractuel en agriculture, JO 8 juillet 1964; For a general explanation of this law: Moreaux J. Analyse critique de la loi sur l'économie contractuelle. In: Économie rurale. N° 60, 1964. pp. 53 - 67.

⁽²³⁾ Article L. 326-1 to L. 326-10 c. rur.; for eg, see Article L. 326-1: «Sont réputés contrats d'intégration tous contrats, accords ou conventions conclus entre un producteur agricole ou un groupe de producteurs et une ou plusieurs entreprises industrielles ou commerciales comportant obligation réciproque de fournitures de produits ou de services...»

⁽²⁴⁾ See above Lorvellec, L'agriculteur sous contrat, 347 - 348 : «Pour le droit rural, entre l'exploitant et le salarié, il n'y a pas la place pour une feuille du Code rural. (...) A l'occasion du vote de la loi d'orientation agricole du 4 juillet 1980,, le législateur se trouvait devant le choix du type de protection juridique qu'il fallait accorder aux agriculteurs intégrés. Ou bien il considérait que la quasi-subordination invitait à l'extension des garanties du droit du travail: salaire minimum, congés payés, représentation collective institutionnalisée, stabilité du lien contractuel, etc. Ou bien il jugeait que l'importance du choix de la contractualisation imposait une mûre réflexion, une information particulièrement précise au profit d'un cocontractant méritant une protection voisine de celle réservée au consommateurs. Cette dernière orientation fut retenue...».

⁽²⁵⁾ We have to underline that the «labour» referencies may be use also in the “integration contracts” regulation in case of contract annulations: Danet J., Lorvellec, Les restitutions après l'annulation d'un contrat d'intégration soumis à la loi du 6 juillet 1964, Dalloz 1982, 31^e cahier, Chronique, 211 - 219 (Also published in 2002, «Ecrits de droit rural et alimentaire», Dalloz, 272 - 291).

⁽²⁶⁾ Articles L631 - 24 to L632 - 26 for written contrats (Law n° 2010 - 874 of the 27th of July 2010).

⁽²⁷⁾ See above Lorvellec, L'agriculteur sous contrat, 344.

⁽²⁸⁾ Recital (85), COM (2011) 626 final/2.

⁽²⁹⁾ Article 1, Loi 99-574 du 09 Juillet 1999 Loi d'orientation agricole JO 10 juillet 1999 : «I - La politique agricole prend en compte les fonctions économique, environnementale et sociale de l'agriculture et participe à l'aménagement du territoire, en vue d'un développement durable. Elle a pour objectifs, en liaison avec la politique agricole commune et la préférence communautaire : (...) - le renforcement de l'organisation économique des marchés, des producteurs et des filières dans le souci d'une répartition équitable de la valorisation des produits alimentaires entre les agriculteurs, les transformateurs et les entreprises de commercialisation.»

⁽³⁰⁾ Major legal base is now in Article 40, Treaty On The Functioning Of The European Union.

⁽³¹⁾ See Council, Regulation (EC) No 1234/2007: (Article 122) “Member States shall recognise producer organisations, which: (a) are constituted by producers of one of the following sectors:

by the proposal COM (2011) 626 is to extend the possibility to constitute a Producer or Interbranch Organisation to every farmers concerned by agricultural products of the Annex I⁽³²⁾. It is the meaning of the end of recital 85 of COM (2011) 626: "Existing rules on the definition and recognition of such Organisations and their associations covering certain sectors should therefore be harmonized, streamlined and extended to provide for recognition on request under statutes set out in EU law in all sectors" that is implemented by the two articles:

Article 106: "Member States shall recognise, on request, producer organisations, which: (a) are constituted by producers in any of the sectors listed in Article 1(2);"

Article 108: "1. Member States shall recognise, on request, Interbranch organisations in any of the sectors listed in Article 1(2) which: (a) are constituted of representatives of economic activities linked to the production of, trade in, and/or processing of products in one or more sectors;"

Under the European background, France has established similar legal regulation but the general implementation to all agricultural sectors has been promoted since 1964.⁽³³⁾

(i) hops; (ii) olive oil and table olives; (iii) fruit and vegetables in respect of farmers growing one or more products of that sector and/or of such products solely intended for processing; '(iiii) milk and milk products;' (Regulation 261/2012) (iv) silkworm"; (Article 123): "1. Member States shall recognise interbranch organisations which: (a) are made up of representatives of economic activities linked to the production of, trade in, and/or processing of products in the following sectors: (i) the olive oil and table olives sector; (ii) the tobacco sector; 3. Further to paragraph 1, Member States shall, with regard to the fruit and vegetables sector, and may, with regard to the wine sector, also recognise inter-branch organisations which: (...) ; 4. Member States may also recognise interbranch organisations which: (a) have formally requested recognition and are made up of representatives of economic activities linked to the production of raw milk and linked to at least one of the following stages of the supply chain: processing of or trade in, including distribution of, products of the milk and milk products sector"

⁽³²⁾ Article 1 (2) COM (2011) 626 final 2: "Agricultural products as defined in paragraph 1 shall be divided into the following sectors as listed in Annex I: (a) cereals, Part I of Annex I; (b) rice, Part II of Annex I; (c) sugar, Part III of Annex I; (d) dried fodder, Part IV of Annex I; (e) seeds, Part V of Annex I; (f) hops, Part VI of Annex I; (g) olive oil and table olives, Part VII of Annex I; (h) flax and hemp, Part VIII of Annex I; (i) fruit and vegetables, Part IX of Annex I; (j) processed fruit and vegetables, Part X of Annex I; (k) bananas, Part XI of Annex I; (l) wine, Part XII of Annex I; (m) live plants, Part XIII of Annex I; (n) tobacco, Part XIV of Annex I; (o) beef and veal, Part XV of Annex I; (p) milk and milk products, Part XVI of Annex I; (q) pigmeat, Part XVII of Annex I; (r) sheepmeat and goatmeat, Part XVIII of Annex I; (s) eggs, Part XIX of Annex I; (t) poultrymeat, Part XX of Annex I; (u) ethyl alcohol, Part XXI of Annex I; (v) apiculture, Part XXII of Annex I; (w) silkworms, Part XXIII of Annex I (x) other products, Part XXIV of Annex I."

⁽³³⁾ See the «Code Rural» (<http://www.legifrance.gouv.fr/>): Organisations de producteurs : articles L 551-1 to L 551-8 ; In-

In this paper it is not necessary to go into detail and beyond the recognition rules neither in French nor European context. Maybe we can mentioned that in the European Proposal, there is no rule for the moment that requires a representativeness of the Producer Organisations to be agreed⁽³⁴⁾, whereas COM (2011) 626 state that Interbranch Organisations "are constituted of representatives of economic activities linked to the production of, trade in, and/or processing of products in one or more sectors."⁽³⁵⁾ On the other hand, when looking at the extension rules⁽³⁶⁾ - and it is valid for Producer and Interbranch Organisation - one might see that there exist a definition of representativeness: "An organisation or association shall be deemed representative where, in the economic area or areas concerned of a member state: (a) it accounts for, as a proportion of the volume of production or of trade in or of processing of the product or products concerned: (i) for producer organisations in the fruit and vegetables sector, at least 60%, or (ii) in other cases, at least two thirds, and (b) it accounts for, in the case of producer organisations, more than 50% of the producers concerned."⁽³⁷⁾ What we don't know is if these last rules will be implemented in the agreement procedure.

More widely, we have to highlight that the procedure of recognition is one of the ways states may use to regulate agricultural markets in the direction of economic partners concentration. But, the two types of Organisations, the European Union promotes, have not exactly the same role, even if they both participate to avoid dispersion organising integration/concentration. Thus, Producer Organisations aim strictly to concentrate majority of the producer in order to give them a real voice for negotiation with other operators.⁽³⁸⁾ The situation is particularly obvious for milk sector where Producer Organizations have a legal background to sell agricultural products coming from its members under a condition of representativeness.⁽³⁹⁾ It is a bit different for Interbranch Organisations that are made to facilitate meeting between different categories of actors and to decide together on common rules for trading and agricultural producing⁽⁴⁰⁾ whom extension may be request following article 110 of Proposal COM (2011) 626.

Some of us may think that this type of Organisations and the role states give them are in contradiction with free market orientations; here, I would like to refer to what professor Iannarelli said in a recent article: "(...) such farmers' associations are not regarded with disapproval even by the industrial world. First of all, the presence of many small farms may represent a disincentive both to the modernisation of manufacturing activities, in general, and to the stipulation of inte-

terprofessions : articles L 632-1 to L 632-14.

⁽³⁴⁾ COM (2011) 626 final, Article 106.

⁽³⁵⁾ COM (2011) 626 final, Article 108.

⁽³⁶⁾ Not only, see below bargaining power of Producer Organization in milk sector.

⁽³⁷⁾ COM (2011) 626 final, Article 110.

⁽³⁸⁾ COM (2011) 626 final, Article 106.

⁽³⁹⁾ See new Article 126 c) of Regulation 1234/2007 as amended by Regulation 261/2012 which may modify Proposal COM (2011) 626.

⁽⁴⁰⁾ COM (2011) 626 final, Article 108.

gration contracts, in particular: this is due to the high costs to the industries of stipulating such contracts and of monitoring individual transactions. It is not by chance that, for this reason, in many developing countries, many industrial enterprises prefer to avail themselves of an intermediary operating as an interface between themselves and the individual farmers dispersed across the territory. From this point of view, the establishment of farmers' associations may, on the one hand, promote the homogenization of the agricultural supply, the diffusion of information and of productive methods and, on the other hand, favour the conclusion of integration contracts by the enterprises. In other words, farmers' associations are a fundamental instrument to build a modern agro-industrial system besides playing a special role also in the field of contractual integration.⁽⁴¹⁾

2.4 To make partnerships more transparent

As we said above, farming contracts are legal modalities to organize the relationships between farmers and other operators of the agri-food chain. Three criteria have been underlined to define them: a transfer of technology or know-how, a transfer of information and a transfer of risks.⁽⁴²⁾ But these criteria remain too broad, what is more they are tricky to implement in law.

The difficulty comes from the fact that farming contracts "embraces a variety of contractual institutions, starting from the simplest which, in legal terms, corresponds to the simple sale of future goods with certain specific technical and qualitative characteristic"⁽⁴³⁾ but going to more complex agreements in which we can find different kinds of combination of various contracts, or of legal requirements (obligations to do and/or to give) but also more than two partners or only one industrial partner that hide another one. Indeed it might be quite difficult to identify and classify them.⁽⁴⁴⁾

Considering this complexity and this diversity, it should be appropriate that states require written contract.

It is exactly what French government has done recently with the "Loi d'orientation agricole"⁽⁴⁵⁾ for produces sales contracts between farmers or farmers associations or agricultural cooperatives and buyers if agricultural products are intended to be processed or to be sold again (so it is not

sold directly to supermarkets or their distribution centres or for direct sale to consumers).⁽⁴⁶⁾ The French procedure is as follows:⁽⁴⁷⁾ written contract may be required following an Interbranch agreement which is extended by state or if there is no agreement, directly by state (décret). From now, French government has set up two regulations for milk and "fruits and vegetables".⁽⁴⁸⁾

It is also what the European Union would like to do with its proposal COM (2011) 626 but in a restrictive way as we will see. In the Recital (90), the European Commission opened the possibility for member states, "within their own contract law systems", to "make the use of [formalized, and written] contracts compulsory". This provision seems to be limited only by the respect of the Union law and the fact that this possibility depends on member states (implementation of subsidiarity principle).

But from now, the implementation of this objective concerns only the milk and milk products sector that has been already set up by Regulation 261/2012 which should modify also the writing of article 104 of COM (2011) 626: "If a member state decides that every delivery of raw milk in its territory by a farmer to a processor of raw milk must be covered by a written contract between the parties and/or decides that first purchasers must make a written offer for a contract for the delivery of raw milk by the farmers, such a contract and/or such an offer for a contract shall fulfil the conditions laid down in paragraph 2."⁽⁴⁹⁾

Thus we can say that if the European Union seems to be

⁽⁴⁶⁾ Article L. 631-24 c. rur.: "I. La conclusion de contrats de vente écrits entre producteurs et acheteurs, ou entre opérateurs économiques [sociétés coopératives agricoles et leurs unions, sociétés d'intérêt collectif agricole, associations entre producteurs agricoles, sociétés commerciales et groupements d'intérêt économique], propriétaires de la marchandise, et acheteurs, peut être rendue obligatoire pour les produits agricoles destinés à la revente ou à la transformation."

⁽⁴⁷⁾ Article L. 631-24 I c. rur.

⁽⁴⁸⁾ Stated by Décret n° 2010-1753, 30. 12. 2010, pris pour l'application de l'article L. 631-24 du code rural et de la pêche maritime dans le secteur laitier, JO n° 0303 du 31 décembre 2010 page 23590, now in the «code rural»: Article R. 631-7 to L. 631-10. See for eg. Article R. 631-8: «En application de l'article L. 631-24, l'achat de lait de vache livré sur le territoire français, quelle que soit son origine, fait l'objet de contrats écrits entre producteurs et acheteurs. Ces contrats sont soumis aux dispositions de la présente sous-section.»; Décret n° 2010-1754, 30. 12. 2010, pris pour l'application de l'article L. 631-24 du code rural et de la pêche maritime dans le secteur des fruits et légumes, JO n° 0303 du 31 décembre 2010, 23591, now in the «code rural»: Article L. 631-11 to L. 631-14.

⁽⁴⁹⁾ Regulation No 1234/2007, as amended by Regulation (EU) No 261/2012, Article 185 f) : «...Where the Member State decides that deliveries of raw milk by a farmer to a processor of raw milk must be covered by a written contract between the parties, it shall also decide which stage or stages of the delivery shall be covered by such a contract if the delivery of raw milk is made through one or more collectors. For the purposes of this Article, a "collector" means an undertaking which transports raw milk from a farmer or another collector to a processor of raw milk or another collector, where the ownership of the raw milk is transferred in each case."

⁽⁴¹⁾ See above Iannarelli A., 2011, Contractual relationships..., 10.

⁽⁴²⁾ See above Lorvellec, L'agriculteur sous contrat, 341 - 343.

⁽⁴³⁾ See above Iannarelli A., 2011, Contractual relationships..., 4. The author distinguishes three kinds of contracts: Market Specification Contracts, Resource Providing Contracts and Management and Income Guaranteeing Contracts.

⁽⁴⁴⁾ Lorvellec propose to classify them following the main obligations (property transfer or not; service delivery), their effect (integration of the farmer) or the motivation of the contract (decision to become partner: independent?). Carroza had suggested in some case the quality of «société de fait» See above Lorvellec, Les contrats agro-industriels, 318; 323.

⁽⁴⁵⁾ See above French Loi n° 2010 - 874. To go further, see Fabregue E., 2011, La «contractualisation» dans la loi de modernisation de l'agriculture et de la pêche. - À la lumière de l'exemple du secteur laitier. Droit rural n° 396, Octobre 2011, dossier 23.

ready to promote “formalization” of agri-food chain contracts, it is not ready to extend it to every produces of annex I, what might be considerate as disappointing. But it is not said that the Proposal will be strictly followed; maybe the Parliament and Council will change the article 104 (modified following new Article 185f Regulation 1234/2007) extending the possibility to require written contracts.

Anyway, the other fundamental point concerning farming contracts is the legal system the Commission proposes. As we have said, it seems close to French “integration contracts”⁽⁵⁰⁾ and also to Article L. 631-24 of the code rural⁽⁵¹⁾, because European Law regulates the contract content:

Written contract in milk sector “shall: (a) be made in advance of the delivery; (b) be made in writing; and (c) include, in particular, the following elements: (i) the price payable for the delivery, which shall: be static and be set out in the contract, and/or, be calculated by combining various factors set out in the contract, which may include market indicators reflecting changes in market conditions, the volume delivered and the quality or composition of the raw milk delivered, (ii) the volume of raw milk which may and/or must be delivered and the timing of such deliveries; iii) the duration of the contract, which may include either a definite or an indefinite duration with

⁽⁵⁰⁾ Mandatory provisions in French «integration contracts» Regulation following: Article L. 326-5, c. rur.: «Un ou plusieurs contrats types fixent par secteur de production, les obligations réciproques des parties en présence, et notamment les garanties minimales à accorder aux exploitant agricoles. Le contrat type détermine notamment: 1° Le mode de fixation des prix entre les parties contractantes; 2° Les délais de paiement au-delà desquels l'intérêt légal est dû au producteur sans qu'il y ait lieu à mise en demeure; 3° La durée du contrat, le volume et le cycle de production sous contrat ainsi que les indemnités dues par les parties en cas de non-respect des clauses. Les clauses contraires aux prescriptions du présent chapitre, et notamment les clauses pénales ou résolutoires incluses dans les contrats mentionnés aux articles L. 326-1 à L. 326-3, sont nulles. Les dispositions correspondantes du contrat type homologué leur sont substituées de plein droit...».

⁽⁵¹⁾ Mandatory provisions in French «contrat de vente de produits agricoles» Regulation following: Article L631-24 I c. rur.: Durée du contrat: L'accord interprofessionnel ou le décret fixe, par produit ou catégorie de produits et par catégorie d'acheteurs, la durée minimale du contrat qui est de 1 à 5 ans et les modes de commercialisation pour lesquels une durée inférieure est admise. Sauf stipulations contraires, ces contrats sont renouvelables par tacite reconduction pour une période équivalente à celle pour laquelle ils ont été conclus. volumes et aux caractéristiques des produits à livrer; Modalités de collecte ou de livraison des produits : interdiction, pour les acheteurs, de retourner aux producteurs ou aux opérateurs économiques les produits qu'ils ont acceptés lors de la livraison sauf en cas de non-conformité des produits à des normes légales ou réglementaires; Critères et modalités de détermination du prix, aux modalités de paiement: Si remises, rabais et ristournes ou rémunération de services rendus à l'occasion de leur revente, clauses spécifiques relatives aux modalités de détermination du prix et indication des avantages tarifaires; Modalités de révision et de résiliation du contrat ou au préavis de rupture.

termination clauses; (iv) details regarding payment periods and procedures; (iv) details regarding payment periods and procedures; (iv) details regarding payment periods and procedures; and (vi) rules applicable in the event of force majeure.”⁽⁵²⁾

There is a strange provision which follows the mandatory elements of the contracts: “All elements of contracts for the delivery of raw milk concluded by farmers, collectors or processors of raw milk, including the elements referred to in paragraph 2(c), shall be freely negotiated between the parties.”⁽⁵³⁾ Would it be then possible to have mandatory clause but that can be freely negotiated? It is quiet obscure...

We have to add that cooperatives are excluded, presuming that “statutes of that cooperative or the rules and decisions provided for in or derived from these statutes contain provisions having similar effects to the provisions” that are mandatory for other operators. This point may be discussed because it assumes that every cooperative have similar provisions and that it is concretely possible to check it, whereas the cooperatives world is very heterogeneous.

Despite these two current remarks and the fact that the system depends on the will of member states, it is obvious that the European Union tries to promote increased transparency in agri-food chain, giving to farmers the possibility to have better information on their legal commitments. If it is a success in practice, written contracts will be good tools for judges in case of trial.

This optimistic conclusion may be aligned with what Lorvellec said: the plasticity of contractual tool is a way to married independence and checking and to promote the constitution of a symmetric structure as in supermarkets and their distribution centers network.⁽⁵⁴⁾

III. Limits

If the spirit of the European and French reforms, as well as the spirit of the current legal system on co-operation in agri-food sector, seems to be clear enough, we have to underline the internal and external factors that might reduce the scope of it. Indeed, the will to institute food chain Governance, to maintain legal autonomy of farmers, to avoid dispersion in organizing concentration and to make partnerships more transparent, is affected by several issues:

The governance stated the autonomy of farmers and the more transparent partnerships in the agri-food chain are based on freedom and transparency of contract. However, deeper analysis shows that freedom and transparency of contract prove a myth, what may jeopardize part of the spirit.

⁽⁵²⁾ Regulation No 1234/2007, new Article 185f which may impact Article 104 of COM (2011) 626.

⁽⁵³⁾ Regulation No 1234/2007, new Article 185f which may impact Article 104 of COM (2011) 626.

⁽⁵⁴⁾ «La plasticité de l'instrument contractuel permet à la fois de marier l'indépendance et le contrôle, et de favoriser la constitution d'une structure symétrique de celle d'un réseau de distribution»: See above Lorvellec, Les contrats agro-industriels, 315.

The food chain governance stated and the choice to promote concentration/integration is also affected by the implementation of competition law.

3.1 The Myth Of Freedom And Transparency Of Contract

We started speaking about contracts with the aim to demonstrate that they reveal a specific and theoretical representation of the farmer: an independent company manager. In fact, things are totally different. Farmers are involved in an economic chain where they constitute a necessary but weak link and where they are under control of non producer operators. As Fargeat, a French Professor, have said farmers have lost – if they have ever had – the decision power and the market or the “means of production” control, that characterize integration.⁽⁵⁵⁾ Indeed, from now, most of producers have no bargaining power, even if they are in an Interbranch Organisation, unless they are well organized in a powerful and representative horizontal organisation or firm. This unbalanced position is obvious in milk sector, where thousands of producers do not have the choice of where they can deliver milk because of the geographical condition and the numerous of potential partners.

Contracts farmers have with processors or seed or chemical products traders or other partners, are done in accordance with this economic context characteristic for an integrated chain. Thus, it is not surprising that they may be defined as “adhesion contract”. In such contracts, scope of farmer freedom is limited to accept or to decline; and if farmer agrees, he just has to sign. As professor Iannarelli said, « it should be borne in mind that these contracts are offered on an adhesion basis, often containing unfair provisions that reflect the unequal bargaining power of the large processors and the much smaller producers.»⁽⁵⁶⁾

Thus, it is not sure that the fact to require written contract will change the context; neither the obligation to include specific provisions. Even the obligation of French “integration contract” Regulation, to include specific clauses with risk of financial sanctions, may be ineffective firstly because it is not sure that this regulation gives more guaranties to farmers than the normal implementation of domestic trade law and secondly because “integration contract” regulation has been done in order to balance the disadvantages of the adhesion contract, rather than to ensure the economic balance of an unfair contract.⁽⁵⁷⁾ The European provision mentioned above

stating that “All elements of contracts (...) including the elements [that may be mandatory], shall be freely negotiated between the parties”⁽⁵⁸⁾ strengthen this conclusion because it recalls the freedom of contracts what benefit to the most powerful contractor. That is what the study of contracts for milk delivery in France shows whereas the written contract is mandatory.

It is like if economic power gives legal power. This observation must be recalled to every protagonist: contract is not a way to balance relationships; it is still the result of the balance of social and economic power between partners. Every speech that said the opposite may be seen as a deception. And if I underline this point, it is because most of the time, discussions, particularly with farmers, show that they have a mythic vision of contract...

Therefore, if farming contracts give economic and legal security for farmers because they assure buying their production, there is also a part of insecurity because the contracts support risk linked to production or financial problems and risk connected to unfair clauses imposed by non farmer operators. It is what explain professor Iannarelli: «The out-grower system is viewed as benefit for firms by enabling them to obtain cheap labour and to transfer the risks to the growers. (...) [The] advantage to farmers in terms of risk reduction linked to the fact that they can place their full agricultural output on the market and shield themselves from price fluctuations (...) ; but, he highlights « the fact that farmers contractually bind themselves to perform certain actions during the manufacturing process in accordance with cultivation and farming practice (in general, obligations “to do”), defined on the basis of indications and directives coming from the contractual counterparty, to which a right to inspect the farm with its own technicians and representatives is often granted. (...)»; and he adds «For instance, production contracts often use unfair systems to determine how producers are paid. Other uncertainties derive from the termination clauses: short-term contracts or a withdrawal clause in favour of the industrial enterprise conflict with the long-term investment that the farmer must make, on the strength of expectations of a lasting contractual relationship. Yet further uncertainties concerning the way in which the weight and quality of the farmer’s products are checked. Lastly, the prevalence of mandatory arbitration clauses keeps disputes between producers and processors out of court, forcing the former to litigate before private arbitration panels that can be expensive and biased, and offer little chance of meaningful appeal. Furthermore, particularly in the North American experience, one of the most unfair terms imposed on producers in production contracts is the non-disclosure clause».⁽⁵⁹⁾

This legal context may call several issue and questions from «Obligations Law» that just have to be mentioned here: is not it possible for farmers on trial against their partner to argue on the basis that they are victim of violence by abusing the economic dependence? What may be the role of even-

⁽⁵⁵⁾ Fargeat, *Droits économiques*, PUF, coll. Themis, 1982, 228. see also above Lorvellec, *L’agriculteur sous contrat*, 345 – 346 saying that farming contracts reveal three «lost» for farmers : «privatisation du temps de l’agriculteur (...), de l’espace agricole (...), de la qualité et de la quantité. »Pour une étude approfondie de la dépendance, see Del Cont C., *Propriété économique, dépendance et responsabilité*, L’Harmattan, Logiques Juridiques, 1998, 400 p.

⁽⁵⁶⁾ See above Iannarelli A., 2011, *Contractual relationships*, 6.

⁽⁵⁷⁾ See above Lorvellec, *Les contrats agro-industriels*, 326: «La protection assurée à l’agriculteur intégré a donc plutôt cherché à remédier aux inconvénients d’un contrat d’adhésion, qu’à assurer l’équilibre économique d’un contrat injuste.»

⁽⁵⁸⁾ Regulation No 1234/2007, new Article 185f which may impact Article 104 of COM (2011) 626.

⁽⁵⁹⁾ See above Iannarelli A., 2011, *Contractual relationships*, 5 – 6.

tual judicial sanctions based on abused clause⁽⁶⁰⁾? What may be the efficiency of «lesion» Regulation? One of the biggest problems for judge will also be to know how to interpret the contract if he had to do it. In France at least, he has to do it regarding the «common intention of the contractors»⁽⁶¹⁾ and he may review or change part of the contract only if he considers that clause is not in accordance with the «common interest», what is quiet rare because of the principle of intangibility of the contract.⁽⁶²⁾ Finally, we have to mention another issue: may mandatory clause become condition of validity of the contract, so without them, the contract does not exit and farmer may profit by saying he is not engaged or may the contract be valid even without mandatory clause and the farmer may ask for indemnity but remains engaged? These points should merit to be explored further in order to compare state members' laws.

On that base, the only way to change the economic context is the concentration of producers on negotiating, furthermore, trading directly. It is the condition to balance the bargaining power of non farmer operators. In that sense, the extension promoted by the European Commission is a good solution.

More they will be powerful, more the Producer Organization will be able to discuss directly with their partner, and also may affect discussion into Interbranch Organization. For example, they may impact standard contract models established under Interbranch organization and that may be extended by state. The problem, here, is Competition Law...

3.2 Agricultural Associations and Contracts Face To Competition Law

Under Articles 106 and 108 of Proposal COM (2011) 626, Producer Organisations do have to find agreements for example in order to ensure «that production is planned and adjusted to demand, particularly in terms of quality and quantity», or to improve «concentration of supply and the placing on the market of the products produced by its members». Doing so, Producer Organisations impact directly or indirectly agricultural prices and supply of agricultural products, as do Interbranch Organisations when they improve and help «to better coordinate the way the products are placed on the market, in particular by means of research and market studies» or draw «up standard forms of contract compatible with Union rules», or optimise «production costs and stabilising producer prices».

This mission accorded by law seems to contradict the European Competition Law that prohibit «as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction

or distortion of competition within the internal market...»⁽⁶³⁾ and «Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market as far as it may affect trade between Member States...»⁽⁶⁴⁾

But, for agricultural market, Treaty On The Functioning Of The European Union (TFEU) 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 European Parliament and the Council within the framework of Article 43(2) and in accordance with the procedure laid down therein, account being taken of the objectives set out in Article 39. »If we have a literal interpretation of Article 42 TFEU, that is to say agriculture markets are not automatically under Competition Law. Moreover, we must say that on principle agriculture is outside the scope of Competition Law because the European Council and Parliament have the power to decide it.⁽⁶⁵⁾

But, two elements are against this conception:

- Firstly, few exemptions have been recognised for national market organisation, for agreements «necessary for attainment of the objectives set out in Article 39 of the Treaty. » and for some agreements of Producer Organisations.⁽⁶⁶⁾ Some specific provisions may also be found in particular sector such as fruits and vegetables.⁽⁶⁷⁾
- Secondly, European precedents study shows that the European Commission and European Court of Justice have made another interpretation of Article 42, on the basis of regulation 1184/2003. Following them, the few exemptions specified by the European Council in favour of agriculture have to be strictly accepted⁽⁶⁸⁾ in particularly when they impact or only may impact prices what is quite different from the United State Anti Trust Regulation.⁽⁶⁹⁾ Same studies demonstrate that national authorities of competition follow the line drawn by the Commission.

⁽⁶³⁾ Article 101, TFUE.

⁽⁶⁴⁾ Article 102, TFUE.

⁽⁶⁵⁾ See for the procedures, Article 43, TFEU.

⁽⁶⁶⁾ Article 2, Regulation 1184/2006 which may be find also in Article 175 and 176 Reg 1234/1007.

⁽⁶⁷⁾ Specific regulation. Article 285 reg 1234/2007.

⁽⁶⁸⁾ See Regulation 1184. Iannarelli, A, Competition Law and European Agricultural and Food Law, in European Food law, Costato L and Albissini F (eds), CEDAM 2012, 511 p., 77. See also : Del Cont C. and Pironon V., L'affaire de la viande bovine irlandaise, Revue Lamy concurrence, 2010/4; GADBIN D., 2007, La filière bovine française et les organisations syndicales piégées par les règles, communautaires de concurrence Droit rural n° 350, février 2007, comm. 37; Gadbin D., Agriculture et droit européen des affaires: l'irréductible droit communautaire agricole. Droit rural n° 372, avril 2009, dossier 21.

⁽⁶⁹⁾ Iannarelli (Competition Law, 80 - 81) and Lorvellec (L'agriculteur sous contrat, 336) have both underline the more opening approach in USA. Différence modèle français et USA. Both articles are inspired by the wordings introduced in the North-American Sherman Act and Clayton Act. See alto Iannarelli, La concorrenza e l'agricoltura nell'attuale esperienza europea: una relazione «speciale», in Riv. dir. agr. 2009, 515 ss.

⁽⁶⁰⁾ The «Violence par abus de dépendance économique» and the «clauses abusives» are strictly accepted by Cour de cassation in France.

⁽⁶¹⁾ «Commune intention des parties».

⁽⁶²⁾ The contrat can't be modified or revised except if an exception has been stated («clauses pénales»; for eg.).

That's why Iannarelli stated that «in the European legal system, the agricultural sector does not represent a “no competition space”, but competition can be sacrificed or curbed in view of the pursuit of the CAP underlying political goals, just as still defined in art. 39 TFEU. It is not by accident that advocate general Stix-Hackl, in his opinion in Case C-137/00, p. 42, has recalled «the tension between agricultural policy and competition law». In its turn, Court Judgment 5 October 1994 in Case C-280/93 Germany v. Council of the European Union, with regard to both the institution of a system of undistorted competition and the establishment of a common agricultural policy has reminded (paragraphs 60 - 61) that “the authors of the Treaty were aware that the simultaneous pursuit of those two objectives might, at certain times and in certain circumstances, prove difficult”; hence “the priority of the agricultural policy over the objectives of the Treaty in the field of competition and the power of the Council to decide to what extent the competition rules are to be applied in the agricultural sector”. This does not rule out, of course, always according to the Court Judgment, decision 9 September 2003 in Case C-137/00 Commission v. Milk Marque Ltd National Farmers' Union, p. 57. that “the maintenance of effective competition on the market for agricultural products is one of the objectives of the common agricultural policy and the common organisation of the relevant markets”⁽⁷⁰⁾

This «tension» between Competition and Agricultural policies, did not change with the proposal COM (2011) 626 that copy and paste Regulation 1237/2007 (Article 175 and 176) in its Articles 143 and 144, except the first exemption as there is no more national organisation. However, we have to underline that as Interbranch organisation will be able to concern every Interbranch Organisations, the scope of Competition Rules of specific implementation that was reserved to some sector (mostly fruits and vegetable), is also extended.

Thus, we are still facing dual position of the European Commission which, on one hand, promotes agreements on Producer and Interbranch Organisations, and on the other hand maintains a strict interpretation of article 42 TFEU and agricultural exemptions. From now, except if the European Parliament or Council, that have to debate on this proposal, change the proposal, there is no general presumption of legality of these agreements and no list of exempted agreements. Therefore, the implementation of new rules on contracts, producer and Interbranch Organisations may be widely affected.

IV. To progress

To progress, two ideas may be debated:

The aim of the first one is to extend the French Regulation on «Integration contracts» based on mandatory information and effective sanctions that might cover every agricultural sector. In order to avoid a legal dumping, this extension might be done at the European level.

⁽⁷⁰⁾ See above . Iannarelli, A, Competition Law, 74 - 75.

The second proposal concerns the revision of the European competition Law for Agriculture in order to clearly promote Producers Concentration and Agri-food chain discussions. The idea of a presumption of legality for interbranch and producers agreements should be discussed.

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