Spain: The CNC’s Report on the Draft Royal Decree regulating the Recognition of Producers’ Organisations and Interbranch Organisations and establishing Contractual Conditions in the Milk Sector

The Council of the National Competition Commission (CNC), in a meeting held on 16 February 2011, approved a report on the Draft Royal Decree regulating the recognition of producers’ organisations and interbranch organisations in the milk sector and establishing contractual conditions in the milk sector (the Draft Royal Decree). In this report, the CNC analyses the implications of the Draft Royal Decree from the point of view of effective competition in the sector concerned.

The purpose of the Draft Royal Decree is to make progress with some of the recommendations put forward on 15 June 2010 by the High Level Group on Milk as set out in the Commission Proposal for a Regulation to amend EC Regulation 1234/2007, which, in the event that it is approved in its current terms, could give rise to an amendment of the EU provisions relating to contractual relationships in the milk and milk products sector. Therefore, the Draft Royal Decree:

- Regulates the position of the producers’ organisations in the sector, listing their functions, along with the minimum requirements that they must satisfy and the rules for their recognition, and allows them to negotiate the terms of contracts with buyers on behalf of their members;
- Makes it mandatory to conclude contracts for the transactions carried out in the sector, as well as setting out the minimum requirements that such contracts must satisfy;
- Determines the purpose of the interbranch organisations in the sector, listing some of the activities for which they are responsible and the type of agreements that such organisations must notify to the European Commission for authorisation.

The main considerations of the CNC on the Draft Royal Decree and exposed in this report are the following:

1. The Draft Royal Decree regulates some aspects that are also contemplated in the proposed reform of the aforementioned EU draft proposal; in particular the possibility for producers’ organisations and associations of producers’ organisations to negotiate the terms of the contracts with the buyers of raw milk on behalf of their members and the type of agreements that inter-branch milk organisations can carry out. The domestic regulation of these provisions and the entry into force of national rules before such a reform is eventually approved at European level and without knowing the final terms of such reform, may impact on the understanding of the operators concerned as to the application of the current competition provisions to the practices of the producers, giving rise to legal uncertainty.

2. The domestic and EU competition provisions are currently fully applicable to such practices, irrespective of the entry into force of this Royal Decree. That is the case because, until the EU reform is completed, there is no legal basis for taking the view that these practices are not subject to the application of national and EU competition provisions (subsections 1 and 3 of article 1 of Spanish Competition Act 15/2007 of 3 July 2007 and Article 101 TFEU). The regulation contemplated in the Draft Royal Decree does not release the agents affected from the obligation to comply with the current competition rules, and they may not legitimate rely on the fact that their practices would be in line with the new law if they infringe the prohibitions established in the said competition provisions.

3. As a result, and without prejudice to the fact that the specific wording of the text of the Draft Royal Decree on the above points may be liable to additional improvements to which the report also points out so as to eliminate competition risks, the CNC takes the view that the regulation of such aspects ought to be removed from the Draft Royal Decree. If that is not done, its entry into force ought to be deferred until the EU reform is fully effective, if that turns out to be the case.

4. The CNC considers that the regulation of the obligation to formalise contracts in writing that is foreseen in the Draft Royal Decree does not raise competition problems. In a sector such as the milk sector, the obligation to formalise contracts in writing and the determination of their minimum content may help to eliminate possible asymmetries in terms of information, oblige the buyer to reach agreement with the seller on a price and quantity prior to the delivery date, balance the inequality of bargaining power and contribute towards respect for and control of the conditions agreed between producers and buyers.
These provisions on minimum contractual terms should not be seen as liable to restrict competition, particularly as the Draft Royal Decree expressly establishes that all the elements of the contract must be freely negotiated by the parties.