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Food supply chain: The French CEPC addresses certain provisions and practices between producers and first buyers, in the dairy sector, with the view to facilitate the optimization of the commercial opportunities for producers

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CEPC, Op. n° 20-1

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Following an initial CEPC opinion on a milk supply contract, previously commented on (see Circular Letter 12/2017, nos. obs.), the Commission once again examined this very specific type of contract, which is fairly symptomatic of the tensions that can exist between the players in the agricultural sector, against the backdrop of a recurring debate on the value of production (see also the report on the CEPC's first opinion on the subject). CEPC press release of 19 June 2009, https://www.economie.gouv.fr/files/directions_services/cepc/cp_190609.pdf).

Facts. In this case, the CEPC's opinion was sought on two clauses and two practices. The first clause stipulated that the producer undertook to fulfill in good faith its delivery commitment by providing the purchaser with quantities of milk "corresponding to the production cycle of its herd". The second, according to the party initiating the referral, would make it impossible to change the milk collection circuit. In terms of practices, the first concerned the buyer's failure to take a specific position following a request from a producer under contract to be able to reduce the volume of production that the latter undertook to deliver to him. The second concerned the failure to respond to the producer's request to have the milk collection system changed as a result of the contract.

Trouble. Hence the following questions posed by the PO, which make it possible to gauge the greater or lesser freedom for a producer to organize his outlets and, finally, to emancipate himself a little and proportionally from his buyer:

- does a supply clause formulated in the following terms: "*the producer undertakes to fulfil his delivery commitment in good faith by supplying the purchaser with quantities of milk corresponding to the production cycle of his herd*" not create an obligation of exclusivity that is not clearly agreed?
- Is a clause that makes it impossible to change the collection route legal?
- Is a letter from the buyer that leaves a discussion open to reduce the producer's volume and does not respond to the request to change the collection route legal? Is the buyer's refusal in principle to allow producers to take over collection operations legal?

Solutions. Where a milk supply contract explicitly refers to the supply of quantities corresponding to a "herd production cycle", clauses providing for minimum annual volume commitments should expressly stipulate the exclusive nature of the relationship. Since the production cycle of a herd has consequences for its production capacity, and consequently for the volume commitment agreed, this reference may - in combination with other terms of the contract - create an exclusivity of supply which prevents the producer from considering new outlets. In the view of CEPC, this clause is therefore insufficiently precise in terms of the freedom of the producer.

Furthermore, the clause providing for the organisation of collection by the buyer without any commitment to regularity or recurrence of the passages organised at his sole initiative is void if it does not provide for sufficient advance notice in setting the collection times and frequency. Such a clause could also be sanctioned on the basis of the significant imbalance in the rights and obligations of the parties (Com. C., art. L. 442-1) to the finding that the producer cannot organise parallel activities, anticipate additional storage and production (livestock) capacities, whereas it is contractually bound by a volume commitment and permanent availability with regard to a collection rate which depends on the buyer, without any real counterpart to these constraints.

Lastly, the proposal by the buyer to reduce the minimum annual volume commitment of the producer to enable him to develop and diversify his activities, while refusing to consider a change in the conditions and pace of milk collection, may constitute a failure by the buyer to fulfil his obligation to perform the contract in good faith, whereas forecasting the pace of collection is essential to the organisation of the seller's activity. In order for the discussion (concerning the producer's request) to be considered in good faith on the part of the buyer, the latter must draw the consequences of his proposal for a reduction in volume on the frequency of collection. In the present case, it did not appear to the CEPC that the terms of the buyer's letter showed a willingness to negotiate the possible amendment of clauses which, as they stand, do not allow the seller to envisage an expansion of its activities. It is the combination of a refusal to amend the collection, the proposal for a reduction in the contractual volume and the vagueness inherent in the collection clause that makes it possible to assess the buyer's position in the negotiation.

Analysis. As a preliminary point, the opinion stresses that although the facts brought to the attention of the CEPC and the referral are prior to the Order of 24 April 2019, the provisions of the opinion are not called into question by the amendments to the reform. Moreover, contractualisation in the cow's milk sector, which must be written between a producer and his first buyer, has been governed for about ten years now by Articles R. 631-7 et seq. of the Rural and Maritime Fishing Code (resulting from a decree of 30 December 2010 issued for the application of Article L. 631-24 of the same code in the dairy sector), the content of the notice, in terms of the issues addressed in terms of the content of the contractual relationship or practices, does not seem to us to be called into question in light of the provisions of the Equalim

Law of October 2018 (see new articles L 631-24 et seq.). It should be noted that this law has, among other things, modified the contractualisation regime between producer and first purchaser, and introduced, for example, a system of price construction "in advance", i.e. initiated by the producers, based on production costs (but not only), in particular when the price is not determined (see Art. L. 631-24 III penultimate paragraph; à rappr.". Improving the income of livestock farmers is more than a question of price! "by H. Dion (Caplait), A. Ecoiffier (Association Laitière Jura-Bresse), F. Eyraud (Danone Produits Frais), R. Gavaille (OP Sud-Ouest-Laitier), D. Lecuir (OP. des Trois Vallées), P. Poncet (OP Danone Sud-est), Les Echos 26 February 2020). The concrete implementation of the new provisions is not without technical difficulties, starting with the issue of the indicators to be taken into account for the criteria and methods of price determination (art. L 631-24 III, penultimate paragraph). According to some POs, it may sometimes come up against abusive buying behaviour (rappr. Framework agreements must be concluded as soon as possible, La France Agricole, 27 May 2020). However, the issue of a better valorisation of production can also involve optimising outlets, hence the interest of the opinion.

In order to better approach the issues addressed by the opinion with an understanding of the context and the stakes of the relationship between farmers and buyers, who are sometimes food manufacturers who have a territorial network of producers for their milk supply, grouped within sometimes dedicated Producer Organizations or Associations of Producer Organizations, we suggest a combined reading of the current comments with a precedent, following an initial CEPC opinion on this type of contract (opinion 17-11, prec.).

Two observations for two problems. The first is structural and the second contractual, both ultimately tending towards greater fluidity, in the absence of mobility, of producers between dairies and flexibility in the relationship that they are entitled - or not - to enter into with different buyers, thus reducing their relative dependence on them, which is often quite strong. First of all, at the structural level, the intervention of POs (or PDOs) in the CEPC is to be welcomed. Indeed, they need to be stepped up so that the upstream part of the supply chain is better able to influence commercial negotiations with the first buyers. Although there is still a long way to go to rebalance relations, the approach consisting in seeing a PO refer a contract to the CEPC or suggesting the modification of certain behaviours is a step in the right direction.

The second observation concerns the content of the contracts. Competition law issues aside (rappr. Opinion ADLC 17-D-12 of 26 July 2017 in the beet supply sector), the diversification of outlets, with complete legal certainty for a producer, when selling the milk production of his livestock without running up against an exclusive supply obligation, presupposes that the latter, if it exists, must be unequivocal and in return for consideration. The CEPC therefore calls for clarity of the clauses. Clarity, but also harmony between them, with a view to the aim to be attained, namely to enable any farmer who so wishes to make arrangements, in particular as regards collection, to be able to take an effective interest in new outlets with other purchasers, in the interests of better exploitation of his production. In milk production, the subject of collection is crucial. Without a change in a certain collection method, no diversification is possible. A collection system whose modalities are subject to the good will of one party only does not go in the direction sought. This idea was already apparent in Opinion 17-11, which stated that "*the same consideration applies to the cumulative effect of these clauses stipulated in a single contract*". The ECCP indicates that a comparable situation is found in this notice, namely a clause modifying the pace of collection for the sole benefit of the purchaser. Consequently, the absence of contractual notice renders abusive the clause which makes the modification of the rate of collection subject to the will of only one of the parties. Lastly, where a request for a change in the rate of collection is made by the producer, the buyer must refrain from making any diversions, at the risk of being accused of failing to act in good faith in performing the agreement. Lastly, it should be noted that the ECCP refers to certain provisions of the contract under examination (e.g. a penalty clause that is an economic deterrent for the producer, a delivery clause, a force majeure clause allowing circumstances not external to the

buyer to be considered as force majeure). These clauses, according to the CEPC, reinforce the impression of imbalance found when examining the provisions relating to the organisation of milk collection. However, no more is said about their content. Perhaps this is a harbinger of a future referral?

It is therefore an interesting opinion which, like the previous one (Opinion 17-11), contributes to the edifice of agricultural contractualisation and indirectly underlines the interest for producers to group together in POs to "bring" their problems together when they notice some imbalances or asymmetries in the rights and obligations of the parties or in commercial negotiations (referral to the CEPC, the mediator of agricultural trade relations, etc.).