



A clear ban on price-fixing practices in the wine sector – The solution of introducing a “price tunnel” clause

Jade PROST

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Resume: *The French Competition Authority delivered a recent opinion (no. 24-A-01, March 12, 2024) on the question to know if a wine inter-branch organization could set the price of wine products, especially wine reserves. The authority argued that such a practice should be prohibited under article 101 TFEU and under article L420-1 of the French Commercial Code. However, it introduced a possibility for an inter-branch organization to include a “price tunnel” clause – in an inter-branch agreement – in which the contracting parties must remain free to determine their own prices.*

The agricultural sector is a special and regulated area in the European Union. The principle is that competition law does not apply to practices related to the production and trade of agricultural products: this inapplicability is instituted by the Treaty of Rome¹. However, some practices remain prohibited under competition law, particularly those relating to price-fixing. As in any market, the price of agricultural products should only result from a free market – in general – and from the contracting parties – in particular.

With this idea in mind, the French Competition Authority was asked to give its

opinion on a special matter: at the request of the Minister for the Economy, the authority delivered a recent opinion on price-fixing practices by wine inter-branch organizations². In particular, the question was to know if an inter-branch organization has the possibility to regulate the price of wine reserves.

This opinion can be studied in the light of the specific features of the market in this sector (I). In sum, the opinion prohibits price-fixing practices by an inter-branch organization as a cartel practice (II). Finally, this practice is not subject to an exemption, but the authority saw a possibility of introducing a “price-

¹ TFEU, Art. 42, *OJEU* C 326, Oct. 26, 2012.

² Aut. conc., Opinion No. 24-A-01, March 12, 2024.

tunnel” clause in an inter-branch agreement (III). This clause should only be a standard or a model clause, in which contracting parties must remain free to set the price of their own wine reserves.

I- The role of inter-branch wine organizations: guaranteeing stability in a precarious sector

Inter-branch wine organizations are institutions that bring together the various players of the wine industry and that aim to act in the common interest of all their members. In France, these organizations are represented by the *Comité national des interprofessions des vins à appellation d'origine et à indication géographique* (CNIV). These inter-branch wine organizations have a decision-making power given by Member States – as provided by the article 167 of the CMO Regulation. The CMO Regulation establishes a common organization of the markets in agricultural products in the EU. It allows Member States to give decision-making powers to some recognized inter-branch organizations, in order to improve and stabilize the common market in wine sectors³.

Under this provision, the majority of inter-branch organizations in France adopted specific measures. One of them was to put a part of the harvest realized by each

winegrower “in reserve” – in other words, out of the market. This involves setting aside a part of the wine production of the year in the purpose to limit market fluctuations. Indeed, the wine sector is characterized by the vagaries of the weather, which influence the volume and the quality of the harvest from one year to the next (§19). Therefore, a “reserve” makes it possible to store a part of the harvest when the production is high – and to put it on the market when the next harvest is lower. This process is guaranteed by two legal mechanisms: an individual reserve must be made by the producer, as provided the French Rural Code⁴; and a reserve can be decided by inter-branch measures (§20). The limit to a reserve is that it must not block an excessive percentage of the harvest normally available.

The Competition Authority has been asked to give its opinion on this second reserve mechanism. The inter-branch organizations wished to set up a price framework for these wine reserves, but this practice raised competition concerns.

II- The competitive analysis: a price-fixing practice implemented by an inter-branch organization is a cartel practice

The question asked here to the French Competition Authority was whether it is

³ Reg. (EU) No 1308/2013, Art. 167, Dec. 17, 2013, *OJEU* of Dec. 20, 2013.

⁴ *Code rural*, Art. D. 645-7.

possible for an inter-branch wine organization to put in place a mechanism to regulate the price of these wine reserves. In other words, is this possible for the inter-branch organizations to stipulate – in their inter-branch agreements – that the price of the reserve will not fluctuate above and below some amounts?

According to inter-branch organizations, if the answer is no, such a broadly framework would allow prices to fluctuate – too widely – and would result in a risk of price-increasing for the consumer (§29). It could lead to a situation where the winegrower will ask to the winemaker an excessive price in exchange of its wine-reserve, since he has nothing else to sell. Therefore, the winegrower will set higher prices, which will lead to a fall in demand (§31).

As far as competition law is concerned, European law provides a specific regulation of the agricultural sector.

Firstly, according to article 42 TFEU, competition rules do not apply to the production of and trade in agricultural products⁵. The CJEU interpreted this article as meaning that the common agricultural

policy prevails over objectives assigned to competition policy⁶.

The French Competition Authority also accepted the possibility of derogating from the competition rules prohibiting cartels – in accordance with the intent of the European legislator in the context of the specific activities of producer organizations (§36).

Secondly and however, articles 167 and 210 of the CMO Regulation prevent Member States from authorizing a price-fixing practice. If there is a price-fixing agreement, it cannot derogate from competition law and would therefore be subject to the provisions of articles L420-1 of the French Commercial Code and 101 of the TFEU (§§39-40).

As Vincent Téchené pointed it out, even if the agricultural sector benefits from numerous derogations from competition law, inter-branch price-fixing related to wine reserves is not covered by these derogations⁷. It is likely to constitute a violation of antitrust law: in other words, the authority recognized that such a practice « *is likely to constitute a price cartel contrary to competition law* »⁸.

⁵ TFEU, Art. 42, *OJEU* of Oct. 26, 2012.

⁶ CJEU, Case No. C-671/15, Nov. 14, 2017.

⁷ V. Téchené, « Avis de l'Autorité de la concurrence concernant les réserves interprofessionnelles dans le secteur des vins », *Lexbase Affaires*, n°793, 2024.

⁸ Aut. conc., « The Autorité publishes an opinion on inter-branch reserves in the wine sector », Press Release, April 15, 2024, available on the website: <https://www.autoritedelaconcurrence.fr/en/press-release/autorite-publishes-opinion-inter-branch-reserves-wine-sector>.

Thirdly, such a conclusion can also be drawn from article 2 of the “EGAlim 2” law which aims to protect farmers’ remuneration. This article allows the parties to agree, in the form of a clause, on minimum and maximum price limits (§46). In this case, the organizations argued that it would be possible to extend this provision to inter-branch organizations. However, the French Competition Authority interpreted this text in a restrictive manner: the possibility of setting the limits of the price tunnel is only given to the parties to a contract and cannot be extended to the inter-branch level (§48)⁹.

In sum, the French Competition Authority concluded its opinion by referring to this provision: it founded that a measure adopted to regulate the price of reserves could violate competition law and does not fall within the scope of the special law provided by the CMO Regulation. It is therefore not possible for an inter-branch organization to set the limits of the “price tunnel” that would apply to the entire wine sector.

In support of its opinion, the authority reiterated the reasoning it followed in an opinion delivered in 2011 regarding contract negotiation procedures in the livestock sector (§42). The French Competition Authority

already considered that « *price-setting clauses, even if they can take account of changes in objective indicators or if they can set calculation methods designed to combat excessive volatility, must never lead to a collective agreement on the price levels charged by competing operators* »¹⁰. The prohibition of wine inter-branch reserve prices is therefore in line with the prohibition of price agreements that the French Competition Authority has been asserting for several years.

III- The refusal of an exemption but the solution of a “price tunnel” clause

However, under the “EGAlim 2” law, it is possible to set a price fluctuation tunnel in which the contracting parties must set their own minimum and maximum price limits (§50).

This mechanism of “price tunnel” is already provided by a decree in the beef sector: written contracts related to beef products must contain such a “price tunnel” clause (§47). In other words, under this decree, farmers must include a price tunnel clause in their beef sales contracts, setting a framework which prevents the market from price fluctuations¹¹.

⁹ Loi n° 2021-1357 du 18 octobre 2021 visant à protéger la rémunération des agriculteurs, Art. 2, OJFR No. 0244, Oct. 19, 2021.

¹⁰ Aut. conc., Opinion No. 11-A-11, July 12, 2011, §65.

¹¹ Décret n° 2021-1415, du 29 octobre 2021 pris pour l'application de l'article 2 de la loi n° 2021-1357 du 18 octobre 2021 relatif à la clause de prix des contrats de vente de produits agricoles mentionnés à l'article L. 631-24 du code rural et de la pêche maritime, OJFR No. 0254, Oct. 29, 2021.

Inter-branch organizations can therefore require producers to include such a clause, although they cannot determine the amounts involved.

What about the possibility of an exemption, under paragraph 3 of article 101 TFEU and article L420-4, I, 2° of the French Commercial Code? The inter-branch organizations could set a framework for reserve prices that would be contrary to competition law but would be subject to an exemption. Article L420-4, I, 2° of the French Commercial Code applies to the agricultural sector and provides the possibility of agreeing a common transfer price for agricultural products or products of agricultural origin – such as wine reserves in this case –, if this practice restricting competition is essential to achieve the objective of economic progress¹².

About this point, the French Competition Authority – as Alain Ronzano pointed it out¹³ – considered that this framework measure is not essential to maintain and encourage contractual relations between producers and traders, insofar as there are other practices that are less restrictive for competition that can be put in place (§59). In particular, the authority raised the following issue: the

possibility for an inter-branch organization to publish statistical data or objective indicators to suggest the reasonable price at which the operators should sell their wine products. However, such indications are qualified as indirect price-fixing practices (§58).

Referring again to its opinion issued on July 12, 2011, it also pointed out that « *save in exceptional circumstances, the dissemination of pricing guidelines by a professional body can never be exempted individually and has been condemned by the Authority in almost all the cases it has had to examine* »¹⁴.

Conclusion

In conclusion, the French Competition Authority strictly interpreted these European and national laws. It is impossible for a wine inter-branch organization to introduce a price framework for wine reserves. It can only set up a “price tunnel” clause – in an inter-branch agreement – allowing operators to include in their contracts the minimum or maximum limits between which the price could fluctuate in the future. Indeed, these price limits must be freely determined and agreed by each contracting operator.

¹² *Code de Commerce*, Art. L420-4, I, 2°.

¹³ A. Ronzano, « Avis : L’Autorité de la concurrence rappelle son opposition à l’encadrement collectif par les interprofessions vitivinicoles du prix de la réserve

lors de sa libération et les invite à prévoir un mécanisme de tunnel de prix », *Concurrences*, No. 2-2024, March 12, 2024, Art. No. 118301.

¹⁴ Aut. conc., Opinion No. 11-A-11, July 12, 2011, §45.

An author recalls that this “price-tunnel” clause is promoted and encouraged by the legislator itself¹⁵. In the future, it will also be possible to adopt a future decree that would force wine producers to insert a “price tunnel” clause, along the lines of the beef sector.

However, the opinions of the competition authority are not binding on the parties. Inter-branch organizations may also – if they wish – implement these price-fixing practices, but they would then take the risk of breaching competition law.

Jade PROST

¹⁵ H. Juillet-Régis, « Droit rural – Les institutions privées de représentation du monde agricole », *Droit rural*, No. 11, 2024, File No. 46, §19.