AGRICULTURE (MILK): THE MILK MARQUE CASE

Subject: Agriculture
Pricing policy

Industry: Milk; milk products

Parties: (See Case citation below)

Source: Judgment of the Court of Justice, dated 9 September 2003 in Case C-137/00 (*R v The Competition Commission, the Secretary of State for Trade and Industry and the Director General of Fair Trading, ex parte Milk Marque Ltd and the National Farmers Union; third party, the Dairy Industry Federation*)

(Note. Here is a classic illustration of the relationship – in some ways, the clash, - between competition policy and the Common Agricultural Policy. The English Court submitted four questions to the Court of Justice, of which the two most important may be summarized as follows. Do the provisions of the EC Treaty on the CAP preclude the application of national competition laws; and does the existence of "target prices" under the CAP preclude the application of national rules on price-fixing? Broadly, the Court answers in the negative. Excerpts from the Court's judgment, including its formal ruling, are set out below.)

Judgment

1. ... the High Court of Justice of England and Wales, Queen's Bench Division (Crown Court), referred for a preliminary ruling ... four questions on the interpretation of Articles 12, 28 to 30, 32 to 38, 49 and 55 of the EC Treaty, of Council Regulation No 26 applying certain rules of competition to production of and trade in agricultural products and of Regulation EEC/804/68 of the Council on the common organisation of the market in milk and milk products ...

2. Those questions were raised in proceedings ... relating to a report by the Competition Commission recommending that measures be adopted against Milk Marque because of allegedly anti-competitive conduct engaged in by it and to decisions subsequently taken by the Secretary of State on the basis of that report.

[Paragraphs 3 to 12 set out the relevant terms of the CAP regulations.]

Questions referred for a preliminary ruling

13. Milk Marque is a farmers' cooperative society engaged in the collection, distribution and supply of milk. Immediately after the deregulation of the milk market in the United Kingdom in 1994 the members of Milk Marque had some 60% of the supply of milk in Great Britain. In the period 1997/98 to which the

Competition Commission's report relates, that figure was 49.6%. During the period from April 1999 to September 1999, it fell still further to 40.8%.

[Paragraphs 14 to 30 describe the circumstances in which the UK Competition Commission, on a reference from the Director General of Fair Trading, issued a reported finding a scale monopoly in Milk Marque's activities, criticizing the prices resulting from those activities and recommending to the Secretary of State certain action designed to curb the monopoly and lower prices. Milk Marque took action in the High Court against the official parties concerned; but the High Court decided to refer to the Court of Justice four questions for a preliminary ruling on the application to the case of Community law.]

31. In that legal and factual context, the High Court of Justice of England and Wales, Queen's Bench Division (Crown Office), decided to stay proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:
1 Are Articles 32 to 38 ... EC, Council Regulation [No 26 of 4 April 1962] and Council Regulation (EEC) No 804/68, as amended, to be interpreted as precluding a Member State from applying national laws such as the Fair Trading Act 1973 and the Competition Act 1998 to the manner in which producers of milk choose to organise themselves into co-operatives and conduct themselves in regard to the sale and processing of their milk:
(a) in all circumstances; or
(b) where the intended or actual effect is to deprive such producers of the ability to increase the price obtained for their milk; or
(c) where the intended or actual effect is to reduce the price that producers obtain for their milk in circumstances where that price is already below the target price fixed pursuant to Article 3 of Regulation No 804/68; or
(d) in a way which is not consistent with any one or more of the following:
(i) the objectives set out in Article 33 EC ...; and/or
(ii) the policy, aims or functioning of the common organisation of the market in milk and milk products: and /or
(iii) the policy of Article 36 EC ... and Regulation No 26?
2 Does the function of the target price for milk set by the Council under Regulation (EEC) No 804/68 preclude a Member State from:
(a) making use of the target price as an indicator of the actual price movements due to the common agricultural policy; and
(b) treating the fact that a milk producers' co-operative in that State has achieved for its members milk prices that are below the target price, but are nearer to the target price in one period of time than another, as supporting a conclusion that the co-operative exercises market power which contributes to prices being higher than they would have reached under more competitive conditions?
3 Are Articles 28 to 30, EC ... and Articles 49 and 55 EC ... to be interpreted as precluding a Member State from applying national laws such as the Fair Trading Act 1973 and the Competition Act 1998 in such a way as to prohibit a milk producers' co-operative which has been found to enjoy market power from sending milk produced by its members to be processed by contractors on its behalf, including in other Member States, as a step being taken by the co-operative for the purpose of exploiting its position in the market in its favour?

4 Where large vertically-integrated dairy co-operatives exist and are permitted to operate in other Member States, is the general principle of non-discrimination, whether independently or as a given specific effect in Articles 12 and/or 34 EC ..., to be interpreted as precluding a Member State from applying national laws such as the Fair Trading Act 1973 and the Competition Act 1998 to prohibit a milk producers' co-operative which has been found to enjoy market power from:
(a) acquiring or building further plants for the processing of milk produced by its members, which would give the co-operative the ability to exploit still further its position in the market in its favour; or
(b) sending milk produced by its members to be processed by contractors on its behalf, whether within the Member State concerned or in other Member States, as a step being taken by the co-operative for the purpose of exploiting its position in the market in its favour?

[Paragraphs 32 to 42 deal with the admissibility of the reference, which the Court accepted. Paragraphs 43 to the end of the judgment go into detail on the four questions raised by the High Court and are fully summarized in the Court's formal ruling. However, paragraphs 85 to 89 are of particular interest.]

85. As the Court has already held, the essential aim of the machinery of the common organisation of the market in milk and milk products is to achieve price levels at the production and wholesale stages which take into account both the interests of Community production as a whole in the relevant sector and those of consumers and which guarantee market supplies without encouraging overproduction (see *Irish Creamery Milk Suppliers Association and Others*, cited above, paragraph 20).

86. In consequence, the objectives of that common organisation cannot be compromised by national measures such as those at issue in the main proceedings since they do not as such affect the fixing of prices but rather seek to safeguard the proper working of the machinery for setting prices in order to achieve price levels which serve the interests of both producers and consumers.

87. With regard, in particular, to the question whether national measures such as those at issue in the main proceedings infringe the relevant Community legislation because the milk price of Milk Marque producers was lower than the target price laid down by Regulation No 1190/97 before the national authorities took action, it must be observed that that fact alone is not sufficient to render those measures unlawful under Community law.

88. First of all, this sort of price guideline is a political objective at Community level and is not a guarantee to all producers in every Member State that they will earn an income corresponding to the target price.

89. Secondly, given that, as is clear from paragraphs 57 to 60 of this judgment, the maintenance of effective competition is one of the objectives of the common organisation of the market in milk and milk products, Article 3(1) of Regulation EEC/804/68 cannot be interpreted as meaning that producers of milk have the

right to seek to earn an income corresponding to the target price by any means, including those that may constitute abuses or be anti-competitive.

The Court's Ruling

The Court hereby rules:

1 Articles 32 to 38 EC, Council Regulation No 26 of 4 April 1962 applying certain rules of competition to production of and trade in agricultural products and Regulation (EEC) No 804/68 of the Council of 27 June 1968 on the common organisation of the market in milk and milk products, as amended by Council Regulation (EC) No 1587/96 of 30 July 1996, must be interpreted as meaning that, in the sector governed by the common organisation of the market in milk and milk products, the national authorities in principle retain jurisdiction to apply national competition law to a milk producers' cooperative in a powerful position on the national market.

Where the national competition authorities act in the sector governed by the common organisation of the market in milk and milk products, they are under an obligation to refrain from adopting any measure which might undermine or create exceptions to that common organisation. Measures taken by national competition authorities in the sector governed by the common organisation of the market in milk and milk products may not, in particular, produce effects which are such as to impede the working of the machinery provided for by that common organisation.

However, the mere fact that the prices charged by a dairy cooperative were already lower than the target price for milk before those authorities intervened is not sufficient to render the measures taken by them in relation to that cooperative in application of national competition law unlawful under Community law.

Furthermore, such measures may not compromise the objectives of the common agricultural policy as set out in Article 33(1) EC. The national competition authorities are under an obligation to ensure that any contradictions between the various objectives laid down in Article 33 EC are reconciled where necessary, without giving any one of them so much weight as to render the achievement of the others impossible.

2 The function of the target price for milk laid down in Article 3(1) of Regulation No 804/68, as amended by Regulation No 1587/96, does not preclude the national competition authorities from using that price for the purposes of investigating the market power of an agricultural undertaking by comparing variations in actual prices with the target price.

3 In the context of the application of national competition law, the Treaty rules on the free movement of goods do not preclude the competent authorities of a Member State from prohibiting a dairy cooperative which enjoys market power from entering into contracts with undertakings, including undertakings

established in other Member States, for the processing, on its behalf, of milk produced by its members.

4 Article 12 of the EC Treaty and the second subparagraph of Article 34(2) do not preclude the adoption of measures such as those at issue in the main proceedings against a dairy cooperative which enjoys market power and exploits that position in a manner contrary to the public interest, even though large vertically-integrated dairy cooperatives are permitted to operate in other Member States. ■

Cross-Channel Transport Services

Following press inquiries, the Commission's spokesman for Competition has confirmed that, on 3 September, Commission officials carried out simultaneous unannounced inspections at the premises of a number of operators of cross-Channel transport services. The officials were helped by officials of the Member States concerned.

The purpose of these inspections is to ascertain whether there is evidence of suspected cartel agreement and related illegal practices concerning fixing of prices and trade conditions for cross-Channel transport services. The purpose is also to ascertain whether there is evidence of suspected market sharing agreements in relation to the provision of ferry services to and from the UK.

Surprise inspections are a preliminary step in investigations into suspected cartels. The fact that the Commission carries out such inspections does not mean that the companies are guilty of anti-competitive behaviour nor does it prejudge the outcome of the investigation itself. The Commission respects the rights of defence, in particular the right of companies to be heard in antitrust proceedings.

There is no strict deadline to complete cartel inquiries. Their duration depends on a number of factors, including the complexity of each case, the exercise of the right of defence and the implementation of the Commission's consultation and other procedures.

A similar statement has been made by the Commission's spokesman for Competition to the effect that, on 3 September, Commission inspectors assisted by officials from National Competition Authorities carried out simultaneous unannounced inspections at the premises of a number of ferry operators located in Sweden, Denmark and Germany.

Source: Commission Memoranda MEMO/03/168 and MEMO/03/167, both dated 3 September 2003