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**EU Competition Policy and the
Common Agricultural Policy:
a case study of Contractual Relations
in the milk and milk products sector**

Alice O' Donovan

**Europa-Kolleg Hamburg
Institute for European Integration**

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Editor:

Europa-Kolleg Hamburg
Institute for European Integration
Prof. Dr. Markus Kotzur, LL.M. (Duke) (Director of Studies)
Dr. Konrad Lammers (Research Director)
Windmühlenweg 27
22607 Hamburg, Germany
<http://www.europa-kolleg-hamburg.de>

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Alice O' Donovan*

Abstract

This thesis considers the overlap, the interaction and the possible conflict between an element of the Common Market Organisation of Agricultural products, specifically the Dairy Package measures contained within Regulation (EU) No 261/2012 and the Competition Policy of the European Union, subject to the rules governing competition in the Treaty (in particular Articles 101 and 102 TFEU), and in Regulation (EC) No 1234/2007 establishing a common organisation of agricultural markets (CMO regulation). Regulation (EU) No 261/2012 prescribes new CMO conditions for the milk and Dairy sector. My research question is: to what extent do the Treaty and Regulation rules on upholding competitive standards apply to the new measures and what consequences will this have for fairness of competition in a sector which already enjoys Council and Parliament endorsed derogation? Is there scope for potential conflict between agricultural-interest based policies and compliance with the fundamental rules of competition?

Ultimately this analysis concludes that while the Dairy Package is a well-intentioned legislative initiative with the goal of enhancing the bargaining power of producers in a seemingly hostile commercial environment, it is seemingly not prescriptive enough in clearly delineating objectively acceptable and fair limits of concerted behaviour. Moreover, several ambitious dairy economies, in which the co-operative model is more often employed and who seek to maximise production, have arguably been short-changed in the absence of a soft landing commitment in the lead up to the abolition of the milk quota regime in April 2015. The key question as to whether agriculture can be more market orientated and less tied to the paternalistic principles of the Treaty nevertheless remains unanswered, the scope of this exercise being far too limited to find an answer to this long running dilemma.

key words: Dairy, Common Market Organisation, Supply Chain, Concerted Practices, Common Agricultural Policy

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Address:

Alice O' Donovan

e-mail: odonovanalice@gmail.com

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List of Abbreviations:

CAP	Common Agricultural Policy
CMO	Common Market Organisation
DG AGRI	Directorate General for Agriculture and Rural Development
DG COMP	Directorate General for Competition
ECJ	European Court of Justice
EDA	European Dairy Association
EMB	European Milk Board
EU	European Union
FAO	Food and Agriculture Organisation of the United Nations
GDP	Gross Domestic Product
HLG	High Level Expert Group for the Dairy sector
<i>Ibid.</i>	Ibidem (as before)
ICOS	Irish Co-operative Organisation Society
IPO	Inter-branch or Inter professional organisation
NCA	National Competition Authority
OJLS	Oxford Journal of Legal Studies
PDO	Protected Designation of Origin
PGI	Protected Geographical Indication
PO	Producer Organisation
R&D	Research and Development
RGM	Relevant Geographical Market
RPM	Relevant Product Market
TFEU	Treaty on the Functioning of the European Union
UK	United Kingdom
WTO	World Trade Organisation

1. Introduction:

Agriculture has lost the significance it once boasted as a contributor to EU Gross Domestic Product (GDP) and as an employer in the Member States.¹ Nevertheless, it continues to enjoy special treatment in terms of the limited degree to which Competition Policy applies to it, as is to be determined by the Council in accordance with Article 42 TFEU.

This thesis will look specifically at the competition based consequences of the four targets of the Dairy Package regulation, [Regulation (EU) No 261/2012] namely ‘*contractual relations*’, ‘*Producer Organisations*’, ‘*Inter-branch organisations*’ and ‘*transparency*’,² while also considering the ending of the milk quota regime and new measures connected with products which have protected designations. These measures present significant changes for an industry which maintains both a constant presence in all Member States and an active lobby in Brussels and which has ultimately been shielded from the turbulence of an open market to an appreciable extent by the Common Market Organisation (CMO) framework. This regulation did not emerge as a result of competition based concerns by European institutions or stakeholders, but as a means of guaranteeing better bargaining power for producers.³

Far from the motivations for the Dairy Package being a deterrent against analysing its competitive effects, it makes the exercise all the more necessary, especially if one is of the view that ‘*competition policy is a tool which can be used to help achieve the fundamental aims of the Community*’.⁴

There will be elements of political and social analysis in this thesis in addition to legal analysis. This reflects the unique characteristic of agriculture, that it is both a way of life and an industry.

In Chapter One I will provide background information which will enable the reader to understand the developments and circumstances which have culminated in the formation of a Dairy Package. Policy considerations will also be examined, taking into account the many factors which influence the formation of Agricultural Policy and which were considered by European Union (EU) institutions when creating the regulation. Chapter Two will consider the abolition of the Milk quota, a development which was decided on prior to the milk market price crash of 2009 and which will have ramifications for the ultimate functioning of the Dairy Package. Chapter Three examines the substance of the regulation and questions whether the new measures being pursued will positively affirm Competition Policy in this field or whether they will simply reiterate the derogation which exists for agricultural products. Chapter Four will provide concluding remarks.

¹ Bouamra-Mechemache, Jongeneel, Réquillart, p. 3.

² Regulation (EU) No 261/2012, Recital point 4.

³ Regulation (EU) No 261/2012, Recital point 5.

⁴ Van Miert, Karel, The Competition Policy of the New Commission, EG Kartellrechtsforum der Studienvereinigung Kartellrecht Brussels 11.5.1995, as cited by Chalmers, Davies, Monti, European Union Law p. 919.

1.1. Preliminary Note; Framing the scope of the thesis:

When the term ‘Dairy Package’ is used within this thesis, it is simply intended to refer to Regulation (EU) 261/2012.

The terms ‘first purchaser’ and the ‘first purchasing’ are used within the thesis. This terminology is used to refer to the processor, co-operative or dairy which collects milk from the farmer, and from whom the farmer receives payment in kind.

The terms ‘European Court of Justice’ (ECJ) and ‘the Court’ will be used interchangeably.

Article 38 TFEU declares that references used in the Treaty to refer to the Common Agricultural Policy (CAP), namely to agriculture and to matters described as ‘agricultural’, also to apply to fisheries. In this thesis, while here acknowledging the broader scope of the treaty provisions, I will refer to agriculture in the narrower sense of products governed by Regulation (EC) No 1234/2007 only.

The Dairy Package measures are exempt from the application of Council Regulation (EC) No 1184/2006 (laying down competition rules on both the production of trade of particular products of an agricultural nature) and therefore this legislation will not be discussed.

Horizontal clauses as contained within the treaties (for example, Article 11 TFEU outlining a duty to safeguard the environment and Article 13 TFEU relating to the ‘sentient’ nature of animals), while important from a broader perspective of Agricultural Policy, will not be examined in this thesis, given space constraints.

A broad reform of the CAP is earmarked to take place during 2013 and will come into full effect from 2014. This development will not be substantially examined in this thesis.

Regulation of the global trade in dairy and the associated rules on tariffs in the World Trade Organisation (WTO) framework will not be examined within this thesis.

1.2. Background to the Common Agricultural Policy:

Understanding CAP motivations is key to appreciating the reasons for the introduction of the Dairy Package. I will briefly introduce the argument that the CAP has failed to clearly define its goals and that therefore any justification for a continued derogation for agricultural goods in a modern, dual-level competition regime (as between the EU and National Competition Authority (NCA)) is questionable.

The fundamental treaty provisions for CAP are in Articles 38-44 TFEU. Article 39 TFEU sets out goals to be pursued and the following articles prescribe the means for achieving these goals.⁵ Little appears to have changed in the CAP’s objectives since the Treaty of Rome came into force in 1957. This stagnation is *prima facie* a fundamental failure of EU policy, as it fails to address modern commercial and social realities, such as falling participation rates in agriculture⁶ and the fact that agriculture contributed less than 2% to the EU GDP in 2009.⁷

The inclusion of the CAP in the founding treaty of the European Economic Community was both a necessary and challenging task, as the founding Member States had

⁵ Calliess/Ruffert, EGV/EUV, Article 39.

⁶ Hill, p. 37.

⁷ Lirzin, Paulo, p. 151.

prior to these opted to safeguard domestic production from outside forces.⁸ Bringing a sector which was subject to much national ‘*intervention*’ into a common European framework was highly desirable at the time of the founding treaty.⁹ As regards the motivation of European integration and cooperation in this field, memories of the destruction and devastations of the Second World War and of the food shortages which followed it were still raw in the minds of the Treaty architects. The concerns of the European populace have now shifted, for the most part, to the ‘safety and quality’ of food stuffs.¹⁰ Supporting farmers in a particular way in the auspices of the new European Communities was also politically motivated¹¹; by offering substantial protection to their livelihood and incomes from outside competitive pressures, the CAP acted as a means of beckoning the otherwise reluctant farming community into the fold of the national and European economic and political systems.¹²

The CAP has had to face with desires for reform ‘relatively recently’ in its history.¹³ The *Mansholt* plan of the late 1960s which envisaged a significant reduction in the European agricultural workforce, failed in a deluge of protest and dissatisfaction from farming interest groups.¹⁴ The *McSharry* reforms in 1992 introduced a means of controlling and limiting agricultural output and stabilising market prices for certain products. As an example of a reform which affected dairy in particular, in 2003 floor prices for milk and by-products were rendered more flexible, and were not tied to an intervention price. An intervention price ensures that a minimum price is paid to producers, in the event that costs of production are not covered by the ‘*market price*’.¹⁵

The aspect of the CAP which is most controversial and divisive is that of the expenditure and cost which it entails for the EU. The proportion of the total EU budget which is spent on the CAP has decreased significantly (now circa 40%)¹⁶ although there are critics that claim that this is still far too high a percentage, in relation of the public good return enjoyed by wider society.

The aims of the CAP and what the policy wishes to achieve should be discussed. Formulating an authoritative understanding of what is meant by a ‘fair standard of living’ as outlined in Article 39 (1) TFEU can only be surmised by analysing what major actors in European Agriculture have publicly stated. For example, in his answers to the British House of Commons’ Members Questions posed in relation to the CAP reform in January 2011 the Commissioner for Agriculture and Rural Development, *Dacian Cioloş*, hints at certain conditions which he considered to be relevant to understanding a ‘fair standard of living’, without providing definitive and exhaustive criteria.¹⁷ In particular it will be considered in Chapter Three whether increased productively, applying the principles of increased efficiency and improving quality,¹⁸ can be achieved through the Dairy Package measures. This thesis will argue in the *Chicago-School* spirit that efficiency is a key objective of Competition

⁸ Von Urff, Winfried in Weidenfeld, Werner, (ed), p. 205.

⁹ Chalmers, Davies, Monti, p. 12.

¹⁰ Hill, p. 255.

¹¹ Rieger in Wallace/Wallace, p. 182.

¹² Rieger in Wallace/Wallace p. 183.

¹³ Calliess/Ruffert, EGV/EUV, Article 38.

¹⁴ Baffes, de Gorter, Hearry, p. 43.

¹⁵ Geradin, Layne-Farrar, Petit, p. 44, footnote 217.

¹⁶ Spector, p. 1.

¹⁷ *Environment, Food and Rural Affairs Committee*, 13.1.2011, Q.172.

¹⁸ Calliess/Ruffert, EGV/EUV, Article 39.

Policy, although this has been subject to a certain degree of criticism for being an ‘*overly simplistic*’ assessment.¹⁹

Article 43 (2) TFEU expressly allows the European Parliament and Council to deviate from the regular treaty-based rules governing Competition, i.e. Article 101 TFEU and following, in order to pursue ‘provisions necessary for the pursuit’ of the five CAP policy objectives under Article 39 TFEU. While this may seem weak and permissive in the context of the highly developed competition regimes which exist in the 21st century, the fact that there were any provisions safeguarding competition in the Treaty at the end of the 1950s, even if the rules had limitations, was ground-breaking. The ‘*culture of competition*’ was yet to emerge in Member States.²⁰ Now that there are reasonably well developed NCAs in the Member States, I argue that derogations afforded to agricultural markets should be applied sparingly and cautiously.

1.3. Dairy in Europe:

This section briefly considers the standing of the European dairy sector on a world scale and indicates that while there is optimism on the national level in certain Member States that fortunes will improve, the impetus of the Dairy Package is welcomed as a means of achieving this.

Why were changes demanded for the dairy sector in Europe? Simply stated, the new regulation has arrived on stream at the end of a volatile period for dairy farmers. A price spike on the world market following a bad season in Oceania in 2007 resulted in a price crash on the same market the following year.²¹ There is ample evidence to support the stance that price fluctuations would be more likely for milk producers in the years following the price collapse.²² There is no single ‘EU Dairy’ model. Dairy as an industry in the EU has a multitude of structures, depending on the respective Member State and on the volume of milk emanating from producers therein.²³

At the consultative phase which ultimately resulted in the new legislation, a clear majority of Member States supported the introduction of ‘permanent’ competition exceptions for the Dairy sector.²⁴ Such a system may be desirable from the perspective of creating legal certainty, subject to the requirement that two separate midterm assessments of the effectiveness of the regulation take place before 2020. However, it is argued here that provisions should be worded in broad enough terms to facilitate addressing possible future changes of market conditions, as one of the potential disadvantages of there being less protection under the CAP umbrella from a producer’s point of view is the increased exposure to the vicissitudes of the world market. The potential in the Dairy Package for ameliorating the competitive position of the European Dairy sector on the international playing field should also be examined, particularly in light of the diminishing share of the world milk market which is held by the EU.²⁵

¹⁹ European Advisors Group on Competition Policy: An economic approach to Article 82, July 2005, p. 2, as cited by Geradin, Layne-Farrar, Petit, EU Competition Law and Economics, p. 21, para. 1.66.

²⁰ Chalmers, Davies, Monti, p. 909.

²¹ Proposal for a Regulation of the European Parliament and of the Council, 9.12.2010, p. 2.

²² Baptiste, Chantellier, Daniel, Slide 12.

²³ EUROSTAT, Agricultural Products.

²⁴ High Level Group on Milk, Final Report, p. 12.

²⁵ FAO, Food Outlook June 2009.

Europe is increasingly losing ground, particularly in the export markets of large newly industrialised countries in Asia.²⁶ The absence of a Free Trade Agreement with, for example, China, is based on a complex matrix of trade, policy and political considerations. Yet it presents a massive missed opportunity in terms of the enormous potential on this market for EU Dairy exports, especially in view of the high demand for *foreign produced* dairy products in the wake of widespread mass media attention on tainted consumer products in China.²⁷ In spite of this, the *Irish Farmers' Association* states in its position paper on Dairy post 2015 that it is confident that the explosion of a 'middle class' with Western consumer tastes and preferences presents export opportunities for Member States with high volume milk production capabilities.²⁸ On a similarly optimistic note, *Udo Folgart*, vice-president of the *Deutscher Bauernverband*, has spoken of the exceptional quality for which German products are known around the world.²⁹ One must however consider the harsh reality that assertions from such nationally-based interest groups are premature and slightly overoptimistic, especially in light of the phenomenal rise of New Zealand, a milk-producing super hub.

The decision to abolish the milk quota, which will be considered below, coincides incidentally with this world market position decline. As was suggested above, the industry in Europe has been eclipsed by New Zealand, (the co-operative *Fonterra*, owned by New Zealand producers, prides itself in its claimed position as 'the world's leading exporter of dairy products'.³⁰) The growth of *Fonterra* resulted from a deliberate move by the New Zealand Authorities, which legislated to alter aspects of their competition regime to allow for a single super-sized co-operative.³¹ It is almost impossible to imagine a similar development being approved on a European level. However, New Zealand will be watching developments in Europe with keen interest, as it also prepares to introduce reforms, which by design will put some constraints on the dominant *Fonterra*.³² Even from the perspective of a state which has much to gain from the opportunities presented by a mega co-operative, there appears to be an inherent need to reinforce competition measures to curb the exercise of dominant behaviour.

It is hoped that the efforts contained within the Dairy Package, while not bringing Europe to the grand scale mass production levels of other agricultural regions of the world,³³ will increase consumer welfare. The desired outcomes are easier access to market information and more efficient interactions between actors involved in all the stages of getting milk from the farm to the fridge or shelf (production, processing, marketing and retailing).

This thesis proposes that a structured framework for co-operation and negotiation between all links of the milk production and processing chain with a particular focus on innovation may be a contributing factor in reviving flagging European fortunes in the coming years. The Directorate General for Agriculture (DG AGRI) clearly envisages 'a more market orientated and sustainable future'³⁴ as a goal of the reform measures in the Dairy sector. National authorities, such as those in the United Kingdom (UK), have similar ambitions for development and progress in their respective industries. April 16th 2012 witnessed the launch

²⁶ Interview with *Conor Mulvihill*, European Affairs Manager, Irish Co-operative Organisation Society (ICOS), 15.3.2012.

²⁷ *Luo, Yiyun*, When Apology and Product Recall Is Not Enough, (2010) *Open Access Theses*, Paper 71, pp. 1-68.

²⁸ *Irish Farmers' Association*, Regional Dairy Meeting.

²⁹ *Deutscher Bauernverband*, 'Milch macht Mut!'

³⁰ *Fonterra*: Key Facts.

³¹ Dairy Industry Restructuring Act 2001, Part 1 Section 4.

³² Summary of the Proposed Amendments to the Dairy Industry Restructuring (Raw Milk) Regulations Background, p. 2.

³³ *Chaddad, Jank, Marcos*.

³⁴ *DG AGRI*: Milk and milk products, 7.3.2012.

of the Dairy 2020 initiative at the House of Commons.³⁵ In terms of the observed success in maintaining competitiveness on the national level within a Member State, the *Bundeskartellamt* published its evaluation of the German Dairy sector in January 2012,³⁶ following an interim report which was published two years previously. The report considered the impact of the proposals of the Dairy Package, most of which have legal force from 2nd April 2012. This report represents many of the concerns which resonate not in German stakeholder circles but also in the dairy industries of multiple Member States.

1.4. Policy Considerations:

1.4.1. Contradicting Policies and attempts to reconcile them:

One of the greatest challenges of the evaluation within this thesis is the balancing of one prominent policy (preservation of workable competition within the European Union) against another (the aforementioned static goals outlined in Article 39 TFEU). Finding an equilibrium point which can further the aims of both and which will not adversely interfere in the functioning either policy has so far proven to be a challenge. EU Competition Policy and Agricultural Policy work paradoxically against one another and this is a conflict that, while impossible to conclusively resolve, must be addressed in order to successfully evaluate the interaction between the policies.³⁷

The relationship is difficult to reconcile: competition regulation is a field in which the EU has consistently proven to excel,³⁸ whereas the CAP has been problematic from the time of its inception and has had to adapt in response to numerous crises in order to remain relatively 'fit for purpose.'³⁹ Competition Policy has a Community dimension, but CAP is motivated primarily by individual Member State interests⁴⁰ while still wearing the moniker of a 'common' policy.

Further disparities can be seen in the intentions which lie behind pursuing both policies. As an example Article 101 (1) TFEU is envisaged as a means of securing efficiency and consumer welfare and cementing the goals of the internal market by guaranteeing a functioning process of competition.⁴¹ This goal is further supported in Articles 119 and 120 TFEU which demand 'free competition' which includes the participation of 'small' actors in a non-concentrated market.⁴² Conversely, Agricultural Policy is primarily focused on the benefits which can be enjoyed by the producer.

In the *Milk Marque Ltd* judgment⁴³, it was acknowledged by the ECJ that standard European Competition rules, as outlined in the TFEU, must cede to accommodate the objectives of the CAP outlined in Article 39 TFEU, (one of which is '*the maintenance of effective competition on the market for agricultural products*'). This does not permit unlimited scope for cartels and abuse by agricultural undertakings, as the same case found that in the absence of relevant EU Law on the matter, NCAs are empowered to step in and act.⁴⁴

³⁵ *Dairy 2020*, Vibrant UK Dairy Industry.

³⁶ *Bundeskartellamt*: Sektoruntersuchung Milch.

³⁷ Bureau, Jean-Christophe, Mahé, Louis-Pascal, p. 4.

³⁸ McGowan in Wallace, Wallace, p. 116.

³⁹ Hill, p. 89.

⁴⁰ Rieger in Wallace, Wallace, p. 181.

⁴¹ Craig/De Búrca, p. 959-960.

⁴² Geradin, Layne-Farrar, Petit, EU Competition Law and Economics, p. 20.para. 1.63.

⁴³ ECJ, Case C-137/00, *The Queen v The Competition Commission, Secretary of State for Trade and Industry and The Director General of Fair Trading, ex parte Milk Marque Ltd and National Farmers' Union*, (*Milk Marque*) [2003] ECR I-07975, para. 50.

⁴⁴ *Milk Marque*, para. 67. See also Geradin, Layne-Farrar, Petit, p. 46, para. 1.151.

However, in the *FNCBV* judgment, the ECJ clarified that in order for derogation from the normal rules governing competition to be accepted, (namely Article 101 (1) TFEU), all five objectives outlined in Article 39 TFEU must be served cumulatively by the measures being pursued.⁴⁵ This criterion automatically applies to the Dairy sector, which like all other agricultural sectors has been subject to protectionist policies.

Both judgments support the view that while there are limits to the full application of Competition Law to the Dairy sector, this does not entitle Member States to facilitate their Dairy sector actors to act in a way which is blatantly anti-competitive. The ECJ's approach has been to demand a high level of compliance without providing an authoritative answer as to the contemporary meaning of Article 39 (1) TFEU, (as discussed above in the context of the '*standard of living question*'). In the absence of any guidance from the European Institutions, one is trapped in a cycle of uncertainty as to how the conflict between the CAP and EU Competition Policy can best be resolved.

1.4.2. Policy and the Dairy Package:

It has been debated in the European Parliament⁴⁶ whether some of the objectives of the CAP within Article 39 (1) TFEU can actually be achieved through the new regulation. This is a particularly telling question when one considers that there were '*divergent*' opinions as how best to proceed with the particular provisions contained therein, e.g. the position of Producer Organisation (PO) *vis à vis* established co-operatives in the traditional sense,⁴⁷ which will be discussed in Chapter Three.

It is submitted here that efforts made to bring less developed dairy structures in certain Member States into line with their more advanced counterparts in others, while certainly admirable from a development perspective and for the purposes of raising living standards, will not contribute much in the medium run to improving the standing of European dairy on a world scale. Maximisation of efficiency is considered to be one of the primary objectives of Competition Policy.⁴⁸ This thesis will consider competition in the light of this, but will also acknowledge that there is another theory that the motivation of Competition Policy should be the maintenance of the '*competitive process*' itself.⁴⁹

Numerous amendments were proposed by the European Parliament in the first draft of that which became Regulation (EU) 261/2012, such as Recital 1a, reflecting the dependence of economically '*disadvantaged regions*' on dairy farming as a livelihood.⁵⁰ This recital was ultimately excluded from the legislation which was formally adopted in February 2012.

With the release of the various versions of the legislation which emerged prior to the final draft agreed on at the end of February 2012, the Dairy Package was poorly received by several of the interest groups and stakeholders which had been involved in the discussions prior to its creation. The European Milk Board (EMB) went as far as to brand the measures as a '*toothless tiger*'.⁵¹ The thesis will consider all of the measures individually and create its own conclusions as to the validity of this statement, as well as their compliance with accepted standards of competition.

⁴⁵ Joint cases T-217/03 and T-245/03, *FNCBV and ors. v Commission*, [2006] ECR II-04987, para. 199.

⁴⁶ European Parliament Debate 14.2.2012.

⁴⁷ *James Nicholson*, (Rapporteur), European Parliament Debate 14.2.2012.

⁴⁸ *Craig/De Búrca*, p. 959. See also *Akman*, p. 271.

⁴⁹ *Chalmers, Davies, Monti*, p. 910.

⁵⁰ *European Parliament*, COMAGRI Report.

⁵¹ *Ingredients Network Website*, 10.10.2011.

Following an introduction into the peculiarities and characteristics of the dairy sector and some examination of the conflict between the CAP and European Competition Policy, the developments which are forecasted to take place in this sector will now be considered in some detail.

2. Abolition of the Milk quota:

Some background information into the milk quota regime and its scheduled end in 2015 provides a context for the challenges the industry is currently facing.

The period on the run up to 2015 will be, in a certain sense, the test period for the Dairy Package measures. The milk which will form the subject matter of the new contracts in the regulation will for the time being still be subject to milk quotas. This additional challenge will obviously have some impact on the initial functioning of the Dairy Package.

Quotas can be defined as ‘*a limited quantity of a particular product which under official controls can be produced, exported, or imported.*’⁵² Quotas, *prima facie*, pose potential problems in relation to the functioning of competition; by controlling production they leave little scope for market forces to dictate price and quantity. This runs contrary to the observed function of EU Competition Law as a mechanism which renders markets more ‘open’ to competition.⁵³ The disappointment expressed by certain Member States, that significant extra production will continue to be penalised for the time being, is understandable if one considers the immediate comparative advantage gains which will be lost. However, there is logic in retaining the existing control of milk volumes, as will be noted below.

2.1. Rationale behind the Milk quota:

The Milk quota has been the primary control mechanism of milk output in the EU for three decades. Providing some information on its inception will illustrate some of the problems that will have to be dealt with in a different manner once the milk quota system ends.

The CAP consumed an estimated two thirds of the entire European Community budget in the 1970s and 1980s.⁵⁴ Large scale overproduction and the need to store unwanted surplus emerged from the policies of heavy direct subvention which were pursued at this time.⁵⁵ The aforementioned *Mansholt* Plan had been an early attempt in vain to rectify this fundamental problem.⁵⁶ Regulation (EEC) No 1078/77 was a dramatic move, in that it offered supports in the form of a ‘*premium*’ to farmers on condition that they withdrew themselves from milk production and marketing activities, proposing a switch to beef production as an alternative occupation. This was seen as a solution to curb a flood of milk.⁵⁷ For all the failings that may plague the new Dairy Package, there is a discernibly more focused approach to improving dairy market function, rather than simply circumventing the core issue and shifting overproduction to another sector and contributing to a surplus of beef.

The system of milk quotas was introduced in 1984 as a replacement for direct subvention in this particular sector. This was envisaged as a means of addressing overproduction and of limiting mounting expenditure.⁵⁸ Despite the misgivings which I have

⁵² Oxford English Dictionary.

⁵³ *Chalmers, Davies, Monti*: p. 909.

⁵⁴ *Stead, David R.*, Common Agricultural Policy.

⁵⁵ *Knight, Douglas K.*, Romania and the Common Agricultural Policy, p. 18.

⁵⁶ Alliance Environnement: p. 21.

⁵⁷ Council Regulation (EEC) No 1078/77 introducing a system of premiums for the non-marketing of milk and milk products and for the conversion of dairy herds, OJ [1977] L 131/1, 26.5.77, Article 1.

⁵⁸ *Hill*, p. 300.

expressed as regards quota's effects on the full and unfettered functioning of competition, non-competition considerations, such as prevention of waste and ambitions to curb the proportion consumed of the EU budget, were clearly to the forefront in 1984. Commentary from the European Parliament has praised the milk quota for having done 'a tremendous job' in this sense during its tenure.⁵⁹

As regards its abolition, the EMB openly welcomes this development, attributing the Milk quota as a cause for the increase in the number of farmers who have quit production since 1983.⁶⁰ This of course cannot be considered as the only reason behind the changes which have taken place on the rural landscape in the last thirty years, there are a multitude of factors which are too numerous to be discussed in detail here.

2.2. Use of the quota in Member States:

Until its abolition, the quota continues to have effect. Member States which produce close to (or over quota) are said to have binding quotas, which have an economic value and can be bought or sold within the Member State. Member States which produce under quota have quota prices close to zero.⁶¹

Subsequently there have been changes made on a national level in some Member States (for example, Ireland), to allow for greater internal transferability of quotas, in order to maximise permitted production.⁶² Quota transfers within Germany were considered in a presentation to the Commission by *Deutscher Raiffeisenverband* in March 2012, showing a concentration in the north of Germany of quotas acquired from other federal states. Even within Member States, the quota regime fails to reflect regional disparities and domestic hubs, where production exceeds originally allocated quotas, (e.g. Lower Saxony, Schleswig-Holstein in Germany).⁶³

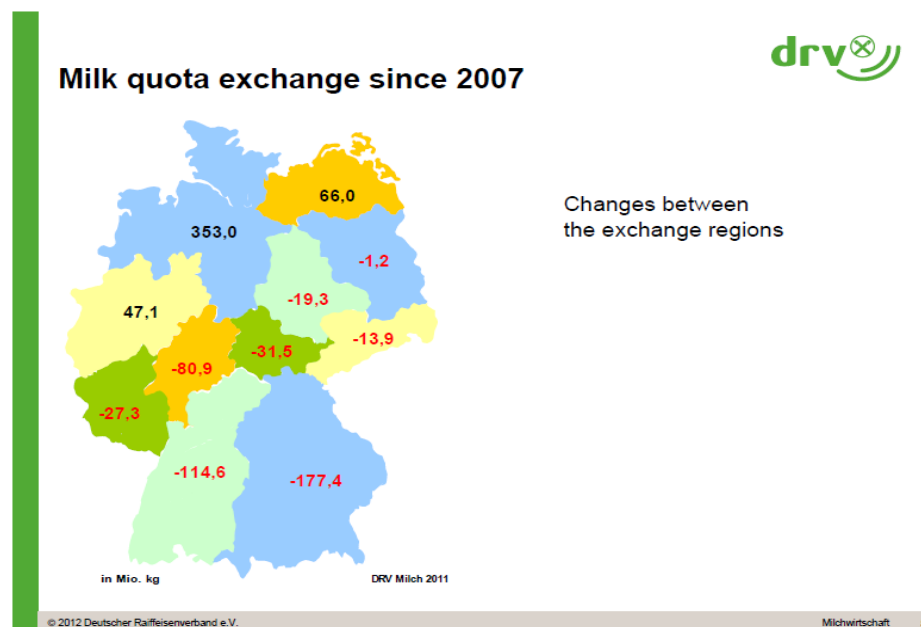


Figure 1: © 2012 Deutscher Raiffeisenverband⁶⁴

⁵⁹ James Nicholson, European Parliament Debate, 14.2.2012.

⁶⁰ EMB, The European Milk Board's position, (Block 1) p. 3.

⁶¹ Bouamra-Mechemache, Jongeneel, Réquillart, p. 6.

⁶² Hennessey, Shalloo, Wallace, p. 2.

⁶³ Schmidt, Heinrich, Deutscher Raiffeisenverband, p. 8.

⁶⁴ Ibid.

What is certainly lamentable from the perspective of Member States which produce close to their maximum permitted volume is the absence of the opportunity to buy quotas from other Member States. A quota has a potential economic value like any other commodity. If competition rules and the principles of a free and open internal market were to be strictly applied, without recourse to any of the many policies which seem to secure agriculture's special position, free trade of quotas on an intra-Community basis should be permitted. This was a policy suggestion which emerged from a European Parliament-supported study in 2008 but it was never developed to a legislative level.⁶⁵ This thesis surmises that fears of creating conditions which would encourage or entice stakeholders to achieve industry dominance within the bigger-dairy producer Member States were a factor in the decision taken not to facilitate cross-border transferability. It should be flagged here that agricultural products do not enjoy derogation from the prohibition of dominant-position abuse under Article 102 TFEU; therefore any creation of dominance should be monitored and controlled. This will be considered in more detail in Chapter Three.

2.3. Maintenance of the super-levy and quota increases:

To the displeasure of Luxembourg in particular, (who voted against the adoption of the Dairy Package regulation in the Council, noting that only certain select recommendations from the High Level Expert Group for the Dairy sector (HLG) had been taken on board),⁶⁶ DG AGRI has chosen not to incorporate the '*soft landing*' for the phasing out of the milk quota into the final legislative proposal for Regulation (EC) No 261/2012. This would have involved gradually allowing surplus production to commence in Member States before 2015, without the costly consequences of 'super-levies' (penalties which must be paid in the event of a Member State producing over quota). In terms of super-levy payments which have been incurred in the recent past, Denmark, the Netherlands, Luxembourg, Austria and Cyprus have come close to or have '*overshot*' their quotas in last few years.⁶⁷ This characteristic of the quota is one example of how the market for milk differentiates itself from regular non-agricultural markets which are subject to the full rigours of EU Competition Policy. Those who are most efficient and who would under regular market conditions be rewarded for this efficiency in production are punished. When announcing the changes in 2008, DG AGRI took the opportunity to introduce a 1% per annum increase in quota, with effect from 1st April 2009 leading up to 2015, (which was frontloaded for Italy, whose quota increased by 5% with immediate effect). An alternative to this system could have been to follow the '*voluntary quota*' system which operated in Switzerland between 2006 and 2009. However its success demanded that that voluntary quota adherence be accompanied by mandatory contracts between producers and processors and membership of a PO.⁶⁸ The introduction of blanket demands of such a nature would be virtually unworkable in the context of the heterogeneous EU dairy industry. Therefore the Commission has opted to maintain milk quotas while leaving PO membership to the discretion of producers within the Member States, as is outlined in Regulation (EU) No 261/2012.

⁶⁵ *European Parliament Policy Department-Structural and Cohesion Policies*, p. 12, section 3.2.2.

⁶⁶ *Council of European Union*, Declaration of the delegation for Luxembourg.

⁶⁷ AGRA FACTS, No.81-11, 19.10.2011, p. 2.

⁶⁸ *Chavez, Jaques*, The Swiss Milk Market, slide 4.

2.4. Possible challenges:

Milk Quotas place a cap on production which prevents certain Member States from capitalising on their natural and fairly achieved advantage in milk production.⁶⁹ Abolishing the milk quota provides the perfect opportunity for large scale producers to increase their production levels and to reap economy of scale benefits. This in conjunction with a free and ‘open market’ will, according to the Commission, promote an increase in ‘efficiency’.⁷⁰ It would perhaps be more fitting to call this potential gain ‘dynamic efficiency’, in that it would be induced by the introduction of a new ‘incentive’⁷¹ (i.e. the invitation to produce more milk). What the realisation of this advantage will mean for small stakeholders remains to be seen. Farms in the EU 12 accounted for only 24% of the total EU dairy cow population in 2010⁷² and this region tends to be Member States in which there is a significant underuse of the permitted quota. For example, Lithuania undershot its quota in terms of deliveries by 24.7% and Romania by 37.6% between 2009 and 2010.⁷³ It is accepted at an academic level that Member States are not equally situated as regards milk production conditions and do not enjoy the same ‘economies of scale’ potential.⁷⁴ (See Figure 2).

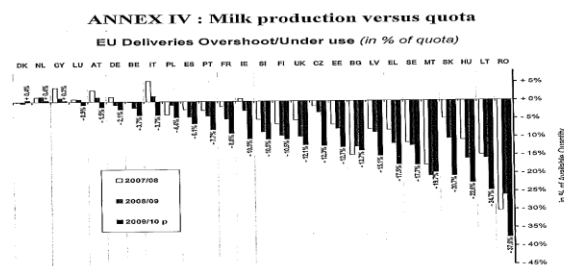


Figure 2: Evolution of the market situation and the consequent conditions for smoothly phasing out the milk quota system⁷⁵

⁶⁹ Spector, p. 2.

⁷⁰ Commission Notice- A proactive competition policy for a competitive Europe, para 1, as cited by Geradin, Layne-Farrar, Petit, p. 23.

⁷¹ De la Mano, Miguel: For the Customer’s Sake: The Competitive Effects of Efficiencies in European Merger Control, Enterprise Papers No. 11 (2002 Enterprise Directorate-General) pp. 8-14, as cited by Chalmers, Davies, Monti: European Union Law, p. 911.

⁷² Agriculture and Horticulture Development Board, p. 17.

⁷³ European Commission, Evolution of the market situation, 8.12.2010, p. 14.

⁷⁴ Ibid. p. 6.

⁷⁵ European Commission, Evolution of the market situation, 8.12.2010, p. 14.

Figure 3 gives an outline of the farm size situation in a number of Member States for the year 2007.

Member State	Holdings (1000)	Average number of dairy cows per farm	Percentage of dairy cows in large farms (100+ size herd)
Denmark	5.4	101.4	46.5
UK	28.1	69.4	27.3
Netherlands	24.5	59.9	13.3
Lithuania	123.2	3.2	0.2
Bulgaria	120.8	2.9	0.1
Romania	1012.4	1.6	0.0

Figure 3: (Differences in) Dairy farm structure 2007⁷⁶

Looking beyond the spectre of hypothetical efficiency gains which will not be realised prior to 2015, super levies act as a means of preventing output levels from spiralling out of control. The immediate release of a deluge of milk onto the market is inadvisable at this stage and the memory of the 2008 price crash is still fresh in policy architects' minds. With the introduction of the new measures provided for in the regulation, the Commission will be informed by the Member States as to the 'volumes of raw milk delivered' within each territory, as a means of accurately assessing the market situation.⁷⁷

Managed well, producers and processors could benefit greatly from the changes coming on stream in 2015. What is perhaps desirable at the present time is a period for preparation and planning, so that all actors are prepared for the challenges post 2015 of adapting to increased milk volumes. The Inter-branch organisation (IPO) could find a niche role here, particularly in identifying potential scope for export⁷⁸ and in spearheading initiatives to stimulate demand and consumption, so as to prepare the market for extra supplies of milk and dairy products.

3. From High Level Expert Group proposals to final substantial changes:

In this chapter, I will start by considering the outcomes of the HLG, the body whose consultations acted as the basis for the Dairy Package. From there I will consider each of the measures contained within the Dairy Package in turn.

Estimates suggest that the price received by producers for their milk fell by approximately 30% between 2007 and 2008.⁷⁹ Lower prices did not translate onto shop shelves at retail level and therefore there was no automatic scope for consumer demand for milk and dairy products to increase by any appreciable extent.⁸⁰ It has been acknowledged that there is relatively poor 'distribution of value added along the supply chain.'⁸¹ The HLG made eight suggestions, most significantly the call for legislative intervention to prevent volatility in producer incomes, as was in line with the Health Check objectives.⁸²

Member State representatives as well as industry stakeholders were included in this process and were invited to submit their various positions on the proposals which were tabled

⁷⁶ Eurostat, as cited by Eurostat: Agricultural and Fisheries Statistics, p. 14.

⁷⁷ Regulation (EU) No 261/2012, Recital point 19.

⁷⁸ Bundeskartellamt: Sektoruntersuchung Milch, p. 110, para. 338.

⁷⁹ Ibid. p 47.

⁸⁰ Regulation (EU) No 261/2012, Recital, Point 2.

⁸¹ European Parliament, COMAGRI Report, p. 49.

⁸² Proposal for a Regulation of the European Parliament and of the Council, 9.12.2010, p. 2.

in the form of blocks.⁸³ For the purposes of examining the changes in light of EU Competition Policy, Block 1 on the introduction of contractual relations in the Dairy sector and Block 4 on innovation are most relevant to this thesis. What follows is analysis of the measures proposed by the Commission and accepted by the Parliament and Council, following from the HLG meetings.

In terms of the political interests at stake, there was little involvement in the formulation of the final legislation or objection to its content from the newer Member States.⁸⁴ Stronger opinions on the measures at stake were expressed by other Member States; the vote taken in Council at the end of February 2012 saw abstention from Denmark, (holding the Council presidency at the time), Ireland and the Netherlands, with an explicit negative vote from Luxembourg.

3.1. Contractual Relations in the Dairy Industry:

3.1.1. Introduction:

This measure was introduced to address that which is referred to in the recital of the Dairy Package as ‘*imbalance[s] [which] can lead to unfair commercial practices.*’⁸⁵ As one of the major developments to emerge from the Dairy Package, contractual relations organised on an EU level will offer an additional layer of regulation for producers who are already subject to such contracts with collectors and processors. Additionally, it will provide a net of protection and improve the bargaining power of producers who have yet to officialise their relations with first purchasers. It is hoped that it will encourage both categories of producers to heed ‘*market signals*’.⁸⁶

The regulation envisages that the issue of ‘*extremely short contracts*’ which are blatantly disadvantageous to the producer in particular will be tackled by the introduction of standard-form contracts.⁸⁷

Currently sales of milk between producers and processors function on a partially or entirely contractual basis in a number of Member States e.g. the UK, where the largest volume of sales of milk from farmers to processors is based on contracts.⁸⁸ For guidance in how best to evaluate the effects of such contracts, the opinions submitted by interest groups for Block 1 of the HLG will be considered.⁸⁹ For the purposes of my analysis, this will be restricted to considering the views of two organisations, namely the EMB representing producers and the European Dairy Association (EDA), which represents processors. The views expressed by these two organisations give a perfect insight into the difference of opinion which existed during the HLG discussions. For example, EDA called for minimal regulation of the supply chain,⁹⁰ whereas EMB later expressed its disappointment that a monitoring body was not adopted at the legislative proposal stage.⁹¹

⁸³ DG AGRI: High Level Group on Milk, 17.6.2010.

⁸⁴ Conor Mulvihill, ICOS.

⁸⁵ Regulation (EU) No 261/2012, Recital point 5.

⁸⁶ European Parliament, COMAGRI Report, p. 49.

⁸⁷ Regulation (EU) No 261/2012, Recital point 10.

⁸⁸ House of Commons Environment, Food and Rural Affairs Committee, EU Proposals for the Dairy Sector p. 19 para. 34.

⁸⁹ DG AGRI: High Level Group on Milk, 17.6.2010.

⁹⁰ EDA letter to Director General, DG AGRI, 1.12.2009.

⁹¹ EMB, European Council ignores threat to Milk Producers’ Livelihood, 6.10.2011.

3.1.2. Possible Problems:

There are several Competition Law questions which arise in relation to contractual terms determined by national authorities which are applied to relations between private legal entities. While these are perhaps not as pressing from a Competition Law perspective as the potential problems pertaining to the mechanisms (namely PO and IPO) which will be used to implement these contracts, these questions will be addressed here. In my opinion, the central issue is that contracts may be used as a barrier to entry and a market foreclosure mechanism.

In addition to the PO and IPO as contract brokers, the option of introducing a third body, which would have been engaged in surveillance of contracts for the benefit of producers, was discussed at the HLG stage. The EMB and the EMA expressed divergent opinions with respect to a '*monitoring body*' which would supervise the functioning of contracts. In support of any contractual mechanism which will improve the relative bargaining power of producers, the EMB metaphorically referred to producers as '*the weakest link in the food chain*.'⁹² The HLG acknowledged this, as farmers were often left in uncertainty as to the price which they would receive for their milk until it was determined by the price reflecting '*value added*' received at a later point by the processor.⁹³

Whether this perspective can now objectively be supported, in light of the relatively high market shares that can be achieved by producers through membership of PO (see below) is debatable. *Copa Cogeca*, which represents producer-owned co-operatives at European level, advocates the further development of conditions under which farmers' bargaining position is improved.⁹⁴ Conversely, in an interview with the secretariat of the EDA in Brussels, *Dr Joop Kleibeuker*, Secretary General, considered the damage that the introduction of such a monitoring body, which had been the desire of the EMB, would have caused in terms of maintaining a semblance of balance in bargaining power between producers and processors. The monitoring body would have acted as a means of promoting collusion between producers, to a degree which would have exceeded the mechanisms permitted by the regulation.⁹⁵

Assuming that any blatantly collusive action orchestrated by a hypothetical monitoring body would have involved the explicit or acquiescing consent of all of the parties engaged in contracts represented by the body, this would be likely to fall foul of Article 101 (1) TFEU.⁹⁶ On this basis, one must objectively agree with the assessment of the EDA; allowing for a monitoring body, while providing extra strata of vigilance over the market beyond that afforded to the Member State in the regulation, would have involved a risk that the way in which market conditions were represented would have been manipulated. This is especially true in the absence of any efficiency coup, which while being important for the Dairy sector would also bring the concerted practices within the scope of Article 101 (3) TFEU, with the condition that the practices involve '*economic progress*' which is of benefit to the consumer and fulfil the requirement that there are no unnecessary '*restraints*' or '*elimination of competition*'.⁹⁷

A matter which is clearly flagged within the regulation is that there is no intention by the Member State authorities to interfere in freedom of contractual relations. Recital point 10

⁹² EMB, The European Milk Board's Position, (Block 1) p. 2.

⁹³ Regulation (EU) No 261/2012, Recital point 5.

⁹⁴ *Copa Cogeca*, What future for milk in the EU? p. 3.

⁹⁵ Interview, *Mrs Bénédicte Masure*, Director of Trade and Economic Policies, and *Mr Joop Kleibeuker*, Secretary General, European Dairy Association, 29.3.2012.

⁹⁶ Regulation (EC) No 1/2003, OJ C 210/2, 1.9.2006, Article 23, para. 2, as cited by *Geradin, Layne-Farrar, Petit*, pp. 112-113, para. 3.27.

⁹⁷ *Weatherill*, p. 521.

to Regulation (EU) No 261/2012 expressly recognises the prerogative of contracting parties to disregard the Member State recommendation as to minimum contract duration.⁹⁸

One issue that may arise as the standardised contract model is phased in across the participating Member States relates to the requirement that the quantity of milk which is to be supplied is stated within each contract. This is seen as a positive development as it is a quantitative specification serving as a planning mechanism for a farmer's annual output.⁹⁹ However, if producers are bound to a situation in which they are restrictively tied to producing a given volume of milk for a processor, one could argue that this could theoretically have the same constraining effect as a milk quota in curbing future growth, which presents a challenge to Member States where the quota is currently binding. When considering the different perspectives which have been expressed as to this issue, this thesis concludes that dairies and other processors must create capacity and remain open to supporting increased output if a system of contracts is to be of benefit to such Member States, all while remaining within the competitive auspices of the regulation.

When evaluating the substantive effects of rules governing contractual relations determined on a national level, these rules will be relatively unproblematic as long as the scope of their application remains within the national boundaries.¹⁰⁰ Therefore it can be deduced the question of the need for harmonisation is not relevant when the contract is between a producer and a processor in one Member State.

However, in order to uphold internal market principles, an element of 'uniformity' and the application of equal conditions for milk originating in different Member States are essential.¹⁰¹ Therefore, if a written contract is required between processors and producers within a territory, it follows that raw milk crossing a border to be processed into value added products (e.g. flavoured products), in another Member State should also be subject to a contract, according to Recital point 9 to the regulation.¹⁰²

While this is sensible from the perspective of the Member State receiving the milk, this places an extra administrative burden on producers from the exporting state, in the event that this is a Member State in which domestic processing and first purchasing is predominantly controlled by co-operatives and there is little or no use for contracts on their domestic supply chain.

This is potentially more of an issue concerning the free movement of goods in the context of the internal market and the extent of the disincentive to trade is debatable; however conceivable interferences in the functioning of competition should be flagged here. A potential obstacle to market entry is created by this administrative requirement and this thesis poses an open question in relation to this; is it imaginable that a Member State in a relatively weaker position, e.g. with a less developed and therefore less efficient industry, could operate complex contracts as a means of encouraging procurement by first purchasers of domestically produced milk?

In the spirit of the *Dassonville*¹⁰³ case law (prohibition against preventing the free movement of goods 'directly or indirectly, actually or potentially') such restrictive contractual terms could not be applied to exporters on a discriminatory basis.¹⁰⁴ Complex

⁹⁸ Regulation (EU) No 261/2012, Recital point 10. See also Regulation (EU) No 261/2012, Article 185f (4).

⁹⁹ High Level Group on Milk, Final Report, p. 9.

¹⁰⁰ *Grundmann*, p. 505.

¹⁰¹ *Chalmers et al.* European Union Law, p. 676.

¹⁰² Regulation (EU) No 261/2012, Recital point 9.

¹⁰³ Case 8/74, *Procureur du Roi v Benoît and Gustave Dassonville*, [1974] ECR 837, para. 5.

¹⁰⁴ Case C-50/85 *Schloh v Auto Controle Technique*, [1986] ECR 1855, para. 15.

contracts would therefore also have to apply to domestic-based sales of milk, which would essentially cancel out the benefit intended by the Dairy Package measures. For this reason it is perhaps sensible to assume that the hypothetical scenario outlined above is unlikely to arise.

Much to the dissatisfaction of the EMB,¹⁰⁵ the introduction of standardised contracts is now to be left to the discretion of each individual Member State, which will entail some Member States embracing and others disregarding the development. The true competition distorting potential of the standard form contract can only be examined in the context of its vehicle, namely the PO, which will be subsequently analysed.

3.1.3. Conclusion; Success of Contract- the Danish example:

In support of the introduction of standardised contracts, the employment of contracts by Danish dairy co-operatives has been credited in academic literature as a major reason behind the co-operatives' historical and continued success.¹⁰⁶ Interesting alternative theories as to the success enjoyed by Denmark in its dairy and creamery endeavours are referred to and refuted and the authors argue against some academics' assertions that it is to be attributed to so-called '*cultural homogeneity*' and subsequent '*trust*' amongst people, (as opposed to '*cultural heterogeneity*' and correspondingly less success in another dairy exporting country, Ireland¹⁰⁷). Certainly, without recourse to historical factors such as the purchase and processing of milk within the immediate community, (i.e. a village) personal affinity is largely absent in arrangements between farmers and large commercial co-operatives. Rather than basing their thesis on cultural factors, the authors simply present contracts as a means of legally obliging producers to co-operate, rather than insisting on their freedom to conduct business in a manner of their choosing.¹⁰⁸

However, in spite of this example of a joint system of contracts and co-operatives which worked well in one Member State, the recital to the new regulation accepts that the co-operatives which already offer producers conditions broadly in line with those in the standardised contract form should be exempted from the requirement to provide such contracts.¹⁰⁹ Conversely, if one supports the view that producers have no loyalties to a particular processing source and seek to '*sell their milk but not supply it*',¹¹⁰ it is easily envisaged the consequences for smaller processors and dairies which may not be in the position to offer the terms of a larger processor. This further indicates that contracts were introduced primarily as a way of regulating the industry in Member States where there is a low presence of co-operatives.

As discussed above, the full and efficient functioning of the free market may be compromised in the event that contracts are applied in a veiled attempt to prevent the free movement of goods. Member state authorities will need to monitor the situation carefully to ensure that equivalent conditions are applied in domestic and cross border transactions. Minimum contract duration must also be scrutinised in order to ensure that producers are not locked into restrictive conditions e.g. as regards the quantity of milk they supply.

For the purposes of the Commission's anticipated midterm assessment of the Regulation and for monitoring the prevailing market conditions in the run up to 2015, parties in contractual relationships must provide information as to the particulars of their contract

¹⁰⁵ EMB: European Council ignores threat to Milk Producers' Livelihood, 6.10.2011.

¹⁰⁶ Henriksen, Hviid, Sharp, p. 1.

¹⁰⁷ *ibid.* p. 2.

¹⁰⁸ Henriksen, Hviid, Sharp, p. 9.

¹⁰⁹ Regulation (EU) No 261/2012, Recital point 11.

¹¹⁰ Nüssel., p. 1.

(duration, volume etc.) to the Member State authorities. It seems reasonable from the perspective of this writer that there is some state interference in supervision of an agricultural market, when one considers the comparatively privileged conditions such commodities enjoy in terms of derogation from competition requirements. On a more concrete level, in order to assess the success of the measures and to genuinely evaluate ‘*mid- and long term arrangements for the milk and milk products sector*’,¹¹¹ taking account of particulars is vital.

3.2. Producer Organisations:

3.2.1. Substance of the measure:

Producer Organisations (PO) provide an alternative to membership of traditional co-operatives as method of organisation for producers. They are conceptualised in the relevant legislation as a vehicle for contractual negotiation between primary producers (farmers) and first purchasers. The major serious concern from the perspective of maintaining a functioning degree of competition is the opportunity for a PO to gain control over a substantial share of the milk market in a Member State, a situation which creates future potential for conflict with Article 102 TFEU.¹¹²

Before considering this in detail, I will outline briefly the maximum size of a PO as authorised in the legislation, I will make reference to the pre-existence of the dairy PO in one Member State and I will analyse one political aspect of the inclusion of PO in the Dairy Package, namely the difference in attitude between Member States *vis á vis* POs and co-operatives.

Size control is contained within the regulation, in terms of the percentage of total national milk volume which may be represented within the membership of a PO: one PO may maintain a maximum representation of producers accounting for 33% of the national pool of milk and a threshold for the EU total volume of milk of 3.5%.¹¹³ These percentages are particularly welcomed by existing POs which negotiate contracts in the UK, which were previously subject to a nationally imposed limit of 15%. A split market between Great Britain and Northern Ireland meant that this old limit could be reached quite easily.¹¹⁴

The legislation demands a degree of control over size, beyond considering cross border effects alone, and considers what a particularly large PO will mean for the functioning of the internal market as a whole, even if the PO’s scope is confined within the borders of one Member State. I would submit that is an approach which is adapted to cater to the particular characteristics of the milk market, i.e. it recognises that production, processing and retailing primarily take place within the boundaries of a Member State. The particular percentages specified were a matter of discord between the various interest groups which were engaged at the HLG stage; producer representatives maintained that these limits are too restrictive.¹¹⁵ The opposite view was expressed by processors’ representatives, who envisaged a scenario where all raw milk not tied to a co-operative within a Member State could hypothetically be controlled by a single PO, giving this PO substantial bargaining power.¹¹⁶ Irrespective of the disagreements as to the ideal threshold, 33% still ranks far above the usual *de minimis* rules which apply to agreements between actors on the same level of the production chain in other

¹¹¹ Regulation (EU) No 261/2012, Recital point 3.

¹¹² Regulation (EU) No 261/2012, Article 126c (2) (c).

¹¹³ Regulation (EC) No 1234/2007, Article 126c(2) (c) (i) and (ii).

¹¹⁴ Harris, *Farmers Weekly*, Dairy Package.

¹¹⁵ European Milk Board, Key Opportunity Missed!.

¹¹⁶ Interview EDA.

industries, which only allow for horizontal arrangements representing less than 10% of the respective market.¹¹⁷

Prima facie, calculating the maximum scale of a PO in this fashion may seem straightforward, however one encounters an issue of qualification, in that there is no universal European dairy blueprint. With this in mind, some discretion has been afforded to NCAs to intervene when they deem that a PO representing less than 33% of the market has the potential to distort workable competition within the Member State.¹¹⁸

The PO is not a new model unique to dairy, as it has already been successfully used in the vast majority of Member States in the fruit and vegetable sector.¹¹⁹ DG AGRI describes the PO as ‘the basic actors’ in this sector.¹²⁰ As was mentioned above in the context of membership size, POs are a feature of the dairy sector in the UK. Additionally, PO have been used in the dairy sector in parts of Germany for quite some time, and are already subject to national regulation from the *Bundeskartellamt*. Following the publication of their final report into the Dairy sector, the *Bundeskartellamt* concluded that the cartel-related exemptions afforded to POs on a national level would be copper fastened by the introduction of the Dairy Package on a supranational level.¹²¹ This follows an interim *Bundeskartellamt* report from 2010, flagging potential cartel-based challenges for the German milk sector¹²², which was criticised by stakeholders for not offering anything in the way of concrete suggestions for reform.¹²³ It now appears that these earlier demands at national level for a roadmap for change have been satisfied at EU level by the Regulation.

In Member States where there is a long and vibrant tradition of the dairy co-operative, the initial proposal in the legislation that PO would be put on an equal legislative footing as smaller co-operatives was strongly opposed.¹²⁴ Subsequently, the legislation guarantees that PO negotiations will be not interfere with existing functioning relationships between co-operatives and producers.¹²⁵

From a political perspective which focuses on the possible interests of the individual Member States, a distinction can be drawn between ‘primary’ co-operatives (those which can be understood in the sense of PO) and ‘secondary’ co-operatives, (co-operatives which are involved in processing and marketing).¹²⁶ In post-Communist Eastern Europe there appears to have been little appetite for organising production on the larger scale of the ‘secondary’ co-operative, in light of the memory of the imposed system of collective farms in this region, (many of which masqueraded as co-operatives not complying with standards as determined by the International Co-operative Alliance).¹²⁷ This is especially true for new Member States in which there was a particularly high concentration of collective farms during the era of Soviet influence.¹²⁸ For historical reasons, there are developmental challenges which are relevant to newer Member States only, and while any risk of market defragmentation is undesirable, legislation for PO on a supranational footing is warmly welcomed in this region (for example,

¹¹⁷ Commission Notice on agreements of minor importance, (*de minimis*), Point 7.

¹¹⁸ Regulation (EC) No 1234/2007, Article 126c (6).

¹¹⁹ *Copa Cogeca*, Fruit and Vegetable Producer Organisations in the EU, p. 2.

¹²⁰ *DG AGRI*: Fruit and vegetables: Producer Organisations.

¹²¹ *Bundeskartellamt*: *Bundeskartellamt legt Endbericht der Sektoruntersuchung Milch vor*.

¹²² *Bundeskartellamt*: *Sektoruntersuchung Milch*, p. 13, para. 13.

¹²³ *Deutscher Bauernverband*, statement of 23.02.2012, p. 2, as cited by *Bundeskartellamt*: *Sektoruntersuchung Milch*, p. 13, para. 15.

¹²⁴ *Conor Mulvihill*, ICOS.

¹²⁵ Regulation (EU) No 261/2012, Recital point 15.

¹²⁶ *Chloupková*, p. 1.

¹²⁷ *Ibid.* pp. 8-9.

¹²⁸ *Chloupková*, p. 11.

in Romania).¹²⁹ The inclusion of PO in the regulation is in line with the 2011 opinion of the European Economic and Social Committee which highlighted the particular importance of the PO for the dairy sector in newer Member States.¹³⁰

Policy decisions can never be shaped exclusively by current economic or structural concerns and the HLG was cognisant of these differences in national experience when formulating recommendations as to how the contracts system should be organised.¹³¹

3.2.2. Competition Concerns:

In this section, I will draw attention to a number of areas in which possible issues may be foreseen and consider the provisions in the Dairy Package which may counteract any threats to the functioning of competition.

In the absence of there being an ‘*exclusively social function*’ performed by the PO¹³² or of it having tasks connected to the exercise of ‘*public authority*’¹³³ in combination with its competence to negotiate contracts, it must be concluded that a PO qualifies as an ‘*undertaking*’¹³⁴ in the sense of EU Competition Law. It is left to be determined whether contracts concluded by a PO are ‘*unilateral*’ and are considered by the authorities to constitute the actions of one undertaking or are multilateral pursuits involving producers, the PO as an intermediary and the first purchasers.¹³⁵ Irrespective of the view taken by the Commission or a Member State’s NCA as to whether the PO is a unilateral or multilateral structure, obvious cases of collusion or price fixing are unlikely to be tolerated. Producers will be considered to have ‘*implicitly agreed to the [PO’s] commercial choices*’, if the PO is interpreted as being a single undertaking.¹³⁶ It should be noted here that so-called ‘*associations of undertakings*’ are also subject to EU Competition Law rules.¹³⁷

Similarly, subject to the criteria which the new regulation has added in the form of Article 126a, it is left to the Member States to ‘*recognise an association of recognised Producer Organisations in the milk and milk products sector*’, but only if the Member State in question considers the applicant body to fulfil the requisite criteria.¹³⁸

In the regulation, there is no explicit measure stating that PO recognition by a Member State will be withdrawn for reasons of a PO’s inclusion of anticompetitive terms in contracts. However, one could surmise that engaging in practices restrictive of competition, for example the ‘*agreements, decisions and concerted practices*’ as outlined in Article 177a would almost certainly be interpreted as constituting ‘*irregularities in the implementation of the measures*’¹³⁹ governing POs in the dairy sector.

In terms of the potential for conflict with Article 102 TFEU, (namely the abuse of a dominant position on a particular market), a PO holding a position of dominance must first be created. Abuse as outlined in Article 102 TFEU can never be justified and can have

¹²⁹ Correspondance with *Atilla Szocs*, Eco Ruralis Administration, (Cluj, Romania).

¹³⁰ Opinion of the European Economic and Social Committee, p. 110.

¹³¹ Report of the High Level Group for Milk, p. 9.

¹³² Case T-319/99, *FENIN v Commission*, [2003] ECR II-357, para. 10.

¹³³ Case C-364/92, *SAT v Eurocontrol*, [1994] ECR I-43, para. 30.

¹³⁴ Case C-41/90, *Höfner and Elser*, [1991] ECR I-1979, para. 21.

¹³⁵ *Geradin, Layne-Farrar, Petit*, p. 116, para. 3.39.

¹³⁶ Case C-228-229/82, *Ford v Commission*, 28.2.1984, [1984] ECR 1129, as cited by *Geradin, Layne-Farrar, Petit*, p.116, para. 3.41.

¹³⁷ *Geradin, Layne-Farrar, Petit*, p.118.

¹³⁸ Regulation (EC) No 1234/2007 Article 126a (2).

¹³⁹ Regulation (EU) No 261/2012, Article 126a (4) (c).

devastating consequences for ‘*efficiency*’ on a market.¹⁴⁰ The Commission nevertheless accepts the commercial reality of mergers¹⁴¹ and acknowledges the benefits which can be realised when companies consolidate.¹⁴²

Before considering the way in which concentrations between co-operatives have been construed by the Commission and relevant national authorities as a means of comparison, questions of market definition, unreasonable conduct and the possibility of recognition for an association of POs should be addressed.

Choosing a means of defining the market in which the PO will operate is vital when determining whether a situation of dominance exists.¹⁴³ Finding an appropriate market definition has proven to be a challenge in a number of cases before the Court in the past¹⁴⁴ however in the hypothetical scenario that the ‘*Relevant Product Market*’ (RPM) of a PO must be analysed,¹⁴⁵ it is likely that there would be a straightforward finding by the authorities that the RPM is that of raw milk. The more narrowly defined the market, the more likely it is that there will be a finding of dominance.¹⁴⁶ Older Commission cases have been criticised for creating a double burden for undertakings, i.e. allowing for both a finding of a narrow market definition and for imposing ‘*special responsibilities*’ on the ‘*conduct*’ of the dominant undertaking.¹⁴⁷

It should be stressed that dominance in itself is not illegal. As mentioned above, a different standard of conduct is demanded of the dominant firms in a market. For example, a very large PO is unlikely to be in a position where it can legitimately demand an ‘*unfair price*’ from first purchasers on behalf of the producers it represents. The concept of ‘*unfair price*’ is in itself unclear,¹⁴⁸ and this is all the more the case in an industry where it is producers who claim disadvantage in their relations with first purchasers. Such a situation arising would in effect switch the bearing of the disadvantage in bargaining negotiations from producers to processors or dairies.

In order to draw a parallel between the maximum size of PO which will be tolerated and the maximum size permitted for other milk producer-processor relationships, an analysis of instances where mergers between co-operatives have been approved may be insightful.

There has been a tendency observed to allow for broad market definition when co-operatives are considered by the Commission and the national courts.

Comparing co-operatives with POs in terms of the maximum size tolerated by the Commission and NCA, *prima facie* there is a difference in approach. There are co-operative organisations, for example Arla, whose operations collectively consist of a milk volume in

¹⁴⁰ *Chalmers, Davies, Monti*, p. 997.

¹⁴¹ Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation) OJ [2004] L 24/1, 29.1.2004, Recital point 4.

¹⁴² *Craig/De Búrca*, p. 1048.

¹⁴³ *Geradin, Layne-Farrar, Petit*, p. 177, para. 4.10.

¹⁴⁴ See cases *C-53/92 P Hilti AG v Commission of the European Communities*, [1994] ECR I-667, C-27/76 *United Brands v Commission of the European Communities*, [1978] ECR 207, T-374, 375, 384, 388/94 *European Night Services v Commission of the European Communities*, [1998] ECR II-3141.

¹⁴⁵ *DG COMP*: Working Paper, p. 22.

¹⁴⁶ Commission Decision, 22 December 1987, IV/30.787 and 31.488, *Eurofix-Bauco v Hilti*, OJ L 65/19, (11.3.1988) as cited by *Geradin, Layne-Farrar, Petit*, p. 177, para. 4.10.

¹⁴⁷ *Kauper, T.*, The Problem of Market Definition Under EC Competition Law, in *Hawk, B* (ed), *International Antitrust Law and Policy*: Fordham Corporate Law Institute (London: Sweet and Maxwell, 1997), p. 303, as cited by *Geradin, Layne-Farrar, Petit*, p. 177, para. 4.10.

¹⁴⁸ *Whish, R.*, *Competition Law* (Oxford University Press, 2009), Ch. 18, as cited by *Weatherill*, p. 537.

excess of 3.5% of total EU production¹⁴⁹ and they do not face such constraints on their activities. In terms of allowing for the creation of a position of dominance, several mergers have been approved in the course of 2011 which have resulted in a smaller number of enlarged co-operatives operating in some European territories. For example the Arla Foods/Allgäuland merger which was approved by the Commission, in spite of what was noted as ‘horizontal overlaps’ in certain product sectors,¹⁵⁰ (without an overlap being detected in the market for raw milk¹⁵¹).

When analysing the market power of the co-operatives, RPM played a significant role in steering the decision-making of the Commission; for both the Arla co-operative and Allgäuland, (which was collectively owned by a number of co-operative societies in Germany and Austria), this could be construed as covering a broad range of products, (not just raw milk, but ‘fresh milk’, ‘buttermilk’, ‘plain yogurt’, ‘value-added yogurt’, ‘quark’ etc.). This is possibly useful for the guiding decisions of NCAs as regards co-operative mergers on the level of a Member State; for example, the *Bundeskartellamt* has failed in the past to provide a definitive answer as to whether divisions along product lines in this fashion are appropriate.¹⁵² When considering the Relevant Geographical Market (RGM), the Commission considers the entire Member State to be the region of analysis.¹⁵³

Similarly, in a previous merger, there was no issue found with putting all production facilities concerned into the control of one firm.¹⁵⁴ An example of a liberal attitude by a national court towards a co-operative acquiring control over another company is the Kerry/Breeo¹⁵⁵ decision in Ireland. Here the High Court deemed that the NCA had erred in evaluating the RPM too narrowly and overturned the decision which had been made to block the acquisition.

It will be interesting to observe another large merger which is scheduled to take place, namely between Arla and Milk Link in the UK. This development between the largest processor of dairy products in the UK and one of the top 20 dairy producers globally¹⁵⁶ strongly supports the view that consolidation and concentrated production is the way of the future.

Despite the fact that there is no exemption available to agricultural undertakings under Article 102 TFEU, there appears to be a rather permissive attitude by the Commission, NCAs and national courts to large concentrations between co-operatives in the milk sector. This can perhaps be explained by the turnovers involved, which may not exceed the limits stated in Articles 1-3 of the Merger Regulation.¹⁵⁷ This does not eliminate the possibility that aspects of mergers in this ‘distinct’ sector, be they between co-operatives or POs, will come under scrutiny of the Member States or the Commission in the future, subject to the so-called ‘German clause’ in the Merger Regulation.¹⁵⁸

¹⁴⁹ *Van Bekkum, Onno Frank*: p. 62.

¹⁵⁰ Case No COMP/M.6348 – Arla Foods/ Allgäuland, para. 10.

¹⁵¹ *Ibid.* para. 41.

¹⁵² *Bundeskartellamt, Sektoruntersuchung Milch*, p. 23, para. 48.

¹⁵³ Case No. COMP/M.5046 – Friesland Foods/Campina, para. 77 and 80.

¹⁵⁴ Case No. COMP/M.6119- Arla/Hansa, Notification of 25.02.2011 pursuant to Article 4 of the Council Regulation No 139/2004, para. 6.

¹⁵⁵ *Rye Investments Ltd v Competition Authority*, [2009] IEHC 140.

¹⁵⁶ *Milk Link: Proposed Merger Announced Between Milk Link and Arla Foods amba*, 22.5.2012.

¹⁵⁷ EC Merger Regulation, Articles 1-3.

¹⁵⁸ EC Merger Regulation, Article 9. See also *Kaczorowska, Alina*, *European Union Law*, p. 920.

3.2.3. Conclusion:

Where does the generous stance afforded to co-operatives leave PO? It has been acknowledged that PO are somehow less necessary in Member States which have a sophisticated network of dairy co-operatives, in that these form *de facto* PO in themselves.¹⁵⁹

There is an intense element of monitoring for PO built into the regulation. This begs the question as to whether the EU affords comparatively less room to manoeuvre to POs because of fears from co-operative stakeholders, because co-operatives are regarded by EU agenda setters as an inherently more valuable model of market organisation or because of genuine concern for the proper functioning of competition within the internal market. Considering the second argument briefly, correlation has been drawn between the development of properly functioning co-operatives in rural areas and the wider process of democratization and economic development in a country. This theory may be carried a step further and suggest that the utilisation and growth of the co-operative model contributes towards the wider process of European integration, namely that of Enlargement.¹⁶⁰ This falls in line with the broader objectives of the European project to provide incentives for the co-operative growth and to reform what are seen as lingering remains of the collective farming regime in some of the newer Member States.¹⁶¹

From the perspective of policy makers, it is not unreasonable to consider POs as an ‘embryonic’ form of co-operative.¹⁶² Co-operatives are recognised as structures which benefit producers, however in order to achieve advanced objectives such as [implementing] ‘marketing strategies’, access to capital is vital.¹⁶³ In the current economic climate this may seem a tall order for a relatively inexperienced and/or underfunded PO.

There is an overlap in this sense with the role conferred on IPO, which will be acknowledged by the Member State if they engage in the creation of ‘*standard forms of contract*’ which are in accordance with Union requirements as between producers and first purchasers.¹⁶⁴ Certainly this gives Member States the option of recognising IPO, even in instances where raw milk is largely tied into co-operative arrangements and there is no urgent need for PO.¹⁶⁵

3.3. Inter-branch or Inter-professional organisations:

3.3.1. Substance of the measure:

IPO are a mechanism employed in various agricultural sectors as a means of uniting the different links on the production and distribution chain to achieve more efficient and satisfying outcomes for all concerned. They act as the voice of actors within ‘*various occupational categories*’¹⁶⁶ and support efficiency in interactions between, for example, processors and retailers.

IPO have been used in the context of some individual Member States’ Dairy sectors, including in France, Spain and Hungary. Pre-existing IPO in the Dairy sector must comply

¹⁵⁹ Telephone Interview, *Mr Pekka Pesonen*, Secretary General of *Copa Cogeca*.

¹⁶⁰ *Lars Hillbom*, Studies and Reports, Thirty-first in the series *The Impact of the European Union’s Enlargement on Co-operatives*. Papers presented at a seminar held in Prague 3-4 November 1997, (Introduction March 1998), pp. 5-6.

¹⁶¹ *Chloupková*, p. 10.

¹⁶² *Conor Mulvihill*, ICOS.

¹⁶³ *Szabó, Gabór G*, p. 1.

¹⁶⁴ Regulation (EC) No 1234/2007, Article 123(4)(c)(v).

¹⁶⁵ *Conor Mulvihill*, ICOS.

¹⁶⁶ DG AGRI, Competitiveness, Market Orientation, Fruit and Vegetables.

with requirements as outlined in the new the legislation otherwise they risk being stripped of their IPO status from October 2012.¹⁶⁷

Another agricultural industry which utilises the IPO model is Fruit and vegetables. However, much consideration has been given to the structural variations and differences in levels of development between various sectors and it is impossible to draw a truly fair comparison between fruit and vegetables on one side and dairy on the other.¹⁶⁸

Given that the relevant legislation has only been in force since April 2012 and that the Commission is empowered to use both ‘implementing’ and ‘delegated’ acts to supplement the primary legislation,¹⁶⁹ it is difficult as of yet to envisage precisely how IPO for dairy will look in reality. In the COMAGRI report to the European Parliament of July 2011, it was recommended that IPO be introduced for the Dairy sector, while not imposing rules to the extent that they apply to the fruit and vegetable sector,¹⁷⁰ (namely, allowing for a less rigorous regime).

It will be argued here that despite the control mechanisms which will be exercised by Member State authorities in respect of IPO,¹⁷¹ the rules with which they must abide are still undeniably less strict than those of trade associations in other industries. This is particularly relevant when one considers that IPO activities can be construed as vertical integration.

The purpose of the IPO is to ‘*optimise production*’ and contribute to minimising costs of production.¹⁷² Enhancing transparency along the supply chain is also regarded as a central objective, however with deeper analysis it can be observed that this has potentially negative effects for the full functioning of competition.

Typical activities of an IPO include negotiating the terms of ‘production activities’ and creating initiatives with the aim of improving quality standards along the chain.¹⁷³ Should Research and Development (R&D) activities fall within the scope of IPO this could encourage a favourable assessment of their activities by NCAs or the Commission.¹⁷⁴ Promotions and actions designed to lead to increased consumption also fall within the scope of IPO activities,¹⁷⁵ the full scope of which is outlined in Article 123 (4), Regulation (EC) No 1234/2007. While the power to extend or limit the activities of IPO operating within their respective territory is conferred by the regulation on the NCAs, ultimately the final assessment as to IPO compliance with competition demands and with the proper functioning of the internal market is left to the Commission.¹⁷⁶ In the broadest sense, this would appear to echo the intention behind Regulation (EC) No 1/2003, which empowers the national court to apply competition rules while still reserving the right of final determination to the Commission.

3.3.2. Competition Concerns:

On first glance, it appears that the regulation covers all bases in its efforts to maintain competition. However, concerns should still be expressed in terms of vertical integration of

¹⁶⁷ Regulation (EU) No 261/2012, Article 126a (3).

¹⁶⁸ Telephone interview, Mr. Pekka Pesonen, Secretary General of *Copa Cogeca*.

¹⁶⁹ Regulation (EU) No 261/2012, Article 126e.

¹⁷⁰ *European Parliament*, COMAGRI Report, p. 50.

¹⁷¹ Regulation (EU) No 261/2012, Article 126b, para. 3.

¹⁷² *EUROPA*: Common Organisation of Agricultural Markets.

¹⁷³ *Freshfel*, Inter-branch Organisations in the Fruit and Vegetables sector, p. 1.

¹⁷⁴ Article 101 (3) TFEU. See also *Geradin, Layne-Farrar, Petit*, p. 436.

¹⁷⁵ *Freshfel*, Inter-branch Organisations in the Fruit and Vegetables sector, p. 2.

¹⁷⁶ Regulation (EC) No 1234/2007, Article 177a.

markets and transparency. The risk of IPOs potentially using R&D as a means of circumventing Competition Law rules will also be considered.

There are eleven activities outlined in the regulation which fall outside the scope of Article 101 (1) TFEU. These include development activities¹⁷⁷ and ‘*transparency*’- improving activities.¹⁷⁸ In order for an IPO to avail of this derogation, there are two hurdles which must be overcome.

Initially, the activities must be ‘*notified to the Commission.*’ Following this notification the Commission is afforded three months in which it deliberates on the activities’ compatibility with acceptable competition concerns.¹⁷⁹ No action may be taken by IPO before the Commission has exhausted the time period afforded to it in the regulation for its determination.

These requirements indicate the seriousness of the Commission’s intention that IPO operate in accordance with the rules governing competition within the internal market, even in the event that NCAs fail to monitor individual IPO activities correctly.¹⁸⁰ Such deliberation by the Commission is vital, given that *prima facie* certain activities could be considered as ‘*vertical agreements*’ involving actors on the distributive chain (namely in terms of co-ordination of marketing strategies).¹⁸¹

Whether these restraints (should they exist) are actually undesirable is a matter of on-going debate.¹⁸² It can be argued that such restraints prevent undesirable conduct such as ‘*free riding*’, whereby rival undertakings obtain an unfair benefit from the efforts of another undertaking.¹⁸³ Alternatively, agreements of such a nature can have devastating consequences for the functioning of an internal market, in which the free movement of goods should be guaranteed.¹⁸⁴ Indeed, it has been observed post-Maastricht that with a new emphasis on the process of ‘*market integration*’ the consequences of vertical agreements needed to be re-examined.¹⁸⁵ This consideration and the need for additional emphasis on market integration prior to an eastern enlargement ultimately lead to a regulation on vertical restraints in 1999,¹⁸⁶ which was subsequently replaced by a new regulation outlining block exemptions for vertical restraints in 2010.¹⁸⁷

In the case of the dairy industry, there is a certain degree of ambiguity and such agreements cannot automatically be dismissed as damaging. For example, co-operatives constitute a form of vertical integration, in terms of their organisation along hierarchical lines and this plays a role in the competitive advantage that Member States with a high degree of such cooperation enjoy over other Member States which have a lesser focus on co-operatives.¹⁸⁸

¹⁷⁷ Regulation (EU) No 261/2012, Article 123 (4) (c) (ix).

¹⁷⁸ *Ibid.*, Article 123 (4) (c) (i).

¹⁷⁹ *Ibid.*, Article 177a (2).

¹⁸⁰ *Chalmers et al.* p. 909.

¹⁸¹ *Craig/De Búrca*, p. 959.

¹⁸² *Craig/De Búrca*, p. 989.

¹⁸³ *Motta*, p. 315.

¹⁸⁴ *Geradin, Layne-Farrar, Petit*, p. 397, para. 6.19.

¹⁸⁵ *Weatherill*, p. 498.

¹⁸⁶ *Ibid.* See also Regulation (EC) No 2790/1999, OJ [1999] L 336/21, 29.12.1999.

¹⁸⁷ Regulation (EU) No 330/2010 of 20 April 2010 on the application of Article 101(3) to categories of vertical agreements and concerted practices, OJ [2010] L 102, 23.4.2010, p. 1, as cited by *Brenning-Louko, Gurin, Peepkorn, Viertiö*, p. 14.

¹⁸⁸ *Chloupková*, p. 1.

Vertical chains between producers, wholesalers or processors and final retailers, (the journey from the farm to the consumer) contribute significantly to the economy of the EU; cumulative the links on the supply chain are estimated to comprise 7% of all employment and 5% of ‘European Value Added’.¹⁸⁹ Food supplies in general, and not just dairy produce, are considered to adhere to this vertical model.¹⁹⁰

Vertical restraints’ are permitted in the form of a block exemption, provided that they are intended to facilitate efficiency gains and adhere to Article 101(3) TFEU.¹⁹¹ Nonetheless, in the case of dairy, concerns have been expressed that there has been insufficient analysis of vertical supply connections, particularly from the perspective of evaluating and ameliorating the relative strength of producers in their relations with other actors.¹⁹² This is relevant when determining the proportion of market power which is held by the actors brought together by an IPO.

The maximum permitted size of an IPO within a Member State, in terms of the proportion of the total number of actors on each link of the productive or distributive chain represented therein, is not outlined in the legislation in quantitative terms. The IPO is merely stated to ‘account for a significant share’ of the functions performed.¹⁹³ This discretion left to the Member State illustrates the struggle between the desire to create strong and effective legislation and making allowances for differences which exist between Member States. This thesis argues that there should have been a more prescriptive approach in specifying size limits in the legislation. Alternatively, the rules pertaining to vertical integration in the Commission’s *de minimis* notice could have been applied as a means of ensuring certainty.

Market Partitioning, whereby an IPO reserves an entire market in which those with whom it coordinates will exercise exclusive control, is expressly forbidden by the regulation. What has been observed from the perspective of German producer representatives is the reluctance of the *Bundeskartellamt* to interfere in the strong market position and tacit agreements of retailers, on the basis that low prices for dairy products are passed onto and constitute a benefit for the end consumer.¹⁹⁴ Consumer benefit is also a primary concern for the Commission in deliberating on permissive actions by an undertaking, but in the scope of 102 TFEU.¹⁹⁵ It remains to be seen whether the introduction of the IPO on the EU level will lead to greater scrutiny by Competition authorities of the activities of retailers, as elements of this chain.

Transparency means that there is a free exchange of information along a supply chain. The HLG envisaged transparency as a tool to benefit ‘*milk producers, dairy industry and consumers*’¹⁹⁶ and initially suggested a different platform for ensuring transparency other than the IPO, namely through the cooperation of EUROSTAT and of qualified national authorities.¹⁹⁷ What has ultimately been included in the regulation is that IPO are empowered to publish statistics on ‘prices’, volumes delivered to processors and ‘duration of contracts’. It is hoped that this will create an open channel of communication and enable effective monitoring of the new structures, which is particularly important for the Commission’s task in

¹⁸⁹ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, COM (2009) 591 final.

¹⁹⁰ *McCorriston*, p. 350.

¹⁹¹ Regulation (EU) No 330/2010, Recital point 2.

¹⁹² *European Milk Board: Analysis of the European Commission’s Proposals*, p. 4.

¹⁹³ Regulation (EU) No 261/2012, Article 126b (1) (c).

¹⁹⁴ *Bundeskartellamt: Sektoruntersuchung Milch*, p. 84, para. 245.

¹⁹⁵ *Craig/De Búrca*, p. 1025.

¹⁹⁶ High Level Group on Milk, Final Report, p. 6.

¹⁹⁷ High Level Group on Milk, Final Report, p. 5.

evaluating the success of the Dairy Package.¹⁹⁸ Increased transparency will, *prima facie*, also support any producers arguing for better terms in negotiations with downstream actors as it will clearly show any vast discrepancies between what the producer receives and the profits of the processor or retailer. What distinguishes information exchange from the traditional concept of a cartel is that there is no requirement for explicit or implicit agreement between the parties.¹⁹⁹ Indeed, it can be argued that in order to replicate the model of perfect competition, there must be a free exchange of information within the market.²⁰⁰

In Germany, following the interim report of the German *Bundeskartellamt*, national and federal state producer representatives expressed negative opinions towards the idea of improved market transparency who felt it would disproportionately harm the interests of farmers who are not aligned to co-operatives.²⁰¹ This can be regarded as a ‘*foreclosure*’ concern, whereby not being privy to information will harm non-aligned farmers’ interests.²⁰²

Additionally, in the event that information sharing takes place amongst ‘*upstream*’ actors only and excludes ‘*downstream*’ market players, those upstream may use their shared knowledge to raise their prices, thus increasing costs of production and processing for those downstream.²⁰³ As the Dairy Package simply states that in order to be recognised, IPO need only be involved in ‘*at least one of the... stages of the supply chain*’,²⁰⁴ it can be potentially envisaged that producers could use the IPO transparency mechanism to achieve an advantage over the first purchasers of their milk.

Collusion in this sense can be defined generally as a situation whereby ‘*independent*’ market players reach ‘*joint decisions*’ on which courses of action to initiate or pursue.²⁰⁵ The difficulty which a NCA analysing behaviour may encounter is ‘*differentiating*’ collusion from ‘*parallel behaviour*’, which cannot be considered illegal.²⁰⁶ IPO-led creation of increased transparency may provide ample opportunity for ‘*tacit collusion*’ between actors on the same level of the supply chain, who are then enabled to closely observe the strategies of their competitors.²⁰⁷ It can be argued that, aside from achieving better market outcomes for producers, the role of the IPO in creating transparency allows for a degree of ‘*stability of collusion*’²⁰⁸

Using processors as a working example, who produce pasteurised drinking milk with 1.5% fat content (a homogenous product from a consumer perspective, although this characteristic is not always necessary), a mechanism such as IPO would potentially place them in a perfect position to conform to price uniformity, without necessarily creating an explicit agreement. Announcements and information sharing based on ‘*future*’ price

¹⁹⁸ Regulation (EU) No 261/2012.

¹⁹⁹ *Geradin, Layne-Farrar, Petit*, p. 429, para. 7.23.

²⁰⁰ *Glais, M. and Laurent, P.*: *Traité d'économie et de droit de la concurrence*, (Paris: PUF, 1983) p. 107, as cited by *Geradin, Layne-Farrar, Petit*, p. 429, para. 7.23.

²⁰¹ Statement of *Landesbauernverbandes Sachsen-Anhalt*, 22.2. 2010, p. 1, answers provided to questions posed in the interim report, p. 1, as cited by *Bundeskartellamt: Sektoruntersuchung Milch*, p. 50, para. 128.

²⁰² *Geradin, Layne-Farrar, Petit*, p.430, para. 7.27.

²⁰³ *Ibid.*

²⁰⁴ Regulation (EU) No 261/2012, Article 123 (4) (a).

²⁰⁵ *Martin*, p. 49.

²⁰⁶ *Weatherill*, p. 500.

²⁰⁷ *Motta*, p. 140.

²⁰⁸ Case C-7/95 *John Deere v Commission* [1998] ECR I-3111, at 87, 88-9, as cited by *Geradin, Layne-Farrar, Petit*, p. 431, para. 7.33.

projections, while not binding or creating obligations for any party, will almost certainly be interpreted by the Commission as an invitation to collude.²⁰⁹

Contrasting the IPO situation with that of traders in markets for which there is no exemption provided in the Treaty, the Commission has clamped down on information sharing on the basis that it can act as a means of creating ‘*barriers to entry*’.²¹⁰ Homogenous market conditions, such as those outlined above in the example above, can be considered a factor which makes collusion through information exchange more likely.²¹¹ This condition of homogeneity is not a necessary pre-requisite for the existence of collusion; one can conversely argue that the act of information sharing enables different parties to gain an understanding of each other’s differences. In terms of transparency, I therefore conclude that the make-up of the parties to the information exchange coordinated by the IPO, i.e. whether they are producers interacting with processors or processors in contact with retailers, is irrelevant. Scope for collusive behaviour exists and it is therefore left to the NCAs and the Commission to monitor the developing transparency situation carefully.

‘Innovation’ is an area in which the dairy IPO is also empowered to act. In relation to innovation ambitions in this field, Block 4 of the HLG discussions with stakeholders produced the following conclusions. From the perspective of processors, there should be an increased focus on R&D into new value-added products and on the economic value that can be derived from milk production by-products which, while not fit for human consumption, can play a role in the manufacturing of industrial products.²¹² It is unlikely that a focus on innovation would be of much benefit to those upstream on the supply chain, namely farmers.²¹³ Nevertheless R&D as a means of encouraging innovation is desperately needed as a means of reversing the stagnation of the European dairy industry.

However, in light of the favourable opinion of R&D held by NCAs and the Commission, care must be taken that development activities which are spear-headed by an IPO do not have restriction or partition of the market as their ‘*true object*’.²¹⁴ Any allowances made in terms of Competition Policy will be withdrawn from an IPO in the event of such a misdeed being detected. More generally, to draw a parallel with the view adopted by another European institution, the ECJ has been quick to state its disapproval of an ‘*exclusive licence*’ between firms based on the innovation of a newly developed product, even if the exclusive agreement is claimed to be a means of promoting the product on the market and thereby offering consumers increased choice.²¹⁵ It can be surmised that in such a situation the Court will take account in any agreement of the relevant ‘*legal and economic context*,’²¹⁶ which by analogy suggests that an IPO facing accusations of facilitating market division should be allowed to state its case.

²⁰⁹ Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, OJ C 11/1, 14.1.11, para. 74, as cited by *Geradin, Layne-Farrar, Petit*, p. 430, para. 7.28.

²¹⁰ *Møllgaard, Baltzer Overgaard*, p. 121.

²¹¹ Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, OJ C 11/1, 14.1.11, para. 82, as cited by *Geradin, Layne-Farrar, Petit*, p. 432, para. 7.37.

²¹² *EDA*, EDA Position, (issues on 3rd and 4th block), pp. 5-6.

²¹³ Regulation (EC) No 1234/2007, Article 123(4)(c)(vii), as inserted by Regulation (EU) No 261/2012.

²¹⁴ Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, OJ C 11/1, 14.1.11, para. 128, as cited by *Geradin, Layne-Farrar, Petit*, p.437, para. 7.62.

²¹⁵ Case C-258/78 *Nungesser v Commission*, ECR [1982] 2015, para. 53, as cited by *Weatherill*, pp. 506-507.

²¹⁶ *Weatherill*, p. 515.

3.3.3. Conclusion:

As can be observed in the rules governing the functioning of IPO, there is a dual-level system of control, with both the NCA and the Member State acting to ensure activities of an IPO, which can potentially damage the process of fair competition, are prevented and eliminated if necessary. The Dairy Package states that a breach of an anti-competitive nature can result in serious consequences for an IPO, namely that the NCAs can decide to withdraw recognition of the IPO.²¹⁷

From a procedural point of view, it is interesting to observe that there is no provision outlined in the Dairy Package allowing for an appeal of such a decision of the NCA. These grave repercussions indicate intent by legislative drafters to uphold competitive standards in this sector which is commendable. The aforementioned ambiguity in identifying collusion from parallel behaviour could however create difficulties for NCAs to evaluate IPO behaviour.

In terms of the IPO's role as a platform for increased transparency, provided that this does not extend to facilitating collusion it has potential to encourage increased competition between the different links on the dairy production chain, which will ultimately benefit end consumers. To provide an illustration of this as a conclusion, if information sharing is conducted in the right way it will enable producers and processors to concentrate on the products for which consumer demand is strongest.²¹⁸

3.4. Protected Designations of Origin and Protected Geographical Indications:

Space precludes an in depth analysis of the measures which have been adopted in the area of Protected Designations of Origin (PDO) and Protected Geographical Indications (PGI). However I will attempt to identify the potential points of contention with the Competition Policy of the EU.

The objectives of PDO and PGI designations are to verify the true origin of a product and to avoid deceptive misuse of a name, while also upholding marketing rights attached to that name. PDO are connected to characteristics stemming from 'natural and human factors', while PGI are based upon 'reputation' or associations with a particular region which cannot objectively be divorced from the product in the mind of the consumer.²¹⁹ In the *Feta II* judgment²²⁰ the ECJ upheld the finding of the Commission that the PDO had correctly been applied to Feta originating from various regions (but not all) of mainland Greece and a limited area of the Greek islands. This conclusion was reached on the basis of public perception of the product, a comparison of consumption patterns between Member States, national legislation and the special natural conditions pertaining to livestock and vegetation which contribute to the characteristics of the cheese.

The relevant provisions within the Dairy Package are as of June 2012 untested, in that the measures will not come into effect until October 2012. Therefore there is a certain degree of prediction required for this part of the thesis.

This provision is notable for the degree of collusive behaviour which is tolerated. Article 126d allows for the Member State, at the request of a PO or IPO, to apply rules to the 'supply' of varieties of cheese bearing the moniker of either a product with a protected

²¹⁷ Regulation (EU) No 261/2012, Article 126b (3) (d).

²¹⁸ *Motta*, p. 131.

²¹⁹ Council Regulation (EEC) No 2081/92.

²²⁰ Joint cases C-465/02 and C-466/02, *Federal Republic of Germany and Kingdom of Denmark v Commission of the European Communities*, [2005] ECR I-09115.

designation of origin or geographically indicated designation.²²¹ PDO/PGI provisions in the Regulation essentially give power to PO and IPO to collude with two thirds of the total number of producers of a certain variety of cheese, (with whom they must have an existing relationship),²²² in order to limit supply, for a limited period of time, for the purposes of responding to market signals. This is certainly contrary to the spirit behind Article 101 (1) TFEU. There are clearly stated limitations within the regulation; Member States can be compelled to surrender control of this area of PO and IPO activity to the Commission, should the Commission deem such activities to distort market conditions disproportionately. There is also an explicit prohibition against the creation of ‘barrier[s]’ to market entry for potential producers.²²³ Measures only relate to concerted control of supply; any initiative to predetermine prices, (even in the form of a recommended retail price) is expressly forbidden.²²⁴

It is argued here that the measure’s inclusion in the Dairy Package reflects producer concerns about the potential erosion of their standing in the market after the end of the milk quota, because of a perceived threat of possible increased production of cheaper or imitation cheese.²²⁵ It is argued here that this is a restriction operating along the same lines as a protectionist quota, albeit for a defined period of time.²²⁶

In a similar vein as the debate about the harm caused by vertical agreements, there exists ambiguity as to whether the disadvantages from the perspective of maintaining free competition which promotes efficiency maximisation outweigh the advantages from a producer’s point of view, as far as PDO/PGI are concerned. *Prima facie* by combining a designation which states that a certain product must come from a particular region and possess a range of distinguishing features with a limitation on supply puts a premium on the product. This assumption of automatic benefit has however been refuted by research into French consumption of a number of brands of what can be classified as Camembert cheese, showing that most will opt for the product not bearing a PDO in the absence of a difference in price.²²⁷ The exact reasons for this consumer preference are unclear. Therefore it will be the quality of monitoring which will determine the cost-benefit of the PDO/PGI measures.

4. Conclusion: Does the Dairy Package effectively apply the principles of EU Competition Law?

The CAP is fundamentally flawed and has been sharply criticised for decades for disregarding basic economic principles and manipulating market outcomes.²²⁸ While far from solving every structural problem, the Dairy Package provides a point of clarity, even if in achieving this there were disagreements between representative groups at HLG discussions.

Adopting the perspective of an external observer, there is public authority control of the contractual activities of PO and IPO, because it is the Member State which lays down the requirements to which both entities must adhere. What is particularly important for successful milk volume monitoring by the Member State authorities is the willing participation of ‘first producers’ in providing required information in an appropriate and timely fashion.²²⁹ The

²²¹ Regulation (EC) No 1234/2007, Article 126d (1), as inserted by Regulation (EU) No 261/2012.

²²² *Ibid.* Article 126d (2).

²²³ Regulation (EC) No 1234/2007, Article 126d (4) (h).

²²⁴ *Ibid.* Article 126d (4) (f).

²²⁵ *Ibid.*

²²⁶ Regulation (EU) No 261/2012, Article 126d (4) (c).

²²⁷ *Bonnet, Simioni*, p. 447.

²²⁸ *The Economist* (29 September 1990) as cited by *Rieger in Wallace/Wallace*, p. 182.

²²⁹ Regulation (EU) No 261/2012, Recital point 19.

unfulfilled promise to incorporate a soft landing before the end of the milk quota would almost certainly have encouraged a situation to emerge earlier where efficiency and capacity to produce is rewarded.

PO have a clearly stated mandate within the regulation. A new legislative document, which here sets out a legal vision of a PO improving producer bargaining position, is always accompanied with uncertainty as to how the real situation will be. Here I have raised the possibility of a PO acquiring a market position which is too strong. A requirement of periodic surveillance by the Member State authorities should go some way to insure that the hypothetical situation outlined in this thesis does not come to pass.

The case is less clear for IPO, which also have the authority to draft contracts but fulfil more of an intermediary or agency role. The task of increasing transparency, while certainly welcomed from the perspective of producers in particular, does not provide a substitute for the intense production control mechanism of the milk quota;²³⁰ rather it enhances information exchange within the market. The potential abuses which can result from an increased in knowledge between stakeholders have been flagged. The impact of the innovation competencies bestowed upon IPO still remains largely unclear. Particularly if these innovations bring European Dairy in line with other industries such as that in New Zealand, Europe could re-establish itself as a global dairy producing agenda setter. A high level of surveillance must be maintained to prevent intended or unintended exclusionary or foreclosure effects of R&D.

The demand for tighter control of PDO/PGI was clearly a result of fears for the relatively vulnerable position of artisan producers after the expiry of the quota regime. While there is care taken in the regulation to ensure that openly anti-competitive behaviour is subject to sanction, it cannot credibly be argued that a desire to uphold competition standards was the catalyst behind the inclusion an article reflecting PDI/PGI. There was a political motivation for protectionism in the face of the potential wider expansion of the dairy sector post 2015.²³¹

The degree of discretion afforded to the individual Member States e.g. in setting the terms of standardised contracts distinguishes the operation of the Dairy Package from that of other regulations, a legal tool which by definition focuses on achieving maximum harmonisation. Such variation in the adoption of the contents of the Dairy Package could render the entire endeavour a *'toothless tiger'* in time, both in terms of maximising welfare across the EU and ensuring that uniform competition standards are affectively applied. Alternatively, it recognises that this part of the CAP cannot realistically be considered *'common'* in a diverse union of twenty-seven and therefore goes as far as it is possible to achieve a level of harmonisation.

From the perspective of reversing fortunes after the 2008 price crash in the milk market and increasing the share of the world market held by EU producers, farm holdings will need to be of *'adequate economic size'* and a new focus on skilled *'human capital'* will be necessary to promote success post 2015.²³² This is broadly in line with trends which have been observed within Member States, e.g. in the UK, an increase in *'average herd size'* was observed in 2010 in spite of an overall fall in the cow population.²³³ The parallel between the shrinking number of individual farms and the emergence of larger holdings, while regrettable from a regional perspective must also be accepted as a consequence of increasing efficiency. Concentrated Production appears to be the development of the future and measures which

²³⁰ Telephone interview, Mr Pekka Pesonen, Secretary General of Copa Cogeca.

²³¹ Conor Mulvihill, ICOS.

²³² Opinion of the European Economic and Social Committee, p. 113.

²³³ Agriculture and Horticulture Development Board, p. 17.

safeguard the livelihood of the most disadvantaged farmers, while admirable from the perspective of solidarity, contradict this direction of progress.²³⁴

The core finding of this thesis has been that the Commission and NCAs are fully cognisant of the importance of maintaining functioning competition, and generally provided ample means of ensuring that their control is exercised in contractual relations. However, there are conflicting policies, such as the maintenance of rural life and respect for the different developmental narratives of Member States, which frustrate any possibility of bringing agricultural produce fully in line with the rules on trading and agreements which apply to other commodities. Policy directions do not automatically emerge from out of the blue; there is the requirement that a problem is identified (e.g. the less favourable position of producers in their relationship with other actors on the dairy products supply chain), and that there is a sufficiently well positioned interest group which will support a cause.²³⁵ The Blocks in which the HLG discussions were structured illustrate the diversity in interests that can be represented within the European dairy lobby itself. A compromise is a reasonable assessment of the package, in that no side of the debate had all of their demands fulfilled.

When so much of the exemption from the rules governing Competition which is afforded to the Dairy sector stems from an intention to maintain the treaty objectives of the CAP, should this not impose a duty on the Commission and other institutions to unequivocally state what these objectives actually mean in the context of the 21st century? Any indication as to the contemporary meaning of the provisions would have to take account of the dynamic nature of policy and thus would be very different to what was imagined in the 1950s. As a cost saving mechanism, granting limited leeway to initiate and to engage in what would qualify under normal circumstances as collusive behaviour in exchange for reduced direct supports seems reasonable.

Ultimately, a competitive assessment of Dairy Package is a complicated task which takes the researcher far beyond the bounds of the specific regulation. European Dairy's ranking on a world scale as well as the different agricultural backgrounds of the Member States have shaped the policy decisions which gave life to the legislation. Exemptions granted by the treaty are static, but the catalysts behind the application of these exemptions are in constant flux, reflecting the chameleon-like characteristics of European policy.

The Regulation goes to some lengths towards imposing competition standards within a particular agricultural sector. In particular the detailed provisions within the Dairy Package which clearly state the limits of Competition Policy derogations with respect to *agreements*, *decisions* and *concerted practices* should be commended. However, my final assessment is that more needs to be done to explain the EU's continued special treatment of agricultural markets.

²³⁴ McGowan, in Wallace, Wallace, p. 143.

²³⁵ Hill, p. 52.

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