



EU provisions relating to price regulation & anti-competitive behaviour – what is possible & what is not possible between the various players in the market.

**Anthea McIntyre MEP**

# Background

- ▶ MEP since 2011 - ECR Group
- ▶ Small business owner
- ▶ Horticultural small-holding
- ▶ West Midlands region of the UK
- ▶ Our horticulture sector is worth over €350 million at the farm gate & produces 35% of the UK's blackcurrants.



# Background

- ▶ Became a Member of the European Parliament two and a half years ago.
- ▶ Before that ran a small business for 25 years.
- ▶ Partner in my family's horticultural holding.
- ▶ Represent the West Midlands region of the UK, the third most important region in England in terms of crop value.



# Background

- ▶ Horticulture uses just 3 per cent of the agricultural land in the West Midlands but contributes over 21 per cent of the region's total agricultural output.
- ▶ Our sector is worth more than £350 million at the farm gate and produces 35 per cent of the UK's blackcurrants.
- ▶ Other significant crops include soft fruit, cider apples and asparagus.





EU provisions relating to price regulation & anti-competitive behaviour – what is possible & what is not possible between the various players in the market.

**Anthea McIntyre MEP**



# Championing European Horticulture

- ▶ Member of the Agriculture & Rural Development Committee of the European Parliament
- ▶ Public Hearing in Parliament
- ▶ Delegation of MEPs to the West Midlands
- ▶ Rapporteur: *“The future of Europe’s Horticulture Sector – Strategies for growth”*

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# Championing European Horticulture

- ▶ Joined the Agriculture Committee of the Parliament on a mission to promote horticulture in all its forms.
- ▶ My first step was to hold a Special Hearing in the European Parliament on the future of European horticulture. This happened last July. We had speakers from the UK, Germany, Spain and Italy and I was particularly pleased that your Vice President, Mr Anthony Snell, came to represent the United Kingdom.
- ▶ Mr Snell spoke passionately about the damaging effects of the pesticides regulation and called upon the EU to base discussions, such as the ban on the use of neonicotinoids, on hard scientific evidence rather than emotion, as I am sure many of you here today would agree.







# Championing European Horticulture

- ▶ So, after the Special Hearing in the Parliament, my next step was to take Members of the Parliament's Agriculture Committee to the West Midlands. Members came from Germany, Belgium, Italy, Portugal, as well as the UK, to look at Research and Innovation, Plant Protection, New Growing Methods, Skills, Training and Marketing.
- ▶ The highlight for the delegation was a visit to Lower Hope Farm in Herefordshire. The fruit farm at Lower Hope produces cherries, raspberries and apples for supermarkets and wholemarkets. What is particularly important here is Lower Hope's membership of the Berry Gardens farmer cooperative. This makes them eligible for EU Producer Organisation funding and has helped the farm to invest in new growing techniques for its soft fruit, a state-of-the-art Packhouse and cold storage area.

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# Championing European Horticulture

- ▶ After my MEP colleagues' visit to the UK, I drafted a report for the Parliament entitled "The Future of Europe's Horticulture Sector-strategies for growth" and this was voted through the Agriculture Committee in March.

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# Horticulture Hearing in European Parliament



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# European Parliament visiting Herefordshire



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# Horticulture Report

- ▶ Research & Innovation:
  - the need for 'practical application'
  - new breeding techniques
- ▶ Minor Uses fund for speciality crops
- ▶ Reform of the F&V Producer Organisations Scheme





# Horticulture Report

- ▶ My report emphasises the need for Research and Development to be translated into practical applications that the sector's farmers can use. I also believe that the soft fruit sector must be helped to make better use of EU programmes, such as Horizon 2020, for research, technological development and product innovation.
- ▶ Global warming and the increasing lack of Plant Protection Products highlight the importance of new breeding techniques such as cisgenesis and the use of GM. I believe that these techniques are essential to maintaining the competitiveness of the soft fruit sector.

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# Horticulture Report

- ▶ Europe has a real problem with a lack of plant protection products and my report calls on the European Commission to create a European fund for Minor Uses of Pesticides. The Commission has since announced the creation of this fund.
- ▶ Soft fruit is classified as a minor uses crop and with 90 per cent of the world's blackcurrants produced in Europe- 50 per cent here in Poland- it is essential for our farmers to have access to pesticides. We need a Minor Uses fund because manufacturers do not support use on these minor crops, because of the relatively low return on their investment.

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# Horticulture Report

- ▶ Finally, I want to highlight the significance of the EU Fruit and Vegetables Producer Organisation Scheme. My report calls on the Commission to encourage greater use of this scheme by simplifying the rules governing POs and to allow them to better reflect the market structures in the Member states

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# Significance of POs Financial Support

Financial support for growers:

- ▶ to engage in joint marketing
- ▶ to undertake research & development
- ▶ to share expensive equipment
- ▶ for product innovation
- ▶ POs and other forms of cooperatives are of vital importance to the soft fruits sector and right across Europe they are helping growers to plan production, introduce contracts, co-ordinate the marketing of produce and invest in research and innovation.

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# Importance of Collaboration

## Collaboration results in:

- ▶ Less market fragmentation
- ▶ Concentrated production
- ▶ A more competitive & marketed-oriented sector
- ▶ Better marketing and greater consumption
- ▶ Fewer fluctuations in producers' incomes
- ▶ This collaboration leads to less market fragmentation, a more competitive and market-oriented sector, growth of production and fewer fluctuations in growers incomes.

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# Congratulations

Congratulations to Poland!

- ▶ Largest producer of blackcurrants
- ▶ First blackcurrant cooperative 2012
- ▶ KSPCP for their role in organising this conference

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# EU Competition Law Background

EU competition law arose out of the desire to ensure that the efforts of government could not be distorted by corporations abusing their market power

EU Treaties contain provisions to ensure that free competition prevails, rather than cartels and monopolies sharing out markets and fixing prices

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# Role of the European Commission

The Commission (DG Competition) & national competition authorities enforce competition law.

The Commission can:

- prohibit conduct and require remedial action
- impose fines as both punishment and deterrent

Strict limits on Commission's powers. Decisions subject to appeal in European Court of Justice.

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# Role of the European Commission

The European Commission, together with the National Competition Authorities (NCAs) directly enforce the rules on competition law.

Within the Commission, the Directorate-General (DG) for Competition is primarily responsible for these direct enforcement powers.

DG Competition pro-actively monitors markets, and conducts sector inquiries to see where competition problems might be occurring.

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# Role of the European Commission

If DG Competition concludes that a company or Member State has breached the competition rules it can propose that the College of Commissioners adopts a formal decision. The decision can prohibit the conduct, and can require remedial action. The Commission can also impose a fine as both a punishment and a deterrent.

There are strict limits to its powers – DG Competition can only intervene if it has evidence of an infringement of the competition rules – and its decisions are subject to appeal before the Court of Justice of the European Union.

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# Role of the European Commission

DG Competition is unlike most parts of the Commission in that, rather than proposing legislation, its work is concentrated on action against companies or Member States if it believes they are breaching the rules.

## Role of the European Parliament

Unlike the Commission, the Parliament does not have the jurisdiction to enforce the law, but as co-legislator in areas such as agriculture, it does amend EU law including, where relevant, competition law.

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# Role of the European Commission

This was recently the case with the reform of the CAP in which one MEP in the Agriculture Committee of the Parliament attempted to re-write Competition law to allow Producer Organisations to attain a single dominant position in the marketplace. This did not gain the support of either the Parliament or the Council of Ministers. N.B. Retailers can obtain a single dominant position in the marketplace, but they are not allowed to abuse their position.

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# Role of the European Commission

MEPs did, however, amend the law to give Interbranch Organisations (IBOs) and producer groups a temporary exemption from certain competition rules in periods of severe market crises. The suspension of normal rules can only last for a maximum of 12 months (6 months with one renewable period for six months). Hard core infringements such as price fixing and market sharing are still not permitted, even when the normal operation of competition rules is relaxed.

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# EU Competition Law Overview

Many forms of collaboration are beneficial, both to farmers and their customers

The aim of competition law is to prevent harmful anti-competitive agreements and behaviour

Key consideration in competition law is the likely effect on competition and on customers

Businesses should determine commercial conduct independently of one another

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# EU Competition Law Overview

The aim of competition law is to prevent harmful anti-competitive agreements and behaviour.

Anti-competitive agreements and abuses of dominant market positions:

- ▶ increase prices
- ▶ harm consumer choice
- ▶ make the supply chain less efficient
- ▶ undermine the performance of the economy as a whole

Most forms of collaboration do not raise any competition problems. It is only where co-operation could appreciably affect the competitive process.

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# EU Competition Law

## Article 101 (TFEU)

### Article 101

1. The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market, and in particular those which:
  - (a) directly or indirectly fix purchase or selling prices or any other trading conditions;
  - (b) limit or control production, markets, technical development, or investment;
  - (c) share markets or sources of supply;
  - (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
  - (e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

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# EU Competition Law

## Article 101 (TFEU)

### So what do the rules actually say?

- ▶ EU competition rules are set out in Articles 101 and 102 of the TFEU. These articles prohibit agreements and practices which restrict or distort competition within the internal market.
- ▶ Article 101 outlaws agreements, decisions and practices to:
  - directly or indirectly fix prices
  - limit production
  - share markets

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# EU Competition Law

## Article 102 (TFEU)

### Article 102

Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States.

Such abuse may, in particular, consist in:

- (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
- (b) limiting production, markets or technical development to the prejudice of consumers;
- (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
- (d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

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# EU Competition Law

## Article 102 (TFEU)

Article 102 prohibits firms holding a dominant position in the marketplace to abuse that position, for example by charging unfair prices or by limiting production.

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# Agricultural Sector

## Exceptions to the rules 1

Article 101 does not apply to agreements between farmers, farmers' associations, or associations of such associations, or POs, or associations of POs.

Four conditions must be met. The agreement:-

- must relate to production or sale of agricultural products or the use of joint facilities for the storage
- must only involve only farmers or associations of farmers
- must not include an obligation to charge identical prices
- cannot jeopardise the objectives of the CAP



# Agricultural Sector Exceptions to the rules 1

Whilst the agricultural sector is subject to the same standard EU rules on competition, there are two exceptions:

1. Article 101 does not apply to agreements between farmers, farmers' associations, or associations of such associations, or producer organisations or associations of producer organisations, however, four **cumulative** conditions must be met:



# Agricultural Sector

## Exceptions to the rules 1

- The agreement must relate to the production or sale of agricultural products or the use of joint facilities for the storage
- It must be an agreement involving exclusively farmers or associations of farmers; so, for example, an agreement between farmers' co-operatives and associations of slaughterhouses cannot benefit from this exception.
- The agreement must not include an obligation to charge identical prices
- The agreement cannot jeopardise the objectives of the CAP.



# Agricultural Sector

## Exceptions to the rules 1

2. Agreements or practices that are deemed necessary for the attainment of the CAP objectives are also exempt from Article 101.





# Agricultural Sector

## Exceptions to the rules 2

Under this first exception common selling prices allowed however:

- Farmers must sell through a recognised common organisation such as a co-operative or PO and must take whatever price it realises for their produce.
- The co-operative should not otherwise constrain competition for example by limiting quantities sold by its members or imposing a choice of customer on them, which might amount to market sharing.





# Agricultural Sector Exceptions to the rules 2

Under the first exception, arrangements involving common selling prices are excluded from Article 101, however:

- Farmers must sell through a recognised common organisation such as a co-operative or Producer Organisation, and must take whatever price it realises for their produce.



# Agricultural Sector

## Exceptions to the rules 2

- The co-operative should not otherwise constrain competition, for example by limiting quantities sold by its members or imposing a choice of customer on them, which might amount to market sharing.
- Also, joint selling arrangements should guard against providing an opportunity for exchanges of sensitive commercial information, particularly on market strategy and prices.
- If a joint selling agreement would be likely to lead to a substantial and unjustifiable restriction of competition, NCAs would consider withdrawing the agricultural exclusion.





# Agricultural Sector

## Exceptions to the rules 2

Article 101 does not apply to agreements or practices that are deemed necessary for the attainment of the CAP objectives.

In order to benefit from this exception, agreements need to fulfil all of the objectives of CAP **cumulatively**. These objectives are:

1. efficiency of production
2. a fair standard of living for the agricultural community
3. stabilising markets
4. assuring supply, and
5. ensuring supplies to consumers at reasonable prices.

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# NOT Exceptions to the rules

Price fixing & market sharing is still not permitted, even when competition rules are relaxed.

The 'French beef' case (2001): anti-competitive behaviour by French associations to jointly set a minimum price for beef. Their actions were not covered by the exceptions to the competition rules for agricultural undertakings.

EU Commission imposed fines totalling €16.7 million

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# NOT Exceptions to the rules

The European courts have interpreted these derogations (exceptions) restrictively, and they have therefore played a very limited role in practice.

It should also be noticed that price fixing and market sharing are still not permitted, even when the normal operation of competition rules are relaxed for the agricultural sector. These are viewed by the competition authorities as serious, 'hard core' infringements.



# NOT Exceptions to the rules

**The French beef case is a good example of this.** In 2001 six French agricultural associations entered into an agreement in the beef sector (four represented farmers, the two others represented slaughterhouses). Under the agreement the associations jointly set a minimum price for beef. They also undertook to suspend or at least limit imports of all types of beef. The organisations knew that their action was unlawful. During the inspections carried out by the EU Commission documents were found which noted that the agreements were 'a bit against the law but that can't be helped' and asked 'can we close ranks, without being caught by the French Competition Authority'. The EU Commission imposed fines totalling euro 16.7 million on the six participants to the agreement, of which euro 12 million was on the FNSEA.







# DOs & DON'Ts of EU Competition Law

Arrangements to sell through a co-operative or Producer Organisation (PO) is allowed

Price fixing (directly or indirectly) & market sharing between direct competitors is not allowed

Agreement and/or conduct which has an appreciable effect on competition within the common market and which may affect trade between Member States will fall foul of the law

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# DOs & DON'Ts of EU Competition Law

- It is probably by now clear that EU competition law is a complex web of rules with an even more confusing web of exceptions. To try and keep matters simple I've listed in the simplest way possible what is allowed and what is not allowed.
- In general, any agreement and/or conduct which has an **appreciable effect on competition** within the common market and which may **affect trade between Member States** will fall foul of the law.

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# DOs & DON'Ts of EU Competition Law

- All agreements or collaborative arrangements between direct competitors in the farming sector which seek to **fix prices or divide markets** will be regarded as having an adverse effect on competition, no matter how small the proportion of the market they cover.
- Arrangements whereby farmers agree to sell through a co-operative or Producer Organisation (PO) and take whatever price the co-operative or PO realises in the market is permitted.
- Limiting production is permitted in times of severe market imbalance but this only applies to IBOs & Producer Groups & is for a maximum of 12 months.

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# Information Exchange NOT Permitted



Decisions, including recommendations, as to prices and charges, including pricing or marketing strategy

Exchanging information which reduces uncertainty or reveals a business's future commercial behaviour

Information that is recent, current, sensitive, detailed or confidential in nature



# Information Exchange NOT Permitted



- Competition authorities recognise that many collaborative arrangements involve a degree of information exchange and that much of this is harmless. Information exchange can be pro-competitive, for example, when it enables companies to gather market data that allow them to become more efficient and better serve customers. However, there are also situations where the exchange of market information can be harmful for competition, for instance when companies use sensitive information to align their prices.
- Whether or not the information exchange has an appreciable effect on competition will depend on the circumstances of each individual case: the market characteristics, the type of information and the way in which it is exchanged.



# Information Exchange NOT Permitted



- Any decision including any recommendation as to prices and charges, including the exchange of information relating to a business's pricing policy, for example discounts, costs, allowances, terms of trade, rates and dates of change is likely to have an appreciable effect on competition and is prohibited.





# Information Exchange NOT Permitted



- The following is likely to have an appreciable effect on competition and should also be avoided:
  - exchanging information which **reduces uncertainty** about a competitor's behaviour
  - information that may reveal a competitor's **future** commercial behaviour
  - information that is **recent, current, sensitive, detailed and confidential** in nature is likely to be problematic.





# Information Exchange Permitted



Historical & general information on price

Collation of general price trends & aggregated information

Information that cannot influence future competitive market behaviour

Information exchanges that are unlikely to have an appreciable effect on competition

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# Information Exchange Permitted



## Information exchange – what is permitted:

- The circulation of purely historical information on price or the collation of general price trends is unlikely to have an appreciable effect on competition, particularly if the information is aggregated.
- Information that does not reveal a competitor's future commercial behaviour is also acceptable.
- Information that cannot influence future competitive market behaviour
- All of the above exchanges are unlikely to have an appreciable effect on competition
- Businesses should determine their commercial conduct independently of one another

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# How competition law can help farm businesses?

By establishing the conditions under which farmers can develop sustainable forms of co-operation with a view to improving their farms' efficiency and strengthening their bargaining power, without undermining their incentives to become more efficient and to innovate.

By protecting them from anti-competitive practices which may limit access to markets, and/or adversely affect the level of competition existing in the market or farmers' ability to compete effectively in that market.

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# EU Single Market

28 Countries - 500 million consumers

Competition is at the heart of any successful market economy. It provides a stimulus for businesses to improve performance. It encourages the development of new products and processes

Europe has to compete in the global marketplace

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